Université de Montréal

How Far Are We Willing to Go? Transition, Resistance, and Adaptation in Ontario's Criminal Courts During the COVID-19 Pandemic

Par
Brendyn Johnson

École de Criminologie, Faculté des Arts et Sciences

Thèse présentée en vue de l'obtention du grade de doctorat
en criminologie

Août 2023

Université de Montréal
École de Criminologie, Faculté des Arts et Sciences

Cette thèse intitulée

How far are we willing to go? Transition, Resistance, and Adaptation in Ontario's Criminal Courts During the COVID-19 Pandemic

Présenté par
Brendyn Johnson

A été évalué(e) par un jury composé des personnes suivantes

Marianne Quirouette

Présidente-rapporteure

Chloé Leclerc
Directrice de recherche

Massimiliano Mulone
Membre du jury

Yvon Dandurand
Examinateur externe

"*Disasters provide a basis for new sociological knowledge that can be applied not only to cope with future disasters but to better understand the workings of human behavior and social organization under less stressful conditions*."
Forrest (1978: 105)

Résumé

Le Canada a connu des changements importants pendant la pandémie de COVID-19. Les tribunaux criminels n'ont pas fait exception puisqu'ils ont dû fermer leurs portes et reprendre leur travail au compte-goutte. Il s'agissait d'un changement opérationnel sans précédent qui a nécessité plusieurs ajustements. Compte tenu de la nouveauté de cette pandémie au Canada, on trouve peu de recherches empiriques sur ses impacts sur les tribunaux. Pour combler cette lacune, j'ai cherché à répondre à la question suivante : Comment les tribunaux criminels de l'Ontario ont-ils adapté leurs pratiques judiciaires pour faire face à la pandémie COVID-19 ? Cette thèse a utilisé des sources de données à la fois qualitatives et quantitatives. Plus précisément, des observations et des entretiens approfondis avec des avocats et des juges, couplés aux données administratives des tribunaux criminels, ont été utilisés pour explorer la manière dont les pratiques judiciaires ont changé pendant la pandémie. Cette thèse s'intéresse à plusieurs changements tels que la transition vers les comparutions à distance, les modifications dans la prise en charge des dossiers et l'évolution des usages de l'incarcération. Elle s'intéresse aux facteurs qui font que certains changements ont plus de probabilité de perdurer après la pandémie. J'en conclus que des changements dans le système de justice sont possibles, mais qu'ils se heurtent bien souvent à des résistances importantes. Ainsi, un élément clé pour soutenir le changement à long terme dans le système de justice consiste à collaborer et avoir l'appui du personnel de première ligne qui est responsable d'appliquer les changements. Cette thèse permet de mieux comprendre comment le système de justice réagit sous pression, mais elle permet une réflexion plus générale sur les transformations possibles dans le système de justice.

Mots Clés: Tribunaux criminels, COVID-19, pratiques pénales, développement pénal, sociologie du désastre

Abstract

Canada underwent significant shifts during the COVID-19 pandemic. Its criminal courts were no exception as they were forced to shutter their doors and slow their work to a trickle. This was an unprecedented operational change for courts in this country that required a response. Given the novelty of this pandemic in Canada, it is understandable that relatively little empirical research has been conducted on its impacts in the courts. To address this gap, I sought to detail and analyze the changes that Ontario's criminal justice system underwent following the onset of the COVID-19 pandemic, asking *How did the criminal courts in Ontario adapt in-court practices to navigate the COVID-19 pandemic?* This thesis made use of both qualitative and quantitative data sources. Specifically, court observations and in-depth interviews with justice actors coupled with administrative court data were used to explore how court practices changed during the pandemic. This thesis detailed how several changes in the court system occurred, such as the transition to remote appearances, changing case processing patterns, and changing uses of incarceration. It also discussed how some of these changes may have different likelihoods of outlasting the pandemic. I conclude that change in the system is possible, but it can face significant resistance. Thus, a key element to supporting change in the criminal justice system is by engaging with frontline staff who will be responsible for implementing any changes. This thesis provides a greater understanding of how the system reacts under pressure and how it may be able to adapt in the future. Though undertaken in an emergency context, conclusions may still inform others of what changes may be possible moving forward.

Key Words: Criminal courts, COVID-19, criminal justice practices, penal change, disaster sociology

Table of Contents

List of Tables

List of Figures

Chapter 3

Chapter 4

Acknowledgements

The writing and - perhaps more importantly - the completion of a thesis is no easy task. This program is meant to test our academic abilities and I have relished the opportunity to do so even if it has proved challenging. There are many people I must thank for helping me get here.

Chloé, you are the first person that comes to my mind when I think of those responsible for getting me where I am today. I struggle to express exactly how thankful I am. I feel that I have developed significantly as a researcher since we met, and I know it is because of all the time you spent working with me. You have always been quick to cheer on my successes or steer me away from mistakes as needed. I am very happy I made the decision to come work with you/ The reason is quite simple: I had the opportunity to collaborate with someone who contributes so much to the field and who has such an inquisitive spirit. I wish you the absolute best moving forward!

Marianne, it has been an absolute pleasure working with you. Your work is absolutely fascinating, and I am beyond pleased you decided to share your time and experience with me these past years. You consistently challenge me and force me to reflect upon myself, and my work. I am immensely grateful for that.

Cheryl, you have always been one of my greatest supporters and I have been so lucky to collaborate with you. You have always given me your ear for any issue that might arise, helping me work through problems, critiquing where necessary, but always with the goal of making sure I do the best I possibly can. Your support means the world to me.

To the staff and personnel of the *École de Criminologie*, thank you for your efforts in getting me to this point. Thank you for your interest in my work and the thoughtful comments and feedback you have provided along the way.

To my evaluators, thank you for your time and your attention. Just as writing this work has required dedication, so too does its evaluation. You provided me with thought-provoking feedback, and it was truly a pleasure addressing your comments and questions.

Thank you to the SSHRC, FRQSC, the CICC, and the *École de Criminologie* for your financial support in the completion of my doctoral research. Your contributions allowed me to dedicate my time and effort to my research, relieving me of funding-related stressors.

To my family, I know sometimes it has been hard to understand what I am doing. I know sometimes it seemed strange that I was "still" in school. But I also know you were quick to check in on me to make sure I didn't get too lost in all of this work. Thank you for grounding me and making sure I knew I always had a soft place to land.

To Jono, you have been with me throughout this whole journey. Even if we could not always be in the same place together, I always knew you were there for me. You have always taken an interest in my work, and I cannot tell you how much I appreciate that. Other times, you knew I needed to put work away for my own good. You were right. Every time. We have both come so far these last seven years and I can't wait to see where we go next. I love you.

Thinking back five years, I feel like a lifetime has passed in the blink of an eye. I sometimes ask myself where the time went, but then I remember I spent it with a group of intelligent, and supportive friends and colleagues. I truly could not have done this without you, and I am glad I didn't have to.

Introduction

The COVID-19 pandemic has impacted the world in a manner unseen in over a century. For better or for worse, this pandemic has altered the lives of millions in Canada, specifically in the criminal court system. It remains to be seen how long lasting the consequences of the pandemic, whether positive or negative, might be. Nevertheless, while Canadian courts may never have experienced a similar occurrence to COVID-19, other criminal justice systems have been severely disrupted. Indeed, following Hurricane Katrina and the destruction it rained upon not only the lives of New Orleans' residents, but also the justice system of Louisiana, an American prosecutor asked readers if their criminal justice system would be ready for the next disaster (Boland, 2007). I ask the same question in the context of the COVID-19 pandemic. Were Ontario's courts ready for the disaster that this health emergency became? Prepared or not, what can be learned from the criminal justice system's response to the disaster? This is perhaps a clearer question to answer and is the goal of this research. Indeed, what better time to understand the workings of a system than when its limits are tested, and it is pushed into dysfunction?

This work will show that there were great efforts to react, adapt, and continue processing cases throughout the COVID-19 pandemic. However, it will also demonstrate instances of resistance to pandemic-related changes to the functioning of Canadian criminal courts. Specifically, it will show efforts on the part of certain actors to return to the orthodoxy characterizing the criminal justice system prior to the onset of the pandemic. It will serve as a case study of how change may be helped or hindered and what role the COVID-19 pandemic played in such processes. Given the centrality of the pandemic to this work, it is hoped that these findings will help prepare for the next disaster that will surely impact Canada. Further, despite the centrality of the pandemic in this work, it is hoped that academics, policy-makers, practitioners might be able to extrapolate these results to improve the criminal justice system in a disaster-free future.

The COVID-19 pandemic has impacted the world in a manner unseen in over a century. At the time of writing, the pandemic has been affecting Canadians for over three years. However, in the final months of writing this work, the WHO declared COVID-19 to no longer be a global

pandemic. It has impacted Canada. It has impacted people. It has impacted criminal courts. For better or for worse, this pandemic has altered the lives of millions in Canada. This thesis is grounded in an assumption that the impacts of an emergency or disaster such as the COVID-19 pandemic are worth studying, and that there are lessons to be learned that can outlast the immediacy of this public health emergency.

The objective of this thesis is to document and understand the changes that criminal courts as part of the wider criminal justice system underwent throughout the pandemic. It is concerned with the tensions that emerged between, on one hand, the necessities of responding to the pandemic and, on the other, the legal rights of all under its jurisdiction. In so doing, I examine which changes may be more long-lasting or shorter lived.

This thesis is premised on the assumption that the beginnings of change in criminal justice as well as the impacts of change can be witnessed most clearly through those responsible for carrying out said change. In this way, this thesis places strong emphasis on criminal justice system actors who lived through and were responsible for finding practical ways to continue their work through the pandemic. Despite this concern for actors and their work, this thesis recognizes that large-scale trends can also reveal important information on change that might be difficult to see at more local levels of analysis.

The arguments I develop in my 3 analytical chapters draw from three principal sources of data. (1) 125 days of remote court observations were conducted in 8 criminal courts in Ontario; (2) 16 qualitative interviews conducted online (15 conducted by me); (3), quantitative datasets from the Ministry of the Attorney General of Ontario as well as from Statistics Canada. Finally, though not used in a systematic fashion, this work is supported by a non-exhaustive review of grey literature and Canadian case law during the pandemic in order to better understand the criminal justice terrain. The results of this work are divided into three scientific articles.

The first article, Chapter 2, concerned the use of audiovisual technologies for remote appearances during the COVID-19 pandemic and its impacts on access to justice in Ontario. Based on court observations and in-depth interviews, this article found that, while there was hope

of expanded access to justice with the use of remote appearances, there were also concerns that access to justice for three types of defendants (rural, self-represented, and those held in pretrial detention) was undermined. Given these concerns, the article discusses the future of such technologies in Ontario's courtrooms.

The second article, Chapter 3, details the changes in case processing practices of Ontario's criminal courts over the previous 10 years, including the COVID-19 pandemic. Principally employing quantitative data from the Ministry of the Attorney General, and supported by in-depth interviews, this article investigates the case backlog in Ontario's courts before the pandemic and the backlog created as a result of the effective shuttering of courts. This article demonstrates that while Ontario's courts made positive progress in completing criminal cases during the pandemic through the use of pretrial resolutions as well as through the increased use of withdrawals and stays of proceedings. However, it also highlights that many of the troubling tendencies surrounding delay in criminal courts remain and have in fact reached record highs. We discuss how these tendencies might coexist and reflect a culture of complacency toward delay in Ontario's criminal courts.

The third article, Chapter 4, explores the use of incarceration, whether pending trial or as a sentence, by Ontario criminal courts during the COVID-19 pandemic. Combining fieldwork data as well as publicly available statistics, it shows that the use of incarceration decreased during the pandemic and continues to be used less than prior to the pandemic. However, this article demonstrates that there exists some friction among court actors as to the appropriateness of such leniency in sentencing. This article considers whether this marked drop in the use of incarceration may continue into the future or if actors opposed to such restrained use of incarceration will prevail in returning to pre-pandemic levels of the practice.

In Chapter 5, I outline and discuss various characteristics that might help identify if a given change during an emergency may be more or less likely to outlast said emergency. I suggest that (1) should a practice that changed or transformed during an emergency have existed prior to the onset of said emergency, (2) should there be a relative consensus and thus a lack of resistance to

this changed practice, and (3) should the cost or effort of this change not be overly cumbersome, the likelihood of the change lasting increases.

In this chapter I also reiterate the importance of triangulating data, especially in an environment as unique as an emergency where data sources may be shallow and dispersed. Using concrete examples from this research, I underline why it is important for researchers to situate their work in time and to make this clear to readers. This may help facilitate their own analysis and also allow future researchers to compare and contrast their findings more easily.

Together, these articles and this thesis develop a larger discussion of change in the criminal justice system through the particular case of the COVID-19 pandemic. Change in this system is frequently cited to be slow and difficult, much to the chagrin of those seeking its advancement and its improvement. Nevertheless, this research will reflect on what is possible in terms of change in the system and also what might be more difficult to change. It is hoped that this may advance criminal justice policy development in Canada.

Chapter 1: Exploring the Literature of Change in Criminal Justice and Criminal Courts

The COVID-19 pandemic has impacted the world in a manner unseen in over a century. For better or for worse, this pandemic has altered the lives of millions in Canada, including in the criminal court system. It remains to be seen how long lasting the consequences of the pandemic, whether positive or negative, might be. Prepared or not for this emergency, we can ask what lessons can be learned from the few years when COVID-19 pushed the system into dysfunction and its limits tested.

1. COVID-19 in Canada

On March 11, 2020, the World Health Organization declared COVID-19 a pandemic. In a matter of weeks, this novel coronavirus had spread to countries across the world, including Canada. This illness, about which professionals knew little, was initially thought to be spread through droplets, then as an aerosol, meaning preventive measures had to change. At times individuals would become very sick while others would not even know they were infected, heightening the risk of transmission. Consequently, the virus forced governments to impose public health restrictions on a scale most Canadians had never experienced in their lifetime. Gatherings were prohibited with the force of law, entry to Canada was severely restricted and domestic travel was curtailed. A two-week lockdown instituted by various provinces was soon extended to several months, though restrictions would change over time and between regions. These months extended into years and at the time of writing, COVID-19 is still present, if not to the same level.

In Canada, infections number in the millions, while deaths are in the tens of thousands at the time of writing (Boynton, 2023). Some live with the potentially debilitating symptoms of "long COVID" for months after infection (Health Canada, 2023). Moreover, this health crisis has been acute in vulnerable populations: the elderly, visible minorities, and low-income communities (Flanagan, 2020). Thankfully, the availability of vaccines has allowed the country to begin rebuilding from the scars left by the pandemic even if trials remain ahead, including potentially new variants (Boynton, 2023).

2. Criminal Court Changes During the COVID-19 Pandemic

The criminal justice system is no exception to the challenges experienced in Canada. Policy changes, both official and otherwise proliferate across this vast country (Department of Justice, 2022). Beginning in March 2020, some courts advised staff and other court workers to not physically go to court unless it was for official business. Once the pandemic was officially recognized in Canada a few weeks later, Canadian courts were forced to close their doors to all but the most urgent matters. Previously scheduled matters were automatically adjourned for over 10 weeks in Ontario, though this again varied across the country (Paciocco, 2020). Consequently, a backlog of cases developed requiring attention (Azpiri & Daya, 2020; Robitaille, 2020).

Due to the nature of the pandemic, physical and social distancing were required. Those matters which were proceeding were conducted by videoconference and minimal staff in the building. Physical barriers were installed in some courtrooms to facilitate physical distancing. Directives were issued by the courts attempting to advise frontline workers on how to proceed in the context of the pandemic (Department of Justice, 2022).

From the front end of the criminal court system to the back, changes have been noted by many authors. Studies on the consequences COVID-19 has had on the criminal justice system are becoming more common as time passes since the emergence of the virus. Notably, some recent studies have highlighted preliminary impacts of COVID-19 in the system while calling for further study (Baldwin, Eassey & Brooke, 2020; Buchanen, Castro, Kushner & Krohn, 2020; Jennings & Perez, 2020; Piquero, 2021; Skolnik, 2020).

In this section, I will explore changes in criminal courts that have been described to date, with particular emphasis on the Canadian context. However, given the dearth of existing scholarship on court responses to the pandemic, I will also integrate studies that originated in other jurisdictions. I will also review some key pieces of criminal justice legislation and policy that arose during the pandemic. Following this, I will review other practical changes that have impacted criminal courts.

2.1 Legislation and Official Guidelines

During this time, criminal courts made notable changes in legislation and official protocol. While there is no guarantee that these policy changes trickled down to impact the practice of criminal justice actors, they provided tools and rationales to those who desired to make use of them. With that caveat, I will discuss a few pieces of legislation and protocol which emerged during the pandemic aiming to solve the issues it raised.

2.1.1 Ontario Court of Justice Rules & Notice to the Profession

Among the first to act among the larger organizations tasked with the administration of justice, the courts of Ontario issued many new directives on a variety of matters. New rules were added to the Ontario Court of Justice (OCJ) Criminal Rules allowing for the adjournment of matters without the defendant present, and specifically allowing for electronic signatures on documentation (Ontario Court of Justice, n.d.). Further, guidelines for the smooth functioning of remote appearances were produced by the courts in 2022 and updated again in 2023 (Ontario Court of Justice, 2023). For example, direction was given that accused will appear by video or audio for first appearances absent other direction from the presiding judge, and that entering pleas and trials should be conducted in person.

Importantly, the courts released notices to the profession almost immediately upon the arrival of COVID-19 in Canada. These notices were frequent and provided information to justice stakeholders who needed to know how their criminal matters would be handled, if at all. While the government took many months, if not years, to respond with legislation, Ontario courts had to react immediately as the frontline.

This should not be taken as criticism of the government. Legislation and other procedural updates from court administrators can, understandably, take time to craft. Further, this is not to suggest the government did not help the courts. Indeed, we know that a COVID-19 Recovery Secretariat was set up in the Ontario Ministry of the Attorney General. A national Action Committee on Court Operations in Response to COVID-19 (ACCORC) was implemented in

May 2020, co-chaired by the Minister of Justice and Chief Justice of the Supreme Court of Canada (ACCORC, 2021). Thus, even outside of legislation, working groups were created to offer guidance to courts around the country on how best to respond to the pandemic and the mounting crisis in the criminal justice system.

2.1.2 Ontario Bill 245

While the federal government has a part to play in the criminal justice system, the administration of the courts is a provincial responsibility. Bill 245, the Accelerating Justice Act, received royal assent in April 2021. According to the Attorney General of Ontario, the legislation will "improve access to justice for people across Ontario, across the system, by modernizing processes and breaking down barriers in the province's courts…" (Government of Ontario, 2021a: 11419). One measure implemented was to change the appointment process of judges in Ontario, with the goal of increasing the speediness of these appointments[1]; the logic underpinning this change was that if more judges could be appointed more quickly, then cases could be heard, and resolved more quickly as well[2].

Further, at the end of 2021, the Government of Ontario updated their guidelines for prosecutions (Government of Ontario, 2021b). In this new COVID-19 Recovery directive, they emphasize that prosecutors, in charge screening, should consider delay and backlog caused by the COVID-19 pandemic in their decision-making. While this is not meant to be the only factor considered, the government modified some policies to address what it sees as the mounting pressures in the criminal justice system.

2.1.3 Bill S-4

Bill S-4 was passed in December 2022. It is entitled An Act to amend the Criminal Code, the Identification of Criminals Act and to make consequential amendments to other Acts (COVID-19 response and other measures). This bill was designed to "increase the efficiency,

[1] For a closer review of the bill, refer to https://www.ola.org/sites/default/files/node-files/bill/document/pdf/2021/2021-04/b245ra_e.pdf.
[2] Of course, this legislation was met with scepticism and controversy as some in the legal community suggest the new process introduces potential political partisanship into the appointment process (Loriggio, 2021).

effectiveness and accessibility of the criminal justice system in response to the challenges posed by the COVID-19 pandemic" (Keenan-Pelletier & Phillips, 2022: 1) through changes to the Criminal Code of Canada. It introduced amendments to expand and clarify the use of remote appearances at various stages of the criminal justice process and expand the use of and telewarrants[3].

Though legislation was introduced relatively late in the pandemic, it is unclear what, if any, impact it may have had on the workings of courts during this period. Indeed, as the pandemic was declared over in May 2023, it has, at the time of writing, not had a great deal of time to influence the courts. Nevertheless, it will certainly play a part in the workings of the court as they attempt to grapple with the aftermath of the pandemic such as the backlog of cases and related delays, and other pressures the system faces.

2.1.4 What to Make of These Changes?

As these pieces of legislation and these rules are still relatively new in Ontario's courts, there is little research on how they may have impacted the day-to-day workings of courts, if at all. However, even in the best of times, ascribing causal relationships between court operations and legislation can be difficult. Nevertheless, these legislative and changes in protocol demonstrate that governments and court administrators took the COVID-19 pandemic seriously, acknowledging the difficulties it brought on the criminal justice system. They clearly seek to address these pressures, even if their successes, or challenges remain unclear. These changes also serve as the legislative or procedural context for any changes in criminal justice practices that did occur during these trying times.

2.2 The Courts

Despite this lack of study linking criminal justice policy and court operations during the COVID-19 pandemic, there has been some study of how criminal courts in Canada adapted to this unprecedented health emergency. Importantly, such an exploration of the courts will

[3] For a clause-by-clause review of the bill, refer to Keenan-Pelletier and Phillips (2022).

occasionally bring the reader outside the walls of the court as they cannot be completely isolated from other components of the criminal justice system. In each of the following subsections I will review the Canadian criminal justice system's experience of adapting to the pandemic followed by a similar review of international examples as additional context.

