Who Said Anything About Justice? Bail Court and the Culture of Adjournment

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Abstract

The criminal court is supposed to be a place of adversarial justice; however, these formal legal values do not appear to translate into practice. The courtroom workgroup, though made up of formal adversaries with widely divergent roles and objectives, is a community of workers whose shared interests include getting through the day as quickly and efficiently as possible. Using data from 142 days of bail court observation in Ontario the author argues that a "culture of adjournment" has taken over the bail process. Rather than the court being run by an efficient adversarial group of people processing criminal cases through the system, the courtroom has developed a culture that emphasizes the importance of expeditiously disposing of the daily docket over distributing justice.

Keywords: Court culture, justice, efficiency, adjournments, bail court

Résumé

Le tribunal pénal est censé être un lieu judiciaire de nature accusatoire. Toutefois, ces valeurs juridiques formelles ne semblent pas se traduire dans la pratique. Le groupe de travail d'une salle d'audience, bien que composé d'adversaires formels ayant des rôles et des objectifs divergents, représente une communauté de travailleurs dont les intérêts communs incluent passer à travers la journée aussi rapidement et efficacement que possible. Se fondant sur les données de 142 jours d'audiences sur le cautionnement en Ontario, l'auteure soutient qu'une « culture de l'ajournement » domine le processus de libération sous caution. Plutôt que d'avoir un tribunal dirigé par un groupe efficace de personnes opposées procédant au traitement des affaires pénales, la salle d'audience fonctionne sur la base d'une culture qui met l'accent non sur l'exercice de la justice mais sur l'importance de disposer rapidement du plumitif journalier.

Mots clés : culture de cour, justice, efficacité, ajournement, libération sous caution

Introduction

The criminal court is often conceptualized as the state-sanctioned finder of truth and the distributor of justice—an institution of majesty charged with upholding the sanctity of the law. This conception of the court, however, breaks down when

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one closely examines the working relationships of the members of the court community. Though the court, according to law, is supposed to be a place of adversarial justice, the realities of the lower level court actors' interactional dynamics do not, in published research (see Blumberg 1967b; Eisenstein and Jacob 1977; Feeley 1983), support the conclusion that these formal legal values translate into practice. The courtroom workgroup, though made up of formal adversaries with widely divergent roles and objectives, is a community of workers whose shared interests include getting through the day as quickly and efficiently as possible (Blumberg 1967b; Harris and Jesilow 2000; Blumberg in Feeley 1973).

As will be demonstrated in the case of the province of Ontario, Canada, bail courts, a culture has developed that has shifted the court's focus from moving cases through the system to moving cases off the docket for the day. In this way the interests and values of the courtroom workgroup conflict with the objectives of the criminal justice institution as a whole. This courtroom reality has inspired the development of a workplace culture that emphasizes the importance of expeditiously disposing of the daily docket over distributing justice.

Bail Court

The organizational system in court is based on cooperation, exchange, and adaptation, rather than adherence to formal rules and prescribed roles. Indeed, formal rules are only one of the many factors shaping and controlling decisions. Instead, the system is more likely to be governed by informal rules, established through the cultivation of standard operating procedures, than by officially prescribed rules of conduct. In the end, the court organization brings together groups with formally divergent goals who, on an informal basis, can agree to shared objectives and goals (Feely 1973, 413).

In the criminal courtroom there are a number of independent organizations, each with its own mandate, motivations, and supervisory structure; the judiciary, the prosecution, private defence counsel, and duty counsel.[1] This collection of organizations is thrust together in the courtroom and is expected to work together in the pursuit of justice. Ulmer and Kramer (1998) argue that as actors with varying interests, ideologies, or commitments confront problematic situations, they continuously engage in interaction strategies of negotiation, cooperation, manipulation, and coercion to force solutions that further their individual and collective interests (251).

Blumberg (1967a) argues that an administrative, rational-bureaucratic model, rather than a due process model has been institutionalized in the courts. The ideological qualities of due process, the belief in its presence as the guiding principle governing the administration of justice, have concealed the court's drift toward the "mediocrity of assembly-line justice" (290). Gertz (1980) suggests it is precisely this shift that has introduced a lack of concern, or ambivalence, on the part of courtroom participants toward the absence of an adversarial process in a system that is premised on this very trait (46).

[1] Duty counsel are staff lawyers paid for by the state to assist accused who do not have their own defence counsel.

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Despite the presence of some characteristics consistent with a bureaucratic organization, there is considerable evidence in the literature to suggest this is not an appropriate characterization of the courts (Eisenstein and Jacob 1977; Feeley 1983; Jacob 1983). Specifically, the term "bureaucracy" implies the existence of a rational organization, with clearly delineated hierarchical control, central administration, and a shared sense of purpose. The courtroom work unit is organized in a loosely, rather than strictly hierarchical fashion. Though judges are the formal superiors in court, in practice they share their power with the attorneys who work with them (Jacob 1983).

