The Parable of Ms Baker: Understanding Pre-Trial Detention in Canada[†]

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Abstract

Although Canada's overall and violent crime rate dropped dramatically between the early 1990s and 2007 and its overall imprisonment rate has been relatively stable for the past 50 years, the portion of all prisoners who have not yet been sentenced (largely remand prisoners) has increased dramatically. The remand rate tripled between 1978 and 2007. Various explanations for this increase are explored in this article. In the end, we conclude that Canada's growing remand population is largely the product of an increasing culture of risk aversion which is permeating the entire criminal justice system.

Introduction

Taking our cue from previous (successful) story-tellers, perhaps the most effective way of understanding the current reality of bail and pre-trial detention in Canada is to begin with a recent newspaper story. We quote it in its entirety. Under the headline 'Stolen Laptop Recovered', we learned the following.

> A Dell laptop computer stolen in December has been located. The Huntsville [detachment of the Ontario Provincial Police] report that in December, police were advised that the computer had been turned in to a local computer shop for reformatting. While store employees were conducting a reformatting process, they found that the laptop was property of Trillium Lakelands District School Board and it had been taken from Huntsville High School. After an investigation, police arrested 40-year old Rosanne Baker of Huntsville for the theft. Baker was charged with possession of stolen property obtained by crime and breach of probation. She remained in custody and was held for a bail hearing in Bracebridge today (Huntsville [Ontario, Canada] *Forester*, 4 March 2009).

Under the law as it presently exists, Ms Baker could have been released by the arresting officer, or a designated 'officer in charge' (i.e. the officer in command of the police station

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in which an accused would be temporarily detained). Ms Baker clearly was not released by the police. Instead, she was held for a full court hearing before a justice of the peace to determine if she should be formally detained until trial.

There are three grounds by which a justice of the peace might have detained Ms Baker under s515(10) of the Criminal Code of Canada:

> (a) where the detention is necessary to ensure his or her attendance in court …
>
> (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, 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.

Pre-trial detention is also governed by Canada's Charter of Rights and Freedoms which, in this context, promises (in s11) that '[a]ny person charged with an offence has the right … not to be denied reasonable bail without just cause'.

Within this legislative context, the case of Ms Baker may appear – at least at first glance – perplexing. Specifically, the fact that the offence is of a minor nature, coupled with the apparent lack of threat that this accused poses to society (barring any relevant information which the news article fails to report), her presumed ties to the community and the arguably low likelihood that the administration of justice would fall into disrepute with her release until trial renders Ms Baker a seemingly unusual 'bail case'. This article explores several explanations for the inclusion of cases such as this one as part of the current caseload in bail court. Indeed, we would argue that Ms Baker's case is not unusual and – in a sense – typifies some of what is currently happening with bail and pre-trial detention in Canada.

Trends in Pre-Trial Detention

When addressing the issue of pre-trial detention, prison would seem to be an appropriate place to start. More specifically, we begin by presenting the trends in overall imprisonment rates in Canada over the last 50 years (Figure 1).

Perhaps the most salient point about the picture portrayed in Figure 1 is the blandness of Canada's trends in imprisonment. Looking initially at the overall or total rate of incarceration for Canada (top line in Figure 1), our imprisonment today is not much different from what it was a half century ago. In 2007, the rate was 110 prisoners per 100,000 residents. In 1958, the overall rate was 99 per 100,000. While there is clearly some fluctuation over this time period – with a low of 83 per 100,000 residents in 1974 and a high of 116 per 100,000 in 1995 – the overall picture is one of relative stability.

An examination of the disaggregated imprisonment rates at the federal and provincial levels (bottom two lines in Figure 1) tells the same story. These sub-levels of incarceration reflect the fact that prisons are a shared responsibility in Canada.[1] The provincial and territorial governments are responsible for administering all non-custodial sentences and for

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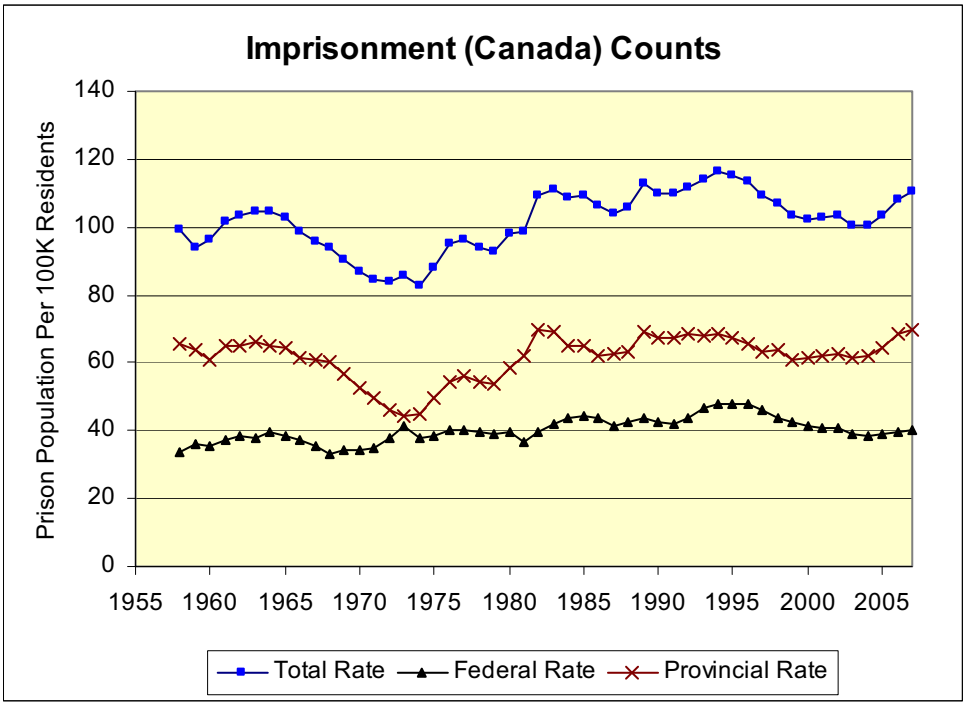
[1] Criminal law is the responsibility of the Parliament of Canada. However, the administration of justice (police, prosecution, courts, etc) is a provincial/territorial responsibility. Hence, the 10 provinces and three territories in Canada all *administer* the same criminal law, but they do it under their own policies. In that sense, differences across provinces in the manner in which the justice system works clearly cannot be attributed to the criminal law itself.

pre-trial detention as well as all prison sentences of less than two years in duration. In contrast, the federal government is responsible for penitentiaries – for those inmates with aggregate custodial sentences of two years or more – as well as for parole decisions and parole supervision of these same prisoners. Despite some fluctuation over time, rates of imprisonment have also remained relatively constant over time at both the federal and provincial sub-levels.

Figure 1: Imprisonment Rates (Total, Federal and Provincial[2]) in Canada from 1958 to 2007



Elsewhere, we (Doob & Webster 2003, 2006; Webster & Doob 2007) have attempted to explain the various ways in which Canada has maintained this stable pattern. Notably, our explanations were largely focused on the *scope* or pattern of the overall rate of incarceration over the past several decades. Indeed, we did not examine the *nature* of our imprisonment levels to any significant extent. Such an exploration would have drawn attention to a dramatic shift that has occurred over the same period in the nature of the rates of imprisonment in provincial institutions in Canada. Figure 2 illustrates this change.

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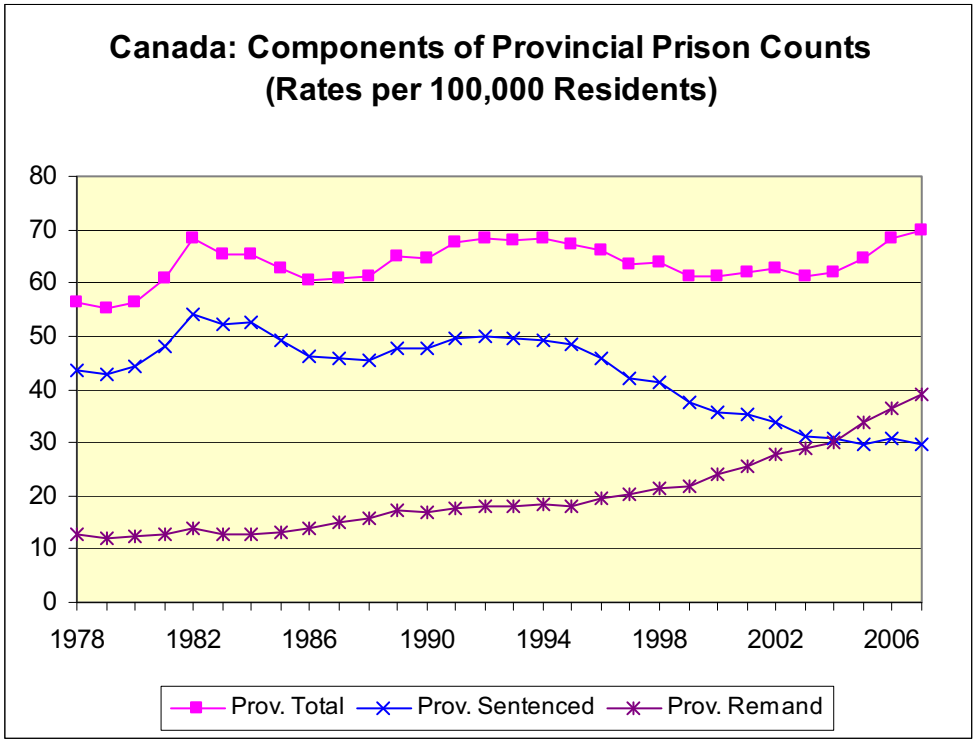
[2] With apologies to the Yukon, Northwest Territories and Nunavut (our three Canadian territories which contain 0.3% of Canada's total population), we will generally refer only to the provinces (e.g., 'provincial' imprisonment rates) when we actually mean 'provinces and territories'. Further, the crime and criminal justice problems of the territories are – in some cases – dramatically different from those of the provinces and probably should be considered quite separately from them. As such, although we will also include the territories when we present data from 'Canada', we will otherwise exclude them when we examine individual provinces.