2.2.1 Virtual Appearances

One of the most striking changes to occur during the pandemic was the shift toward remote appearances via various technologies for in-court appearances (Department of Justice, 2022). As courts closed their doors, at least physically, justice still needed to be done. One way to do so was through remote appearances.

While Canadian criminal courts had used remote appearances prior to the onset of the pandemic[4], the need for and ubiquity of these technologies is what differentiates their use during the pandemic from before its onset. Technologies used included audio and video appearances using conference call telephone lines, as well as applications such as Zoom, Microsoft Teams and WebEx (ACCROC, 2022*b*).

Importantly, legislation put in place not long before the pandemic helped order the legal environment in regard to virtual appearances. Bill C-75 (*An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*) was one piece of legislation that modified the legal landscape of court proceedings. The Bill was passed in the summer of 2019, mere months before the pandemic. It contained provisions aiming to modernize the criminal justice system[5]. The most salient in the context of the COVID-19 pandemic was expanding the use of remote appearances whether through audio or video appearances. The bill introduced factors to be considered when allowing the use of remote appearances such as the person's location, the nature of evidence to be presented, the costs that would be incurred for an individual if they appeared in person, etc. (Barnett et al., 2019). In so

[4] For example, see Webster (2009).
[5] Of course, the Bill contained several other provisions such as restricting the use of the preliminary inquiry. I will not explore those here as they are not germane to the subject of COVID-19 in the courts. For a fuller exploration of the legislation, see Barnett et al. (2019).

doing, it allowed for a more flexible approach to their use, with the aim of ensuring "fair and efficient proceedings while enhancing access to justice" (Barnett et al., 2019: 20).

Though the use of these technologies in court was perhaps driven by necessity during the pandemic rather than by choice, their use is in part what allowed criminal courts to continue operations while maintaining mandated social and physical distancing in public during the pandemic (Myers, 2021; Puddister, 2021).

It is important to note that, both before and following the onset of the pandemic, the benefits and drawbacks of remote appearances had been discussed, if not always tested empirically. Frequently, those promoting remote appearances discuss how such technology can increase access to justice and promote efficiency in the use of court resources (Department of Justice, 2019; Dumoulin et Loupe, 2015; McKay, 2018; Rossner, Tait et McCurdy, 2021). Indeed, it is argued that individuals can more easily appear and participate in proceedings if they are not required to be physically present. Those from remote communities would no longer need to travel long distances. Accused in pretrial detention would not need to be brought to and from prisons, potentially missing their programming, and being searched invasively upon their return (Bailey, Burkell & Reynolds, 2013; Capp, 2021). Further, the ability to appear remotely may allow counsel to appear from various locations where they might be able to continue working until their matter is called. For these reasons, Mulcahy (2021) warms against romanticizing the benefits of in-person proceedings when virtual appearances can expand access to justice.

Nevertheless, there are detractors from the use of these technologies. Indeed, some question whether access to justice is truly advanced through the use of these technologies (Alkon, 2022; Gras et du Marais, 2013; McKay, 2018; Vermeys, 2013; Webster, 2009) and if we are not introducing more obstacles. For example, concerns were raised about access to these technologies as well as their adequacy to allow full participation of involved parties (Alkon, 2022; Capp, 2021; Matyas, Wills & Dewitt, 2021; Turner, 2022). Indeed, individuals must not only have internet or cellular service, but service that is strong enough to support video or audio conferencing (McKay, 2018). Questions have also been raised about the privacy of users and the

confidentiality of communications between Defence attorneys and their clients (Alkon, 2022; Turner, 2022).

In one of the few empirical studies conducted on the use of these technologies since the emergence of COVID-19 in Canada, undertaking court observations in the first summer of the pandemic, Myers (2021) found that adjournments were agreed to and granted easily in the bail process. She draws parallels to an earlier study by Webster (2009), who found that it was more common for bail hearings to be adjourned rather than resolved when the individual was not present. For this reason, Myers warns that "Caution must be exercised to avoid generating new or amplifying old inefficiencies through the virtual process". (2021: 17).

Notwithstanding the concerns raised by authors such as Myers (2021) concerning the use of remote appearances, the Action Committee on Court Operations in Response to COVID-19 has stated that "technological solutions have been, and will continue to be, a key element to addressing the backlogs and delays that the pandemic has caused or exacerbated" (ACCORC, 2022*a*: 10). Despite this championing of these technologies, the triumphs and pitfalls of their use, particularly in the pandemic context in Canada, remain largely unexamined through empirical analysis.

It is useful then to review the experiences of other nations. Like in Canada, the use of virtual technologies expanded after the onset of the pandemic in other countries such as Australia, England and Wales, and the USA (Gill, 2021; Viglione, Peck & Frazier, 2022). Turner (2022) employed a similar methodology to Myers; from August 2020 to February 2021, Turner conducted 300 days of observation in Texas and Michigan, warning about technological issues caused delay and hampered communication between an accused and their lawyer. According to the author, court feeds dropped or lagged, forcing court actors to repeat themselves. Lawyers also found it difficult to communicate privately with their clients because there were others in the areas where the remote technology was being used. Similar concerns were raised in Canada by Myers (2021) and also in England and Wales by Godfrey, Richardson and Walklate (2022). Conducting a survey of legal actors, the authors also explain how even as early as September

2020, judges in England and Wales showed a strong preference for in-court appearances, with only about 15% of cases proceeding virtually (2022: 1048).

However, similarly to Canada while there are a number of essays exploring how virtual appearances may or may not impact the court process in these other countries, there is still a striking lack of empirical research on the subject. Further, given that some of these studies reference practices between the first and second waves of the pandemic, it is unknown how courts may have altered their practices as subsequent waves of the virus waxed and waned.

2.2.2 Pretrial

Another area that scholars have identified as experiencing significant change during the pandemic was bail. However, before exploring bail itself, it is helpful to explore how police underwent certain changes during the pandemic as they determine whether an individual will be released upon arrest or not[6].

Moreau (2022) reveals that police reported criminal incidents in Canada decreased roughly 9% in 2020, though increased again slightly by 1% in 2021. Similarly, Myers explains that there was a reduction in court caseloads "likely attributable to interwoven factors, including a reduction in the police-reported crime rate, police being more likely to release accused rather than hold them for a bail hearing, and courts working to make bail decisions sooner after an arrest" (2021: 15).

Several American authors have noted similarly that arrests by police officers dropped precipitously in the months following the onset of COVID-19 (Harris, 2023; Lum, Maupin & Stoltz, 2022; Piquero, 2021; Spence, 2021). Indeed, Piquero (2021) suggests that police in Miami-Dade were stopping, and arresting individuals less than pre-pandemic. Similarly, Lum

[6] Importantly, I will not discuss other areas where police might have undergone change during the pandemic as this is a much broader topic. Nevertheless, Lum, Maupin and Stoltz (2022) provide relevant information in the American context should the reader seek more information.

and colleagues (2020, 2022) conducted a survey of police chiefs in the USA and Canada and found that calls for service had decreased significantly.

These reductions in the number of individuals stopped and arrested would necessarily have an impact on the use of bail, and the justice system more widely. For the current discussion, it is sufficient to note that reducing the number of arrests would necessarily limit the number of individuals appearing in bail court; similarly, this would potentially impact the types of offences that would be appearing before the court as it may be easier to avoid arresting individuals for certain offences while more violent or otherwise serious offences may not benefit from leniency in arresting individuals.

In bail courts themselves, with potentially smaller dockets than pre-pandemic, several authors have detailed how decision-making transformed in the aftermath of the pandemic. However, there is some conflicting evidence, largely between jurisprudence and other data sources.

Canadian jurisprudence suggests that COVID-19 was a factor that could be considered in the determination of bail[7]. This was due to the well-known health problems which can proliferate in tight quarters such as prisons; as a result, provincial prison populations decreased significantly (Kouyoumdjian et al., 2016, 2018; Statistics Canada, 2020; Standing Senate Committee on Human Rights [SSCHR], 2021).

Jurisprudence made clear that the pandemic could be considered in bail decision-making under the primary, secondary, or tertiary grounds for incarceration (Gorman, 2021; Kerr & Dubé, 2020; Skolnik, 2020). However, the tertiary ground (the public confidence in the administration of justice ground) is more commonly applied by courts (Kerr & Dubé, 2020: 316). Though different approaches were taken by courts across the country, there were frequently considerations of an individual's risk of catching this novel coronavirus as well as the risk that,

[7] See Kerr and Dubé (2020) or Gorman (2021) for an in-depth exploration of jurisprudence on bail in the time of the pandemic. These legal scholars are better suited to the task of evaluating and interpreting the legal reasons behind court decisions.

should the accused catch it, they would risk serious complications; this could devolve into discussions of an accused's medical history to ascertain if, for example, their age or asthma may put them at greater risk than the average person (Kerr & Dubé, 2020). However, this was weighed against the risk an individual might pose to the community should they be released.

Contrasting the information emerging from precedent-making cases, Myers (2021) found that this jurisprudence may not have meaningfully increased leniency in releasing individuals pending trial. Undertaking numerous court observations during the first few months of the pandemic, Myers (2021) noted some initial efforts to avoid the use of pretrial detention during the pandemic; however, she also noted that this leniency seemed to fall to the wayside by midsummer 2020 when courts appeared to return to pre-pandemic practices of bail, noting the "obdurate nature" of bail practices during the pandemic (Myers, 2021: 16). In this way, while the relevant jurisprudence suggested COVID-19 would result in a more conservative use of pretrial detention, this empirical study suggests this may not have been the case on the ground. To date, no other analyses on bail practices in Canada during the COVID-19 could be located.

Once more, an international lens may be helpful in filling this gap. Leniency in bail due to the COVID-19 pandemic was also noted in other jurisdictions such as Australia, where jurisprudence showed similar deference to incarcerating accused during a health emergency as Canada (Greener, 2021; Murphy & Ferrari, 2020).

Similarly, US Attorney General Bill Barr "encouraged federal prosecutors to utilize other alternatives, such as home confinement programs, whenever they were deemed appropriate" (Spence, 2021: 99); of course, while it is unclear if this advice was actually acted upon, Carroll (2020) notes that the trend in the USA has been mixed:

> Some [District Attorneys] have voiced support for these temporary reforms [restricting the use of bail], hailing them as an appropriate balance between law enforcement and public health. Others have been less supportive—urging aggressive policing, seeking continuances in pending criminal cases while opposing pretrial release, and advocating that certain people remain detained because they are less able to comply with CDC handwashing and social distancing guidelines (Carroll, 2020: 76-77).

Interestingly, England and Wales appear to have been less reticent to incarcerate individuals pending trial during the pandemic. In England and Wales, custody time limits place a ceiling on the length of time an individual can be held in pretrial detention. If the ceiling is breached, bail is granted automatically. However, during the pandemic, a new protocol was instituted, extending the custody time limit from six to 8 months (Godfrey Richardson and Walklate, 2022; McConville & Marsh, 2023); nevertheless, McConville and Marsh (2023) detail resistance on the part of judges who did not follow this directive, instead favouring release pending trial due to court delay during the pandemic in unhealthy institutions.

Thus, while there is a significant amount of jurisprudence, as well as jurisprudential analysis on the subject both in Canada and abroad, the actual impacts on the use of bail in practice are unclear and underexplored. There is some suggestion that police were arresting fewer people, leading to fewer cases overall and necessarily fewer bail cases; these assertions, of course, require further investigation. Moreover, while one study has shown that bail practices have changed very little prior to and after the onset of the pandemic, jurisprudence would suggest otherwise. In all, of the limited existing empirical literature, large-scale trends are difficult to ascertain.

2.2.3 Sentencing

Like at bail hearings, there is some indication that sentencing changed in the wake of the pandemic[8]. Logically, if courts were at least somewhat reluctant to incarcerate pending trial due to the pandemic, similar health concerns would apply if incarceration was to be the ultimate sentence of an individual[9].

As a majority of cases in Canada result in a finding of guilt, courts must decide upon a fit sentence. The Department of Justice has highlighted how the federal and provincial incarceration

[8] Importantly, though sentencing is much broader than incarceration, examinations about the impacts of COVID-19 on sentencing concern the use of incarceration. Thus, sanctions other than imprisonment were addressed in the literature in so far as they served to avoid the incarceration of an offender. There is little discussion if, for example, courts imposed fewer probationary sentences instead of a fine.

[9] As the health measures and harsh conditions in prisons, such as prolonged lockdowns and lack of proper personal protective equipment would apply both to those sentenced as well as those who were awaiting trial, I will not revisit the topic here.

rates decreased 10% and 22% respectively between 2019-2020 and 2020-2021, the largest decreases on record (Department of Justice, 2023). However, Statistics Canada revealed that average daily counts of sentenced individuals began to increase at the end of 2020 from lows seen earlier that year, this number started to increase slightly (Statistics Canada, 2021). Thus, there is certainly the suggestion that courts avoided handing down custodial sentences due at least in part to the pandemic; however, there appears to have been variation in custody levels depending on the stage of the pandemic.

Nevertheless, like bail, a great deal of jurisprudence emerged at the onset of the pandemic urging consideration of COVID-19 in sentencing decisions, thus explaining the reduction in the custodial population revealed by Statistics Canada. Most authors analyzing the jurisprudence suggest more lenient sentencing positions may be justified due to the unprecedented reality of the pandemic and its impacts on custodial facilities (Kerr & Dubé, 2020, 2021).

Authors such as Kerr and Dubé (2020, 2021), Skolnik (2020), Rudnicki (2021) as well as Gorman (2021) have explored jurisprudence from across Canada on the subject. They demonstrate how approaches varied regarding the impact COVID-19 should play at sentencing, if at all. Many courts found that a sentence could be reduced, anticipating the harsh conditions of custodial facilities. For example, Gorman (2021) cites the Ontario Superior Court in *R. v. MacDougal* where the sentencing judge reduced a sentence of 3 years and 6 months to 3 years and one month, though the sentencing judge provided no calculations behind the decision.

These same authors also highlight how courts in Ontario would offer extra credit at sentencing for time spent in pretrial custody. This discount is known as “Duncan” credit for the eponymous 2015 Ontario Court of Appeal decision which allowed courts to surpass the statutorily limited rate of 1.5 days credit for every day spent in pretrial custody. Kerr & Dubé (2020) as well as Gorman (2021) discuss how credit greater than 1.5:1 was given the harsh realities of pretrial detention during the pandemic; however, like at sentencing, this was not always granted to an offender, and calculations were not always explicit.

While calculations were not always shared or made explicit, these same authors show that Canadian courts, like with bail, began to consider if COVID-19 may be particularly problematic for certain offenders compared to others. Courts began to examine the health backgrounds of an accused to establish risk to the virus within custodial institutions. Gorman (2021) brings up cases where courts were deciding whether asthma was significant enough a condition to warrant a sentence reduction. For this reason, Gorman explains that "Canadian judges have generally concluded that in the absence of evidence specific to the offender, the impact of COVID-19 on offenders sentenced to periods of imprisonment is a matter for the prison authorities to consider" (2021: 27).

However, while some courts required specific evidence of risk, others were satisfied with a more generalized risk and did not require specific evidence be proffered (Burningham, 2022; Gorman, 2021). Indeed, in a more recent jurisprudential review, Burningham (2022) appears to disagree slightly with Gorman (2021) even while largely agreeing with his analysis, and that of Kerr and Dubé (2021), otherwise. While courts did place a great deal of emphasis on individualized risk, the 2020 decision in R. v. Hearns from the Ontario Superior Court became a leading authority and was widely cited; according to Burningham:

> *Hearns* focuses on the conditions of detention under COVID-19, not the risk to the offender, and thus does not require that the offender establish heightened risk from COVID-19 to receive a sentencing benefit. Many judges have agreed, finding that COVID-19 consideration attaches irrespective of personalized risk" (2022: 598).

Interestingly, she also notes that these cases from the earlier days of the pandemic, such as *Hearns*, remain the primary authorities on the use of incarceration during the pandemic. Indeed, she states that jurisprudence later in the pandemic was less "ambitious" and "became more tempered"), perhaps due to an acclimatization to the pandemic or a judiciary less inclined to "implement sweeping reform to detention policies even in the context of an emergency" (Burningham: 2022: 596). Nevertheless, all agree that, while the jurisprudence demonstrated concern for the virus in both sentencing decisions, it was also noted not to be determinative (Gorman, 2021).

Of course, while there were those in favour of considering COVID-19 at sentencing, some did not agree with this approach. Questions have emerged in Canadian jurisprudence about whether courts should attempt to consider leniency in sentencing should be compensatory for pretrial detention, or forward-looking to account for the particularly harsh conditions of prisons during this time[10] (Gorman, 2021; Kerr & Dubé, 2020, 2021; Rudnicki, 2021). It was unknown how long the pandemic would last. During sentencing in the first year of the pandemic, courts could not know if the harsh conditions in prisons precipitated by the public health emergency would last another 6 months, another 12 months, another 24 months, or even longer. As such, sentencing an individual to custody meant subjecting them to these conditions for an unknown amount of time.

Stated otherwise, courts did not and continue not to have a crystal ball for what may or may not happen within the walls of custodial institutions in the future. Should conditions dramatically improve, the rationale to reduce the severity of a sentence would dissipate along with the virus. Should they deteriorate, might that sentence become unfit? Thus, some judges felt that any reduction in sentencing for COVID-19 would be "guesswork" (Gorman, 2021: 26).

The response to such concerns was to shift these decisions to the Parole Board of Canada who are, according to this logic, better placed to decide upon the early release of prisoners (Gorman, 2021; Kerr & Dubé, 2020, 2021). However, a recent report by the Department of Justice on the state of the criminal justice system showed that percentage of successful parole requests fell after the onset of the pandemic; however, it also suggests this might have been due to the increase in requests for parole during the pandemic from individuals who may otherwise have waited until later in their sentence to apply (Department of Justice, 2022).

Outside of Canada, jurisprudence on sentencing during the pandemic has also been explored. Gorman (2021) explores some jurisprudence from other Common Law jurisdictions such as England and Wales as well as New Zealand in his discussion of Canadian trends. The trends coming out of judicial reasoning appear to be largely similar to what was highlighted here in Canada during the pandemic. Gorman (2021) states that England and Wales reduced

[10] These conditions will be explored shortly.

sentencing as a result of COVID-19. He also notes that New Zealand's jurisprudence allowed for alternative sanctions such as house arrest over custodial sentences served in prison. Specifically, while each case must be considered on its own values, and that incarceration will not always be avoided, COVID-19 requires judges to consider if alternatives are possible to incarceration; if no alternatives are possible, judges must ask what the shortest period of incarceration is possible and if it can be suspended (Sentencing Council of England and Wales, 2020).

In the United States, Alkon (2022) details the opinions held by court personnel on sentencing during the pandemic. Through the collection and quantification of survey data across the country, Alkon (2022) demonstrates how there was disagreement among American judges about whether sentences ought to be more lenient due to the pandemic. Some participants in the survey noted that "Outrageous bails and unnecessary pretrial incarcerations are down, as are outlandish probation terms" (Alkon, 2022: 487). Further, some judges criticized prosecutors who chose to continue prosecuting low-level offences such as failure to comply which carried mandatory custodial penalties, forcing these low-risk offenders to remain imprisoned (Alkon, 2022). However, some judges were hesitant to be more lenient at sentencing out of a fear that doing so would give the impression defendants could do whatever they want without consequence (Alkon, 2022).

Notwithstanding these concerns from judges, Alkon (2022) shows that only about 1 in 5 Defence attorneys and prosecutors felt incarceration was avoided during the pandemic when it would have otherwise been ordered prior to the pandemic and this only for low-level offences; this number climbs slightly to 1 in 4 for judges.

Even considering these studies and the distinct impression of change they give, sentencing remains the perennial black box of the criminal justice system. It is difficult to explore these topics in the best of times, and the crisis precipitated by the pandemic has not made this easier. As such, any data that can be gathered would help better understand if, how, and when sentencing changed during the pandemic.

2.2.4 Prisons[11]

To this point, I have referred to some conditions in prisons which have impacted the way these facilities interact with courts. I will now explore these conditions in more detail to better understand the reality courts were faced with during the pandemic. Courts have long understood the negative impacts prisons have on the health of detainees. Rates of communicable diseases such as tuberculosis and HIV are significantly higher in these environments than in the general public (Kouyoumdjian et al., 2016, 2018; Massoglia & Pridemore, 2015). Mental health is also known to suffer in these environments (Office of the Correctional Investigator, 2018). However, adding COVID-19 to the mix exacerbated this (Iftene, 2020; Sapers, 2020).

Importantly, in the early days of the pandemic, the virus was thought to be passed on through droplets; this meant that surfaces needed to be sanitized, social and physical distancing needed to be maintained, among other precautions (Novisky Narvey, & Semenza, 2021). However, we later learned that the virus was airborne, meaning that many of the droplet protections in place were insufficient to stop the spread (Miller, 2020). To avoid spreading an airborne disease, more stringent requirements were needed; the most obvious being increased adherence to social and physical distancing (Miller, 2020). Of course, this can be difficult in prisons, particularly when overcrowding is widespread in many Canadian prisons (Office of the Correctional Investigator, 2021). In addition to these difficulties, the median custodial sentence length in Canada was about 30 days in 2016/2017 (Miladinovic, 2019); consequently, individuals may cycle in and out of prison either bringing in the virus, spreading it within, or simply exiting the confines of the institution with the virus. Such was the case in Thunder Bay where several outbreaks occurred among the homeless population which were traced back to the local prison; importantly, the prison was overcrowded and experiencing difficulties due to staff shortages linked to those sick with the virus (Anderson, 2021; Diaczuk, 2021; Turner, 2021); thus, courts would hopefully have been aware of the direct impacts their decision to send individuals to

[11] While prison decision-making is outside the purview of the courts, as elaborated above, courts at times would anticipate the realities of prisons in rendering their decisions. As such, it is important to discuss the realities of these closed institutions.

prison. It is evident then that prisons represented a significant public health hazard during the pandemic.