There is no management structure or system of accountability in place to monitor the daily performance of the court. Since court actors come from different independent sponsoring agencies, nobody is responsible for, or oversees, the operation of the court; the court is like a ship without a captain. In this sense, no one is "steering the ship." ensuring the court is effectively and efficiently processing and advancing cases through the court system. Without this hierarchical structure and system of accountability, the court has established its own informal culture and objectives. The lack of hierarchical oversight means the court system lacks the necessary organizational instruments with which to supervise and ensure the workgroup's compliance with the formal goals of the criminal justice system.

In time, the workgroup develops a set of values that transforms into a local legal culture of shared expectations, attitudes, and practices (Dinovitzer and Leon 2001; Young 2013). This culture appreciates the functionally interdependent nature of the workgroup's relationships (Ulmer and Kramer 1998). Informal norms, rather than what is prescribed by formal rules, are the dominant force dictating the nature of interactions. The informal culture is what binds the independent specialists together in a cohesive workgroup.

This reality is unsurprising when the court is conceptualized as an organization, rather than a state-operated distributor of justice. Within an organizational context, the workgroup's behavior is rationally connected to the attainment of their shared goals. Informal relationships and working agreements create a court culture of shared expectations about case processing, and the desire for speed tends to be linked to case processing times (Dinovitzer and Leon 2001; Leverick and Duff 2002; Mack and Anleu 2007; Young 2013). Mack and Anleu (2007) argue the courts are driven by a desire to "get through the list" and adjournments are the fastest way to dispose of cases for the day. Indeed, Resident Magistrates emphasized "getting through the list" as a key concern that could only be achieved by addressing matters rapidly (Young 2012).

A Typical Day in Bail Court

Observational bail court data were collected for 142 full days from 11 different courts in Ontario,[2] yielding data on 4,080 appearances made by accused.

[2] Large urban and medium-sized courts that serviced large geographical areas, including surrounding small towns and rural areas, were observed.

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Complementary quantitative and qualitative data were collected to capture the way cases were processed, how time was used, and the relationships among court actors. Data were collected for each accused, and included information on how each case was discussed and disposed. Extensive notes were taken on how issues were discussed in court to provide a more detailed understanding of the operation of the bail court.

On an average day 29.9 cases were heard in the regular weekday bail court.[3] Each accused appeared before the court for a mean of 6.5 minutes (median of 3 minutes).[4] To illustrate the emphasis placed on speed by the court some examples from a variety of days/locations are described below. These are not exceptional; rather, these depict the daily reality in bail court.[5]

1- A consent release was proposed to the court and the surety[6] was to be named. The surety stood up and was proceeding toward the bench when the JP said the following:

JP- "Bring your ID up here. Get it out, you can walk and get it out of your wallet at the same time! You are able to do two things at once, aren't you?"

2- After a number of adjournments and consent releases in rapid succession, the clerk (who prepares all the paperwork) said to the JP:

Clerk- "Slow down please, we are getting mixed up. We are tired and we have not had a break."

3- Defence counsel was speaking to the client, trying to get instructions on how he would like to proceed when the JP interrupted their discussion saying:

JP- "You are holding up the parade, make up your mind."

JP- "We have to move on, we cannot take 10 minutes per person."

4- In the middle of a bail hearing,[7] where the Crown was examining the surety the JP interrupted asking:

JP- "How much longer is this going to take? Honestly!"

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[3] The two weekend courts (Weekend and Statutory Holiday or WASH courts) are presented separately.

[4] The mean is raised by a small number of cases with long contested hearings.

[5] A is the accused, C is the Crown (prosecutor), D/DC is the defence counsel or duty counsel, JP is the justice of the peace.

[6] Generally, a family member or friend who agrees to supervise the accused while on bail and promises a sum of money if the accused fails to appear in court, commits further offences, or breaches a condition of the release order.

[7] In a bail or "show cause" hearing the Crown is contesting the release of the accused. It is up to the justice to determine if the accused should be released or should remain in detention until trial.

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5- During defence questioning of the accused during a show cause hearing[8] the JP cuts off the accused, saying:

JP- "Get to the point. Why did your surety pull your bail? I don't have all day."

A-"It was too difficult because my surety is friends with my wife and kids. . . ."

JP (interrupting) - "OK ALREADY! After all this time in the country you have no one that can be your surety?"

A- "I don't want to ask people because it puts them between me and my wife and kids."

JP- "You are risking staying in jail."

These quotes demonstrate how the justice, faced with a long list of cases, tries to rush the in-court process. Indeed, the court resembled an assembly line in that disruptions to rapid processing were greeted with distain and a reminder that the court must move on.

Use of Court Time

As seen in table 1, on an average day, court was open for operation[9] for 5 hours and 49 minutes. The time between these start and end points, however, was actively used to varying degrees. Dead time was defined as operational court time that was not being actively used; it was calculated as the total amount of time expended on recesses and time when court was in session but was not being used. Dead time comprised on average 2 hours and 33 minutes a day. Dead time was deducted from the operational hours resulting in a mean of 3 hours and 15 minutes of actual used court time on an average day. During this "active" time period of 3 hours and 15 minutes, the court heard on average 29.9 cases.

The amount of time available to address the daily docket was to some extent controlled by court staff as they determined when the court closed for the day. At the direction of the Crown or justice, court closed before 5:00 p.m. (91% of observed days) and in many cases before 4:00 p.m. (on 66% of observed days).