Figure 2: Provincial Imprisonment Rates (Total, Sentenced and Remand) in Canada from 1978 to 2007



As already noted, provincial prisons house those receiving a custodial sentence of less than two years (labelled in Figure 2 as 'sentenced') as well as those in remand – pre-trial detention prisoners who are either awaiting bail determination or trial (identified as 'remand').[3] Most notably, while the sentenced population shows a steady decline over time, the remand population in Canada has increased threefold over the last 30 years. Specifically, it has risen from a rate of 12.6 per 100,000 in 1978 to 39.1 per 100,000 residents in 2007. By 2007, 56% of all provincial inmates on an average night were remand prisoners. In fact, there are currently a greater number of people being held in remand than there are offenders actually serving custodial sentences post-conviction in provincial institutions in Canada. As Figure 2 illustrates, the remand population shows a long-term upward trend which eventually overtakes the sentenced population. In fact, the ratio of the remand population to the sentenced population continued to increase every year since the former outnumbered the latter.

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[3] We have chosen not to include a third category of provincial prisoners – often referred to in government statistical reports as 'other provincial prisoners'. This very small group largely constitutes those who are being held in custody for various other reasons, most notably immigration issues (e.g., until they can be deported). While this group is not presented separately in Figure 2, it is included in the provincial total and overall total prisoner counts in Figures 1 and 2.

These counter-trends in the remand and sentenced prisoner populations provide an interesting 'paradox' for those focused exclusively on sentencing data. Specifically, the intersection of these two sub-groups of provincial prisoners would suggest a compensation of increased pre-trial detention with 'time served' credit at sentencing.[4] Indeed, the overall provincial imprisonment rate in Canada (that is, the number of people incarcerated per 100,000 population) shown in the top line has remained relatively stable over the last 30 years.[5] However, a quick glance at the other two lines on the graph (i.e., those of the remand and sentenced populations) qualifies this overall stability. In fact, one quickly sees that it is a 'constructed' stability, being produced by an increase in the remand population and a simultaneous decrease in the sentenced population. Said differently, judges are not handing down fewer custodial sentences as the (declining) 'sentenced' pattern might suggest at first glance. Rather, these sentences are simply shorter because they are taking into account the increasing amount of 'time served' in custody on remand.

Clearly, Canada has a problem with pre-trial detention. Indeed, this country has witnessed a steady growth in this population in our provincial prisons over the past several decades. Equally notable is the fact that the size of the 'remand' problem is not evenly distributed across the 10 provinces and territories. Under our federal system, while the criminal law is identical across Canada, the administration of justice is the responsibility of the provincial governments. As such, the 'remand' problem is one which is created and endured by the individual provinces rather than the federal government. As such, the exact nature of this problem varies across provinces. Figures 3 and 4 explore this inter-provincial variation.

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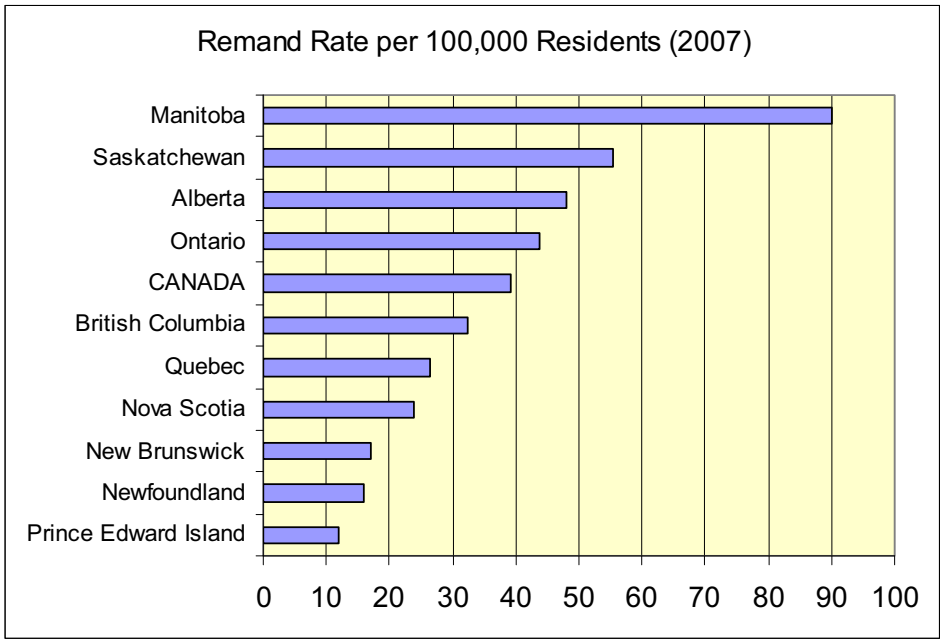
[4] Judges in Canada may, under s719(3) of the Criminal Code, take into account time spent in pre-trial detention when handing down sentences. Pre-trial detention is generally credited on the basis of two days credit for each day served (Manson 2001). This practice is rooted in the fact that almost no one sentenced to prison in Canada serves every day of the sentence in custody. Rather, some part of the sentence is served in the community. While those sent to prison receive – for the most part – fixed length sentences, the ways in which they are served vary enormously. For instance, all provincial and territorial prisoners can be expected to earn remission of – typically – one third of their sentences. For those serving sentences of over six months, they would also be eligible to apply for parole at the one-third point in their sentence. For federally sentenced prisoners, full parole can be granted as early as one-third into the sentence and statutory release occurs at the two-thirds point. Although most federal prisoners serve two-thirds of their sentences, those federal prisoners who are paroled serve – on average – (only) 40% of their sentence in a penitentiary. The total of these legislated releases is that a non-trivial number of prisoners serve as little as one-third of their sentence. Further, almost all of the remaining prisoners serve two-thirds of their sentences or less. It is precisely this reality which justifies a credit of between 1.5 and 3 days credit for each day spent in pre-trial detention. Indeed, a 'rough and ready' calculation of 2 days credit for every day served in pre-trial detention (often referred to in Canada as "two for one" credit) is not far off as an equivalent way of calculating the 'credit' for time served in remand. Specifically, a prisoner who might be expected to be paroled at the 40% point in his or her sentence should receive a 'credit' of 2.5 days for every day served. A prisoner who might be expected to be released after serving two thirds of the sentence should get 1.5 days credit for every day of pre-trial detention. Those who might be paroled by way of accelerated parole review at the one-third point in their sentence should get three days' credit for every day served.

[5] Although there is some variability across time (i.e. from a low of just under 60 to a high of 70 prisoners per 100,000 population), this variation is clearly small when considered across the 30-year time period.

Figure 3: Average Remand Counts by Province (2007)

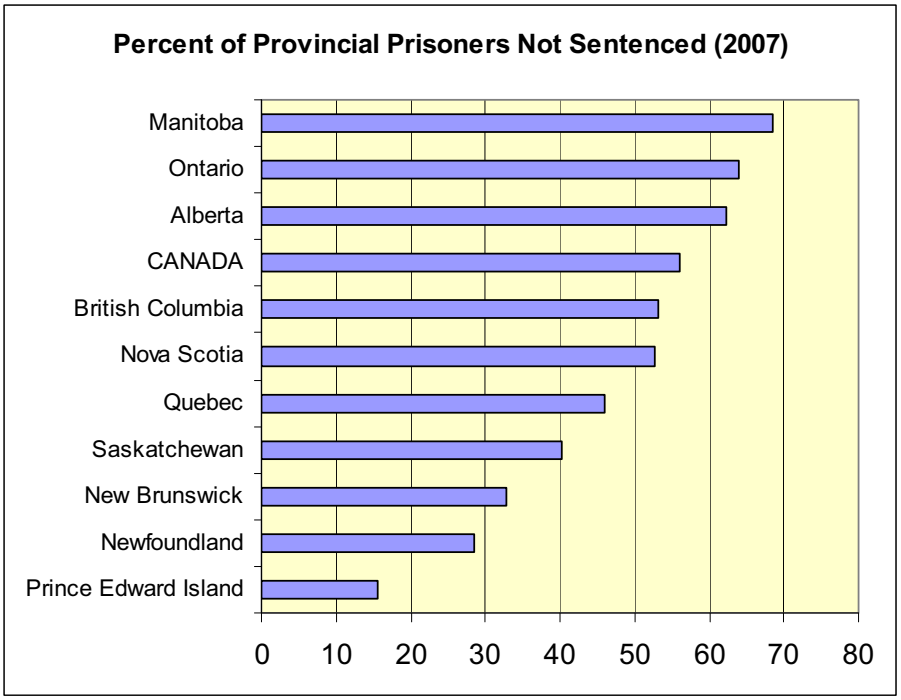


We have chosen to present two different measures of the 'remand' problem in Canada. Both of them tell the same story. Specifically, there is considerable variability across jurisdictions in the size of the pre-trial detention population. Indeed, we go from a low of 12 remand prisoners in Prince Edward Island (per 100,000 residents) to 90 remand prisoners per 100,000 residents in Manitoba in 2007 (Figure 3). Similar variation is found when one examines the proportion of the provincial inmate population on any given day which is composed of remand prisoners. Illustratively, while only 16% of the provincial counts in Prince Edward Island constitute those being held in remand in 2007, this value jumps to 64% in Ontario and 69% in Manitoba for the same year (Figure 4). Further, there is a relationship between these two measures, with a correlation of +0.73. Generally speaking, the small eastern (Atlantic) provinces of Newfoundland and Labrador, Prince Edward Island, Nova Scotia and New Brunswick have low rates. At the other extreme, Manitoba and Ontario have relatively high rates.