The actual conditions of prison during the COVID-19 pandemic were harsh. Frequently, lockdowns due to contagion were instituted, visitation was disallowed, contact with lawyers was difficult, and programming was virtually non-existent (Bucerius et al. 2022; Department of Justice, 2022; Spratt, 2021). McDonald and colleagues (2023) interviewed 32 individuals with loved ones incarcerated in Canada during the pandemic who reiterated many of these same fears. While this is not to say that all prisons were like this at all times throughout the pandemic, these were common features of prison during the health crisis (Fayter, Mario, Chartrand & Kilty, 2022).

This may be unsurprising as the increased use of incarceration increased the risk of COVID-19 spreading not only to other inmates, but also correctional staff; so great was this risk, Canadian prisons were described as "pure chaos everyday" during the pandemic (Norman & Ricciardelli, 2022: 9) due to increasing workloads, health concerns, and "inadequate organizational response to the risk of COVID-19 in the early days of the pandemic" (*ibid.*: 13). These added new stressors within institutions, generating concerns about increased violence within these walls (Norman & Ricciardelli, 2022).

In the US, similar concerns for the virus were raised. Conducting a national online survey with 549 respondents in the spring and summer of 2020 in the USA, Alkon (2022) found that judges, defence attorneys and prosecutors were largely of the opinion that jails were dangerous due to the COVID-19 pandemic and that it should be avoided. Fears of the virus's effects on one's health were noted alongside concerns for the safety of inmates and correctional officers due to growing tensions related to lockdown strategies designed to curb the spread of the virus (Ferdik, Frogge & Doggett, 2022). In such a context, federal prisons were directed to consider early release opportunities under the various existing pieces of legislation (James & Foster, 2020).

Given that the American government and its courts acknowledged these significant issues and that courts would typically heed such recommendations, one might assume this was indeed what happened. However, this is not necessarily what occurred in all prisons across the United States. For example, Piquero (2021) demonstrates through prison data that prison counts were down in Miami-Dade due to individuals being released from prison early. Carroll (2020) agrees with this, noting that some prisons released certain inmates early; nevertheless, she explains that overall responses varied greatly: "While some jurisdictions have failed to release inmates, others have released those close to the completion of their sentences, those held as a result of administrative probation or parole violations…and those detained for nonviolent or misdemeanor offenses" (:75).

In the UK, Novisky and colleagues (2021) explained how prisons, particularly since the onset of COVID-19, posed a significant public health hazard. Beyond physical health, however, Maycock (2022) interviewed Scottish prisoners who highlighted feelings of isolation and fear while imprisoned during COVID-19; the author concludes that these feelings enhanced the pains of imprisonment. Using a similar methodology, Suhomlinova and colleagues (2022) found similar negative impacts on Welsh prisoners.

These studies have shown that the pains of imprisonment were exacerbated during the pandemic. Studies in Canada, the USA and the UK have demonstrated quite clearly that prisoners, whether pretrial or following sentencing, experienced terrible conditions. While these conditions appear to have been known to the courts, if and how this was considered requires further study and remains to be confirmed.

2.2.5 Delay

As discussed previously, one result of the COVID-19 was the partial shuttering of courts, and the adjournment of criminal cases. However, these cases did not simply disappear, and the intake of new cases did not stop, even if the police may have reduced the number of charges they

lay. Thus, while courts operated at reduced capacities, a backlog of cases to be dealt with increased[12].

Concerns for this backlog have been noted in Canada as well as many other countries including Australia, the UK, and the US (ACCORD, 2022a; Alkon, 2022; House of Lords Select Committee on the Constitution, 2021; Murphy & Ferrari, 2020; Paciocco, 2020; Piquero, 2021). Indeed, the Action Committee on Court Operations in Response to COVID-19 state bluntly that the "While the Canadian justice system is no stranger to court backlogs and delays, the COVID-19 pandemic has increased pre-existing challenges by forcing courts across the country to postpone large waves of criminal…cases" (2022c: 1).

One issue that had to be grappled with during the pandemic was the impacts of the 2016 Supreme Court of Canada decision in *Jordan.* In the context of decades of mounting delay in case processing, this decision created a presumptive ceiling for the duration of criminal cases; should this ceiling be surpassed, the constitutional right to trial within a reasonable delay would be assumed to have been infringed upon. Questions were raised concerning the applicability of *Jordan* during the pandemic. However, most authors accepted that COVID-19 would be considered an exceptional circumstance and thus would not count toward the ceiling put in place by *Jordan* (Burningham, 2022; Paciocco, 2021). However, Burningham (2022) makes it clear that the COVID-19 pandemic has not given courts *carte blanche* to delay; efforts have to be made to resolve cases in a timely manner or they risk still falling afoul of *Jordan*. A recent article in the Toronto Star confirms this, citing a Justice of the Ontario Court of Justice who states that "COVID-19 is not a magic incantation" to sweep away accountability for delay in resolving cases (Gallant, 2023). Thus, while there appears to be some leniency for increased delay due to COVID-19, there is a limit to what the courts are willing to accept as reasonable.

Reviewing preliminary Canadian data during the first months of the pandemic, Matyas, Wills, and Dewitt state that, where data was available, it showed "a near-universal negative trend

[12] Delay and backlog are issues that can be witnessed at the front and back end of the court system. Indeed, while new cases are constantly being added, the time it takes to do so can only be confirmed once it has proceeded through the various stages of criminal case processing. For this reason, I address the issue following the section on sentencing.

in pre-hearing and trial delays (2022: 193). ACCORC also explains that, through anecdotal evidence in their stakeholder engagement, "trial courts were disproportionately impacted by adjournments and delays" (2022c: 1)[13]. However, Haigh and Preston contend that "Canadian courts have been facing a crisis of sorts for several years, at least as related to delay and the criminal justice system" (2020: 878). Thus, while indicators may have worsened after the onset of the pandemic, they were not promising beforehand.

In the American context, court actors from across the country were extremely concerned that the backlog of cases was growing to dizzying heights (Alkon, 2022; Harris, 2023); such concerns were amplified, according to Alkon (2022), as speedy trial legislation was suspended in some American states. Similar trends were also explored by Piquero (2021) in Miami-Dade County.

Interestingly, based on a survey of several hundred court participants, Alkon (2022) suggests that, due to the lack of trials, prosecutors were not making deals to resolve cases because defendants could not threaten to proceed to trial; consequently, prosecutors did not need to worry about the threat of an impending trial to resolve a case. She further clarifies that there was an aversion to plea bargaining among some American prosecutors in many cases as they prioritized cases involving the potential for incarceration during the pandemic. Consequently, without quantifying it, Alkon (2022) suggests such practices have contributed to delays and backlog in the courts.

Similar discussions have taken place in England and Wales. In these regions, temporary courtrooms known as "Nightingale courts" were opened in unconventional locales such as hospitals to help alleviate the mounting pressure of court backlog (Select Committee on the Constitution, 2021). Despite these efforts, the House of Lords Select Committee on the Constitution stated that "The backlog has now reached record levels. The consequent delay to criminal trials is undermining the rule of law, access to justice and risks damaging public confidence in the justice system" (2021: 71).

[13] It was also discussed earlier that Myers (2021) suggested increased adjournments, and thus delay, occurred due to the use of unreliable remote technologies.

Like Haigh and Preston (2020) in Canada, some authors resist the temptation to ascribe the critical state of criminal courts in the UK to COVID-19 alone. While they accept that the backlog has grown significantly since the onset of the pandemic, they content is due principally to decades of underfunding of criminal courts; according to these authors, this is the issue that must be addressed in order to overcome systemic delay (Godfrey Richardson and Walklate, 2022; McConville & Marsh, 2023). For this reason, despite the efforts of courts in England and Wales, case backlog in the courts continue to pose significant challenges.

Thus, strong concerns exist about mounting backlog in courts due to the negative impact delay has on justice users and the system itself; these problems were then exacerbated by the pandemic . A handful of studies have quantified the size of the backlog, but a great deal remains to be understood. Indeed, while some of these studied court backlog in the months following the pandemic, more recent data has not been used which may shed light on the continuing efforts of courts. What remains clear is that backlog is a long-standing issue in need of attention.

2.3 COVID & the Courts: Hints, Indications, and Variation

These studies on the topic of criminal courts during the COVID-19 pandemic have shown that there was a significant deal of change occurring during this period. Changes to legislation and guidelines were made by the federal and provincial governments, as well as the courts in order to respond to the pandemic. Courts also made a necessary transition to remote appearances, for better or for worse. They were permitted to account for the health risks of COVID-19 in deciding upon the pretrial detention of an individual as well as at sentencing due to the horrendous conditions of Canada's prisons. Underpinning all of these decisions, the long-standing issue of delay worsened.

About these issues, we know precious little. Nevertheless, what can be seen in existing studies is that there is a notable amount of variation in if, how, why, and when the virus was considered by the courts. Nevertheless, there is some indication that jurisprudence and qualitative studies tell differing stories about the reality of criminal courts through the pandemic.

For example, jurisprudence suggests that COVID-19 could be considered to avoid imprisonment, while one Canadian study concluded that the pandemic appears to have changed little in this regard. Similarly, some figures suggest the prison population fell during the pandemic while later this appears to have been reversed. Moreover, while some have suggested that remote appearances may increase efficiency in courts, concerns have been raised that these technologies have in face increased delay.

Some of these diverging pieces of evidence may be grounded in the time they were observed. Indeed, many of the existing studies on the pandemic which collected data in the field were conducted in the first few months of the pandemic. It is possible that some data was collected during the phase of the pandemic where jail populations decreased, while others were undertaken when these populations rebounded. Similarly, some data may have been collected in the earlier months of the pandemic when the change to remote appearances was still new; conversely, similar studies may not find these same issues at a later date when these technologies were more firmly rooted. In this way, researchers may have opposing views due in large part to the nature of the pandemic at that point in time.

However, such variation is perhaps not unsurprising. The World Health Organization only just declared the COVID-19 pandemic over in May 2023 (Associated Press, 2023); studies are now emerging, but many are likely still being conceived of and conducted. Indeed, while studies are becoming more and more common as time passes, there is still not a large deal of empirical work on the impacts of the pandemic. Though speaking of the state of American literature, Viglione and colleagues state that “To date, the plight within courts…during the COVID-19 pandemic has received little scholarly attention” (2022: 5). Similar conclusions could be made about Canada, which typically does not benefit from the same volume of scholarship at the United States. Indeed, while there are some empirical studies on the subject, much of the existing literature is comprised of essays and commentaries which do not involve the collection or interpretation of data from primary sources.

Due to this dearth of information on changes occasioned by the COVID-19 pandemic, it is useful to explore how change in the criminal justice system is typically studied and

conceptualized more generally. This will allow for better comparisons between what has occurred during the COVID-19 pandemic and more "normal" times. Further, it will allow for the borrowing of ideas and concepts to further the study of change in a more specific context.

3. Change in Courts Outside of the Pandemic

Efforts to change, reform, and hopefully improve the criminal justice system are never ending. Various efforts abound to reduce injustice and inefficiency or to increase the legitimacy of the system. Nevertheless, the speed and breadth of changes the criminal justice system underwent beginning in March 2020 is remarkable. Indeed, changes to venue, to bail and sentencing, as well as general case processing have all been touched (Matyas, Wilis & DeWitt, 2021). A frequent refrain from various justice system stakeholders such as the Chief Justice of the Supreme Court of Canada was that the system had been pushed into the 21st century, or that the courts had advanced 20 years technologically in the span of a few months (Adach, 2020; Brown, 2020; Davis & Lynch, 2021; Lancaster, 2020; Loriggio & Casey, 2020; Wagner, 2020, 2021). What makes such a quick change noteworthy is that prevailing understandings of the criminal justice system as an entity steeped in tradition, reluctant to change its ways (Adach, 2020; Feeley, 2013).

Given how little empirical research currently exists exploring and analyzing these changes, it is useful to review changes in the criminal justice system that have happened in a more ordinary times; this may allow for better contextualization of the changes that have occurred during the pandemic. Consequently, this section will explore how authors have approached the study of this topic[14].

[14] Importantly, I will not necessarily explore the subject of every change discussed. This would be far too cumbersome if even possible in a single volume. Rather, I focus on the type of analysis used in these studies to explore a given topic.

3.1 Scope and Subject of Change

The scope and subject of research on change in the criminal justice system are immense[15]. One manner to review it is to use the typology of change and reform proposed by Lynch (2011) who was studying mass incarceration. She identifies three arenas[16] where change can be witnessed (1) legislative and statutory, (2) jurisprudence, and (3) on-the-ground changes in practice. I modify this slightly in the current review, looking at (1) societal "background processes"[17] (Garland, 2013) (2) discourses and rhetoric surrounding criminal justice, (3) policies and jurisprudence, and (4) criminal justice practices.

These categorizations are imperfect. Indeed, the scope of many articles reaches various levels. The phenomenon of mass incarceration is one such example[18]. Indeed, it is simultaneously the result of various discourses, policies, and practices; moreover, it has an impact on these same discourses, policies, and practices (Garland, 2001; Lynch, 2011). While a specific discussion of mass incarceration will be had only to showcase its breadth and contribution to the study of change in the system, it typifies the complexity of developing meaningful categorizations to organize this body of literature.

Further, a single phenomenon can be studied from different perspectives, thus potentially fitting in more than one of these categories. For example, Policy A may be the impetus for the rise of Practice B. If focusing on policy, a researcher might qualify Practice B as an impact. If studying local practices, however, Policy A may be considered the origin or the impetus for Practice B. Thus, this single relationship between Policy A and Practice B can be investigated as

---

[15] An essential differentiation in research on change in the criminal justice system is necessary before proceeding further as it will inform the organization of subsequent sections. When discussing change and reform, two principal approaches arise: studies of the emergence or the evolution of a phenomenon and studies on the impacts of such change. These types of studies are not mutually exclusive. It is common for authors to detail the emergence of a particular shift or change in the system, and to follow with an exploration of its consequences. Nevertheless, the following review will address both types of studies separately.

[16] Lynch discusses four groups; however, two groups pertain to jurisprudence but from different levels of American courts that are not particularly useful for the current discussion.

[17] Unlike the other ideal types, I will not explore the emergence of these social changes as this extends greatly beyond the topic of this article and the limits of this exercise. Rather, I will only address studies which discuss the impacts of societal change on the criminal justice system. Furthermore, this category is not based on Lynch's (2011) categories.

[18] Simon (2001) analyzes the "severity revolution" through various theoretical lenses, some of which focus on societal tendencies, policies or practices.

a study on policy or a study on practice depending on the preferences and goals of the researcher. While some would likely categorize these studies differently than I have, these ideal types are not the focus of this paper. They merely serve to organize and highlight the contributions of various studies on change in the system.

Despite these issues, these groupings are still capable of organizing the literature in a way that highlights its trends. Indeed, even if a given change may encompass both change in policy and practice, this change would still fall within the enumerated groups. In other words, while the categories may not be mutually exclusive, together they capture the wide array of potential changes implicating the criminal justice system that exist at different levels; in this way, they contribute to an advancement of the study of change and adaptation therein.

3.1.1 Societal Shifts

While the emergence of change in society generally is not the specific focus of this work, many authors have highlighted how these shifts can influence the criminal justice system (Cavender, 2004; Davis, 2003; Durkheim, 1973; Foucault, 1979; Garland, 2001; Rusche & Kirchheimer, 2007; Rubin, 2023; Simon, 2001; Spierenburg, 1984). Rubin (2018: 192) states that "theories of penal change, from Durkheim to Garland, frequently locate the engine of change in macro-level shifts in society and culture, the economy and labor market, or politics and governance". These include demographic or economic changes, or changes in a society's morals and can facilitate a change in "new punishments and penal schema" (*ibid*.). Garland (2013) calls these "background processes" which can contribute to the modification of various aspects of the system such as sentencing, procedure, or philosophy.

Commonly impacts are located at the level of discourse and rhetoric in the criminal justice system, though links to policy and practice are also made occasionally. For instance, Garland (2001) links shifts in the family unit, demographics, mass media, and culture with the rise of punitive and controlling discourse, policy, and practice. Spierenburg (1984) discusses how Elias' "civilizing process," a process whereby the sensibilities of the aristocracy slowly shift over time in tandem with the rise of the nation-state, caused the decline in public punishment. Foucault

(1979) similarly speaks on how the ideals of the Enlightenment changed practices surrounding public punishment[19]. In these cases, societal shifts serve as the impetus for new discourse or rhetoric, policy, or practices in the system.

These studies demonstrate the importance of larger social structures beyond the criminal justice system when studying change *within* the system. Indeed, the system can be greatly influenced by economic, political, or cultural factors. These impacts on discourse can then have downstream impacts on policy. Consequently, when a change in the system arises, it can be fruitful to seek explanations in what has occurred or is currently occurring in society at large.

3.1.2 Discourse & Rhetoric

A great deal of research has been conducted on the emergence and impacts of changing discourse and rhetoric on the topic of the criminal justice system (Beckett, Reosti & Knaphus, 2016; Campbell, Schoenfeld & Vaughan, 2020; Dubé & Cauchie, 2007; Feeley & Simon, 1992; Forman, 2017; Foucault, 1979; Garland, 1990, 2001; Green, 2015; Kurlychek & Kramer, 2019). Research abounds on subjects such as the rise and fall of the rehabilitative ideal (Robinson, 2008; Lynch, 2011) or the evolution of the tough on crime and smart on crime movements (Dagan & Teles, 2014, 2015, 2016).

As just implied, there are studies which seek to understand how and why discourse or rhetoric changes while others seek to understand what impacts these changes have had. Garland (1990, 2001) is included in this first group, attempting to document changes in discourse and rhetoric. He documents the rise of modern penality and its associated discourses such as penal populism and the devaluation of rehabilitation. Feeley and Simon's (1992) work on the "new penology" is another seminal work seeking to identify and highlight changes in discourse and rhetoric in criminal justice. The authors state that "the new discourse is the replacement of a moral or clinical description of the individual with an actuarial language of probabilistic calculations and statistical distributions applied to populations" (Feeley & Simon, 1992: 452). More recently, Campbell, Schoenfeld, and Vaughan (2020) also analyze the changing rhetoric

[19] Of course, Foucault (1979) spoke on a great many subjects in *Discipline & Punish*. This is but one example.

and criminal justice logics, finding both continuity and change over time in the continued use of tough on crime discourses as well as a push for decarceration[20].

Rather than just documenting impacts of changes in discourse, many studies document the emergence of criminal justice rhetoric while also discussing the impacts such changes can have on policies and practice (Dagan & Teles, 2014, 2015, 2016; Garland, 2001; Newburn, 2007; Phelps, 2011; Rubin & Phelps, 2017). For example, Newburn (2007) documents the proliferation of punitive discourses in England and Wales over time as well as its potential causes. However, he also discusses the impacts this "punitive turn" has had on incarceration rates. In this way, he documents and explain the emergence of punitive discourses in England and Wales while also highlighting the impacts it has had on the criminal justice system. Dagan and Teles (2014, 2015) also seek to document the emergence of the "right on crime" movement while discussing the impacts such a movement has had on policy and sentencing practices. The authors detail how the right on crime movement arose from strong concerns for economic restraint in society at large but also how it has resulted in changing penal policy in the United States. Thus, this discourse has emerged through societal factors but also impacts policy development and the use of incarceration in the system. Rubin and Phelps (2017) similarly discuss the impacts changing discourse has on policy; however, they also show how changes in discourse over time impacted parole and supervision practices in Michigan. Nevertheless, it is worth mentioning that some scholars point to the inability of rhetorical changes to impact change in practice (Phelps, 2011; Leclerc, 2023).

These authors also demonstrate that changes in rhetoric and discourse can have tangible impacts on policy creation and the political success of policy. To again take the example of the right on crime movement, the increasing use of cost-saving rhetoric in policy permits otherwise tough-on-crime proponents to support "soft-on-crime" measures such as decarceration, which can potentially impact local practices (Dagan & Teles, 2014, 2015, 2016). Stated otherwise, an increased concern for spending and austerity allowed those policy makers opposed to certain measures to repackage these very same measures into a palatable, even popular efforts.

[20] While the authors argue that changes in rhetoric can have an impact on policy and practice, their empirical work is less focused on the practical impacts of these changes in rhetoric.

Nevertheless, these changes in rhetoric or discourse are not guaranteed to have a tangible impact in practice as will be seen later.

3.1.3 Policy

Like studies of discourse, many other studies have examined how criminal justice policies emerge and evolve (Audesse, 2019; Caplow & Simon, 1999; Garland, 1990, 2001; Hinton, 2016; Kohler-Hausmann, 2018; Manson, 2012; Monchalin, 2016; Murakawa, 2014; Murphy, 2012; Pfaff, 2017; Puddister, 2018; Simon, 2001; Stuntz, 2011; Steiker & Steiker, 2020; Tonry, 2007). They have targeted various types of policy such as government legislation (Garland, 2001; Hopwood, 2014; Manson, 2012; Marvell & Luskin, 1991; Webster, Sprott & Doob, 2019) and jurisprudence (Burningham, 2021; Gorman, 2021; Kerr & Dubé, 2021; Leclerc & Noreau, 2017; Nicolaides & Hennigar, 2018; Puddister, 2018; Riddell & Baker, 2018; Roach, 1999; Stuntz, 2011). They have sought to understand the impacts of certain policy changes such as those concerning sentencing guidelines (Standen, 1993; Ulmer, 1997; Vance & Oleson, 2014; Woolredge & Griffin, 2005) or those restricting the use of plea bargaining (Carns & Kruse, 1991; Marenin, 1995).