Hold Downs

The court was often reluctant to grant a "hold down," a request to return to the matter later in the day, and preferred to adjourn the case if it was not immediately ready to proceed. At some point in the day the court has to make a decision about how to dispose of cases. However, it was not unusual for an accused or duty counsel to request a matter be held down (most commonly for the arrival of private counsel or a surety) and for the justice of the peace to deny this request

[8] See footnote 7.
[9] The time between court commencing in the morning and closing at the end of the day.

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Table 1
Court Operating Time (Hours: Minutes)

Court	Average court start time (9:30 a.m. indicated with* or 10:00 a.m.)	Average court end time	Average Operating Time (from beginning to end of the court day)	Average Dead Time (recesses, no one in court)	Average Active Time Remaining	Average Number of Cases (Range)
Court 1	10:05	15:27	5:22	2:49	2:33	25.7 (15–39)
Court 2	10:06	16:17	6:11	2:22	3:50	42.2 (23–75)
Court 3	9:32*	15:35	6:02	2:16	3:47	29.8 (25–37)
Court 4	10:20*	14:49	4:29	2:17	2:17	8.4 (2–30)
Court 7	10:02	16:04	6:02	2:40	3:22	29.2 (16–36)
Court 8	9:37*	16:44	7:07	3:29	3:38	28.4 (15–47)
Court 9	9:35*	15:40	6:04	2:03	3:49	33.2 (18–45)
Court 10	10:05	15:17	7:03	2:59	4:04	27.8 (15–46)
Court 11	9:43*	16:46	5:13	3:05	2:05	9.8 (3–16)
TOTAL	–[10]	–	5:49	2:33	3:15	29.9 (2–75)

Note: Since we are looking at averages across days, the average dead time and average time remaining do not exactly equal the average operating time.

(with or without the Crown's objection to the request). In denying a hold down request the court was conveying the message that the process of returning to an accused's matter later in the day was too time intensive. In most instances in which hold down requests were refused, the court adjourned before 5:00 p.m., and in many instances before 4:00 p.m., which means that it was extremely likely there would have been time to hear the case at the end of the day.
At 10:08 a.m.

> A- "My counsel and surety are supposed to be here."
>
> DC- "I have a message from counsel requesting that the matter be held down."
>
> JP - "We do not have the luxury of holding matters down in this court, we are too busy. Court starts at 9:30; when would you like to return?"
>
> Court spent three hours of active court time on breaks and adjourned for the day at 3:10 p.m.

On another day at 9:45 a.m.

> JP- "I am not holding down any matters today. We have a very heavy list."
>
> Court spent two hours of active court time on breaks and adjourned for the day at 4:45 p.m.

Interestingly, hold downs were also routinely requested by the Crown or the justice of the peace when defence counsel indicated the defence was ready to proceed with a show cause hearing early in the day. The Crown or the justice of the

[10] Not calculated due to different scheduled start times.

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peace would then request the matter be held down until the court finished addressing everyone on the docket. It was not unusual for justices to indicate they wanted to address all of the adjournment requests and consent releases before they would entertain a show cause hearing.

At 10:10 a.m.

> D- "We are ready for a show cause hearing. The accused has been up several times and he is the priority today."
>
> C- "I have brought up the priorities and the remands."[11]
>
> JP- "We will deal with all the remands first."

On another day at 1:10 p.m.

> JP- "We have a very long list today, and we still have people who want a show cause hearing, and new accused are coming in from the division. We will start with the remands, traversals, and consent releases and then do show causes if there is time. I will not hold any more matters down, and we will not start any show cause hearings after 3:30 p.m."
>
> At 4:08 p.m. the Crown indicated all outstanding matters were to be adjourned. In other words, even though the accused and their lawyers had been waiting all day, no attempt was made to complete these cases.
>
> Court lost two hours of active court time to breaks and adjourned for the day at 4:35 p.m. On average, show cause hearings take 50 minutes to complete.

It may make sense to address consent releases first so the paperwork can be processed and the accused released. This logic, however, does not extend to matters that are being adjourned. By addressing adjournments early in the day and leaving show cause hearings until later in the day, there was the possibility that the court may "run out of time" to hold the hearings. This means priority was given to cases with quick outcomes (adjournments) rather than to those that required a more lengthy process (hearings) but in the end would result in a bail decision being made. Accused whose cases were adjourned were going to return to a custodial facility whether they were adjourned early or late in the day. It is unclear how court actors were able to predict whether or not there would be time to hear a case early in the day.

This practice was made more problematic when private defence counsel preemptively adjourned cases when advised, on account of the accused's place on the priority list (based on time since arrest), that the accused was unlikely to have his or her bail hearing that day. This means more recent arrests, unless they were a consent release, were more likely to be adjourned for a bail hearing. Unfortunately, it was not unusual for the priority list to change or for the bail court to get offers of assistance after the case had been adjourned and counsel had departed.

Many private counsel did not have time (nor did the accused have the resources) to sit in bail court all day to see if their matter would be reached. Private counsel were often representing a number of clients at various stages in the

[11] The terms "remand" and "adjournment" refer to the accused's case being put over for another day. A bail decision has not been made, and the accused will return to pretrial detention.