Despite this variability, one commonality traverses all provinces. Indeed, the pre-trial detention population is seen as a problem. Illustratively, the federal, provincial, and territorial ministers responsible for justice issues typically meet annually. Following these meetings, they generally release a 'statement' that focuses on areas of agreement and appears to ignore areas of disagreement. At their 2005 meeting, their final news release noted that 'Ministers expressed concern over statistics showing that fully half of the incarcerated population in Canada is remanded pending trial. Discussion focused on factors within each component of the justice system that may be contributing to this increase, including the issue of the two-for-one sentencing credit for remand time served' (see footnote 4 in this article for a detailed description of the aforementioned two-for-one credit). In fact, the figures actually show that half of *provincial* prisoners are remand prisoners,

meaning that the percentage of all incarcerated persons who are remand prisoners is more like 30% when one includes the prisoners in federal institutions. That the Ministers misinterpreted the meaning of the statistics which were presented to them is neither surprising nor important. What is more noteworthy is the fact that they identified the remand population as a problem (and, in effect, focused on these prisoners as responsible for their own fate). In 2007 and 2008, the group raised this concern again.[6]

Figure 4: Percentage of Provincial Counts which are Remand, by Province (2007)



This particular focus on Canada's remand population is not surprising. Indeed, this substantial increase in the number of accused in pre-trial custody has created a plethora of problems. Most obviously, this large (and growing) prison population imposes significant additional economic costs on the provincial governments. In particular, the limited capacity and resources of detention facilities – often already overcrowded and with less than optimal living conditions – are further strained. Administratively, the effective management of this unique population (e.g., its unpredictability in terms of length of stay; the need for separation from sentenced offenders; the inaccessibility of activities and programming) has also been rendered more difficult.

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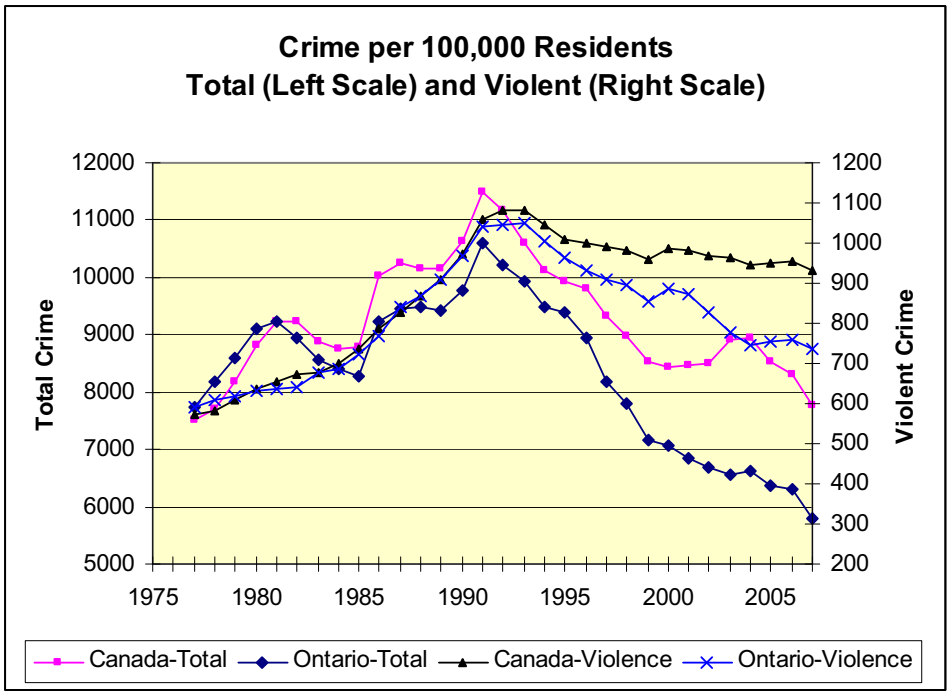
[6] It was acknowledged by the Ministers in 2007 that '…over the last decade, the composition and dynamic of Canada's correctional population has changed considerably, raising a number of issues. For example, the growing number of individuals in remand awaiting trial or sentencing is a concern' (News Release, 16 November 2007). Similarly, one can read in 2008 that 'Provincial and territorial Ministers urged the federal Minister of Justice to implement reforms agreed to by all Ministers in 2006 and 2007 to limit the availability of credit for time served [in pre-trial remand]' (Department of Justice, Canada 2008).

Explaining Canada's Growth in Pre-trial Detention

In attempting to understand this burgeoning population of pre-trial detention prisoners, it is always tempting to look for its cause in crime itself. Indeed, rising crime rates – particularly of violent crimes – could arguably justify the steady increase since the 1980s in the number of accused who are held in remand in Canada. Unfortunately for this explanation, reported crime in Canada peaked in the early 1990s and has drifted downwards since that time. Figure 5 illustrates this trend. We have presented data for Canada overall, as well as for its largest province – Ontario.[7]

Figure 5: Crime Rates (total and violent) for Canada and Ontario (1975-2007)



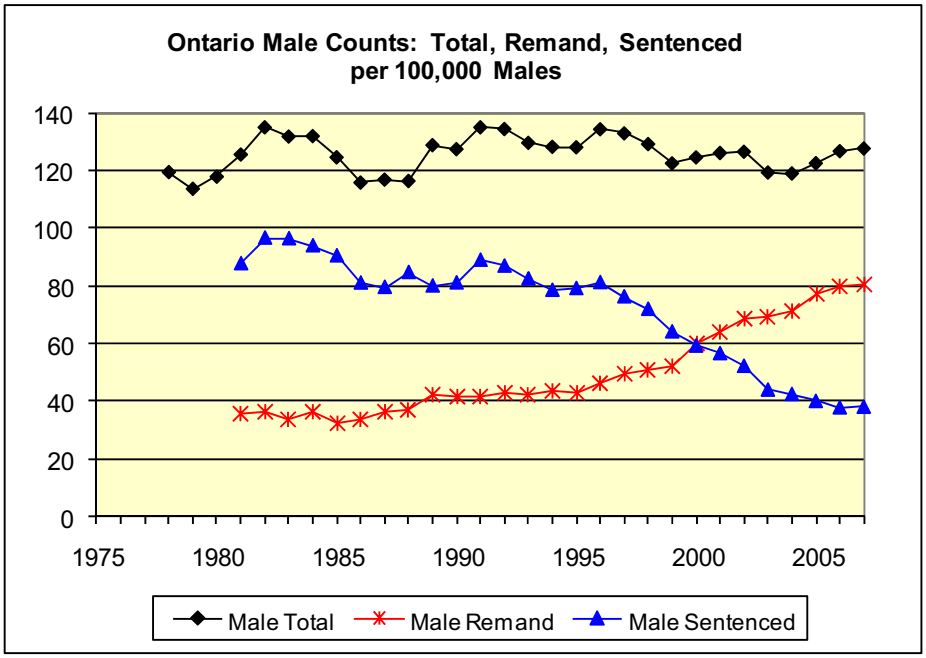
In reference to either total crime or violent crime, there is no indication that crime rates have been increasing over the last decade. In fact, while levels of total crime may have dropped more rapidly than those of violent crime, both measures of criminal activity have shown a steady – and cumulatively dramatic – decrease from the early 1990s through the latter part of this decade in Canada (overall) as well as in Ontario. Clearly, these trends do

[7] The inclusion of Ontario reflects our access to more detailed data on the bail process for this province. This province has a population of approximately 13 million people, constituting 39% of Canada's total population. More importantly for the purposes of this article, the trends in the Ontario remand population reflect – in large part – the patterns in Canada as a whole.

not support the theory that the continual increase in the pre-trial detention population in Canada over the same period is being driven by crime.[8]