Changes in policy are often attributed to changes in societal contexts, or discourse and rhetoric in the criminal justice system (Barnhorst, 2012; Caplow & Simon, 1999; Doob & Webster, 2016; Garland, 1990, 2001; Lacey, Soskice & Hope, 2018; Manson, 2012; Murphy, 2012; Webster & Doob, 2012). For example, Manson (2012) looks at the evolution of policy on the death penalty as well as its replacement with life imprisonment in Canada. Moreover, he reviews the elimination of the faint hope clause[21] and the introduction of consecutive periods of parole ineligibility for multiple murder convictions as part of this evolution. Manson (2012) connects these changes to the government's desire to bolster tough on crime rhetoric. Murphy (2012) discusses how Canadian policing policy changed after the 9/11 terrorist attacks in New York City, linking these changes with larger trends of globalization and risk discourses. In this

[21] A now-removed section of the Criminal Code of Canada allowing those sentenced to life in prison to apply for parole after 15 years even if one's parole ineligibility period is greater than 15 years.

way, both larger societal conditions and discourse surrounding the criminal justice can play a significant role in impacting change at a policy level.

However, some authors such as Bushway (2011), Campbell (2011a, 2011b) or Page (2011) have shown that policy change can emerge from or be stymied by the actions of government officials and professional organizations such as prosecutor associations or prison guard unions. These authors have discussed how advocacy and special interest groups can mobilize to promote policies which benefit them while also advocating against policy they do not deem to be in their interest. For example, Campbell (2011a) discusses how Texan prosecutors and their professional association successfully fought against recommendations for alternatives to prison while promoting prison expansion.

Rather than simply investigating the evolution of policy, scholars have also looked at how policy has impacted change in the criminal justice system, or failed to do so once enacted (Feeley, 2013 [1983]; Hughes & Gilling, 2004; Robinson, 2020). Occasionally, some such as Hughes and Gilling (2004) have found that changes in legislation impact discourse. More often, however, the impacts of these changes are sought out in practice such as court outcomes (Harris & Jesilow, 2000; Webster, Sprott & Doob, 2019) or in local practices of criminal justice actors (Jacobs, 1977; Rengifo, Flores & Jackson, 2020; Ulmer, 1997).

For instance, Webster, Sprott and Doob (2019) investigate how decreased use of incarceration for young offenders in Canada occurred following legislative changes in the youth criminal justice system. Feeley (2013 [1983], 2018) explores how changes in bail, diversion, speedy trial acts, and sentencing policy emerged but also how these reform efforts had little to no impact in practice. He found the aims of these policies were not achieved due in great part to cultures and norms within these courts. Similar conclusions are made by those guided by theoretical concepts of local court culture (Church. 1985; Eisenstein, Flemming & Nardulli, 1999; Ulmer, 1997). Thus, while policies may have an impact in practice, this is not guaranteed (Leclerc, 2023). Nevertheless, whether successful or not, evidence was sought in practice and aggregate court outcomes.

Importantly, like other studies of change, authors have discussed the consequences of a change. For example, authors have discussed the impacts of mass incarceration; specifically, they have investigated its racialized, gendered, and socio-economic consequences (Butler, 2016; Steiker & Steiker, 2020; Stuntz, 2011; Wacquant, 2009). For instance, Wacquant (2009) investigates both the emergence of mass incarceration and its disproportionate impacts on poor and racialized communities; even more specifically, he shows how the system emerged as a manner to control these populations as formal slavery was dismantled. These studies demonstrate that the impacts of policy are not confined to the criminal justice system, but that they can spread beyond the official borders of the system. They also show that that their impacts are not felt equally but shouldered more heavily by some.

These policy studies show the emergence and evolution of criminal justice policy can occur in the context of changes in societal "background processes", discourses as well in justice as practice. Policy change can also impact other policies and practices. However, causal links between higher-level discourse or policy do not always translate into practice. As discussed by Feeley (2013), and as will be addressed in greater detail in the coming section, individuals can undermine or otherwise circumvent policy objectives (Cheliotis, 2006; Rubin & Phelps, 2017). Thus, not only do studies of policy change cover an array of different changes, its emergence and its impacts are particularly intertwined with both higher-order change and changes occurring in criminal justice practices.

3.1.4 Local Practices

Some studies of change in the criminal justice system have focused on the practices of criminal justice agents such as lawyers, judges, probation officers, as well as various lobbying groups (Forman, 2017; Goodman, Page & Phelps, 2015, 2017; Jacobs, 1977; Kohler-Hausmann, 2018; Lynch, 1998; Myers, 2021; Rubin & Phelps, 2017; Ulmer, 1997). These works frequently investigate local practices as an outcome of changes in discourse or policy. In this way, the emergence of local practices was partially addressed in the previous section concerning impacts of policy changes. However, I will attend to the topic further due to some authors' noteworthy preoccupation with "on the ground" local practices (Kohler-Hausmann, 2018; Lynch, 1998;

Ulmer, 1997). The place change occupies in these studies is slightly different than those policy studies discussed in the previous section.

Studies such as that of Kohler-Hausmann (2018) place policy changes as the context for their study of practices rather than their primary concern. Indeed, changing justice policy such as a transition to Broken Windows policing serves as the context within which local practices occur. Though attending to policy, Kohler-Hausmann's goal is not to uncover relationships between changes in policy and local practices, but to explain these practices given this policy change. This is contrasted with previous studies of policy impacts, including the work of Webster, Sprott & Doob (2019) for whom change in policy is central to their argument and their methodology.

Instead of studying the emergence of local practices, many target criminal justice practices as the impetus for change in the criminal justice system more widely (Campbell, 2011a, 2011b; Goodman, Page & Phelps, 2015, 2017; Page, 2011; Quirouette, 2018; Rubin & Phelps, 2017; Weiman & Weiss, 2009)[22]. In this way, these studies place practices at the centre of discussions surrounding the emergence of change. For example, Quirouette (2018: 597) documents the work of community justice practitioners, demonstrating how they "incorporate sociological, social work and medical knowledge to engage with legal stakeholders and thereby change the discourse and legal practices used in lower criminal courts".

The agonistic perspective as developed by Goodman, Page, and Phelps (2015, 2017) is another example of authors paying great attention to criminal justice practices as the impetus for change. Indeed, these authors painstakingly detail how various actors, whether they be community activists, or other reform-minded individuals push forward their criminal justice agendas, causing friction and conflict over time to create large-scale change in policy or rhetoric. In this same agonist perspective, McNeill (2019) discusses how current probation practices in

[22] As discussed previously, the impacts of changing practices in policy could also have been explored when discussing studies concerned with the emergence of new policies. They are discussed in the present section due to the emphasis placed on local practices.

Scotland came to be through the contestation and resistance probation workers exhibited through their practices in the past.

Though I have but scratched the surface of studies concerning changing practices in the criminal justice system, these types of studies reveal a great deal about change in the system more generally. They offer two major contributions to an understanding of change in the criminal justice system: (1) top-down changes are filtered through the practices of individuals who may or may not be inclined to follow these proposed changes and (2) changes can originate on the ground and eventually diffuse to higher levels of the system and in society. Far from being simple recipients of policies and other societal factors, criminal justice system actors have agency and can advance their own agendas or accept that of the system.

3.1.5 Range of the Scope and Subjects of Studies on Criminal Justice Change

This exploration highlights several aspects of the scope and subject of existing studies of change in the criminal justice system. First, as changes can arise from different levels, researchers frequently study their emergence or impact with a wide-ranging scope.

Second, the relationships between background social processes, discourse and rhetoric, policy, and practice are complex. Stated otherwise, causal relationships between these factors are poorly specified in existing literature. Indeed, the impetuses and impacts of a change in one can often precipitate a reaction in the other, even if the reaction is to resist, nullifying the desired change. Moreover, the direction of these relationships is not simply top-down; rather, changes from lower levels can diffuse upwards. Discourse can certainly impact policy and practice; it may impact practice through the intermediary of policy. However, so too might policy impact other policies or discourse. The emergence of change, or its subsequent impacts then must be thought of in flexible terms, unrestricted by preconceived notions regarding the direction of influence.

A caveat to this point is necessary. While changes in one level of analysis can impact another, this does not mean it will; several authors have shown that discourse and policy can be

resisted or otherwise circumvented in practice (Grant, 2016; Lynch, 1998; Goodman, Page & Phelps, 2017; Leclerc, 2023). While changes can be imposed by the system, it is up to individual actors to decide if and how such changes are put into practice (Garland, 2018). Indeed, it has been shown how changes which are long-lasting, and which have their intended impacts are changes which do not go against local norms or court cultures and in which local actors have some input (Eisenstein, Flemming & Nardulli, 1999; Feeley, 2013; Webster, Sprott & Doob, 2019). For this reason, studies of change in the criminal justice system must consider the important role individuals have in their implementation, while accounting for the role of background processes, discourse, policy, and even local norms and cultures.

4. Theoretical Framework

Recently, some have called for a sociology of pandemics (Zinn, 2021). Matthewman and Huppatz have more specifically called for a "sociology of COVID-19", stating that that "disasters are ripe for sociological intervention" (2020: 679). Disaster sociology is one framework that can make sense of these changes, attending to the specificities of a disaster scenario as these authors have stressed.

Disaster sociology is a specific area of sociology concerned with the conditions that can lead to disaster as well as the ensuing impacts (Quarantelli, 2000a). Authors agree that studies of disaster are in fact studies of social change in that disasters are a catalyst for both short-term and long-term change (Fischer, 2003; Perry, 2005, 2017). However, there is no common definition of "disaster" (Harper & Frailings, 2010; Quarantelli, 1995; Perry, 2017; Tierney, 2019). For the purposes of this discussion, I borrow the definition proposed by Fritz (1961), but which has been expanded upon and clarified by several others over time as discussed by Perry (2017). Specifically, I define a disaster as a "'severe, relatively sudden, and…unexpected disruption' of a social system resulting from some precipitating event that is not subject to societal control" (Sjoberg, 1962: 357 *in* Perry, 2017: 7) where there is a "a sense of significant, irreversible loss

and damage" requiring shifts in operational norms which may or may not regularize in the long term (Perry, 2017: 7)[23].

This definition is inherently social in that impacts can only be qualified once the impact has been noticed and experienced (Perry, 2017). If a volcano erupts in the ocean, it is a geological event; if, however, the eruption threatens a city, this can become a disaster. Thus, an event requires the disruption of society to be qualified as a disaster even if the disaster *agent* such as a volcano eruption is the same in either scenario.

I continue with this example of the volcano to make one further precision about change in a disaster setting. Should the eruption destroy a town, this is clearly a change precipitated by the disaster: the town is destroyed. However, evacuation and relocation are also changes precipitated by the disaster. Thus, when speaking about changes in the context of disaster, I refer to both the changes directly caused by the disaster agent, but also the responses to deal with these changes. In the context of COVID-19 in Canada, the virus is the disaster agent, but government responses such as lockdowns, mandated social distancing, and the closure of courts are also consequences of the disaster.

Disaster sociologists point to several features of disaster which differentiate the change they precipitate from more ordinary types of change or even changes that might occur in slightly less routine emergency situations such as a car crash or house fire. While some feature may occasionally be present in more ordinary changes, it is the combination of the majority, if not all, of these features which distinguish change in a disaster context from more ordinary change as was explored previously.

First and foremost, disasters as I have defined them are severe, sudden, and causes wide change across many facets of society and among different communities requiring quick reactions (Lepointe, 1991; Tierney, 2019). While ordinary, routine changes can certainly be negative, they

[23] Some authors include terrorist events when discussing disaster. Given the unsettled definition of the word terrorism, and the fact that there is *some* measure of social control in these events, I exclude terrorist events from my discussion of disasters.

do not generally incur the same great potential for loss of life or livelihood. For example, Hurricane Katrina caused an exodus of hundreds of thousands of households from New Orleans, with the population still only at 66% of pre-hurricane levels six years after the event in 2011 (Lindell, 2013). This impacted everyone and everything in the city such as businesses, government officials, business owners, schools almost simultaneously rather than a single neighbourhood, workplace, or community. Conversely, routine changes such as those that have occurred in the criminal justice system are more localized, and foreseen or intended. For example, decarceration policies impact a specific population.

Second, disasters precipitate responses from the State and various official organizations which are often initially disorganized; consequently, individual actors on the ground are crucial to disaster responses. This can cause the formation of emergent groups who respond to disaster (Barnshaw, Letukas & Quarantelli, 2008; Lepointe, 1991; Lindell, 2013; Palen & Hughes, 2017; Quarantelli, 2000b; Quarantelli, Boin & Lagadec, 2017). New norms and routines to respond to the disaster are created both within the emergent group and in the traditional State institutions who respond to disaster (Perry, 2017; Quarantelli, 2000b). Given this unexpected or unwanted context, there is often a great deal of cooperation and consensus among various groups in the wake of a disaster as individuals try to deal with the impacts of the disaster (Quarantelli, 2000b). This contrasts with ordinary forms of change in the criminal justice system. As several authors have shown, changing discourses, policy developments and practices on the ground are often characterized by disagreement, friction, and conflict between various individuals and groups with different agendas for the system (Goodman, Page & Phelps, 2015, 2017; Rubin & Phelps, 2017).

Third, disasters are understood to be time limited (Eshghi & Larson, 2008; Lepointe, 1991). When a disaster occurs suddenly, there is an expectation that at some point the urgency of the situation will pass and some semblance of normalcy will return. Admittedly, while pre-disaster normalcy and routines may not be the goal, or even possible, there is an expectation that some type of routine will follow which is not spurred by the disaster context (Drabek & McEntire, 2003). For example, Camp Greyhound, the temporary roadside prison established to hold prisoners and newly arrested individuals after Hurricane Katrina hit New Orleans, was not

meant to be a permanent solution to the flooding of the city and its jails. Rather, it was described by CNN as a "step toward normalcy" (*as cited in* Berger, 2009: 498) and existed for about two months until a more permanent solution was found (Ferrara *et al.*, 2012). A more permanent structure was not constructed in the knowledge that the criminal justice system would eventually return to New Orleans once the obstacles brought on by the destruction were overcome.

Fourth, disasters have different phases of existence. While the exact definition and boundaries of disaster stages are subject to debate (Perry, 2017; Thornton & Voigt, 2010; Tierney, 2019), Killian (2002: 51) describes them as the warning, impact, emergency, and recovery stages. The warning stage is the period before a disaster strikes when information is available to prepare for an imminent disaster. The impact phase is the period during which the disaster strikes. The emergency phase follows this stage and is the response to the immediate impacts of the disaster. The recovery stage occurs once the disaster has mostly passed and long-term strategies for recovery are undertaken[24]. Such phases are not a common feature of more routine change. While one could argue changes are always likely to have some adjustment period before they are stabilized, the change, whether it be in discourse, policy or practice, is not analyzed through the lens of these different stages.

Finally, and potentially most importantly, unlike more traditional changes that have been studied in the criminal justice system, disasters entail the inability of various systems to continue "life-sustaining functioning" (Boin, 2005: 159); while the exact level of functionality can vary, the key point is that systems and institutions are severely impaired in the context of a disaster and that changes are made to cope with this reality. In the case of Hurricane Katrina, the criminal justice system in New Orleans was severely impaired, while a ripple effect was felt across the state (McCowan, 2010). Similarly, Garrett and Tetlow (2006) refer to the "collapse" of criminal justice in the wake of Hurricane Katrina. As mentioned earlier, at the beginning of the COVID-19 crisis in Canada, many businesses were forced to close for extended periods of time, while the

[24] The various stages may be unequal in length. The exact endpoints are subjective. Moreover, it is possible to fall back into earlier stages of the process should new issues arise (Thornton & Voigt, 2010). For example, a resurgence of a disease during the recovery stage may result in returning to the emergency stage.

courts adjourned tens of thousands of criminal cases across the country and prisons released inmates.

It is the combination of these unique factors which distinguish the change cased by disasters from more routine forms of change. This is not to say routine change can never have these characteristics but rather that they do not showcase all of them. This is the context in which disaster researchers conduct their work.

Despite this burgeoning study of criminality following disaster, much less work has been conducted on the responses of the criminal justice system in times of crisis or disaster[25]. Nevertheless, some have studied policing policy and practices following disaster (Ferrara *et al.*, 2012; Frailing, Harper & Serpas, 2015; Harper, 2010), the practices and policies of courts (Birkland & Schneider, 2007; Cavise, 2013; Garett & Tetlow, 2006; McAlllister *et al.*, 2003; Vance, 2008), the practices within carceral institutions (Ferrara *et al.*, 2012; Robbins, 2008), or discourses of crime and policing (Berger, 2009). Nevertheless, existing research on the topic appears to focus its efforts on practices and, to a lesser degree, policies which arise in the wake of a disaster.

It must be noted that disaster sociology is not a single theory or methodology. Rather, it offers a series of assertions about how disasters can impact social processes, sensitizing researchers to the particularities that can arise in crisis situations compared to otherwise "normal[26]" times. More specific theories can be used within the confines of the disaster sociology framework so long as the particularities of a disaster scenario are accounted for.

For example, Brodkin (2021) specifically outlines the utility of using Lipsky's concept of the *street-level bureaucrat* within the context of disaster sociology as it places great importance on the workings of individuals on the ground, responding to the needs in front of them.

---

[25] Here I exclude discussions of COVID-19 as this was discussed previously. In this context we refer to other disasters impacting the courts such as the flooding in New Orleans in 2005, or criminal courts in New York City following 9/11.

[26] *Normal* is in quotations in recognition of the highly subjective nature of the word. In this case, it simply refers to a time not experiencing a disaster.

Similarly, the agonistic perspective of penal change (Goodman, Page & Phelps, 2015, 2017) can easily fit within disaster sociology as both approaches theorize how change can come about, focusing on the actions of stakeholders at various levels of analysis. In this way, disaster sociology is a useful sensitizing framework with useful concepts that can easily integrate other sociological concepts in the study of various social processes.

5. Current Research Study

Canada's criminal justice system is not known for its adaptability and flexibility (Feeley, 2013 [1983]); it is a system built around tradition. However, more recent scholarship has complexified this characterization; some have suggested that while noticeable changes to the system might typically be slow to appear, tension exists beneath this surface of immobility, ready for an opportunity to leave its mark (Goodman et al., 2015, 2017). Indeed, there are forces of change constantly at work, even if their visibility is low. Perhaps then it is possible COVID-19 was one such opportunity for change to occur. Indeed, as most anyone will agree, COVID-19 has changed many facets of the criminal justice system. Disaster sociology suggests that some changes may be temporary, while others endure past the emergency. Furthermore, it suggests that behaviours in a disaster context, both those of individuals and also organizations, exhibit noteworthy modifications to respond to the emergency at hand.

For these reasons, some researchers have called for a sociological understanding of the pandemic (Connell, 2020; Matthewman & Huppatz, 2020; Ward, 2020). Similarly, Piquero (2021) explains that greater study "about the extent to which COVID-19 accelerated some of the long-discussed and much needed changes in our response to crime and our prevention efforts" is needed moving forward (2021:393). Some have recently begun to investigate such issues, attempting to catalogue and analyze how the system has responded to the pandemic. They have explored how bail and sentencing jurisprudence have evolved (Kerr & Dubé, 2020, 2021) as well as the living conditions of prisons among other subjects (Bucerius et al., 2022; Department of Justice, 2022; Fayter, Mario, Chartrand & Kilty, 2022).

Despite the utility of these studies, there are several shortcomings. First, there are relatively few empirical studies on the subject of the impacts of COVID-19 in Canadian criminal courts. This dearth of information extends internationally as well; Viglione, Peck and Frazier state that "there remains an extensive void in systematic knowledge surrounding the immediate and long-term impacts of COVID-19 on court systems in the United States" (2022: 5).

Even with what exists internationally, it is hard to draw direct, comparable inferences. Countries took different approaches to the pandemic and thus international studies are not necessarily transferrable to a Canadian context where public health guidelines may have differed. More specifically, however, even in Canada, responses to the pandemic varied between province or territory as the federal government is not responsible for the health system of each region. Thus, even Canadian studies are not necessarily transferrable if they are not region-specific.

Second, many of the existing studies consist of documentary analysis and do not employ methods easily allowing for an understanding of how criminal justice actors conducted their work during the pandemic; this is important as these actors are often charged with implementing any kind of change and are the first to experience it on the ground. While these textual or documentary studies of jurisprudence offer useful insight, they are unable to document the daily workings in great depth as often these actions often escape official accounts. Methods which can more easily shed light on the lived experiences of criminal justice actors could offer further insight.

Third, many of these studies that *were* conducted in Canada were conducted shortly after the onset of the COVID-19 pandemic, a period that might be considered the most tumultuous point of its life cycle. Indeed, this is typically when disorganization is greatest during a disaster. This is certainly a rich environment in which to conduct research. Nevertheless, the conclusions drawn from this period may not be generalizable to later stages of the disaster when the immediate urgency of the disaster has passed and society, or in this case the criminal justice system, has begun to re-establish some form of routine (Thornton & Voigt, 2010; Tierney, 2019). Pushing this idea slightly further, conclusions drawn from a particularly tumultuous time might

be more difficult to generalize beyond the pandemic than studies conducted at relatively more stable moments of a disaster.