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criminal process, in a number of courtrooms and often in different courthouses. While they may have been able to appear in bail court to represent their client, they could not wait all day on the possibility of being heard. Indeed, it was not unusual to see private counsel attend only to discover their client had already been adjourned because counsel had not been present. In other cases, private counsel would have duty counsel speak to bail as they simply could not wait for their client to be brought into court from the holding cells..

The Culture of Adjournment

Looking at the manner in which cases were disposed (see table 2) reveals a clear pattern—53.2% of all cases observed were adjourned to another day. Across all the courts, close to half of the bail cases were adjourned to another day, each and every day of observation. This is remarkable given that the law governing bail suggests the bail decision is to be made relatively quickly after an arrest. Specifically, accused detained by the police are required to be brought before a justice within 24 hours of arrest without delay or as soon as possible if a justice is not available (*Criminal Code* s.503(1)). Further, according to s. 516(1), the justice may, on application by the Crown, adjourn the bail proceedings for a maximum of three clear days. This may be done without the consent of the accused for the purposes of further investigation or to gather the necessary information for a s. 524(3) application to revoke the accused's outstanding bail(s). Trotter (2010, 199) notes, "with time being such a monumental concern when it comes to bail, it is essential that a hearing is conducted as soon as possible." While the law does not state bail is supposed to be decided in one appearance, repeated adjournments and multiple appearances clearly were not envisioned by the legislation.

To further demonstrate the pervasiveness of adjournment requests, table 3 looks at the relationship between the appearance number observed and the proportion of cases adjourned to another day. For example, in Court 1 41.8% of cases seen on their first appearance, 48.4% of cases seen on their second appearance, and 51.7% of cases seen on their third appearance were remanded to another day. It is interesting to note the case outcome did not appear to vary considerably with the appearance number observed. Indeed, the likelihood of an accused being remanded on the first appearance was not dramatically different from the likelihood of being adjourned on the fifth or subsequent appearance.[12]

Though some fluctuations can be seen, looking across courts, there does not appear to be any specific pattern emerging, with the exception that the probability of a case being remanded to another day remains relatively constant regardless of the appearance observed. The lack of logical pattern suggests that each appearance in bail court was considered in relative isolation; there appeared to be no case history or consideration of what had happened on prior appearances. For the most part, regardless of how many times an accused appeared, the probability of being

[12] Court 10 was the exception; however, this court remands fewer cases overall than the other courts. Interestingly, this pattern of fewer adjournments only holds true until the accused was in court for the fifth or subsequent appearance.

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Table 2
Daily Case Outcomes

Court	Detain	Release	Adjourn	Traverse	Plea	Variation/Set Date/ Error/Withdraw	TOTAL
Court 1	10.2% (89)	18.4% (160)	46.7% (407)	7.1% (62)	14.4% (125)	3.2% (28)	100% (871)
Court 2	5.9% (100)	14.1% (238)	59.5% (1002)	10.6% (179)	9.1% (153)	0.8% (13)	100% (1685)
Court 3	2.6% (9)	31.4% (107)	52.8% (180)	5.9% (20)	4.7% (16)	2.6% (9)	100% (341)
Court 4	9.6% (9)	31.9% (30)	45.7% (43)	5.3% (5)	7.4% (7)	–	100% (94)
Court 7	6.2% (9)	18.5% (27)	54.8% (80)	13.7% (20)	6.2% (9)	0.7% (1)	100% (146)
Court 8	5.6% (8)	19.0% (27)	59.9% (85)	14.1% (20)	–	1.4% (2)	100% (142)
Court 9	5.7% (19)	14.2% (47)	40.7% (135)	33.1% (110)	6.0% (20)	0.3% (1)	100% (332)
Court 10	6.0% (7)	26.5% (31)	43.6% (51)	23.1% (27)	0.9% (1)	–	100% (117)
Court 11	8.3% (4)	33.3% (16)	52.1% (25)	–	6.3% (3)	–	100% (48)
TOTAL	6.7% (254)	18.1% (683)	53.2% (2008)	11.7% (443)	8.8% (334)	1.4% (54)	100% (3776)

Table 3
Cases Remanded by the Bail Appearance Number Observed[13]

Court	First	Second	Third	Fourth	Fifth or more	TOTAL
Court 1	41.8% (147/352)	48.4% (109/225)	51.7% (60/116)	55.9% (38/68)	52.3% (45/86)	47.1% (399/847)
Court 2	63.8% (361/566)	59.6% (255/428)	59.9% (148/247)	53.5% (76/142)	65.0% (145/223)	61.3% (985/1606)
Court 7	46.0% (23/50)	63.3% (19/30)	68.0% (17/25)	50.0% (7/14)	55.6% (10/18)	55.5% (76/137)
Court 8	55.0% (22/40)	44.8% (13/29)	61.9% (13/21)	66.7% (8/12)	75.0% (21/28)	59.2% (77/130)
Court 9	34.6% (44/127)	48.6% (34/70)	44.8% (26/58)	42.9% (12/28)	45.9% (17/37)	41.6% (133/320)
Court 10	32.1% (9/28)	27.3% (9/33)	26.7% (4/15)	61.5% (8/13)	81.8% (18/22)	43.2% (48/111)
Court 11	63.2% (12/19)	38.5% (5/13)	33.3% (2/6)	–	83.3% (5/6)	53.3% (24/45)
TOTAL	52.3% (618/1182)	53.6% (444)	55.3% (270/488)	53.6% (149/278)	62.1% (261/420)	54.5% (1742/3196)

[13] Appearance data were unavailable for Court 3 and Court 4.
Recall cases were not "tracked" through the system; rather, these data are collapsed across days of observation. For example those seen on their second appearance were not necessarily observed on their first appearance. The totals for each row include all case appearances. It is likely that some cases were seen more than once.

remanded to another date was the same, resulting in a multitude of unproductive, practically indistinguishable, appearances.