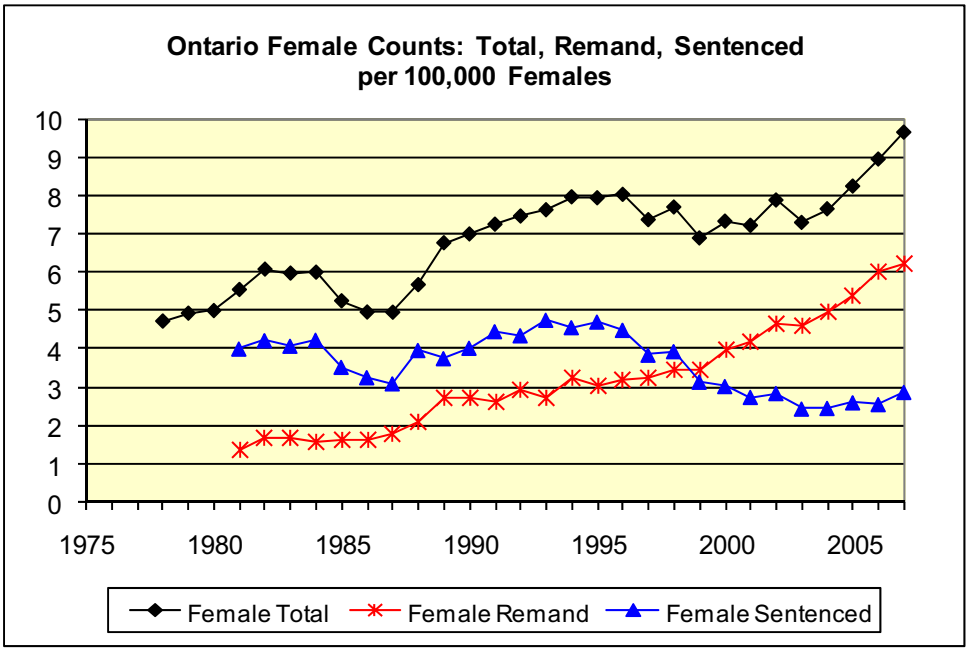
Another plausible explanation for the increase in the pre-trial detention population is rooted in changes in the types of criminal activity committed (or at least in the targeting of particular crimes with which society is especially concerned). In particular, there has been a fair amount of concern – in the past decade or so – expressed by Canadians about 'guns, gangs, and drugs'. This issue has been particularly salient in Ontario (and especially in Toronto, its largest city). It could be argued that the increase in the remand population is a reflection of two inter-related factors: 1) the inherent seriousness of the offences committed in relation to these social problems and 2) the increased concern surrounding this phenomenon and a consequent toughening of criminal justice responses such as an accused person's likelihood of being held for a bail hearing. Figures 6 and 7 examine this hypothesis.

Figure 6: Imprisonment Rates (Total, Sentenced and Remand) for Ontario between 1978 and 2007 (Males)



[8] Interestingly, one finds a relationship between the remand rate (i.e. remand prisoners per 100,000 residents) of each of the 10 provinces in Canada, on the one hand, and overall police recorded crime (or violent crime) for these jurisdictions on the other hand. Specifically, the correlations are .51 for all crime and .54 for violent crime. While this statistical finding would appear to contradict the aggregate trends presented in Figures 2 and 5, it is notable that these correlations seem to be accounted for almost entirely by two provinces which are high on all three measures. Once these two (anomalous) jurisdictions are removed from the statistical equation, the correlations drop to -.15 and .07 respectively. In other words, this lack of correlation corroborates our conclusion – based on the aggregate trends – that there is, in fact, no relationship between the remand rate and the crime rate.

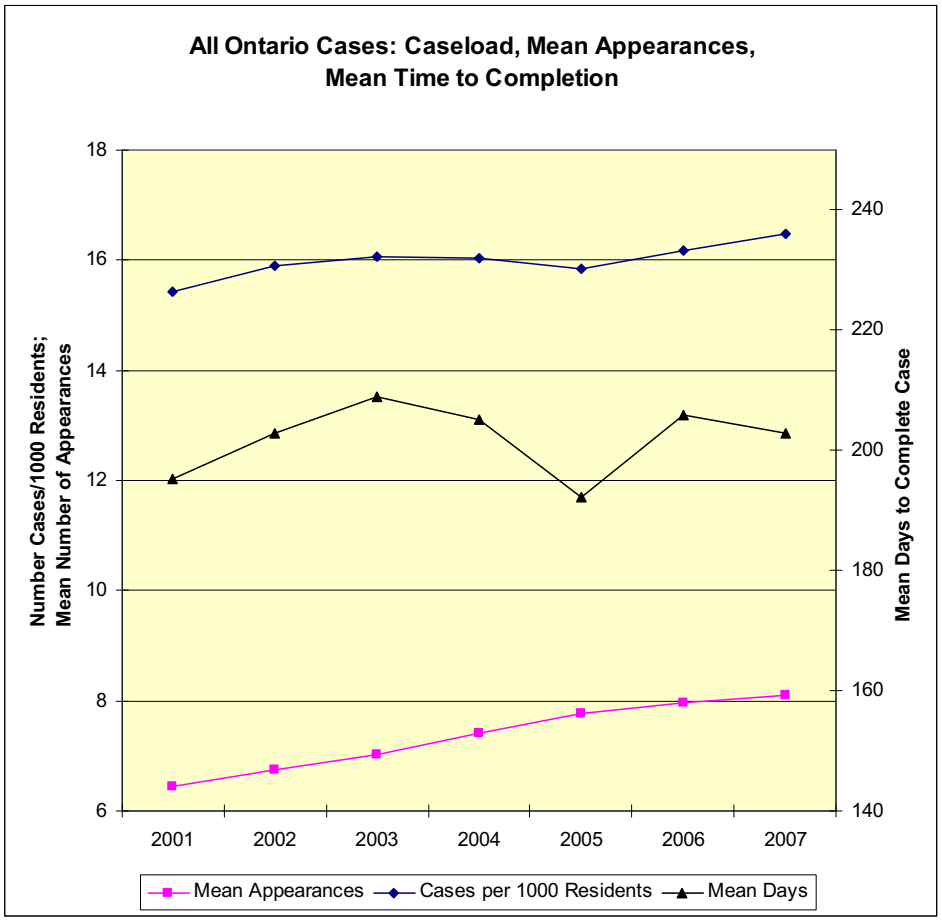
Figure 7: Imprisonment Rates (Total, Sentenced and Remand) for Ontario between 1978 and 2007 (Females)



For both males and females, we see a steady – if not dramatic – increase in the number of prisoners on remand per 100,000 male/female residents. Because the concerns regarding offences surrounding 'guns, gangs, and drugs' are usually associated primarily with male offenders, we should have seen an increase in the male remand rate without an accompanying rise in the female rate. In fact, the female rate – while significantly lower (overall) than the remand rate of males – increases by approximately six-fold over this period, compared to the male rate which (only) doubles. Indeed, it would not appear that the recent concern surrounding this social problem accounts for the increase in the pre-trial detention rates.

In fact, one of the keys to understanding the growth in remand may be rooted in the wider criminal justice arena. In particular, the operation of the court process itself may be able to shed light on potential factors explaining the current pre-trial detention population. Again using Ontario as a window into trends in Canada as a whole, recent studies of this province's criminal court system (Webster 2007; Myers 2006) have revealed a number of systemic problems of inefficiency which have permeated the criminal courts generally and have been developing over the last several decades. In fact, the Province of Ontario officially acknowledged – in 2008 – that it had a serious problem in the operation of its courts by establishing and announcing publicly a 'strategy' to reduce delay in the courts. Figure 8 presents data demonstrating several of the problems facing Ontario's courts.

Figure 8: Efficiency Measures (Number of Cases,[9] Court Appearances and Days to Disposition) in Ontario Provincial Courts from 2001 to 2007



Despite the short period of time depicted in this figure (2001-2007), one immediately notes an overall increase in the caseload of criminal courts in Ontario. Specifically, the number of cases (per 1000 residents) brought to court rose from 15.4 in 2001 to 16.5 in 2007. Notably, this increase occurred despite the fact that crime generally, and violent crime, in particular, had been falling over this same time frame.

Based on this increase in the overall caseload in Ontario, many people naturally attribute current court inefficiency to simply a problem of backlog. Simplistically, a greater number

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[9] For this purpose, a 'case' was defined as all charges on a single Information (that is, the document containing the allegations which formed the basis of the charges against an individual) related to a single person in a particular courthouse whose criminal proceedings are completed in Provincial Court. Defined in this way, it is obviously not a perfect measure. However, even with its inherent limitations, we would argue that this case-based definition is clearly superior to one which is charge-based (the standard presentation of court data in Ontario) as it more accurately reflects the way in which the courts conceptualise and process the accused.

of cases would require more time to process them. In fact, the average number of days required to complete a case in Provincial Court has been relatively stable over the last six years in Ontario, fluctuating around 200 days. What seems to be happening is that the increase in court caseloads has been counter-balanced – to a large extent – by substantial additional resources being poured into the courts, presumably as a strategy to avoid any constitutional violations rooted in the inability of the court to guarantee an accused person's right to be brought to trial within a reasonable time (s11(b) of the Canadian *Charter of Rights and Freedoms*). To use a colourful analogy, although the bathtub is filling with water at an increasing rate, instead of turning off the tap or unplugging the drain, we have simply been bailing (no pun intended) at a faster rate.