In sum, the changes precipitated by the COVID-19 pandemic have only just begun to be studied and there remains a great deal to be said about how the criminal justice system responds to an extreme stress while continuing its work. Despite the dearth of study on criminal courts during the pandemic, there has been some suggestion by researchers and other criminal justice stakeholders that the pandemic will have long-term consequences on the system (Bucerius & Ricciardelli, 2022; Capp, 2021; Skolnik, 2020; Wagner, 2020; Matyas, Willis & DeWitt, 2021). If this is correct, it is imperative to understand them as thoroughly as possible. Indeed, Guggenheim (2014:4) states that "disasters…pose questions about who should be allowed to recompose the world and how'. However, even if some changes are short-lived rather than enduring, an understanding of how the system responded to the crisis is telling of how it might respond to crises in the future. Thus, in either case, studying the criminal justice system in a time of crisis and change is worthwhile.

Consequently, this work thus seeks to explore the in-court adaptations criminal courts have implemented to overcome the difficulties introduced or exacerbated by the disaster that was the pandemic. It seeks to answer the following question: **How did criminal courts in Ontario adapt in-court practices to navigate the COVID-19 pandemic?**

It has three main goals: first, it seeks to explore and understand the transition to a criminal justice system where the majority of court appearances are virtual. Second, it seeks to understand and describe how case processing and case resolution changed as the pandemic evolved. Finally, it seeks to understand and describe how criminal court actors adjusted their use of imprisonment throughout the pandemic and its various waves. Each will be addressed in the three subsequent chapters of this thesis.

Together, this will help elaborate a better understanding of how Ontario's criminal justice system responds to major stress, and how, when, and why it adapts. This will necessarily highlight how criminal justice system actors adapt as well, from the ground-up. Largely, this

work will contribute to understandings of change and resilience in the criminal justice system which may be helpful for the development of future, more deliberate changes in policy and practice.

6. Methodology

In order to investigate the impacts of the COVID-19 pandemic on the criminal justice system as well as the responses of the system to this disaster, various methods could be used. In this section I will discuss how similar studies have conducted their studies in the past. Following this, I will detail the different methods used for this research.

6.1 How to Study Change

Just as the topics of interest and the scope of analysis vary when studying change, so too do the various methodologies and theoretical frameworks that inform research on change in the criminal justice system. The relationship between the scope of the study, the methods to do so and the framework for analyzing results are interdependent. The choice of one impacts the appropriate choices for the others. Researchers employ qualitative and quantitative methods to understand changes in criminal justice. Moreover, just as some research is undertaken with varying scope, such as policy and practice, so too are quantitative and qualitative methods mixed to provide richer analysis of the topic in question.

I again group studies to classify the various methods employed by those studying change in the system: (1) textual/archival methods or secondary source analysis[27], (2) fieldwork methods[28], and (3) quantitative methods. While these categories comprise a great number of methodologies, some methods may fit into more than one category depending on their implementation. For

[27] The analysis of secondary sources is grouped with textual and archival methods because I consider secondary sources to be a text. Again, while others may disagree with this categorization, this ideal type is simply meant to help organize discussion.
[28] While fieldwork methods can conceivably include textual analyses such as official documents, these categories are meant to be broad ideal types, useful for categorizing general tendencies.

example, content analysis may involve the study of government policies (textual methods) or may use interviews to explore individuals' motivations and understandings. Such a study could also *count* the number of times a certain idea arises, wading into some basic quantitative methods. Nevertheless, these categorizations offer a manner to organize and differentiate studies based on the type of data employed which can help provide an overview of existing literature.

6.1.1 Textual/archival and secondary data analysis

Textual methods are often used to analyze changes that have occurred in the criminal justice system as well as the impacts of such changes. They can encompass several specific methodologies and data collection strategies making use of primary or secondary sources which are typically written down. Commonly, researchers will analyze government policy, legislative debates (Campbell, 2007, 2011a), legislation (Cambell, 2011b; Campbell, Schoenfeld & Vaughan, 2020; Rubin, 2018), or other official sources such as the proceedings of a government or parliamentary committee (Campbell, 2011b; Dubé & Cauchie, 2007; Goodman & Dawe, 2016; Kelly, 2017). Studies also use media sources like newspapers, television reporting, or promotional material of interest groups (Campbell, 2011a, 2011b; Goodman & Dawe, 2016; Rubin, 2018).

Textual and archival methods are particularly useful for studying the emergence of change in the system because, particularly when other data are not available, they may access documentation that allows comparisons between the situation before and after the onset of the change event or attempt (Foucault, 1979; Garland, 2001). These studies can follow the development of these accounts of a situation over time to trace the evolution of some aspect of the justice system. For example, Rubin (2018) acknowledges that at a certain point in American history, the prison began to function as a form of punishment. Consulting legislation and penal reform literature from the 1780s to the 1820s, she contests the idea there was one pivotal moment of change; instead, she suggests that over time various actors and governments contested and supported such developments. Rubin does this by focusing on the words and themes emerging from these written accounts.

It should be noted that some research relies on second-hand accounts and analyses undertaken by others to build their arguments about the causes and consequences of various changes in the criminal justice system (Davis, 2003; Foucault, 1979; Garland, 2001; Rubin, 2018). For example, in Rubin's (2018) study of colonial America, first-hand sources are understandably difficult to find. Consequently, she relies upon legislation that was passed by government but also contemporaneous commentaries on such legislation and social movements.

Another important example of textual analysis in the study of change in the criminal justice system is the exploration of jurisprudence. This has long been used by authors to review the evolution of law. For example, as discussed previously, authors such as Kerr and Dubé (2021), Gorman (2021), and Burningham (2022) have analyzed jurisprudence to study how courts responded to the COVID-19 pandemic. Similarly, Lundrigan (2018) evaluated jurisprudence on changes in judicial interpretations of Section 11(b) of the Charter of rights and freedoms and how this impacts delay in the system. These studies provide, not only criminal justice policy, but also strong indications of prevailing judicial attitudes on a given subject. They can also highlight leading authorities as well as any official minority opinions on the bench.

As can be seen in these examples, textual or archival analyses can study change in terms of discourse or policies as these are often written down or recorded in some manner. They can also be used to assess the impacts of changes. Less prevalent, however, are textual or archival works on changing local practices of criminal justice agents. This may be due to the fact that textual approaches may not be able to capture the full breadth of activity in the justice section; indeed, not every decision is written down. Not every opinion of justice stakeholders is written and published. As such, there can be holes in archival and other written sources. In this way, these approaches may overlook the divergences that exist in everyday practices of criminal justice agents. Consequently, the use of textual resources or secondary sources may not be best suited for studying change in local practices, at least without the support of other methods.

6.1.2 Statistical methods

Another oft-used approach to studying changes in the criminal justice system and responses to change is the use of statistical methods. As with other approaches discussed so far, statistical methods can vary from simpler descriptive or bivariate analyses (Caplow & Simon, 1999; Harris & Jesilow, 2000; Kohler-Hausmann, 2018; Webster, Sprott & Doob, 2019), to more advanced forms of regression (Phelps, 2013; Woolredge & Griffin, 2005). These studies often measure trends in various criminal justice outputs such as legislation (Beckett, Reositi & Knaphus, 2016; Merritt, Fain & Turner, 2006), incarceration rates (Doob & Webster, 2016; Webster & Doob, 2014; Webster, Sprott & Doob, 2019), sentencing practices (Kohler-Hausmann, 2018; Lofstrom, Martin & Raphael, 2020; Lynch & Omori, 2014; Tiede, 2009; Ulmer, 1997; Roberts & Pina-Sânchez, 2022), the use of bail (Myers, 2015, 2021), changes in arrest practices of police, including during the pandemic (Harris, 2023; Piquero, 2021); and overall penal severity (David, Leclerc & Johnson, 2023).

While some works exclusively use quantitative methods for analysis (Doob & Webster, 2006; McGarrell, 1991; Lynch & Omori, 2014; Tiede, 2009; Webster & Doob, 2014), many others use them in concert with textual and archival or fieldwork methods; the extent to which statistical measures are used in these combined studies, however, varies. In some studies, statistics such as crime or imprisonment rates are used to provide the context in which various changes occur. For example, Kohler-Hausmann (2018) dedicates significant effort describing the context in which Broken-Windows policing arose in New York City, as well as its eventual impacts on arrest rates; however, this is undertaken before a much more in-depth exploration of fieldwork in the criminal justice system.

However, depending on the data used, they may also overlook individual practice and variation due to the aggregate nature of the data. Further, these studies are typically unable to establish causation between a change and practice. For example, even if incarceration rates fall after the introduction of new legislation such as that explored by Webster and her colleagues (2019), the authors do not speak of causation, with the implicit understanding that practices in the criminal justice system are complex human enterprises and cannot be fully accounted for using these methods. Instead, they speak more largely about attributing – at least in part - some outcomes to certain changes in policy,

Nevertheless, statistical methods thus prove quite versatile in analyzing change in policy and practice, as well as the linkages that can exist between them. They appear strongest when coupled with textual or fieldwork methods. These methods can compare different indicators before and after the onset of a change and can also offer a more general overview of the data and, in some cases, the possibility to predict trends moving into the future. They can also enrich analysis in a study making use of other research methods. This is evidenced by the researchers mentioned above who have used these methods in concert with textual or fieldwork methods.

6.1.3 Fieldwork methods

The use of fieldwork methods to study change in the criminal justice system, though useful, is not as widespread as those methods presented previously. Researchers attempting to study the impetuses and impacts of change have made use of interviews (Goodman & Dawe, 2016; Harris & Jesilow, 2000; Jacobs, 1977; McNeill, 2019; Robinson, 2020; Ulmer, 1997), and or observation (Kohler-Hausmann, 2018; McNeill *et al.*, 2009; Robinson, 2020). These studies most often attempt to understand how changes in policy are carried out in practice.

For example, Kohler-Hausmann (2018) describes how the lower reaches of the criminal justice system responded to an initiative to dramatically expand enforcement against low-level offenses under the banner of the Broken Windows approach to policing. Her work involved a mixture of field work, in-depth interviews, and statistical analysis of trends in arrests and dispositions of misdemeanors over a period of three decades. Similarly, Ulmer (1997) explored factors influencing judges' sentencing decisions. Notwithstanding the great importance of legal factors, he documented the importance of local norms and practices which could at times supersede official sentencing guidelines.. More recently, as discussed previously, Myers (2021) also conducted court observations during the COVID-19 pandemic in order to examine potential variations in bail practice that occurred since the onset of the COVID-19 pandemic. In all three examples, the authors provide rich descriptions of practices after a change in circumstances in the justice system. They provide a detailed look at the work of criminal justice agents that can be

overlooked when exclusively making use of either statistical methods or when investigating text-based sources.

Such methods allow researchers to review individual cases in a depth that would not be possible with statistics or textual methods. Having an individual providing their opinions and sharing their knowledge, or watching them do so, allows the researcher to understand the unwritten, qualitative thought processes behind the actions of individual actors.

Of course, these methods are more difficult to generalize unless a large enough sample is taken. A large sample can be difficult to collect due to the hours required to do so. This is one weakness of these methods compared to the others discussed above. Of course, it is not fatal, and can be overcome. Indeed, what is lost in quantity is made up for in quality and depth (Rubin, 2021). Nevertheless, it is a reality that researchers employing fieldwork methods must face.

6.2 Data Sources for Current Study

In order to answer the research question of this study, taking into consideration the theoretical and practical realities of conducting such research during a public health emergency, I used several collection techniques. This work relies on a body of fieldwork data collected through interviews and court observations, supplemented by secondary data sources[29]. Moreover, this work makes use of available data concerning adult criminal courts in Ontario made public by both Statistics Canada and the Ministry of the Attorney General (MAG) of Ontario. Together, these various data sources help explore the myriad ways the province's courts have adapted to the reality of the COVID-19 crisis.

Importantly, the data collection exercises have different beginning and end times. This is due largely to COVID-19 restrictions, and the availability and openness of research participants. The effects of overlap, or lack thereof, between data types will be highlighted as required.

[29] Ethics approval was granted by the Comité d'éthique de la recherche – Société et culture de l'Université de Montréal. Projet number CERSC-2020-016-D.

6.3.1 Fieldwork

This work is based principally on the fieldwork conducted by the author between November 2020 and October 2021. It included in-depth interviews with members of Ontario's criminal defence bar and members of the judiciary. In addition to formal interviews, court observations were conducted, and informal conversations were had with many members of the criminal justice system.

Though I mark the beginning of official fieldwork beginning in November of 2020, discussions with members of the court community in Ontario as well as observations of the court began at the outset of the pandemic in March 2020. These helped provide insight into how the courts have reacted to the situation created by the pandemic.

6.3.1.1 Court Observations

Virtual court observations were undertaken from early January 2021 until October 2021[30]. Table 1 below shows that a total of 125 days of court observations were undertaken in 8 courthouses across Northern and Eastern Ontario as well as in the Ontario Court of Appeal.

Observations were conducted almost exclusively in bail and sentencing courts. Specifically, bail observation days accounted for roughly 39% of all observations while sentencing hearings were roughly 40% of all cases. These courts decide upon individuals' liberty and detention. Moreover, it is known that those involved in the criminal justice system are often the most marginalized in society (Department of Justice, 2022). Consequently, the plight of these vulnerable individuals as they suffer through the potential of incarceration during a pandemic is of great importance. Indeed, the experiences of vulnerable individuals are frequently a topic of

[30] Short periods of virtual observation were undertaken in the summer and fall of 2020. During this time, systemic notes were not taken, though some notes were still taken. This was done as a sensitizing exercise for myself rather than for data collection purposes. These dates were not included in the number of days in Table 1.

research among disaster sociologists (Adams, 2013; Adeola & Picou, 2016; Sastry & Van Landingham, 2009).

Remand or set-date courts were also observed. These were undertaken less frequently as substantive matters rarely occur in these courts. Nevertheless, they are able to provide data on the digital court environment as well as frequently offering information about the state of the court at that point in time. For example, understanding if and when trials can be set, or difficulties lawyers are facing in the processing of their criminal cases. Court days in these courts account for just shy of 17% of all observation days.

Finally, trials and motions accounted for roughly 4% of all observation days. This is certainly a small number, however, trials are an incredibly infrequent occurrence in the criminal justice system (Karam, Lukassen, Miladinovic & Wallace, 2020). Moreover, during the pandemic, they became even less frequent as many of them were cancelled (Bertrand et al., 2021). As such, less emphasis is placed upon them than other types of matters which were prioritized throughout the COVID-19 crisis.

Observation guides were created for these appearances[31]. Key information such as the names of all parties, the charges, submissions from Crown and Defence regarding bail or sentencing, comments by the judicial officer as well as the substantive decision. Additionally, fieldnotes were taken which outline my experiences observing as well as any events of note. Together, this information and relevant fieldnotes total over 400 pages[32].

Qualitative content analysis was used for the analysis of court observation data; however, I conducted some quantification of key information and court outcomes. Qualitative content analysis techniques were used to analyze observation notes. When reading and re-reading these notes, I used the content analysis process laid out by Rubin (2021:189-190); specifically, I began

[31] Refer to Appendix A.
[32] It should be noted that as observations took place virtually, notes were taken on my personal computer. Consequently, this allowed for detailed notes and the ability to quote parties much more frequently than might be possible had I been sitting in a physical courtroom with pen and paper.

with a process of open coding where my codebook was created. After codes were made, these were pared down, pruning away stunted branches of inquiry and focusing on the most health.

In her outline of the content analysis process, Rubin (2021) mentions that at times it may be necessary to return to the data before proceeding to the next step. This is what I did next. After understanding the data better, I began to fill observation sheets for each court hearing I observed. Again, these sheets allowed me to record the basic facts of a case while also paying particular attention to how, when, and why COVID-19 was mentioned. Once this was completed, frequencies of these various occurrences were noted in order to conduct rudimentary quantitative analyses (i.e., descriptive statistics). For example, frequencies were recorded of certain topics such as the number of custodial sentences rendered, the number of mentions of COVID-19 during proceedings, the number of cases where sentences were reduced due to COVID-19, and so on.

Finally, once this was done, I began the process of closed coding where I reviewed the observation notes with these stronger codes (Rubin, 2021: 189-190)[33]. This process allowed for the data to speak for itself in an inductive manner[34] while leaving room for theory-driven decision-making.

Through this coding, and the quantification of certain in-court trends, I was able to deepen my understanding of the trends present in the notes while also being able to offer some basic numbers to better understand trends.

Observation locations were chosen primarily out of convenience, organically growing to include other courthouses in the Northwest, Northeast, and East judicial regions of Ontario. Convenience was necessary as public access to courts was difficult in the first several months of the pandemic, especially prior to the autumn of 2020 (Canadian Bar Association, 2020). This is related to several factors such as changing login credentials for these courts as well as the need to

[33] It is important to note that other data sources were considered when moving from open to closed coding. This process will be discussed later on in this section when I explore the triangulation of data.
[34] Though, as Rubin explains, this process is not purely inductive, and the process does not perfectly fit within this label (2021:251).

contact courthouses to obtain this information. Though this certainly mirrors my own experiences, I would add that even throughout the autumn of 2020, accessing courts virtually was a difficult endeavour as there were few individuals at the courthouse to respond to calls[35]. In the rare occurrence that I was able to speak with a representative, they were unsure if they were allowed to share this information with me, despite my assurance from contacts that such information was indeed shareable with the public. However, I benefitted from contacts in various courthouses who were able to share this information with me. It is through them that I took my first steps in observing courthouses.

As the months went on, this information became more readily available. Indeed, at the beginning of 2021, inquiries to courthouses suddenly became easier and I received responses to the various messages left on answering machines. Subsequent court locations were chosen in the same judicial districts where other observations had already begun in other courthouses. In this way, I included regions outside of traditional metropolitan centres which can be overlooked in criminological research (Hollis & Hankhouse, 2019) and which may be impacted differently by emergencies due to their remoteness and more restricted access to services and resources. (McKay, 2018; Lepointe, 1991).

Table 1 – Observation Days

	Total Court Days	**Bail Days**	**Bail Decisions**	**Bail Adjournments**	**Sentencing Days**	**Sentencing Decisions**	**Sentence Adjournments**	**Remand Court Days**	**Trial & Motions**
Court 1	45	**21**	62	48	**19**	55	49	**5**	0
Court 2	4	**1**	7	40	**1**	2	5	**2**	0
Court 3	4	**1**	4	4	**1**	3	3	**2**	0
Court 4	17	**9**	8	6	**3**	6	2	**5**	0
Court 5	11	**4**	5	13	**5**	7	5	**2**	0
Court 6	22	**6**	10	15	**10**	18	19	**3**	3
Court 7	8	**4**	1	7	**4**	6	3	**0**	0
Court 8	12	**3**	5	5	**7**	10	9	**2**	0

[35] Perhaps they were indeed in court, and I simply was unlucky in reaching them at a convenient time; however, many messages left went unanswered.

Ontario Court of Appeal	2	-	-	-	-	-	-	-	2
Totals	**125**	**49**	**102**	**138**	**50**	**107**	**95**	**21**	**5**

6.3.1.2 Interviews

In-depth interviews were conducted with members of the criminal Defence bar in Ontario as well as members of the judiciary between November 2020 and June 2021. These interviews explored the changes these actors had lived, how they perceived them and what they hope results from these changes they have experienced throughout the pandemic[36]. A total of 16 interviews were used in this thesis with an average time of roughly 98 minutes. Nine interviews were conducted with members of the Defence bar, and six with judges. I did not personally conduct the outstanding interview used in the analysis. This transcribed interview was conducted by David Milosevic on behalf of the Ontario Bar Association in late 2020 with the three then-Chief Justices of the Ontario Court of Appeal, the Ontario Superior Court and the Ontario Court of Justice. This interview broached many of the same subjects of my own interviews; consequently, this interview was analyzed alongside those I personally conducted.

Qualitative content analysis techniques were used again, though in this instance to analyze interview data. Again, I followed the process laid out by Rubin (2021:189-190); beginning with a process of open coding, moving toward closed coding. This analysis was conducted alongside the coding process for observation data. In this sense, the process of moving from open to closed coding accounted for emerging patterns from observation data. This simultaneous coding will be discussed further on in this chapter once all methods have been outlined.

Interview participants were recruited in two manners. An unknown number of judges across the province were sent an invitation from the Ministry of the Attorney General on my behalf inviting them to participate. I understand this was sent out through a general newsletter to judges. I was then provided with the contact information for those who had demonstrated

[36] A copy of the interview guide can be found in Appendix B.

interest. Interviews took place over Zoom or by telephone. They were audio-recorded and subsequently transcribed.

Members of the Defence bar were recruited through both convenience and snowball sampling methods (Atkinson & Flint, 2004). Firstly, using a snowball sampling method, I reached out to existing contacts to solicit their participation. They were asked to invite colleagues who might be interested. Secondly, invites were sent to several law associations across the province, asking for the invite to be sent to their members.

Given these self-selection and convenience methods, there is the possibility of a self-selection bias among participants. Indeed, it is possible those who were open to speak with me had experiences so extreme, driving them to speak with me. While this is possible, I hold it to be unlikely given the concordance between observation data and that which was discussed in interviews.