Lack of Continuity

In most observed courts the staff rotated on a regular, if not daily, basis. This means that when the accused returned to bail court, they were likely to be before a different justice and Crown and be assisted by a different duty counsel who was not familiar with their case or aware of what had happened at the previous appearance. Most accused in bail court were represented by duty counsel for all bail appearances or until private counsel could attend to arrange a consent release or run a bail hearing. As a consequence of this lack of continuity, no one was held accountable for adjournment requests or for having the business of each appearance build on that of the previous appearance. Failure to ensure adjournments were being used for a legitimate productive purpose increased the number of bail appearances.

The focus was on getting through the list. With that as the primary goal, an adjournment was the fastest way to dispose of a case for that day. Due to the lack of staffing continuity, adjourning difficult, time-consuming cases made the case someone else's responsibility to deal with on another day. Indeed, in serious cases or when duty counsel was unable to negotiate a consent release with the Crown, the court staff would often encourage the accused to adjourn their case and work on strengthening their release plan (by securing private counsel or finding a surety). The pressures of a heavy caseload, where duty counsel must interview, contact sureties, and represent the accused in court often led to focusing on the few cases that were ready to proceed with a strong release plan and to clearing the docket by adjourning the rest.

Interestingly, the heavy caseload confronting those in bail court was the product of the value of getting through the day as quickly as possible as well as of the pressures put on the defence to have a surety (present in court) in order to secure release. Indeed, bail courts face long dockets not because a large number of new accused are brought to bail court by the police day after day, but because many accused people are adjourned to another day.

Adjournment Requests

Most requests for an adjournment were from the accused or their defence counsel. On average across the courts 80.5% of adjournment requests came from defence counsel, 9.5% from the Crown, and 9.9% from the justice of the peace. While defence counsel's wishes were beyond the court's control, the sheer volume of cases remanded at the request of the defence indicates the presence of a systemic issue. Since the defence was not required to provide a reason for an adjournment and thus was not held accountable for fulfilling the purpose of the adjournment at subsequent appearances, the defence could typically request adjournments without risk of reprisal. Indeed, in 13.5% of cases in which an adjournment was being sought, private counsel did not appear in court, opting to relay a message to the court through duty counsel.

The court was offered a variety of reasons for adjournment requests. Table 4 indicates the first explanation given for the adjournment request.[14] The two most common reasons were for the purposes of having private counsel (16.7%) or a surety (16.3%) attend at court. The overall average for these reasons provided across the courts is being pulled down by Court 3 and Court 4.[15]

In almost a quarter of the cases, no reason was offered for the adjournment. A number of these adjournments were likely for purposes related to counsel and sureties, but the more important point is that a reason did not have to be offered to the court. This makes adjournments even easier; counsel does not need to have a reason for the request. Indeed, there was little incentive to provide a reason, as the court did not inquire as to why a matter was not ready to proceed, it simply granted the request.

This is consistent with Leverick and Duff's (2002) findings that in courts where adjournment requests were not challenged a culture developed in which adjournments were the most accepted and expected outcome. However, when the judiciary took a proactive role in challenging adjournment requests and only granted adjournments in exceptional circumstances, a court culture developed in which it was presumed that the case would move forward toward resolution. Indeed, Leverick and Duff (2002) contend that a culture of adjournment can become self-perpetuating when no one challenges adjournment requests.

Out of Time

The proportion of cases adjourned because the matter could not be reached is noteworthy. In these cases the accused was ready to proceed with his or her bail hearing, counsel and surety were present, and the court decided there simply was not enough time to hear the case. Remember, on most days in most courts, the court closed for the day before 5:00 p.m. and in 66% of days before 4:00 p.m. This seems at odds with the purpose of bail court—to decide the pretrial liberty of an accused. Adjourning matters that were ready to proceed because the court was out of time seems to ignore the challenges the remanded accused have in ensuring both their counsel and surety are in court at the same time.

Most accused were required by the Crown or the justice to have a surety in order to secure release, and this surety must be present in court for the proceedings. Sureties were routinely called to give evidence in contested hearings and were sometimes called forward to give evidence when the Crown was consenting to the accused's release. Indeed, accused were often advised, by both counsel and the justice, that it was not in their best interests to proceed with a hearing in the absence of their surety, as it was unlikely they would be released. Crowns would

[14] In some cases multiple reasons were provided. For example, a matter may be adjourned for the accused to obtain counsel and to find a surety.