In fact, the real 'action' appears to reside in the number of court appearances required to complete a case in criminal court. Specifically, cases processed in Ontario took an average of 6.4 appearances to disposition in 2001. This value rose to 8.1 court appearances in 2007 – an increase of 27% over a mere six-year period. Indeed, the problem of court delay in this province is not simply one of additional cases coming into court. Rather, it is also rooted in an increase in the number of appearances being taken to resolve these cases. In brief, we are not only sending more cases to court, but we are processing them more once they are in the courts.

Perhaps not surprisingly, these overall patterns for all cases processed in Ontario's provincial criminal courts are also reflected in this province's bail cases (i.e. those cases in which the accused begins the criminal court process in custody such that the first court appearance is in bail court to determine whether he or she should be released on bail or detained until trial). Figure 9 replicates the three measures of efficiency presented in Figure 8 exclusively for Ontario cases which start their case processing lives in bail court (for a bail hearing).

Similar to wider trends in criminal cases generally, Ontario has also experienced a substantial rise in the caseload of bail courts over the last six years. Indeed, the number of cases which begin their case processing lives in bail court rose from roughly 6 per 1000 residents in 2001 to 8.3 in 2007, constituting an increase of 38%. This rise is even more dramatic when one recalls that crime was decreasing during this time frame. Clearly, the overall increase in court caseloads in Ontario generally, coupled with the fact that a higher proportion of them are being held in pre-trial detention, would have a significant impact on the remand population.

Notably, part of the explanation for the higher proportion of cases being held in remand may reside in their particular characteristics. Using the number of charges per case as a crude measure of case complexity, it would appear that cases in Ontario criminal courts have become more complex over time. For instance, the average number of charges per case in 2001 was 1.89. This value rises to 2.15 in 2007 – an increase of 14% over a mere six-year period. This increase is particularly relevant for our current argument as more complex cases (as defined by the number of charges per case) are more likely to be detained for a bail hearing than less complex cases.[10]

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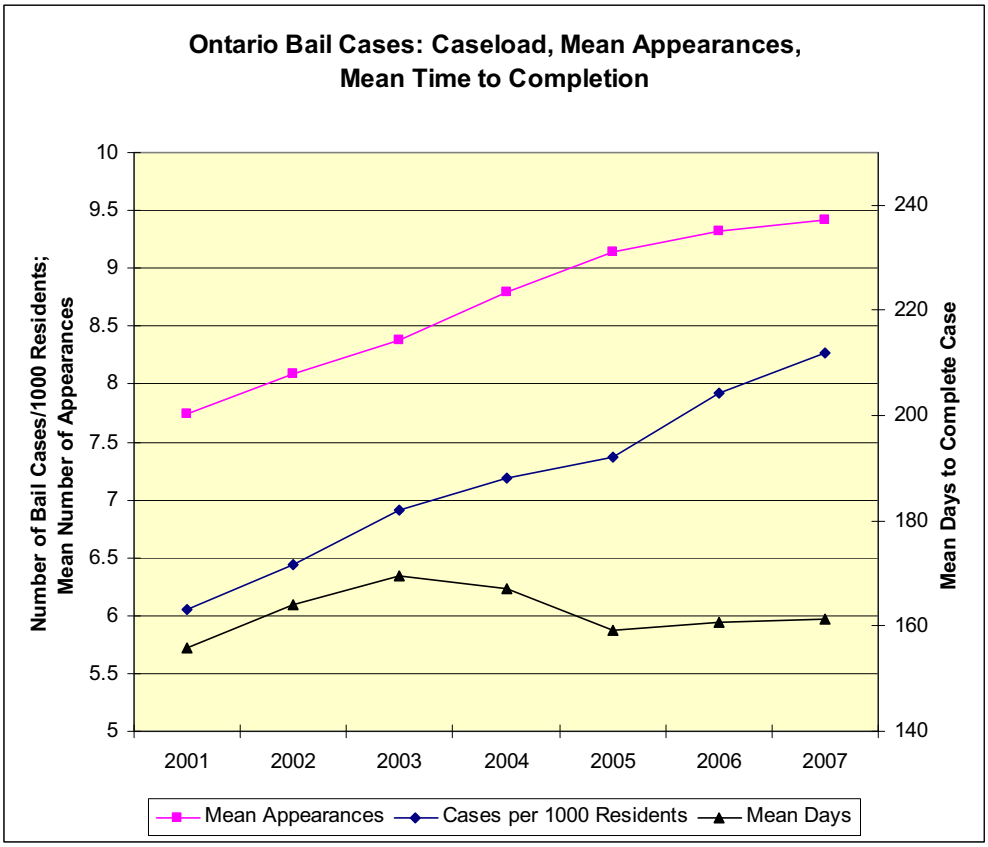
[10] We note, for example, that while 68% of complex cases (defined as cases having three or more charges) were held for a bail hearing in 2007, only 45% of less complex cases (defined as cases having only one or two charges) were sent to bail court over the same year in Ontario.

Figure 9: Efficiency Measures (Number of Cases, Court Appearances and Days to Resolution) for Ontario Bail Cases from 2001 to 2007



Similarly, it would appear that the number of cases including one or more 'administration of justice' charges (e.g., failure to appear, failure to comply with a bail condition, breach of probation) would also explain – in part – this increase in the number of cases being held in pre-trial detention. In 2001, 33% of Ontario criminal cases included one or more 'administration of justice' charges. By 2007, this proportion had increased to 40%. More importantly for our current purposes, cases involving one or more 'administration of justice' charges are more likely to be held for a bail hearing.[11] Ironically, though, the proportion of these same cases which resulted in a formal detention order or completed the criminal court process without a determination of bail[12] decreased slightly (from 53% to 46%) over the same six-year period.

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[11] Illustratively, 54% of the cases in 2007, which included an 'administration of justice' charge, began their court careers in bail court. In contrast, only 26% of cases that did not include any 'administration of justice' charges involved a bail hearing for the same year.

[12] A non-trivial number of offenders held in pre-trial detention awaiting a bail hearing appear to spend all of their court career without a release or detention decision being made (on this anomaly, see, for example, Webster in this issue). Specifically, these cases complete the entire criminal court process – ultimately receiving a final

However, the problem in Ontario is not simply one of a greater number of cases being sent to bail court. While the amount of time to final disposition of a case which had been held in remand for at least some number of days does not appear to have increased between 2001 and 2007 – remaining, in fact, relatively stable[13] – the average number of court appearances that this type of case takes to be resolved shows a considerable increase over time. Specifically, bail cases took an average of 7.7 court appearances to reach final disposition in 2001. In contrast, this same type of case required 9.4 appearances to complete the criminal court process in 2007, constituting a 22% increase.

Part of this increase in the number of court appearances to final resolution may reside in the bail process itself. Specifically, the actual operations of the bail court in determining whether an accused should be released on bail or, alternatively, held until trial may also be adding an increasing number of court appearances over time. Indirect corroboration of this hypothesis is found in another measure of the 'remand problem' – admissions to prisons.[14] Figure 10 presents the data.

Similar to Figures 6 and 7, we see the same separation of remand and sentenced prisoners. In 1991, the number of admissions per 100,000 residents was more or less evenly split between these two types of inmates. However, by 2006, there were approximately twice as many remand prisoners as sentenced prisoners entering Ontario provincial prisons.

Of equal importance, it is clear from this figure that the number of admissions for pre-trial detention prisoners increased over this 15-year period, providing additional empirical support for the rise in the caseload in bail court. While this increase could arguably be rooted exclusively in an increase in cases which were formally detained until trial, this hypothesis is not borne out by the data. On the one hand, the proportion of cases that begin their case processing lives in bail court rose – between 2001 and 2007 – from 39.2% to 50.2% of all cases in Ontario provincial courts. In fact, the majority of cases sent to criminal court in this province were being held in custody before their first appearance before a Justice of Peace for a determination of bail in 2007 and most cases took more than one appearance in the bail process. On the other hand, the proportion of bail cases which were formally detained following a bail hearing stayed much the same between 2001 and 2007 (13% and 12.3%, respectively).

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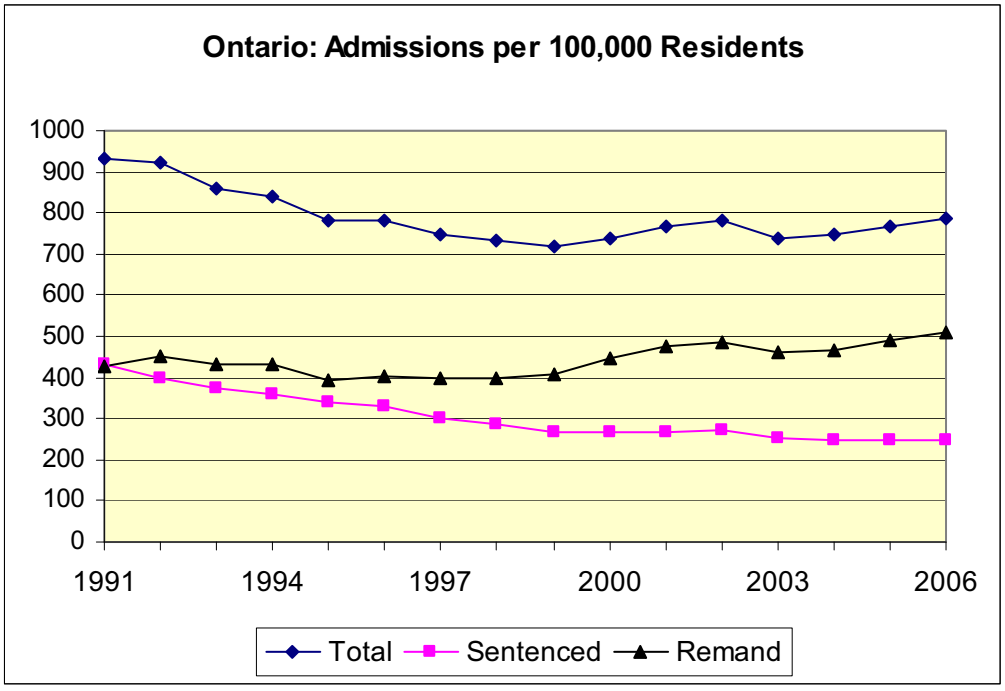
disposition (i.e. finding of guilt/innocence, withdrawn/stayed, or guilty plea) – without ever having had a bail hearing to determine whether they would be released on bail or formally detained until trial. For our current purpose, these cases were combined with those which were formally detained as both outcomes would contribute to the pre-trial detention population in Ontario.