It is also necessary to address the relatively low number of interviews conducted. As alluded to earlier, interviews with members of the court can at times be difficult to recruit for a variety of reasons. Lawyers and other legal actors can be considered what some authors call an "elite group" that is not readily accessible to the public due in part to their social status (Empson, 2018; Noy, 2008; Odendahl & Shaw, 2002). In these situations, access must be negotiated and is often best done through purposive, snowball sampling methods (*ibid.*). However, in the context of a pandemic, this can be even more difficult. Indeed, as backlogs increased in the criminal justice system, the work being demanded of court participants increased. Moreover, particularly among private defence attorneys, suddenly many saw drastic decreases in their income. In this context, it became ethically difficult to ask these individuals of their time[37]. Even if some expressed desire to participate, many explained that it could be several months before they were able to participate.

[37] For a discussion of ethical issues of conducting research on disaster-affected populations, see Van Brown (2020), for example.

It should be noted that while many interview participants have practiced in the jurisdictions which were observed, this was not always the case. Indeed, all judges and 8 of the 9 defence attorneys had practiced criminal law in numerous courthouses in Ontario, allowing them to compare and contrast the different cultures and practices they had witnessed.

Notably, interviews with Crown attorneys were not conducted. While it would have been beneficial to include their experiences and perceptions of the changes precipitated by the COVID-19 pandemic, it was not possible to gain access to this professional group. Efforts were made to reach out to personal contacts with links to the Crown attorney's office before making a formal request. It was made clear by various contacts that in the unlikely event that official permission was given by the Ministry of the Attorney General for prosecutors to participate, the daily workload of Crown attorneys had increased exponentially; consequently, I was told that participation would likely be minimal. As such, I made the decision to no longer pursue this avenue as it was likely a strategy of diminishing returns. Nevertheless, as explained previously, Crown attorneys were observed while in court, allowing for some understanding of their experiences throughout the pandemic. Moreover, discussions of prosecutors arose frequently during formal interviews and informal discussions with members of the court community.

6.3.1.3 Informal Conversations

Adding to my understanding of court actors' experiences of the pandemic are the myriad informal conversations I have had with them from March 2020 through August 2023. These occurred with my contacts whether or not they participated in formal interviews, as well as with those who did participate in interviews but did not want certain opinions on the record. I also had the opportunity to attend several Continuing Legal Education workshops, or events held by various organizations such as the Canadian Institute for the Administration of Justice which highlighted and discussed the experiences of these same actors.

As these conversations were off the record, I did not take extensive notes, or verbatim transcriptions; instead, following such conversations, I wrote brief, anonymous summaries; in them, I noted the themes we touched upon. These notes totalled roughly 40 pages. These were

coded in a similar way to interview data as outlined above. The interaction of these notes alongside other data sources will be discussed in section 6.4.

While these conversations are off the record and cannot be relied upon as strongly as the aforementioned interviews or observations, they helped direct attention to issues which were important for the criminal justice system. Moreover, they reinforced some early working hypotheses I developed as the fieldwork was underway. Thus, while they certainly do not carry the same weight as other data, they contribute to a fuller understanding of the criminal courts as they navigate the COVID-19 crisis.

6.3.2 Secondary Data

6.3.2.1 Statistical Data

This work also relies on publicly available statistical data collected, compiled, and organized by the Ministry of the Attorney General of Ontario. This data contains information from 2012 until December 2022 at the time of writing. Many of these statistics were released at a level of aggregation that precluded more sophisticated statistical analyses. Nevertheless, month-over-month and year-over-year data were available on topics such as disposition type, disposition time, and offence type. Together, these data allow for an exploration of case processing trends over time in Ontario.

I also make use of quarterly criminal court data available from Statistics Canada. Various data tables were used to explore the functioning of Ontario's criminal justice system during the pandemic. Specific tables are cited when used. These data were used primarily to explore sentencing and incarceration trends in Ontario which were not available from the Ministry of the Attorney General. Further, as this data was provided for fiscal quarters from Q1 2019/2020 to Q2 2022/2023, this allowed for a closer analysis of changes over time during the pandemic where significant changes could occur in the span of a few weeks or months[38].

[38] More recent fiscal quarters have since become available through Statistics Canada. However, these were published at too late a date to integrate into the current iteration of this work.

It is important to note that due to collection periods, some statistics from MAG and Statistics Canada are not directly comparable. For example, while some statistics are only given for fiscal years, others are given for the calendar year. Further, since the definition of a case differs between these two data sources, comparisons between them should remain cautious and superficial; indeed, while general trends can likely be compared, individual comparisons of statistics are ill-advised.

These data were analyzed using Microsoft Excel. These time series data were analyzed and visualized in order to discover trends in the case processing practices before, during, and after the onset of COVID-19. Importantly, comparisons between Statistics Canada data and data from the Ministry of the Attorney General are difficult to make as the definition of a case is not the same for the two sources. Further, the variables as well as the level of detail provided by both sources can vary greatly.

6.3.2.2 Secondary Text Sources

Some secondary textual sources were collected in the course of this work. These were primarily news articles and articles from publications written by and destined for legal professionals. These articles were found from national news sources such as CBC News, CTV News, Canadian Lawyer Mag, and Lawyer's Daily. However, this also included grey literature and case law. Specifically, I reviewed emails, reports and proceedings from legal associations as well as published court decisions from Ontario's criminal courts. Finally, I reviewed parliamentary debates pertaining to specific criminal justice legislation at both the federal and provincial levels.

It is important to note that a systemic review was not undertaken when compiling these documents. Rather, they were collected while attempting to stay abreast of changes in Canada's and Ontario's criminal justice systems. Consequently, these sources are not used widely in this work and are never used as the sole basis for any assertions made. Rather, they are occasionally used to enhance conclusions reached through other data sources.

6.4 Combining the Data: Data Triangulation

While my earlier discussion about coding and analysis strategies may have given the impression of linearity in my analysis, this is incorrect; instead, coding and analyzing this data was very much an iterative and circular process. Their trends were also reviewed together in an effort to strengthen any shortcomings inherent in each data collection strategy. This helped create a cohesive, all-encompassing review of the data.

While I necessarily had to begin analyzing a single source of data, as more data became available, I began to review the data simultaneously. Indeed, open coding was conducted on all sources individually as explained previously. However, this process was repeated several times, moving back and forth between the data sources. Trends within all data sources were compared with one another in order to strengthen the conclusions I made in a process of triangulation. More specifically, once I concluded the closed coding section of the analysis, I made summary findings for each data source. Where data agreed and disagreed was noted. When data disagreed, or at least varied, I re-evaluated to better understand the discrepancy, seeking potential reasons and explanations for them.

Comparisons between the fieldwork methods and quantitative secondary sources require closer examination. Indeed, quantitative data were evaluated somewhat more independently from the qualitative data due to their difference in scope. Indeed, the quantitative data spoke to larger, and more long-term trends than the qualitative data could.

Nevertheless, I still examined and re-examined findings within the quantitative data in light of the qualitative data. For example, when I found that incarceration numbers had changed during the pandemic, I sought explanations in the qualitative data collected. The reverse was also true to some regard. While I did not revise my interpretation of qualitative data based on the quantitative data, I did re-evaluate the generalizability of the qualitative evidence when it did not match the quantitative data. For example, should an interviewee have said they noticed no change in the justice system since the onset of COVID-19 while the quantitative data stated

otherwise, I would not assume that this interviewee was wrong; rather, I would interpret this as being a more localized experience that likely did not reflect wider trends across the province.

These comparisons are also done recognizing that certain collection techniques were undertaken at different times due to the realities of conducting research during a public health emergency. Of course, all data overlap to a significant degree; however, observations and informal conversations span before and after interviews, while the statistical data extended to the period before and after other data collection. The effects of a differing levels of overlap are considered in this work, particularly as an alternate explanation to my conclusions should disagreement be uncovered between data sources[39].

6.5 Analysis Strategy:

In order to address the research question and three objectives, three articles were written. Each article addresses a different aspect of the changes the Ontario courts experienced throughout the COVID-19 pandemic. The articles cover three of the major systemic changes already identified in previous research: the transition to a virtual environment, changes in the use of incarceration, and changes in the general processing of criminal cases.

The various methods described above were used to explore these notable changes. To explore the use of videoconferencing technologies in Ontario's courts, the field methods already described allowed for an in-depth exploration, including from an experiential point of view for the author.

Next, statistical data from the Ministry of the Attorney General of Ontario permitted an examination of case processing practices in Ontario's criminal courts, including a province-wide examination of how cases were or were not resolved, before, during, and after the onset of the COVID-19 pandemic. In this way, the impacts of the pandemic could be distinguished from

[39] In order to facilitate this work, a timeline of data collection was made to properly situate and contextualize all data.

ordinary annual variations. These data were supplemented by fieldwork data to compare and contrast province-wide patterns with the experiences of courtroom participants.

Finally, statistical data from Statistics Canada and the Ministry of the Attorney General were used to examine the use of incarceration during the pandemic. These methods were used in conjunction with the aforementioned field methods to generate an overview of incarceration in Ontario during the pandemic. Coupling these methods allowed me to explore participants' experiences in their own words as well as province-wide tendencies. Together they offer a richer recounting of criminal justice practices during the COVID-19 pandemic.

Chapter 2: Accès à la justice dans les tribunaux criminels lors de la crise de COVID 19 : Le recours aux tribunaux virtuels

In collaboration with Chloé Leclerc
Published in 2022, *Criminologie* 55(2), 147-170

Résumé :

Au Canada, la pandémie COVID-19 a forcé la fermeture sans précédent des tribunaux. La solution du gouvernement ontarien a été de mener les procédures judiciaires virtuellement. Longtemps présenté comme un moyen d'élargir l'accès à la justice, certains craignent que l'utilisation des technologies audiovisuelles ne réduise en fait l'accès à la justice à certains égards. Cette recherche s'intéresse à la migration vers un environnement virtuel pendant la pandémie et à ses impacts sur l'accès à la justice, conçu ici comme la capacité des justiciables à accéder aux tribunaux et à leurs avocats. La recherche repose sur des méthodes ethnographiques dans les tribunaux criminels de l'Ontario qui combinent observations et entrevues auprès de juges et d'avocats. Les résultats révèlent que bien que le passage en mode virtuel ait pu contribuer à un meilleur accès aux tribunaux pour une majorité de justiciables, il a aussi pu compliquer l'accès pour les justiciables vivant en région éloignée, ceux qui ne sont pas représenté par un avocat ou ceux qui sont incarcérés. L'article aborde ces enjeux avant de discuter de l'avenir de ces technologies dans les tribunaux dans une ère post-pandémie.

Mots Clés : Accès à la justice ; justice pénale ; COVID-19 ; technologies audiovisuelles ;

Abstract:

In Canada, the COVID-19 pandemic forced the unprecedented closure of criminal courts. The Ontario government's solution to these physical closures was to conduct proceedings virtually. Long touted as a way to expand access to justice, some have raised concerns that the use of audiovisual technologies will in fact decrease access to justice in some respects. This research thus sought to understand how the migration to a virtual environment during the pandemic impacted access to justice, conceived narrowly as the ability to access courts and lawyers. This research employed ethnographic methods in Ontario criminal courts. It found that while the transition to a virtual environment could contribute to greater access to court for a majority of defendants, it also complicated access for those living in rural areas, those who were self-represented or those who were incarcerated pending trial. This article explores these issues before discussing the future of these technologies in criminal courts in the post-pandemic world.

Key Words: Access to justice; criminal justice; COVID-19; audiovisual technology;

Introduction

La COVID-19 a suscité des ajustements majeurs dans les tribunaux criminels. Un des changements les plus marquants apporté par la pandémie est la fermeture physique des tribunaux et la nécessaire migration vers des comparutions virtuelles[40]. Si l'utilisation des technologies audiovisuelles telles que Zoom ou de simples appels par audioconférence était relativement rare en Ontario avant la pandémie (Bureau de la vérificatrice général de l'Ontario [BVGO], 2019 ; Burkell et di Valentino, 2012), elle est devenue la norme suite aux nouvelles exigences de distanciation sociale (Bertrand et al., 2021). Bien que cette transition vers la justice virtuelle soit une stratégie adaptative pour atténuer les impacts de la pandémie sur le système de justice pénale et assurer son fonctionnement quotidien (Haigh et Preston, 2020 ; McLachlin, 2021), certains s'inquiètent de ses effets en termes d'accès à la justice et, plus particulièrement d'accès aux tribunaux (Bertrand, et al., 2021; Haigh et Preston, 2020 ; McLachlin, 2021). Ainsi, bien que la justice virtuelle soit généralement mise en avant dans les politiques d'amélioration de l'accès à la justice (Commission européene pour l'efficacité de la justice [CEPEJ], 2016 ; Ministère de la Justice, 2019), il est reconnu que des problèmes d'implantation pourraient avoir des effets contraires à ce qui est anticipé (CEPEJ, 2016 ; McKay, 2018).

Pour mieux guider le futur de ces technologies, il est essentiel de comprendre leur fonctionnement et leurs effets sur l'accès à la justice et aux tribunaux. Le concept d'accès à la justice a beaucoup évolué au cours des dernières années (MacDonald 1992; Currie, 2004) et comprend maintenant une pluralité de dimensions telles que l'accès aux tribunaux, à un avocat, à la justice de proximité, à des fonds pour payer pour des services juridiques, à l'accessibilité des informations légales ou encore aux sentiments de justice (CEPEJ, 2016 ; Currie, 2004 ; Gramatikov et al., 2009 ; MacDonald, 1992). Or, pour cet article, nous avons retenu la conception originale de l'accès à la justice, qui se limite à l'accès au tribunal et à l'avocat. Étant donné que l'effet principal de la pandémie était de limiter l'accès physique au tribunal et à la disponibilité de la représentation légale, et que ceci est habituellement peu remis en question dans des temps non pandémiques, nous avons choisi de nous concentrer sur ces aspects, en

[40] Le terme « virtuel » signifie « à distance » et comprend les comparutions par internet ou par téléphone. Il comprend les scénarios où certaines personnes comparaissent de la salle de cour alors que d'autres comparaissent à distance.

renvoyant les réflexions sur d'autres dimensions de l'accès à la justice à des travaux ultérieurs qui seront sans doute plus faciles à réaliser lorsque les démarches pour rencontrer des justiciables seront facilitées par la levée des mesures sanitaires.

La justice virtuelle dans les tribunaux

Alors que la transition rapide vers les audiences virtuelles au début de la pandémie était une stratégie d'adaptation à cette crise sans précédent, les technologies elles-mêmes ne sont pas nouvelles. Les comparutions par téléphone ou vidéo sont utilisées dans les tribunaux depuis des années au Canada et à l'étranger (Bailey, 2012 ; Dumoulin et Licoppe, 2015, 2016 ; Johnson et Wiggins, 2006 ; McKay, 2018). Au Canada, les technologies de vidéoconférence étaient par exemple utilisées pour les audiences sur le cautionnement, l'évaluation des compétences et les témoignages d'experts ou de témoins vulnérables (Bailey et al., 2013 ; BVGO, 2019 ; Webster, 2009). Quelques mois avant le début de la pandémie, le projet de loi C-75 a permis l'élargissement de son usage pour les comparutions de routine comme les ajournements ou même d'autres situations, comme une enquête sur cautionnement lorsque tous les participants étaient d'accord (Ministère de la Justice, 2019). De plus, depuis le début de la pandémie, les tribunaux ontariens ont intégré des règles plus flexibles pour les comparutions par un avocat sans le justiciable et pour l'utilisation des signatures électroniques (Cour de justice de l'Ontario, 2021).

Avant la pandémie, une justification importante de l'utilisation de ces technologies audiovisuelles dans les tribunaux était la réduction des délais, des coûts pour l'État et des coûts financiers et émotionnels pour le justiciable (Dumoulin et Licoppe, 2015 ; McKay, 2018 ; Ministère de la Justice, 2019; Rossner, Tait et McCurdy, 2021 ; Vermeys, 2013).

Ces technologies semblaient particulièrement utiles pour faciliter l'accès au tribunal des populations rurales ou incarcérées, pour qui la présence physique dans ces lieux est plus compliquée (Bailey et al., 2013 ; Capp, 2021; SSCLCA, 2017; Vermeys, 2013). Bien qu'on reconnaisse les coûts évités et le temps gagné par la non-nécessité de se déplacer pour les comparutions ou pour obtenir des services juridiques, l'indisponibilité des services internet dans

ces milieux a été identifiée comme un obstacle important dans l'amélioration de l'accès à la justice (Capp, 2021 ; Matyas, Wills et Dewitt, 2022; Puddister et Small, 2021 ; Vermeys, 2013).

Les publications traitant des relations entre technologies audiovisuelles et accès à la justice sont beaucoup plus fréquentes que les analyses empiriques sur le sujet. Néanmoins, quelques-unes soulignent le regard positif que portent les détenus sur ces comparutions virtuelles, car celles-ci leur évitent le transport inconfortable jusqu'au tribunal, ce qui est d'autant plus important pour ceux qui proviennent des prisons plus éloignées. Ces comparutions leur épargnent également les fouilles (parfois à nues) réalisées lors de leur retour en prison (McKay, 2018).

Certains auteurs se sont attardés sur les inconvénients des audiences virtuelles (Gras et du Marais, 2013 ; McKay, 2018 ; Vermeys, 2013 ; Webster, 2009), en montrant que les procédures judiciaires virtuelles n'accélèrent pas toujours la justice (Gras et du Marais, 2013) et qu'elles peuvent même mener plus fréquemment à des ajournements, ce qui allonge le délai de traitement des affaires et la période passée en détention provisoire (Webster, 2009). Ils ont expliqué que des problèmes de technologies causaient aussi des retards supplémentaires (Gibbs, 2017 ; McKay, 2018).

Des chercheurs ont également documenté les préoccupations des juges, des avocats et des détenus, qui soulignent que la participation active des justiciables aux audiences virtuelles est gravement compromise, en ce sens qu'il est plus difficile d'intervenir ou de communiquer avec leurs avocats (Gibbs, 2017 ; McKay, 2018). McKay (2018) évoque les sons et bruits provenant des prisons, qui rendent la compréhension des procédures difficile pour les acteurs judiciaires et les justiciables.

On peut conclure des quelques recherches existantes que l'utilisation des technologies virtuelles peut faciliter l'accès aux tribunaux, mais qu'il existe aussi des difficultés potentielles pour les personnes en détention provisoire ou dans les régions rurales. Bien qu'intéressantes, ces conclusions empiriques demeurent limitées et difficilement généralisables au contexte de pandémie, qui modifie nécessairement la manière dont ces technologies sont utilisées (de

manière massive plutôt que progressive) et reçues par la communauté juridique (vu la nécessité de continuer à gérer les dossiers à distance).

Problématique

Au Canada, vers la fin mars 2020, la pandémie a forcé la fermeture des tribunaux en raison des risques liés aux rassemblements et aux contacts avec d'autres personnes. Ceci a nécessité l'ajournement des procès d'autres procédures. Après quelques semaines, les tribunaux ont repris leur activité mais de manière virtuelle, soit par téléphone ou par vidéo. Deux ans plus tard, la présence physique dans les tribunaux était toujours déconseillée. Par conséquent, l'utilisation de ces technologies est devenue inévitable et une des seules façons d'assurer la continuité des opérations essentielles des tribunaux (Puddister et Small, 2021).

En raison des ajournements et de l'utilisation presque exclusive des audiences virtuelles durant la pandémie, certains postulent que cette transition vers la justice en mode virtuel pourrait limiter l'accès à la justice (Capp, 2021 ; Matyas et al., 2022). Spécifiquement, ces chercheurs, entre autres groupes civils, dénoncent la fermeture des palais de justice à travers le pays et l'annulation des procès pendant une période indéterminée (Bertrand et al., 2021 ; Haigh et Preston, 2020). Or, les acteurs judiciaires reconnaissent dans le même temps que cette transition obligatoire a permis de moderniser la justice à un rythme qui n'aurait pas été possible sans cette crise (McLachlin, 2021).

Cet article vise à documenter comment l'utilisation de la justice virtuelle a pesé sur l'accès au tribunal et à des services juridiques durant la pandémie COVID-19. Il s'intéresse aux effets de la pandémie sur les tribunaux criminels canadiens ainsi qu'à la manière dont les tribunaux ont pu répondre et s'adapter aux défis posés par cette crise sanitaire. Plus précisément, il cherche à mettre en évidence les impacts différentiels de la justice virtuelle sur l'accès au tribunal et à un avocat.

Méthodes

Cet article repose sur un terrain ethnographique des tribunaux criminels ontariens durant la pandémie COVID-19. Il s'insère dans un projet plus large qui a pour but de comprendre les

adaptations des tribunaux criminels à la pandémie COVID-19. Entre janvier et octobre 2021, l'auteur principal a entrepris 125 jours d'observation virtuelle[41] dans neuf tribunaux criminels (7 tribunaux principaux et 2 tribunaux satellites[42]). Spécifiquement, les salles dédiées à la détermination de la peine, les enquêtes sur cautionnement et les salles à volume[43] ont été observées. Selon Statistiques Canada, la taille des communautés au sein desquelles nous avons procédé à nos observations peut être décrite comme petite (6), moyenne (1) et grande urbaine (1)[44]. Cinq tribunaux se trouvent dans des régions rurales ou lointaines, trois autres dans des zones plus urbaines[45].

En plus de ces observations, nous avons aussi procédé à 16 entrevues avec des acteurs clés tels que des avocats de la défense (9), des juges (6), des juges en chef des tribunaux de l'Ontario (1)[46]. Plusieurs conversations informelles avec ces mêmes acteurs judiciaires, des employés de soutien, et des intervenants communautaires (services d'aide aux victimes, programmes de déjudiciairisation, etc.) ont permis d'échanger sur ces observations et approfondir certains enjeux élaborés lors des entrevues, mais que certains participants ne voulaient pas enregistrer.