[15] The courthouse, in which these two courts are located, hears all criminal matters in the city. This means counsel were generally present in the building and could be paged into bail court. This court was also an anomaly in its use of sureties. Unlike the other bail courts, this court did not seem to proceed on the basis of a presumption that a surety was required in order for an accused to secure release.

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Table 4
Reason Provided for Adjournment Request

Court	Counsel	Surety	Court service[16]	Court administration[17]	Out of time/Will not reach	Plea	Misc.	No reason given
Court 1	26.0% (106)	15.7% (64)	11.3% (46)	12.3% (50)	0.5% (2)	5.9% (24)	5.2% (21)	23.1% (94)
Court 2	14.3% (143)	16.9% (169)	9.2% (92)	9.9% (99)	11.4% (114)	7.3% (73)	4.1% (41)	27.0% (271)
Court 3	1.1% (2)	5.6% (10)	16.7% (30)	5.6% (10)	2.2% (4)	10.6% (19)	37.2% (67)	21.1% (38)
Court 4	2.3% (1)	2.3% (1)	16.3% (7)	7.0% (3)	2.3% (1)	18.6% (8)	27.9% (12)	23.3% (10)
Court 7	30.0% (24)	18.8% (15)	3.8% (3)	7.5% (6)	1.3% (1)	2.5% (2)	11.3% (9)	25.0% (20)
Court 8	24.7% (21)	25.9% (22)	5.9% (5)	4.7% (4)	8.2% (7)	3.5% (3)	14.1% (12)	12.9% (11)
Court 9	22.2% (30)	20.0% (27)	19.3% (26)	8.1% (11)	0.7% (1)	4.4% (6)	5.2% (7)	20.0% (27)
Court 10	7.8% (4)	29.4% (15)	17.6% (9)	13.7% (7)	3.9% (2)	7.8% (4)	7.8% (4)	11.8% (6)
Court 11	20.0% (5)	20.0% (5)	8.0% (2)	4.0% (1)	–	4.0% (1)	36.0% (9)	8.0% (2)
TOTAL	16.7% (336)	16.3% (328)	11.0% (220)	9.5% (191)	6.6% (132)	7.0% (140)	9.1% (182)	23.9% (479)

[16] For example: an interpreter, a bail program assessment, for the accused to be sent to a specialized court (mental health, Gladue, or drug treatment), or to await the outcome of another court process.

[17] For example: further paperwork, s.524(3) application, police investigation, to contact the officer, new charges to be added or to clarify information in the Crown's file.

rarely consent to the release of an accused and justices would rarely release an accused after a bail hearing without an appropriate surety. As was seen above, cases were routinely adjourned for the purposes of counsel and surety's attendance. Indeed, it was often difficult and could take a number of appearances before the accused could have their counsel and surety present in court at the same time. This raises the question why the court would adjourn a matter that was ready to proceed with a bail hearing.

At 4:12 p.m.

> D- "I have been here with the two sureties all day; we would like a show cause hearing."
>
> JP- "We are out of time today. We went in order of priority, and there were other people ahead of this accused."
>
> Surety- "I wish we had been told this at the beginning of the day."
>
> Court started at 10:00 a.m., lost two hours and 43 minutes to "dead time," actively used four hours and 29 minutes addressing cases, and adjourned for the day at 5:12 p.m.

In another case at 3:10 p.m.

> DC- "We are ready for a show cause hearing."
>
> JP- "Today? At 3:10 p.m. on a Friday afternoon? How long will this take?"
>
> C- "There are two sureties."
>
> JP- "I am not prepared to deal with this today."
>
> DC- "The sureties have been here all day."
>
> C- "This is his first appearance today, other cases have priority."
>
> DC- "The sureties took the day off of work, and they cannot come back on Monday."
>
> JP- "When can they take time off? We are out of time today."
>
> Court started at 10:05 a.m., lost two hours to "dead time," actively used three hours and 12 minutes addressing cases, and adjourned for the day at 3:18 p.m.

The arbitrariness of having the bail court close when there were accused ready for their bail hearing was further aggravated by comments such as the following:

At 10:14 a.m.

> JP- "I am not sitting late today; I have a retirement party to attend."
>
> Court lost two hours and 15 minutes to recesses and closed for the day at 3:15 p.m.

At 3:26 p.m.

> C- "The accused wants his bail hearing, but it is not possible today."
>
> D- "I just want to confirm with the court, you are only doing one more hearing today?"
>
> A- "I am going to lose my job!"

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JP- "We are not addressing that now, make arrangements with your employer. This matter is adjourned."

The court lost over two hours to recesses, three accused were told they could not have their bail hearing because the court was out of time, and the court adjourned for the day at 4:26 p.m.

At 4:45 p.m.

C- "It is too late in the day to proceed with a hearing. I appreciate that the surety was here all day and the second interpreter has been waiting, but I must leave by 5:00 p.m."

JP- "Adjourned."

The court lost over two hours to recesses, eight accused were told they could not have their bail hearing because the court was out of time, and the court adjourned for the day at 4:48 p.m.

At 3:14 p.m.

C- "I will consent to the accused's release with another surety."

D- "There are no other sureties available; bail program is willing to supervise the accused."

JP- "I will not run any more show cause hearings today."