[13] It is interesting to note that the average number of days required for a bail case to reach final disposition in the courts –161 days in 2007 – is less than the average number of days required for a non-bail case (i.e. a case which was never held in remand custody during the court process to determine whether the accused should be released on bail or held until trial) to reach final disposition – 244 days in 2007. We would expect that this difference reflects – at least in part – the fact that Crown Attorneys privilege 'in custody' cases in terms of the speed in which they are processed. It is likely that this practice is intended to minimise the amount of time that these accused are held in remand while still under the presumption of innocence.

[14] Unfortunately, there are some non-trivial problems with data quality and data availability that make it unwise to look at these data across all of Canada. In particular, data are not available for some provinces. As such, we present data only relative to Ontario. Further, it is important to note that even for this province, a change in its data recording system was introduced in 1991 which may account for all or most of the 34% increase in total admissions and a 62% increase in remand admissions between 1990 and 1991. For this reason, we have opted to begin the series in 1991.

Figure 10: Provincial Admissions in Ontario between 1991 and 2006[15]



More importantly for our current purposes, though, the rise in the number of admissions for pre-trial detention prisoners over the 15-year period depicted in Figure 10 represents an increase of only 26%. This value can be contrasted with the increases in the count data shown in Figures 6 and 7. Indeed, the distinction between admissions and counts is crucial to understanding another factor contributing to the steady rise in pre-trial detention in Canada. Admission data describe the number of individuals – in our particular case, those on remand – entering provincial prisons. Count data refer to the number of individuals – again in our case, those on remand – who are in a provincial prison on any given day.

Within this context, it is notable that while the rate (per 100,000 residents) of admissions for pre-trial detention prisoners only increased by 26% from 1991 to 2006, the rate of counts for this same population rose by 95% (per 100,000 residents) over the same period. The difference between these two measures is explained by the truism: the size of an inmate population is a function of not only the number of people entering prison but also how long they remain in custody. Clearly, the number of people entering remand (i.e. admissions data) is – as we have already seen – increasing (even when expressed as a rate). However, these same people are also staying longer (i.e. count data) as remand prisoners than they had 15 years earlier.

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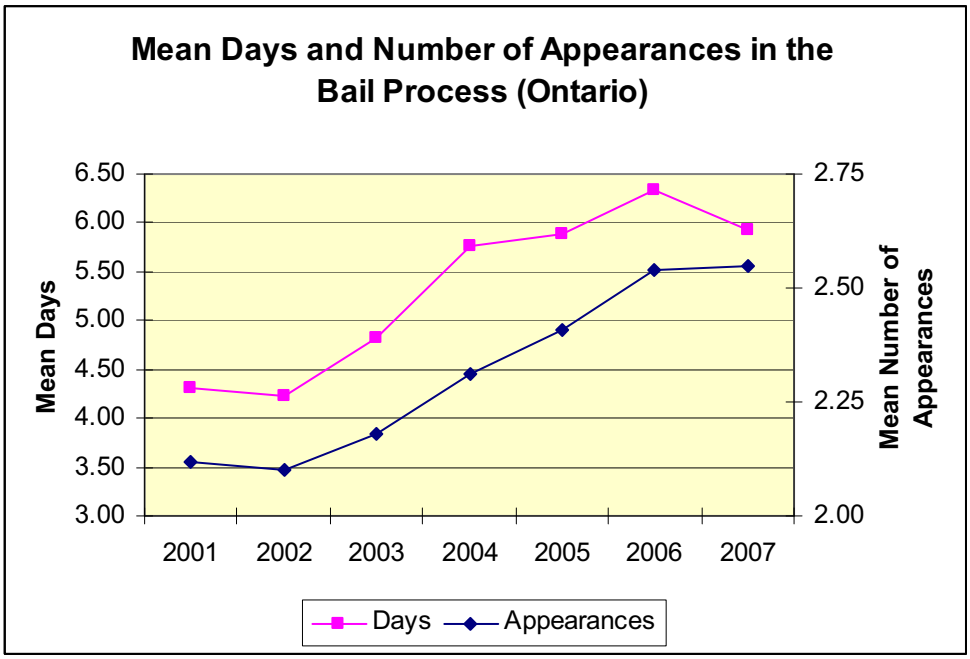
[15] Once again, a relatively small number or 'other' admissions is included in the total, but not shown separately in the figure. In 2006, the 'other' admissions accounted for 4% of all admissions. Further, it is of note that admission data are currently only available to 2006.

Indeed, it would seem that the decision process concerning pre-trial detention/release itself may be becoming longer. Figure 11 explores this possibility.

Figure 11: Efficiency Measures (Number of Court Appearances and Number of Days) in the Bail Process[16] in Ontario from 2001 to 2007



Notably, the bail process is clearly taking more time than it did in the past. Specifically, a case required – on average – just over four days to complete the bail process in 2001. In contrast, cases took an average of almost six days to resolve the question of bail in 2007.

Arguably, this increase in the number of days spent in pre-trial detention in order to resolve the question of bail may simply reflect court backlog. That is, this extra time merely constitutes time spent waiting for an available court date in order to get a determination of bail. However, the data on the number of appearances in bail court would appear to negate this hypothesis. Like other processes in Ontario criminal courts, it would also appear that the bail process itself is also taking a greater number of appearances than it did in the past. While only 2.12 appearances were required to resolve the question of bail in 2001, this value rises to 2.55 in 2007 – an increase of 20%. Indeed, once a person is detained for a hearing to determine whether release until trial is appropriate, it seems to take an increasing number of court appearances for the bail process to be completed.[17] As such, it would appear that the

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[16] The bail 'process' is defined as the period from a case's first appearance in bail court to the formal determination of whether the accused will be released on bail or detained until trial. Within this context, it is important to note that for a non-trivial number of cases, a final decision to release or detain the accused is never made. On these unusual bail cases, see footnote 12.

[17] From an efficiency perspective, the situation is dramatic. Specifically, the problem of lengthy case processing in bail court – rooted in the rise in the average number of court appearances to resolve the question of bail – is

driving force behind the rise in the amount of time spent in the bail process is largely rooted in the fact that cases are now taking more court appearances to resolve the question of bail.

Notably, this increase in the number of court appearances required to complete the bail process is not only a problem in relative terms. That is, cases are currently taking a greater number of appearances in bail court than they did in the past. Rather, it is arguably also a problem in absolute terms. While the Canadian Criminal Code does not explicitly stipulate the number of court appearances during which the bail process is expected to be resolved, the fundamental principles of justice (e.g., presumption of innocence, right to personal liberty, court efficiency – particularly that unreasonable delays should be avoided) would certainly dictate that the determination of bail occur as quickly as possible. Indeed, the bail process has always been conceptualised as a summary matter intended to determine the liberty of an accused until trial in a quick and timely manner. Within this context, it would not seem incorrect to suggest that one or two appearances should be sufficient to complete this process (in that whatever information is needed for a decision could, presumably, be collected between the first and second court appearances).

The reality – as Figure 11 suggests – is quite different. While the bail legislation may have contemplated that – for the vast majority of cases – a decision to detain or release an accused person would be made in a single court appearance, this outcome actually only occurred in approximately 43% of all cases in Ontario in 2007.[18] In fact, a full 29% of cases took three or more appearances in bail court before the initial[19] decision to detain or release was made. More problematic yet are the 9% of cases which required at least five court appearances before a determination of bail (i.e. detention or release) was handed down.[20]

Unfortunately, the identification of the source(s) of this increase in the number of appearances taken in the bail process proves to be more elusive. In particular, we do not have court observation data that are sufficient to draw strong inferences about the manner in which the day-to-day functioning of bail court has changed in recent years. In fact, we could only locate one study carried out 30 years ago of the operation of a downtown Toronto court (Koza & Doob 1975a, 1975b). The data collected in the context of this research can be compared to recent studies conducted in the same courthouse. It is simply important to remember that as a single case study, any findings would only be suggestive of potential explanations for the increase in the number of appearances in bail court over the last decade.

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exacerbated by the simultaneous increase in the number of cases which are beginning their lives in bail court. That is, we not only have a greater number of cases going to bail court in Ontario, but each one is taking a greater number of court appearances to complete the process. Illustrative of the magnitude of the problem, it is notable that the total number of bail appearances in Ontario's provincial courts in 2001 was estimated to be 152,759. This value rose to 269,698 in 2007, constituting an increase of a full 77% over a mere six-year period.