Trente articles publiés par des acteurs judiciaires, qui détaillaient leurs expériences avec ce nouvel environnement virtuel, ont également été consultés et seront utilisés dans le présent article pour soutenir les conclusions découlant des entretiens et des observations menées.

Les entrevues ont été retranscrites et analysées par un processus de codage ouvert qui sert à identifier les tendances initiales qui ressortent des représentations des participants. À la suite de

---

[41] La période d'observation s'est déroulée exclusivement de façon virtuelle et pendant la pandémie. Bien qu'il soit impossible de départager les effets du passage en mode virtuel des effets de la pandémie, les conséquences de l'utilisation quasi exclusive de ces technologies sont comprises comme des effets de la pandémie elle-même.

[42] Un tribunal satellite dessert généralement une région éloignée ou peu peuplée. Habituellement, le tribunal ne siège que quelques fois par mois. Ils sont attachés à et administrés par un tribunal principal qui se retrouve dans une région plus peuplée.

[43] Ces salles se nomment ainsi puisqu'elles gèrent une quantité énorme de dossiers quotidiennement. Habituellement, on y traite les comparutions « *pro forma* » ou celles qui sont réglées très rapidement.

[44]Consultez le site web https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hlt-fst/pd-pl/Table.cfm?Lang=Eng&T=801&S=47&O=A

[45] La Cour d'Appel de l'Ontario ne figure pas dans ces derniers chiffres puisque bien qu'elle se situe physiquement à Toronto, elle a juridiction sur l'ensemble du territoire ontarien, ce qui rend impossible de parler de la taille de la communauté ou de son niveau d'urbanisme.

[46] Cette entrevue en groupe a été menée par l'Association du Barreau de l'Ontario. Largement, elle a abordé les sujets couverts par les entrevues menées par l'auteur.

cette étape initiale, un codage ciblé (Emerson et al., 2011) a servi à identifier les passages concernant la justice en mode virtuel et les représentations des participants sur ce sujet. Un processus similaire a été utilisé pour les notes de terrain de l'auteur (environ 400 pages): un codage initial suivi par un codage ciblé qui visait à comparer les pratiques de justice en mode virtuel. Les extraits d'entrevues ou des notes d'observations présentés ci-dessous ont été choisis pour leur représentativité des données.

Il est important de souligner que nous n'avons pas interagi directement avec les justiciables. Par conséquent, il est impossible de décrire leurs représentations et leurs vécus de la situation, à moins qu'ils ne se soient exprimés ouvertement à ce sujet lors de leur comparution devant le tribunal, ce qui n'est pas arrivé très souvent. Pour cette raison, l'article se limite à la conception d'origine du terme d'accès à la justice et réfère donc à l'accès au tribunal et à un avocat, principalement du point de vue des acteurs judiciaires. De plus, la collecte de donnée s'est faite entre juillet 2020 et septembre 2021, incorporant les expériences de la première, deuxième et troisième vague de la pandémie. Les expériences des vagues subséquentes ne sont pas considérées.

Résultats

L'accès aux tribunaux a été influencé de nombreuses manières par le passage aux technologies audiovisuelles (AV) telles que Zoom,[47] *Justice Video Network* (JVN)[48] ou l'audioconférence. Certains impacts sur l'expérience de la justice étaient généralisés, en ce sens qu'ils n'étaient pas propres à certaines régions ou populations. À l'inverse, d'autres conséquences ont été plus importantes pour certaines populations. Trois groupes se sont démarqués comme ayant des expériences singulières pendant la pandémie de COVID-19 : les justiciables (1) ruraux, (2) qui se représentent seuls et (3) incarcérés. Cette section mettra donc en évidence les répercussions de la justice virtuelle dans un sens plus général avant d'aborder ces trois populations spécifiques.

[47] Zoom est un logiciel de vidéoconférence permettant aux personnes de se réunir par internet ou par téléphone via une application. Les personnes peuvent participer à la rencontre avec ou sans caméra.
[48] JVN est un logiciel de vidéoconférence permettant aux personnes de se réunir par internet ou par téléphone via un navigateur internet. Les personnes peuvent assister à la rencontre avec ou sans caméra.

L’accès facilité aux tribunaux durant la pandémie

L’effet le plus évident de la transition vers les technologies audiovisuelles sur l'accès à la justice était tout simplement la possibilité pour les personnes de comparaître devant le tribunal, que ce soit par vidéo ou audio, malgré la fermeture quasi complète des palais de justice. En effet, contrairement à l’époque antérieure à la pandémie, la grande majorité des comparutions se déroulaient désormais à distance[49]. Les justiciables, les garants, ainsi que les acteurs judicaires ont pu comparaître de l’endroit où ils se trouvaient. Chaque jour d'observation, dans chaque palais de justice observé, des justiciables comparaissaient de leur domicile, de leur lieu de travail ou encore de leur voiture. Ainsi les tribunaux ont pu s'adapter pour garantir l'accès à la justice et aux tribunaux, au moins dans une certaine mesure[50].

L’exemple suivant a été fréquemment observé dans de nombreux palais de justice, avec de légères variations. L'accusée avait récemment trouvé un nouvel emploi après l'avoir perdu au début de la pandémie. Elle s'était organisée pour comparaître via Zoom pendant sa pause de midi. Cependant, le tribunal n'a pas pu traiter son dossier avant la fin de sa pause. Le tribunal a alors décidé de la rappeler à la fin de son quart de travail qui s'est terminé à 16 h. Cet exemple montre une mesure d'accommodement pour l'accusée qui n'était pas aussi courante avant la pandémie. Si l’accusée avait été forcée de se présenter en personne au tribunal, elle aurait nécessairement perdu une journée de revenu et aurait pu être forcée de divulguer son implication dans une affaire pénale à ses employeurs.

Ainsi, les technologies audiovisuelles ont permis la poursuite des opérations du système pénal, et aussi un accès moins coûteux pour les justiciables. En effet, non seulement l’attente au tribunal est considérablement moins longue puisqu’ils ne doivent plus attendre dans une salle d’audience toute la journée, mais le temps de déplacement pour se rendre au tribunal est aussi

[49] Il est difficile d’estimer le nombre de personnes qui comparaissaient en présentiel étant donné l’aspect virtuel de la collecte de données, mais les participants suggèrent que les comparutions en présentiel étaient exceptionnelles.
[50] Comme beaucoup l'ont mentionné, l'accès aux tribunaux virtuels dépend de facteurs tels qu'un accès internet ou téléphonique suffisant, et, plus fondamentalement, les fonds nécessaires pour payer ces services (Bailey et al., 2013). Bien qu'il s'agisse d'une question importante, il serait imprudent d'approfondir ce sujet sans interagir directement avec les justiciables eux-mêmes.

évité. Les tribunaux se sont ainsi rapprochés des personnes qui pourraient autrement rencontrer des difficultés à comparaître.

Bien que les acteurs judiciaires et les justiciables ne se présentaient presque plus dans les palais de justice ontariens, les observations révèlent que le processus judiciaire ne semblait pas si différent de celui avant la pandémie. En entrevue, de nombreux juges et avocats de la défense ont souligné positivement la relative normalité de la pratique du droit dans cet environnement virtuel. De plus, ils envisageaient positivement l'option de conserver ce mode de comparution une fois la possibilité de retourner au présentiel, même s'ils hésitaient à continuer à les utiliser pour des dossiers complexes qui, selon eux, nécessitent une présence physique au tribunal. À noter que cet enthousiasme était réservé principalement au logiciel Zoom. Un avocat de la défense a décrit son expérience avec le logiciel ainsi :

> *So, [Zoom] took some getting used to. At the end of the day, I did have some clients who did breach [conditions] and it felt seamless. It felt seamless in the sense that when I appeared by Zoom, though it was not in a courthouse, everything was observed as it normally would be. The allegations were read in the same manner, whose onus…*(D3)

Comme cet avocat, nous avons souvent constaté durant les observations la nature «*seamlesss*» ou fluide des affaires entendues virtuellement. Le processus virtuel n'était pas réellement différent de ce qui se passe lorsque tous sont physiquement présents au tribunal. De plus, ce sentiment de normalité s'est accru avec le temps. Alors que ces observations ont commencé autour de la deuxième vague de la pandémie et se sont poursuivies tout au long de la troisième vague en Ontario, il était clair que les acteurs judiciaires étaient beaucoup plus prêts à s'adapter aux changements dans les façons de faire dans le système pénal. Par exemple, entre avril et mai 2021, les tribunaux ont à nouveau annulé les procès en personne et les enquêtes préliminaires, comme au printemps 2020. Plusieurs juges et avocats de la défense ont expliqué que, ayant déjà vécu cela dans le passé, ils ont pu passer à un environnement virtuel assez facilement. Selon eux, avec l'infrastructure en place et grâce à leur expérience antérieure, les perturbations étaient minimisées.

Cependant, cette « fluidité » ne caractérise pas nécessairement les procès qui ont été menés pendant la pandémie. Sur les sept procès ou affaires similaires à des procès observés (par exemple, les enquêtes préliminaires, les requêtes), ceux qui se déroulaient de manière hybride (certains personnes présentes physiquement, d'autres comparaissant virtuellement) semblaient plus décousus. Souvent, l'audio du tribunal était mal capté par les microphones, ce qui rendait difficile pour les participants virtuels d'entendre ce qui se passait dans la salle. Ceci a suscité des répétitions, ralentissant les procédures. À l'inverse, les procès menés exclusivement en ligne semblaient se dérouler relativement sans heurts en termes d'accès à la justice.

L'accès mitigé aux tribunaux pour les populations défavorisées

Bien que l'accès aux tribunaux par le biais des technologies audiovisuelles soit généralement utile pour certaines populations, les données d'observations et les entrevues dévoilent que pour d'autres, ce n'était pas le cas. Pour les justiciables ruraux, ceux qui se représentaient seuls sans la présence d'un avocat ou ceux qui étaient incarcérés, l'accès était souvent plus compliqué. Cependant, alors que les technologies audiovisuelles pouvaient parfois entraver cet accès, leur utilisation leur apportait parfois des innovations utiles ou des avantages singuliers.

Justiciables en Secteur Rural

Bien que l'opportunité de ne pas avoir à se déplacer au tribunal soit souvent avantageux pour tous les justiciables, ce fut particulièrement le cas pour les justiciables dans les régions rurales ou éloignées. Lors des observations, plusieurs personnes des Premières Nations ont pu comparaître par téléphone pour recevoir leur peine sans avoir à se rendre au palais de justice par avion ou par voie terrestre[51]. Bref, ces personnes ont bénéficié de réductions notables du temps passé à se rendre dans les palais de justice et à en revenir lorsqu'ils comparaissaient virtuellement, ce qui dépasse ce que les justiciables des juridictions urbaines avaient pu économiser.

[51] Cela prend une plus grande importance pendant la pandémie, puisque les vaccins n'étaient pas encore largement disponibles avant la fin du printemps 2021, rendant les transports en commun potentiellement dangereux pour certaines personnes.

Grâce à l'utilisation accrue des technologies audiovisuelles, les résidents ruraux ont également pu bénéficier d'un meilleur accès aux avocats. En effet, cinq des sept avocats de la défense interrogés ont discuté de la façon dont ils prennent maintenant des affaires qu'ils ne prenaient pas auparavant. Ils sont plus disposés à prendre des dossiers en dehors de leur territoire traditionnel, puisqu'ils peuvent se présenter en personne sur une base occasionnelle, plutôt que pour chaque comparution, aussi futile soit-elle: « *But now…I can be more liberal in cases that I've taken in other jurisdictions knowing that an awful lot of the work that I can do I don't have to physically go there. The only time I'm probably going to have to go there, in other jurisdictions, physically, is for the trial* » (D5). Les observations confirment qu'il semblait s'agir d'une pratique courante chez plusieurs avocats, puisque nous avons fréquemment observé des avocats qui comparaissaient dans des tribunaux à plusieurs heures de route de leur bureau. De cette façon, les justiciables bénéficient d'un plus grand bassin d'avocats.

Cette transition en mode virtuel a également généré des complications qui pourraient compromettre l'accès aux tribunaux. Par exemple, plusieurs acteurs judiciaires ont souligné que l'utilisation des technologies audiovisuelles a rendu la réouverture des tribunaux ruraux, régionaux ou satellites moins prioritaire que celle des tribunaux plus grands et en milieu urbain. En effet, à l'été 2020, le Secrétariat de la Reprise des Activités a déclaré que ces tribunaux ne faisaient pas partie de la réouverture initiale des tribunaux de l'Ontario en raison des ressources limitées (Ministère du Procureur Général, 2020). Lors des observations, bon nombre de ces tribunaux étaient encore fermés physiquement, bien que leurs affaires aient été entendues virtuellement par des tribunaux principaux, loin d'où les justiciables se trouvaient. Deux juges ont exprimé leur inquiétude quant au fait que les tribunaux satellites qu'ils administraient pourraient ne pas réouvrir une fois la pandémie terminée.

Des enjeux liés à l'impossibilité de comparaître physiquement ont été notés lors de toutes les observations dans les tribunaux satellites. Certains justiciables voulaient un procès en personne, mais cela ne pouvait pas se produire dans le tribunal satellite desservant leur communauté. S'il souhaitait un procès en personne, l'individu devait voyager plusieurs heures pour se rendre au tribunal principal ouvert le plus proche. À ce titre, leurs affaires étaient

ajournées indéfiniment jusqu'à ce que le tribunal puisse réouvrir. Un juge en visite apprenant cette situation s'est exclamé avec exaspération « *What kind of court refuses to do trials? »,* ce à quoi la Couronne a expliqué docilement que des options virtuelles avaient été proposées. Dans cette situation, les justiciables ne pouvaient pas accéder à leur tribunal local pour traiter leurs affaires juridiques et étaient obligés de choisir entre un procès virtuel ou un trajet long et coûteux.

Plusieurs juges et avocats ayant travaillé virtuellement dans les tribunaux ruraux ont également déploré l'instabilité ou l'insuffisance des connexions internet qui ont interrompu les audiences. Un juge explique notamment comment plusieurs audiences virtuelles ont été interrompues parce que « *the [courthouse] bandwidth was exceeded…So short answer, we just don't have the infrastructure* » (J3). Cet enjeu a été soulevé lors des discussions avec plusieurs participants travaillant en régions rurales et par la juge en chef Maisonneuve de la Cour de Justice de l'Ontario qui a reconnue dans une entrevue avec l'Association du Barreau de l'Ontario (ABO) que « *In some remote areas the internet is spotty, [such as] our fly-in courts, where we deal with many indigenous individuals. The internet is not as easily accessible as it is here, either in Toronto, or…in Ottawa. So, I think we have to be very careful that access to justice be met* » (ABO, 2021).

Ainsi, non seulement il est impératif pour les justiciables d'avoir un accès internet ou une couverture cellulaire suffisante pour se connecter aux tribunaux, mais ceux-ci et leurs acteurs doivent également disposer d'une infrastructure capable d'héberger ces technologies. Bien que ce besoin existe partout où ces technologies sont utilisées, ces problèmes étaient plus rarement discutés ou observés dans les juridictions plus grandes ou urbaines, où l'accès à internet est traditionnellement meilleur, comme l'a mentionné la juge en chef.

Justiciables qui se Représentent Seuls

La transition vers les technologies audiovisuelles a également eu des impacts singuliers sur les justiciables qui se représentent seuls, sans l'assistance d'un avocat. Plusieurs acteurs judiciaires qui travaillaient en région éloignée ont expliqué que leurs tribunaux ne disposaient

toujours pas d'infrastructure vidéo, plus d'un an après le début de la pandémie. Leurs affaires se déroulaient ainsi uniquement par audioconférence. Or, ils ne voulaient pas que les justiciables sans avocat comparaissent par audioconférence parce qu'ils craignaient que ces justiciables comprennent mal ce qui se passe lors des audiences[52]. Cependant, ils ne pouvaient se présenter ni au tribunal principal en raison des consignes de santé, ni au tribunal satellite en raison de sa fermeture. Alors, un juge admet que *« Self-reps were a totally different situation and that's the one area that we are lagging behind…They have to some degree been left behind* » (J3).

Par conséquent, sans la possibilité de procéder par vidéo dans ces régions plus rurales, il n'était pas possible pour ces justiciables qui se représentent seuls de conclure leurs dossiers. Ainsi, leur accès aux tribunaux était clairement compromis. Reconnaissant ce problème, ces acteurs judiciaires ont expliqué qu'ils essayaient de se procurer l'infrastructure nécessaire pour faciliter les comparutions par vidéo.

Si ce premier problème ne s'applique qu'à une minorité de justiciables en Ontario, un autre problème pour ceux qui ne sont pas accompagnés par un avocat est beaucoup plus fréquent. Toute au long de notre enquête, nous avons observé des accusés non représentés qui comparaissaient virtuellement pour expliquer les difficultés qu'ils éprouvaient à obtenir la divulgation de la preuve du procureur de la Couronne. Au début de la pandémie, très peu de personnes travaillaient dans les bureaux et la communication de la preuve a été déplacée vers un système en ligne, accessible à distance. Plusieurs avocats de la défense l'ont qualifié de compliqué, un sentiment partagé par les personnes qui n'étaient pas représentées par un avocat à qui le juge demandait, lors de leur comparution, des mises à jour sur l'avancement du dossier. Incapables d'obtenir la divulgation physique au palais de justice, les justiciables non-représentés ont été obligés de naviguer seuls avec la difficulté supplémentaire de le faire avec ce nouvel outil de l'ère pandémique.

Un exemple, tiré des notes d'observation, exemplifie cette difficulté. Un justiciable rural qui comparaissait par téléphone sans avocat a expliqué au juge qu'il avait demandé la

[52] Il est à noter que cette interdiction de se présenter par audioconférence s'appliquait seulement si le but de la comparution était de conclure le dossier (par exemple une audience de détermination de la peine).

communication des pièces du dossier à trois reprises, parce qu'il n'avait ni adresse courriel ni accès à internet. La Couronne a alors expliqué que personne ne travaillait physiquement dans le bureau de la Couronne, et donc que le dossier physique n'avait pas encore été compilé et envoyé par la poste. Ainsi, sans avocat ayant l'expérience de ce système de divulgation, ce justiciable a vu son dossier ajourné une quatrième fois.

Justiciables Incarcérés

Les justiciables incarcérés constituent probablement le groupe touché de manière la plus préoccupante, mais pourtant la plus courante. Leur accès virtuel aux tribunaux a été affecté par l'infrastructure souvent insuffisante au sein des prisons. Même lorsque celle-ci ne posait pas problème, l'administration pénitentiaire était rarement capable d'assurer des comparutions ininterrompues au tribunal.

Un exemple issu des notes d'observations montre que l'accès aux tribunaux est affecté négativement par la disponibilité à la fois des technologies audiovisuelles et des ressources humaines pour les gérer durant la pandémie. L'observation concerne une audience d'enquête sur cautionnement par Zoom, que nous attendions déjà depuis 15 minutes lorsque le juge s'est questionné à haute voix quant à l'arrivée des justiciables en provenance de la prison. Les notes de terrains restituent les moments qui suivent :

> The clerk explains that the jail is currently connected to [another courthouse] and [another] courtroom also requires the video feed. Thus, they cannot connect to our courtroom. The court clerk emailed the institution to ask if they could bring a cellphone to the accused. The institution informed him that they do not have enough officers to bring forth the accused nor to bring them a cellphone…. The Justice of the Peace [JP] states he doesn't know how to continue today and that we must adjourn the matter until tomorrow. He states further that this is a systemic issue we cannot deal with today. Unfortunately, the Crown replies that to do so they will have to arrange this with the trial coordinator, and there may not even be a slot for tomorrow for a contested bail hearing. After a few minutes of waiting, the clerk receives a response from the trial coordinator stating that they *may* be able to accommodate the hearing tomorrow. The JP addresses counsel and states in extreme resignation, « *it is a ridiculous way to do this but perhaps the only way to do this* ».

> The Defence goes to speak but she is on mute. She then unmutes herself and says, « *Perhaps it is good I was on mute»*. She looks down at the desk, runs her hands through her hair and is visibly upset. She explains that she appreciates there are issues in jails but that her client has been incarcerated for over 100 days awaiting trial. She exclaims that « *This entire bail system is being held hostage by the resources allocated by the Ministry [of the Solicitor General]. It defies credulity ».* The JP agrees and says that « *This is a travesty. Part of the problem is that we were not prepared for this pandemic. We should have been. Everything we are doing is on the fly ».*

Cet extrait illustre bien le rapport complexe entre la disponibilité des technologies virtuelles, la disponibilité des ressources humaines et l'accès à la justice. En raison d'un manque de connexions vidéo, couplé au manque de personnel dans l'institution (lui-même affecté par l'isolement d'employés suite à une exposition au virus), le justiciable s'est retrouvé incarcéré au moins une journée supplémentaire, dans des conditions particulièrement difficiles, sans pouvoir parler à son avocat ni se présenter devant le tribunal[53].