The court lost over three and a half hours to recesses, two accused were told they could not have their bail hearing because the court was out of time, and the court adjourned for the day at 3:54 p.m.

At 12:26 p.m.

C- "We are trying to clear the list, it is Friday after all. We don't want to be here all day."

The court lost over three hours to recesses and adjourned for the day at 3:13 p.m.

An adjournment means the accused must spend another night in jail (or in the case of a Friday afternoon adjournment, three additional nights in jail) and for sureties this means another day off from work to attend court.

Release on Bail

Despite bail court's mandate to decide whether an accused will be released or detained until his or her case is resolved, the court made remarkably few of these decisions. Over 127 days of weekday court observation there were 515 consent releases, 46 releases on the same bail as the accused had already been released on, and 12 whose bail had been set at a previous appearance. There were also 233 show cause hearings and two judgments delivered for a show cause hearing from a previous date. This translates into an average of only 4.5 consent releases and 1.6 bail hearings a day. Of the 235 show cause hearings/judgments, 124 or 52.8% resulted in a release order. What is clear from this is the dominance of consent releases. This is not entirely surprising when one considers either the general presumption of release or the court's imperative to get through the day as quickly and with as little conflict as possible. Consent releases can be completed considerably faster

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(average 8 minutes, range: 30 seconds to 30 minutes) than full bail hearings (average 51 minutes, range: 9 minutes to 4 hours).[18]

In addition to being time consuming, bail hearings introduce an element of uncertainty that court actors want to avoid. Most releases are negotiated; they are not the product of a formal adversarial process. If a release could not be negotiated, it was likely to be adjourned. It was not uncommon for cases to be repeatedly adjourned for the purpose of finding a surety deemed appropriate by the Crown. A consent release could then be assured without risk of detention, rather than having the matter proceed with a show cause hearing, the outcome of which involves a fair amount of uncertainty.

When a consent release was presented to the court the conditions of release had already been agreed to and all actors, including the accused, knew what to expect. As soon as a bail hearing commences, predictability is forfeited as witnesses are called to give evidence.

WASH Court

The Weekend and Statutory Holiday (WASH)[19] courts present an extreme example of how the court operates in a manner consistent with completing the daily docket as expeditiously as possible. Indeed, it seems all the challenges of the weekday bail court are amplified on the weekend.
For example, at 11:02 a.m.

> JP "Are all the accused in the building? Keep them coming in please. We do not want to be here all day. Do we want to take a lunch today? (staff answers "no"). Ok, we will take a break at 11:30 a.m. and then we will work right through."[20]

WASH court was observed in two metropolitan areas, one for 11 days and the other for 4 days, yielding data on 304 case appearances. As depicted in table 5, there were some clear differences between the courts in terms of operating time. Court 5 opened for an average of 46 minutes, while Court 6 was open for three hours and 54 minutes. When one considers the difference in caseload, this difference in operating time makes sense. If we look at the average active time used in these two courts, Court 5 spent approximately 3.4 minutes per accused while Court 6 spent 3.9 minutes; therefore, despite the dramatic difference in operating time, these two courts were operating in a similar fashion.

While the weekday bail courts adjourned approximately 53% of their caseload on any given day, WASH courts adjourned 70% (see table 6). As a court charged with making release decisions, this court was only making a bail decision in 25% of cases. This court, even more than the regular bail court, seemed to specialize in granting adjournments rather than in making bail decisions. The speed with which the court moved through the WASH court docket, coupled with the large majority

[18] The 14 show cause hearings that were adjourned before the hearing was completed were excluded.
[19] WASH courts are supposed to function as regular bail courts; in Ontario WASH courts only hear first appearance bail matters.
[20] It is my understanding court personnel are paid for a full day's work at WASH court.

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Table 5
WASH Operating Time

Court	Average court start time (9:00 a.m. indicated with* or 10:00 a.m.)	Average court end time	Average Dead Time	Average Active Time Remaining	Average Number/ Range of Cases	Average Number/ Range of Charges
Court 5	9:02*	9:48	0:02	0:44	13 (8–21)	53 (19–84)
Court 6	10:10	14:04	1:05	2:46	42 (30–53)	125 (78–179)
TOTAL	–[21]	–	0:19	1:16	20 (8–53)	72 (19–179)

of cases being adjourned to another day, suggests court actors were even more anxious to move cases off the docket than they were during the regular work week.

Unlike in the regular bail court, the Crown in Court 6 asked for a considerable proportion of the adjournments (see table 7). Court administration[22] was the dominant reason provided for the adjournment request (see table 8), suggesting the Crown had some difficulties getting the necessary paperwork in order on the weekend. In these instances the Crown was often seeking to revoke the accused's prior bail(s) through a s. 524(3) application. This means the accused was also facing other charges, and the Crown wanted to bring together all of the paperwork. It was possible that the Crown would seek to cancel the accused's previous bail(s) and have the accused detained on all charges. Even in cases where the Crown consented to the accused's release, there could be a s. 524(3) application to ensure the new conditions of release were consistent with other conditions that had been imposed on previous bail(s). The challenge in this particular city was that the accused were brought to one central location for WASH court. This meant the paperwork for their previous charges was often at another courthouse, and apparently on the weekend this paperwork could not be forwarded to the WASH court. Electronic records of such matters did not exist or were not available.