[18] It is important to note that these data constitute a conservative measure of the number of appearances required to resolve the bail process. Specifically, they only include those bail cases in which there was a formal decision to either release or detain the accused until trial. We have excluded the (non-trivial number of) cases in the bail process which were either withdrawn or sentenced/proceeded to other criminal processes (e.g., preliminary inquiry, trial) without a determination of bail.

[19] Obviously appeals and reviews of conditions of release (largely because of changing circumstances) can also take place. However, our current figures deal only with the initial decision to release or detain the accused.

[20] Notably, the situation has not improved over time. While 51% of all bail cases in Ontario (which ultimately were handed down a formal decision of release or detention) completed the bail process in a single appearance in 2001, this proportion drops to 42.8% in 2007. Similarly, only 5.4% of cases required five or more court appearances to determine bail in 2001. In dramatic contrast, a full 8.7% of cases took the same number of appearances in 2007.

In the 1970s, this particular bail court operated only in the mornings and dealt with roughly 17 new cases each day. In 2006, this same court dealt with only approximately 15 new cases on an average day although it is important – when interpreting this comparison – to remember that because of the growth of the city, there were a number of additional bail courts operating in other areas of the city which did not exist 30 years ago. More notable is the dramatic increase in the total number of cases being dealt with on an average day – that is, not only cases making their first appearance in bail court but also those which were appearing on a subsequent date, having been remanded on a previous bail appearance. Specifically, the average number of cases appearing in this court in 1974 was 22. This value increases to 52 in 2006. Not surprisingly, the court currently operates all day. The comparison of outcomes is presented in Table 1.

Table 1: Comparison of Daily Outcomes in a Toronto Bail Court – 1974 and 2006

Case Outcome	1974 Number, %		2006 Number, %	
Adjourn to another day	3.40, largely for a bail hearing	15%	32.55 largely by defence	63%
Contested release	1.15	5%	1.05	2%
Other Release	9.85	44%	5.35	10%
Contested detention	1.55	7%	0.90	2%
Other detention	--	--	2.25	4%
Moved to another court (for a hearing that same day)	4.65 for bail hearing	21%	9.35 for plea or bail hearing	18%
Other	1.80 (including 1.15 for plea)	8%	0.35	1%
Total	22.4	100%	51.8	100%

Clearly, the largest single difference in this court between 1974 and 2006 lies in the number (and proportion) of cases simply adjourned to another day. Specifically, while only 15% of the observed cases in 1974 were adjourned on any given day, 63% of cases in 2006 had the same outcome. Equally notable, the vast majority of these requests for a delay (72%) came directly or indirectly from the accused or from his or her lawyer.

In fact, it was our impression from recent observations of this court that none of the principal professionals in bail court – justice of the peace, prosecutor, or defence – was terribly concerned about whether a decision was made regarding pre-trial release or detention. In 28% of the cases in which an adjournment was requested, the party making the request neither volunteered nor was asked to give an explanation. In an additional 15% of the cases, the defence explained the reason for the delay by simply indicating that defence counsel was not ready. The reason that defence counsel was not ready to proceed did not appear to be a concern to any of the key players, nor did it appear to require any additional

explanation. In fact, the information that the defence was not ready came – in most cases – to the court by way of a telephone message through duty counsel.

An objective observer might be tempted to conclude that no one really cared whether the case proceeded. Rather, getting through the day's docket seemed to be the immediate – and predominant – goal. Certainly from the perspective of the Crown, there is no serious (or, at least short-term) incentive to speed up the decision process regarding the determination of bail since the accused person is safely in custody. Further, there is no concern about 'unreasonable delay' on their part as most of the adjournment requests are from the accused or (directly or indirectly) from the accused person's lawyer. More broadly, one might suggest that a 'culture of adjournments' existed whereby requests to remand a case to a later date are seen as somehow inevitable or acceptable. Indeed, a generalised expectation seemed to exist that a large proportion of cases on any given day would be adjourned in bail court.[21]

Canada's Growth in Pre-Trial Detention within a Wider Context

We would suggest that the 'remand' problem in Canada can actually be divided into two separate problems (or contributing factors). On the one hand, and despite the general decline in reported crime for over a decade in Canada, there appears to be increasing pressure on the courts generally, and on the bail process, in particular. Indeed, there was a 15% increase in 'caseload' in criminal court between 2001 and 2007 – precisely during a period in which the population only increased by 7%. Further, these cases appear to be becoming more complex, having – on average – 14% more charges (2.15) in 2007 than they had in 2001 (1.89). Finally, a higher proportion of cases are entering the court by way of the bail process than they had in the past. Indeed, a greater proportion of accused were being held in custody for a judicial determination of pre-trial release or detention in 2007 (50.2%) than in 2001 (39.2%).

On the other hand, it would appear that the actual bail process – like other processes in criminal court – is taking longer than it did in the past. Specifically, upon being detained for a hearing to determine whether release is appropriate, it is likely that the accused will be required to remain longer in pre-trial detention than in the past. Indeed, it currently takes a greater number of appearances (and, therefore, more days in custody) for the bail process to be completed. While the bail process itself is also taking more time than it did in the past, this 'extended' or delayed process would appear to be rooted predominantly in the significant increase in the number of court appearances to resolve the question of bail rather than in any form of court backlog whereby accused are required to wait for an available court date.

Notably, it would appear that a substantial portion of this increase in the number of appearances in bail court has – as its *immediate* cause – the frequent recourse to adjournments by the defence. Given the dramatic increase in the number of adjournments requested over the past 30 years as well as their frequent lack of justification before the court, it is tempting to suggest – for many accused (and/or their defence counsel) – that adjournments are being used to intentionally delay the determination of bail – either because defence is simply not ready to proceed or as part of wider strategic practices. In particular, it

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[21] Similar findings corroborating this hypothesis of a 'culture of adjournments' have also been reported in other Ontario courthouses (Webster 2007; Myers, this issue).

has been argued (see, for example, Webster, this issue) that multiple adjournments in bail court often appear to be rooted in the intentional build-up of 'remand time' to be used at sentencing to acquire a more lenient sanction (see footnote 4 for details). Similarly, the use of adjournments may constitute a delay tactic by defence counsel and his/her client which permits a form of 'judge shopping' to ensure that the accused pleads guilty before a preferred judge.

The result of these two changes – across Canada – is clear. Canada's remand population has grown in the past 20 years from a rate of 15 per 100,000 residents to 39 per 100,000 residents. On an average day in 2007, 35% of all prisoners in Canada were 'serving time' while (legally) innocent. Nevertheless, it needs to be remembered that the size of the remand problem (defined either as the rate of pre-conviction detention or as the proportion of provincial prison populations) varies enormously across provinces in a manner that is not completely explained by differences in police-reported crime.

Perhaps the more interesting question is what this large and growing pre-trial detention population says – more broadly – about Canadians. Certainly within the current 'tough-on-crime', 'law and order' mentality cited by numerous academics (e.g., Roberts et al. 2003; Pratt 2007) to describe many Western democratic countries, it would be tempting to suggest that Canadians are also living in 'punitive times'. Indeed, it would not seem unreasonable to claim that the dramatic increase in remand in Canada simply reflects this new 'punitiveness' – that is, an intentional increase in punishment.

The problem with this wider explanation is twofold. On the one hand, other patterns in Canada's criminal justice system do not lend support to this hypothesis. In particular, if the growth in pre-trial detention were simply part of a more generalised punitive turn in Canada, overall imprisonment – as the most common measure of 'punitiveness' (Doob & Webster 2006) – should show a similar increase. Instead, overall levels of imprisonment have remained relatively stable over the past 50 years. Even examining incarceration rates within a shorter (more recent) time frame, overall imprisonment has increased only marginally – and even then, the current rate of approximately 110 per 100,000 remains below its high of 116 per 100,000 residents in 1994.

On the other hand, this proposed explanation would appear to be too simplistic for the Canadian reality. As we have argued elsewhere (Doob & Webster 2006; Webster & Doob 2007), Canada has not been immune to wider pressures toward increasing punitiveness. For instance, Canada's Parliament – with a Liberal majority – imposed approximately a dozen mandatory minimum penalties for offences carried out with firearms immediately following the peak of Canada's overall imprisonment rate over the last half century. In addition, as noted by others (e.g., Roberts et al. 2003), Canadian public opinion could easily be read as favouring harsh penalties.

The difference – we would argue – is that contrary to other western democratic nations that have witnessed (in some cases, dramatic) increases in their imprisonment rates over the last decade or more, Canada appears to have managed to counter or balance these more punitive trends with other moderating forces. As such, Canadians have largely been able to restrict their impact whereby these wider pressures for increased punitiveness have received only muted or limited expression.

Certainly within this context, the Canadian bail laws are no exception. Indeed, there have been some important changes. However, these modifications have largely – in the end – been more symbolic than real. As a useful illustration, one might think of the current trend toward the use of 'reverse onus' legislation in determining whether an accused person

should be released or detained. When the current set of bail laws was implemented in 1972, the prosecutor was obligated – when a person was detained by the police for a bail hearing (as opposed to being released on an undertaking to appear or on a recognizance, with or without conditions) – to show cause as to why the person should not be released. Further, in the case that the prosecutor believed that conditions needed to be placed on the accused person during the release, the prosecutor was obliged to demonstrate why those conditions were necessary.

This principle has gradually been worn away over the years. Specifically, the theory that it is the responsibility of the state to demonstrate the need to imprison a legally innocent person has been eroded by a stream of 'reverse onus' conditions whereby the accused must demonstrate why detention in custody is not justified. The list began in the mid-1970s with the requirement that the accused show cause as to why detention is not necessary in the following cases: 1) the current charges relate to behaviour alleged to have taken place while the accused was at large awaiting trial for other matters; 2) the accused was charged with trafficking in or importing drugs; 3) the accused was not a resident of Canada; or 4) the accused was charged with failing to comply with another court order. By 2009, the list of 'reverse onus' provisions had grown considerably and included, among other things, offences involving terrorism or organised crime and, most recently, certain crimes committed with firearms.

This last set of 'reverse onus' provisions became law in mid-2008. However, it seems likely – by this time – that for most accused people charged with any serious crime – let alone one committed with a firearm – the burden was, for all practical purposes, already on them to demonstrate why they should be released. Within this context, the 'punitive bite' of these new legislative provisions would arguably have only a minimal effect. Similarly, the provisions that were already in the Criminal Code which created a burden on the accused who was charged with a terrorism offence to demonstrate why release made sense was – we suspect – more political than protective. In brief, we would suggest that the changes in the law were much more symptomatic of what was already happening, rather than the cause of the increased pre-trial detention population.

From our perspective, all signs appear to be pointing in another direction – albeit one which is not completely independent of the hypothesis of increased punitiveness. Specifically, we would suggest that Canada's growing remand population is largely the product of an increasing culture of risk aversion which is permeating the entire criminal justice system. Indeed, we appear to be witnessing a generalised practice whereby decisions are either being continually passed along to someone else or simply delayed by those responsible for making them.

With reference specifically to the bail process, this risk avoidance mentality begins with the police. Despite a decline in (total and violent) crime rates, police are not only bringing a greater number of cases to court but the arresting officer or officer-in-charge is also sending more of these cases for a bail hearing. Further, it would appear that the police are also laying a greater number of charges generally per case, as well as a greater number of 'administration of justice' charges than in the past.

Particularly relative to the latter reality, it could even be argued that the criminal justice system is creating – to a certain extent – conditions for 'crime' to be committed. Specifically, the rising number of charges being brought to court in Ontario is driven, to a large extent, by 'administration of justice' charges. With an increasing number of people being on pre-trial release – almost always with conditions – coupled with an apparently

strong belief that a greater number of conditions will lead to less crime, the criminal justice system 'creates' the likely possibility of additional crime (that might not have existed before) in the form of a failure to comply with these conditions. Equally notable, relatively minor crimes – minor assaults, for example – that might have been dealt with informally in the past, are now increasingly being sent to court. Particularly for cases involving accused who might have a criminal record or have committed a minor offence while on some form of criminal justice warrant, the likelihood of being held for a bail hearing increases dramatically.

We would argue that this same risk-averse behaviour is also manifested within the courts. Most obviously, once a person is held for a full hearing on whether bail should be granted, bail hearings themselves are taking longer. The immediate cause of these delays would seem to reside predominantly with defence counsel in the form of repeated requests for adjournments. Specifically, adjournments appear to have become the norm – rather than the exception – in the bail process. In fact, it is precisely the creation and perpetuation of this 'culture of adjournments' – almost exclusively by the defence – which facilitates (if not encourages) a risk-adverse approach on the part of the other key players in the bail process. In particular, a generalised expectation that a substantial number of cases will be adjourned on any given day in bail court renders it easy for the Justice of the Peace or the Crown Attorney to simply accept these requests as inevitable or even acceptable. By rarely opposing them, any decisions regarding the determination of an accused person's bail is simply 'avoided' for another day (and likely becoming the problem of another Crown or Justice of the Peace).

The dilemma, of course, is that while this risk avoidance culture is adversely contributing to our large (and growing) pre-trial detention population, it arguably constitutes a rational approach for those directly involved in the bail process. Indeed, the *costs* of a decision to release an accused – either on a simple promise to appear in court on a specified date or as a result of a bail hearing – are all 'visible' to on-lookers, rendering the decision maker vulnerable to criticism. Specifically, the public may decry the release of particular offenders or those charged with specific offences or the accused may commit a new (and, perhaps, serious) offence while on bail. In this sense, the decision – by either the Crown or the Justice of the Peace – to release an accused inherently increases the degree of institutional risk (of disapproval/critique, subsequent crimes, bad press and/or reduced confidence in the criminal justice system).

In contrast, the *benefits* of a decision to release an accused are all 'hidden' or non-evident to most on-lookers. For instance, the right of the accused not to be denied bail without just cause is defended with the release of the accused. Further, considerable savings are reaped not only by society (particularly with respect to the high costs of remand) but also by the offender and his or her family (e.g., continuation of employment; increased ability to defend him or herself; personal liberty). However, these benefits generally go unnoticed or unrecognised by most members of society as well as fail to capture the media's attention.

The reverse is no less true. The *costs* of a decision to formally detain an accused or simply delay the determination of any outcome (whereby the accused remains in custody) are all 'hidden'. Most obviously, onlookers are generally oblivious to (or, at a minimum, uninterested in) any suffering by the offender and his or her family, uninformed about the considerable financial investment required by tax-payers to support a larger remand population and unaware of the distortion in sentencing rooted in the practice of taking into account 'time served'. Within this context, it is not surprising that the institutional risk of criticism or outcry is dramatically reduced.

Alternatively, the *benefits* of a decision to formally detain an accused or simply delay the determination of any outcome (whereby the accused remains in custody) are all 'visible'. Indeed, the public will almost never criticise a criminal justice system which – at least at first blush – ensures their safety by keeping those charged with offences locked up. Ironically, the practice of letting a case 'age' in the bail court (with the accused remaining in pre-trial detention through a series of adjournment requests) without a decision on bail and subsequently arranging for a guilty plea (before a preferred judge) would also appear to be an attractive outcome for the defence/accused in some cases. In particular, the (mistaken) perception of 'dead time' in remand as a means of acquiring a dramatically more lenient sentence (with the 2-for-1 credit for time served) renders this strategic (ab)use of the bail process beneficial to the accused.

Conclusions

In the end, the case of Ms Baker (with which we started this article) may not be as difficult to understand as one may have thought at first glance. Within our current risk avoidance culture (facilitated and easily maintained by a 'culture of adjournments' created and perpetuated predominantly by defence counsel), it should not surprise us that accused persons – even those committing minor offences, who are clearly no threat to society, with ties to the community and whose release would not lead the administration of justice to fall into disrepute – are held in remand, awaiting a bail hearing. Nor should it surprise us to find ourselves with a large and growing pre-trial detention population or a criminal court process, more generally, which is becoming increasingly less efficient.

Perhaps what should surprise us is what cases like the one of Ms Baker say about our criminal justice system more broadly. Indeed, it would appear that we are willing to risk sacrificing the fundamental principles underlying the bail process (e.g., presumption of innocence, a determination of bail without unreasonable delay, due process) in the name of risk avoidance. Specifically, the 'risk' of adopting a risk-averse culture is that it tolerates – if not encourages – practices which are, for the most part, incompatible with the legal intentions of the bail process. In fact, the whole purpose of pre-trial detention as a summary procedure to quickly determine the liberty of an accused until trial easily becomes – for all practical purposes – forgotten or, at the very least, subordinate to other extra-legal objectives.

Clearly, the story of Ms Baker challenges our current values and encourages us to re-conceptualise our large and growing remand population as a subversion of the bail process. Indeed, we are currently holding an increasingly larger number of people in custody before – rather than after – being found guilty.[22] Even from this vantage point though, any

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[22] The change in the legal status of a significant number of Canadian prisoners from 'sentenced' to 'remand' clearly constitutes a substantial shift in punitiveness vis-à-vis prisoners being held in pre-trial detention in Canada. However, we argue that the increasing remand population is not the result of an intentional increase in punishment as the 'theory' of increased punitiveness (see, for example, Freiberg 2001) would propose. Rather, it is rooted in a change in motivation. Specifically, our current risk-averse mentality within the bail process (and the resulting increases in the pre-trial detention population) inevitably produces a more punitive response to those being held in custody awaiting a determination of bail. However, this increase in punishment is not the intention or goal *per se*. On the contrary, it is simply the result. Illustratively, Ms Baker was not held in remand because it was felt that she deserved additional punishment. Rather, we would argue that it largely reflected a decision which had – as its primary purpose – the reduction in institutional risk associated with the release of a potential offender into the community while awaiting trial.

reduction in the current pre-trial detention population in Canada will not be an easy task. Indeed, it would appear that the problems are neither local in nature, nor mechanical in the sense of readily resolvable by the mere tinkering with the bail process itself, or by targeted, isolated modifications made to the administration, organisation or (legislative) structure of bail court. Rather, the problems – we would argue – call for broad systemic, cultural change. Specifically, the increasing numbers of accused being held in remand awaiting a bail hearing must begin to be seen predominantly as the 'cost' rather than the 'benefit' of our current risk-averse mentality.

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