In Court 5, which was only operational for 46 minutes on average, close to 45% of adjournments were requested by counsel through a message to the court. In this court it seems private counsel simply did not bother attending court on the weekend in person. This "easy" way of securing an adjournment was also reflected in the 41% of cases that were adjourned without a reason provided to the court. Adjournments were the fastest way to address a matter, and a request via a message with no reason provided further expedited this process.

Perhaps the most obvious indication of the dominant goal of "getting through the list" as early in the day as possible,was that five accused in Court 6 were adjourned because the court "ran out of time" to hold their bail hearing. It is unclear how a court that was open for an average of less than four hours can run out of time to hear an accused who would like to have his or her bail hearing.

[21] Not calculated due to different scheduled start times.
[22] See footnote 18.

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Table 6
WASH Daily Case Outcomes

Court	Detain	Release	Adjourn	Traverse	Plea	Bail Variation/ Set Date/Error/ Withdrawn	TOTAL
Court 5	–	23.4% (32)	73.7% (101)	–	–	2.9% (4)	100% (137)
Court 6	0.6% (1)	26.3% (44)	67.7% (113)	4.2% (7)	–	1.2% (2)	100% (167)
TOTAL	0.3% (1)	25.0% (76)	70.4% (214)	2.3% (7)	–	2.0% (6)	100% (304)

Indeed, in this particular WASH court, on the two separate occasions where accused were remanded because the court was "out of time," the court adjourned for the day at 2:20 p.m. (after actively addressing cases for two hours and 47 minutes and remanding three accused for lack of time) and 2:47 p.m. (after actively addressing cases for three hours and three minutes and remanding two accused for lack of time). Since show cause hearings tend to be time intensive and in the interests of expediting the end of the day, the court had informally established an arbitrary presumptive closing time.

Over 15 days of WASH court observation, there were 72 consent releases and three releases on the same bail. There were a total of seven show cause hearings; on half of the days observed the court did not run a single bail hearing. Of these seven, three accused were released, and the remaining four were adjourned to another day without a bail decision. This court seems have developed practices that allow staff to successfully avoid hearing contested bail hearings on the weekend.

Conclusion

While the literature suggests adjournments and unproductive appearances are common in other courts, bail court is unique in that all accused appearing in this court are in custody and will remain there until a bail decision is made. Adjournments in other courts do not involve continued detention for most accused. According to law, the bail decision is to be made relatively quickly; however, multiple adjournments mean accused are spending longer periods of time in detention before they are being released.

Table 7
WASH: Who Requests an Adjournment?

Court	Defence/Accused	Crown	JP/Unknown	Left a Message to Adjourn[23]
Court 5	78.2% (79)	9.9% (10)	11.9% (12)	44.8% (43)
Court 6	48.7% (55)	38.1% (43)	13.2% (15)	0.8% (1)
TOTAL	62.6% (134)	24.8% (53)	12.6% (27)	20.6% (44)

[23] The proportion of requests for an adjournment from defence/accused relayed to the court through a message from private counsel to duty counsel.

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Table 8
WASH: Reason Provided for Adjournment Request

Court	Counsel	Surety	Court service[24]	Court administration[25]	Out of time/Will not reach	Plea	Misc.	No reason given
Court 5	4.0% (4)	6.9% (7)	21.8% (22)	7.9% (8)	–	3.0% (3)	15.8% (16)	40.6% (41)
Court 6	2.7% (3)	14.2% (16)	12.4% (14)	35.4% (40)	4.4% (5)	7.1% (8)	7.1% (8)	16.8% (19)
TOTAL	3.3% (7)	10.7% (23)	12.1% (26)	22.4% (48)	2.3% (5)	5.1% (11)	11.2% (24)	28.0% (60)

The remanding phenomenon seems to be the product of a "culture of adjournment," in which an adjournment is not only the most common way to deal with a case but is also the most accepted (albeit for different reasons). There appears to be considerable tension between the requirements of the court and the abilities and resources of defence counsel. Since accused generally have only one chance to apply for bail, defence counsel prefer to negotiate a consent release rather than proceed with a contested bail hearing. Duty counsel however represent a large number of accused in a single day so cases that require more assistance are more likely to be adjourned. Defence counsel are understandably reluctant to have a hearing unless the accused has a strong release plan because the Crown and justice of the peace often insist on a surety. The Crown has little incentive to push to proceed with a bail hearing because an adjournment removes the case from the docket, and the accused will remain in detention until the next appearance. The justice, often frustrated that cases are not ready to proceed, propels the day forward by refusing to hold matters down.

Together, this results in an assembly line of adjournments as the court tries to deal with a lengthy docket by putting cases off to another day and likely to different staff. There appears to be a conflict between the legal framework and an informal culture that rationalizes the court's behavior. The court system may share bureaucratic priorities of production and efficiency; however, these do not seem to be translated into practice in the bail court. While court actors are certainly aware of issues of backlog and delay, there appears to be considerable ambivalence toward ensuring the bail decision is made expeditiously.

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[24] See footnote 17.
[25] See footnote 18.

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