Plusieurs acteurs judiciaires ont dénoncé le manque de ressources technologiques et logistiques des prisons, ce qui entrave l'accès à la justice : « *[jails] are ill-equipped…very few have the video capability* » (J1) ou encore « *They've got hundreds of inmates and they've got one phone. Oh that's good!* » (J4). Pour remédier à cette situation, plusieurs prisons ont accordé des blocs de temps (limités) à chaque tribunal qu'ils desservaient. Néanmoins, un avocat de la défense a décrit ses propres expériences avec les prisons ontariennes dans la revue *Canadian Lawyer* en racontant l'audience d'un client qui comparaissait 14 mois après le début de la pandémie:

> On the day of the [bail] hearing, the jail called into the courtroom and put my client on the phone. They were 30 minutes late. And although no one could see him, my client stood by the phone and listened to the evidence. And just as I was about to submit why he should be released, a nameless guard picked up the phone and told the court that our time was up. The jail only had one phone line, or they were short-staffed and could not accommodate my client on the phone. The guard gave both excuses (Spratt, 2021).

[53] En réalité, la justiciable s'est retrouvée incarcérée au moins une autre semaine avec l'ajournement qui s'est produit le lendemain (un jeudi matin). Cependant, l'auteur principal n'a pas été en mesure de suivre le cheminement de ce cas.

Similairement, un juge a utilisé l'expression « *it is the tail wagging the dog* » (J5) pour expliquer que ce sont bien souvent les prisons qui contrôlent le fonctionnement des tribunaux. Dans une tentative de se débrouiller avec cette nouvelle situation, une participante a raconté qu'elle appelait chaque matin tous les tribunaux avoisinants dans l'espoir qu'ils puissent lui « donner » leur bloc de temps s'ils n'en avaient pas besoin. Les résultats de cette démarche étaient mitigés, mais elle a mentionné qu'elle a pu gérer plus de dossiers grâce à ce temps additionnel, libérant davantage de justiciables incarcérés des institutions affectées par la COVID-19.

Deux institutions avaient nommé des agents correctionnels spécifiquement dédiés à la gestion des comparutions virtuelles. Ils organisaient les comparutions et s'assuraient que les justiciables étaient amenés devant le tribunal au bon moment. Lors des observations impliquant ces institutions, les justiciables n'ont jamais manqué une comparution, même en présence d'éclosions de COVID-19 dans l'institution, sauf lorsque l'accusé y consentait et que son avocat était présent. Des acteurs judiciaires ont raconté en entrevue que ces institutions étaient parfois restées connectées au tribunal jusqu'à 19 h pour assurer la comparution des détenus. Un avocat a expliqué que *« as a result [*of this change*], things became much more functional and efficient than they were beforehand* » (D1).

Un autre problème important limite l'accès virtuel aux tribunaux des justiciables incarcérés : le bruit en détention, souvent assourdissant et qui rendait la compréhension difficile, voire impossible. Un avocat de la défense explique en détail une expérience habituelle, vécue lors de plusieurs de nos observations :

> *Il y a beaucoup de bruits en arrière jusqu'à un point où on doit demander à l'accusé de mettre le téléphone…sur mute pour couper le bruit…On a de la misère à se comprendre il y a de l'interférence sur les lignes, entre autres, c'est arrivé régulièrement…On devait dire au juge de paix* « écoutez, on peux-tu procéder? Parce que moi je suis incapable d'entendre ou presque telle ou telle personne » … *Puis il y a eu très peu d'amélioration là-dessus, pis on parle d'un an plus tard* (D2).

La solution la plus commune, observée à plusieurs reprises lors des comparutions, était pour le/la greffier(ière) de couper le microphone de la prison. Dans certaines prisons, les prévenus avaient la capacité de le réactiver; cependant la majorité ne pouvait pas le faire et dépendait de l'agent correctionnel pour réactiver le microphone. Souvent, ce dernier partait lors des procédures et le

justiciable se retrouvait donc incapable de parler, d'intervenir, ou de répondre avant que l'agent revienne. Par conséquent, la cour a fréquemment dû attendre plusieurs minutes le retour de l'agent pour que le détenu puisse répondre par un simple « oui » ou « non ». De plus, avec les sons provenant de la détention, les individus observés devaient régulièrement répéter, attendre, ou même ajourner les procédures.

Un dernier enjeu empêchait l'accès des justiciables à leurs avocats. Avec le système JVN, souvent utilisé en milieu pénitentiaire, il n'était pas possible de créer des conversations privées entre les avocats et leurs clients. À deux occasions, des discussions confidentielles qui se déroulaient à l'écran suite à la déconnexion des autres acteurs judiciaires ont été observées. Dans une autre situation, l'avocat de la défense a demandé à l'auteur principal de se déconnecter de la réunion pour lui donner l'occasion de parler avec son client incarcéré. A une quatrième occasion, l'avocate a ajourné le dossier au lendemain par peur que quelqu'un se joigne à la réunion JVN lorsqu'elle discutait avec son client[54]. Ces exemples révèlent que les technologies peuvent engendrer des délais supplémentaires dans le traitement des dossiers criminels, qui sont déjà un problème sérieux au Canada (CSPAJC, 2017 ; Haigh et Preston, 2020). D'ailleurs, ils dévoilent que l'entretien de la confidentialité des justiciables peut être minée en raison des défaillances technologiques du logiciel utilisé. Ceci est d'autant plus préoccupant du fait de la difficulté accrue des justiciables incarcérés à échanger avec leurs avocats même avant la pandémie.

Que cela soit en raison de la demande accrue pour ces technologies, des nouvelles exigences sanitaires au sein de la prison, ou du personnel en congé de maladie lors de la pandémie, les détenus ont vu leur accès aux tribunaux restreint avec l'utilisation des technologies AV dans les prisons. Les difficultés en prison rendent non seulement impossibles certaines comparutions, mais elles compliquent aussi le déroulement de celles qui ont lieu. Toutes ces difficultés contribuent à allonger les délais de jugement, une conséquence très importante pour cette population dont l'incarcération se voit prolongée.

[54] Contrairement à Zoom, les greffiers ou d'autre personnel de soutien ne contrôlent pas l'entrée des personnes aux réunions.

À bien des égards, ces résultats confirment les résultats d'autres recherches sur les effets que les tribunaux virtuels peuvent avoir sur l'accès à la justice. En effet, malgré le potentiel des technologies audiovisuelles pour faciliter l'accès à la justice des résidents ruraux, dans certains cas, cet accès était entravé lorsqu'ils ne disposaient pas d'une connexion internet suffisamment fiable (Bailey et al., 2013 ; CEPEJ, 2016 ; Vermeys, 2013). De plus, comme d'autres l'ont suggéré, cette recherche confirme que les comparutions virtuelles peuvent réduire la capacité de l'accusé à interagir avec le tribunal en raison du bruit en prison ou en raison des limites de ces technologiques, retardant les procédures (Gibbs, 2017; McKay, 2018 ; Webster, 2009).

Cependant, ces résultats diffèrent sur certains points de ce qui a été discuté précédemment. Alors que Bailey, Burkell et Reynolds (2013) suggèrent que les justiciables non-représentés pourraient bénéficier de cet environnement virtuel, cette recherche montre plutôt les grandes difficultés qu'ils rencontraient sur le plan de l'accès au dossier, la divulgation de la preuve, et les nouvelles technologies associées. De plus, l'impossibilité de comparaître pour les justiciables incarcérés semble être un nouvel enjeu au Canada.

Discussion

Les résultats présentés montrent que le déploiement des technologies virtuelles ont non seulement permis de maintenir un accès au tribunal et aux services d'un avocat, mais qu'ils ont également favorisé ou au contraire limité ces accès dans certaines circonstances particulières. Si la présentation portait jusqu'ici essentiellement sur l'effet des technologies sur l'accès à la justice, il est également intéressant de réfléchir aux façons dont la pandémie module cette relation.

Ce contexte spécifique dévoile deux tendances concernant les réponses des acteurs judiciaires face à cette nouvelle réalité pandémique. D'abord, une faible résistance. En temps « normal », les impositions de « haut en bas » comme les politiques gouvernementales sont souvent contournées dans le système suite à la résistance des acteurs clés sur le terrain (Garland, 2018 ; Goodman, Page et Phelps, 2017 ; Landreville, 2007). Or, dans le contexte pandémique, nous observons peu de résistance de leur part. Un participant exprime que les réticences

exprimées précédemment vis-à-vis de la technologie se sont avérées beaucoup moins importantes dans le contexte de cette crise :

> I wonder why these [technologies] weren't in place the last *at least,* 10 years…[W]hy has our system been so slow to adapt technology wise? …Why have we allowed old attitudes and, a "can't-do" attitude to hold us back for this long? … It's just very…unfortunate that it took a pandemic to bring the system up to where it already should've been (J6).

Dans les entrevues, les avocats et les juges ont tous mentionnés leur volonté de continuer à utiliser les technologies, même lorsque les comparutions virtuelles ne seront plus strictement nécessaires.

Deuxièmement, les participants ont démontré un niveau d'implication et de coopération important, ce qui a facilité dans plusieurs circonstances l'accès au tribunal. Nous avons pu observer que l'implication active de la communauté judiciaire ou pénitentiaire joue un rôle important dans le succès de l'implantation de ces technologies et peut avoir en conséquence un impact direct sur l'accès à la justice. Contrairement à Dumoulin et Licoppe (2015), qui ont observé de fortes résistances de la part des avocats face au déploiement de la visioconférence, les données dévoilent des efforts explicites de la part des juges et des avocats pour assurer le bon déroulement des audiences virtuelles. En effet, plusieurs avocats de la défense ont souligné positivement la désignation d'un agent correctionnel dans la prison pour organiser les comparutions virtuelles, garantissant que les audiences procédaient, et évitant ainsi des reports et des délais. Certains avocats travaillaient jusqu'à 19 h pour libérer les prévenus. Similairement, lorsqu'un juge prenait de nouvelles responsabilités en se chargeant d'appeler différents tribunaux chaque matin pour profiter de disponibilité de dernière minute, elle favorisait l'accès au tribunal à un plus grand nombre de détenus, qui pouvaient ainsi comparaître durant ces nouvelles plages horaires[55].

Cette plus grande acceptation des audiences virtuelles et cette plus grande implication ou mobilisation peuvent certainement s'expliquer en partie par le contexte pandémique. D'abord, ce

[55] L'importance des nouvelles tâches assumées par des acteurs judiciaires a également été soulignée par Dumoulin et Licoppe (2015), mais dans le contexte de droit civil avant la pandémie.

déploiement concernait la quasi-totalité des affaires criminelles et il a dû être mis en place très rapidement, réduisant le temps qui est souvent nécessaire pour que la résistance des acteurs prenne forme (Goodman et al., 2017), et augmentant les ajustements nécessaires aux changements opérés sans grande préparation. Ensuite, ce déploiement résulte d'une crise sans précédent, ce qui suppose de faire preuve de compromis et de flexibilité, de collaboration et de solidarité (Denis, 2002; Tierney, 2019). Finalement, le point le plus important est sans aucun doute qu'il s'est produit en réaction à une urgence, compromettant l'accès physique au tribunal. Sans audience virtuelle, la justice ne pouvait tout simplement pas être rendue (Matyas et al., 2022). Si les acteurs pouvaient normalement s'y opposer lorsqu'ils jugeaient préférable une audience en présentiel, avec la pandémie, un refus signifiait souvent un report d'audience. Pour cette raison, la résistance aux audiences virtuelles est beaucoup plus coûteuse pour les justiciables, qui voient leurs droits compromis.

Bien que l'implication positive de la communauté légale dans les transformations des pratiques judiciaires ait pu être influencée par le contexte pandémique, les observations montrent que de grands changements dans les pratiques du système pénal peuvent être faits relativement rapidement. Ceci est d'autant plus remarquable si l'on considère que les tribunaux sont traditionnellement lents à changer (Puddister et Small, 2021). Plusieurs remarquent que la pandémie a fait progresser le système de justice de près 20 ans technologiquement en l'espace de quelques mois (McLachlin, 2021). Ce déploiement sans précédent devrait alors servir d'exemple non seulement pour relancer des initiatives pour améliorer l'accès à la justice mais aussi pour réfléchir aux enjeux connexes à prendre en considération.

Les résultats de cette étude peuvent aussi servir à éclairer le chemin futur de la justice en mode virtuel, au-delà des nécessités imposées par la pandémie. D'abord, les résultats soulignent qu'un sous-financement des infrastructures technologiques a des conséquences importantes sur les populations les plus vulnérables, creusant d'autant plus les écarts dans l'accès à la justice. Il faut ainsi s'assurer, comme on le ferait dans un tribunal physique, que tous les personnes sont dans de bonnes conditions pour comparaître et discuter avec leur avocat. Dans ce contexte, il faut nécessairement considérer différentes dimensions de l'accès au tribunal et à l'avocat, soit l'accès : 1) à une connexion internet (ou un endroit ou comparaître virtuellement), 2) à une technologie

permettant des discussions confidentielles et, 3) à un environnement tranquille durant la comparution.

Sachant que les comparutions virtuelles deviendront peut-être la norme pour une majorité de comparutions de prévenus, une attention particulière devrait être portée pour leur permettre non seulement de choisir la façon dont ils se présentent devant le tribunal, mais aussi de parler avec leur avocat dans un contexte qui permette les échanges. Les comparutions laissent déjà peu de place aux justiciables. Si ces derniers ne maitrisent pas la technologie destinée à faire entendre leur voix, on peut imaginer son impact sur leur sentiment de justice et leur impression d'avoir été entendus.

Les comparutions en mode hybride semblent une avenue intéressante pour une multitude de raisons. D'abord, elles permettent au système de justice d'adapter la façon dont les procédures se déroulent à la complexité des dossiers. Tous les intervenants rencontrés s'accordent à penser que certains dossiers sont trop complexes pour être traités en mode virtuel. Ensuite, un approche hybride permet à chacun de choisir son mode de comparution, autorisant des avocats à représenter des justiciables en régions éloignés et des justiciables à ne pas endosser les coûts financiers et humains des déplacements. Or, les observations ont montré comment de nombreux problèmes technologiques compliquent ce type de rencontre, ralentissant le déroulement des procédures et surtout limitant la qualité des échanges. Avant de poursuivre dans cette voie, il est impératif de s'assurer que la technologie permet des échanges de qualité. Au fur et à mesure que les règles sanitaires s'assoupliront, il est à parier que le volume des comparutions en mode hybride augmentera et le système doit être prêt à le contrôler comme si les participants étaient ensemble physiquement.

Conclusion

En guise de conclusion, rappelons que la notion d'accès à la justice est beaucoup plus complexe que le seul accès au tribunal ou à un avocat. En effet, cette notion réfère notamment à l'accès à de l'information juridique de qualité, aux sentiments de justice et d'équité qui émanent de l'expérience des justiciables. Bien que la présente recherche conclue que la justice virtuelle

peut favoriser l'accès aux tribunaux, ce n'est pas une approbation sans limite pour faire avancer la justice dans un environnement virtuel. Non seulement, une décision en ce sens devrait s’assurer de régler les problèmes identifiés par la recherche, mais elle devrait aussi s’inspirer des études plus approfondies sur les expériences des justiciables confrontés aux nouvelles réalités de la justice virtuelle. Cette prise en compte est absolument nécessaire pour décider quand, où et comment la justice virtuelle devrait être régularisée dans le système judiciaire.

Chapter 3: Winning the Battle, Losing the War: Reducing the Backlog but Failing to Change the Culture in Ontario's Criminal Courts

In collaboration with Cheryl M. Webster
To be submitted to *Canadian Public Policy*

Abstract:
The criminal justice system in Ontario, like many other jurisdictions, strained under increasing court delay for many years. Despite various strategies, working groups, and commissions, delay in the resolution of case files has continued to increase its ever-upward trajectory. Further, the COVID-19 pandemic has exacerbated these stresses. Courts were forced to respond and deliver justice in the timeliest manner possible. In this work we use publicly available data from the Ontario Ministry of the Attorney General of Ontario alongside interview data to evaluate the evolution of case processing trends in Ontario criminal courts, with a particular emphasis on the more recent impacts of the COVID-19 pandemic in this regard. Through an examination of various indicators, we demonstrate that while courts were successful in reducing some of the backlog created by the COVID-19 pandemic, pre-existing trends in delay remain a great concern. We discuss how the pandemic may have represented a receding of the culture of complacency in Ontario's criminal courts, but that this culture has begun to re-emerge. We discuss what these trends in delay signify for the criminal justice system and future policy efforts.

Questions of court delay and case processing efficiency are frequently topics of concern among criminal justice professionals as well as criminal justice scholars. The time and myriad resources used to resolve criminal files can be extraordinary and demand extraordinary attention. Despite these concerns, it must be mentioned that justice cannot and should not be rushed. Cases require careful consideration and concern for efficiency should not be the deciding factor when dealing with a file. Yet, it should not be completely ignored either. Indeed, the adage "justice delayed is justice denied" is a strong one that Canadian courts have long espoused.

Not surprisingly, court delay has long attracted scholarly attention (Barr, 1997; Bridges, 1982; Dandurand, 2014; Department of Justice, 2006; Grimsdale, 2019; Levin, 1975; Neubauer, 1978). More recently the issue has been studied by the Senate of Canada which outlined serious concern over mounting delay and its impacts on litigants, the public and the criminal justice system (Standing Senate Committee on Legal and Constitutional Affairs [SSCLCA], 2017). Indeed, so important is this issue that two recent pieces of legislation were passed by Parliament: Bill C-75 in 2019 and Bill S-4 in 2022, with the purpose of increasing efficiency and, in the case of the latter, responding to the impacts of the pandemic as experienced in Canada's courtrooms. While their impact may be dubious, these bills were partially justified by the need to reduce delay and backlog in case processing.

Aside from the financial repercussions of lengthy court proceedings, criminally accused persons have a right to be tried within a reasonable time according to section 11b of the Canadian Charter of Rights and Freedoms. Though delay is a perennial issue in Canadian courts, recent Supreme Court of Canada decisions in *Jordan* in 2016 and *Cody* in 2017 have put in sharp relief the primacy of speedy justice. These decisions, for the first time, introduced an explicit ceiling for the amount of time that a case should take to reach resolution; surpassing this ceiling leads to an automatic presumption that the Charter rights of an accused have been infringed upon, potentially leading to the case's dismissal.

Further compounding the issue of long-standing delay in our criminal courts has been the COVID-19 pandemic. During the first months of the pandemic, tens of thousands of cases were presumptively adjourned across the country, some for many months (Paciocco, 2020; Puddister, 2021). Stated otherwise, the time to case resolution of these cases increased significantly, pushing many cases closer to, or beyond the presumptive ceiling elaborated in *Jordan* and *Cody*. However, even if not approaching the presumptive ceiling, any increased backlog can undermine not only the quality of justice but public confidence in the justice system itself (SSCLCA, 2017). Within this broader context, it might be said that the criminal justice system transitioned from experiencing a serious problem to a full-blown crisis.

Given these significant concerns, this article will explore the various ways in case processing time and delay in one Canadian jurisdiction have changed over time, with particular emphasis on the COVID-19 pandemic. It will show that Ontario's courts have almost certainly changed their case processing practices with some having worsened over time, while others appear to have marginally improved.

1. Delay in Canadian Criminal Courts

Various provisions exist in statute and in case law with the goal of reducing delay in the processing of criminal cases. While various justifications are presented, one of the most significant is rooted in the negative impacts that excessive delay can have on the accused, victims, and the criminal justice system itself. While qualifying what may and may not be 'excessive' is difficult, it is undeniable that delay can cause great hardship (Standing Senate Committee on Legal and Constitutional Affairs [SSCLCA], 2016). Accused live with the stigma of a criminal investigation and prosecution, potentially under conditions that (sometimes severely) restrict their liberty (*R. v. Askov; R. v. Jordan;* SSCLCA, 2016). Victims live without the resolution the criminal process may offer. At the same time, they can be revictimized as they continue to participate in the process I(*R. v. Askov; R. v. Jordan;* SSCLCA, 2016). Further, the quality of evidence can degrade, undermining the viability of a prosecution. Importantly, these

impacts of delay can undermine the confidence that the public has in the system (*R. v. Askov; R. v. Jordan;* SSCLCA, 2016).

Recent Supreme Court of Canada decisions in *Jordan* and *Cody* have shone a spotlight on delay and the extent of its negative impact on the administration of justice and the confidence that the public has in the criminal justice system. However, earlier decisions such as *Askov* – handed down in 1990 – remind us of just how long the courts have been grappling with this issue.

Given the seemingly unrelenting increases in case processing times, it would appear that Canada's criminal courts have been fighting a losing battle to date. Time, appearances, and the resources necessary to shepherd a case to its resolution have been increasing for decades (Department of Justice, 2006; Miladinovic, 2019; SSCLCA, 2017). Indeed, even in 2002, it was noted that case time and appearances had increased over the previous decade (Pereira & Grimes, 2002). More recently, the median time to case resolution has increased from 102 to 121 days between 2008/2009 and 2017/2018. Similarly, the average number of case appearances has reached 8.5 in 2017/2018, up from 8.4 in the year prior (Karam, Lukassen, Miladinovic & Wallace, 2020).

Several reasons for increased delay have been proposed. Symptomatically, criminal trials have become longer and more complex, the Criminal Code has become increasingly more bloated, there has been slow adoption of technology, and the courts are plagued by ineffective or inefficient case management strategies such that many court appearances fail to truly move a case forward (Miladinovic, 2019; Office of the Auditor General of Ontario [OAG], 2021; SSCLCA, 2016, 2017). In response, the SSCLCA has laid out several recommendations to reduce delay and backlog in Canadian courts. They include making appearances more meaningful, pursuing fewer administration of justice offences, and making decisions on cases as early as possible, especially for less serious cases. The Committee also suggested increasing the use of technology in courts, with emphasis on its use for procedural matters to reduce unnecessary court appearances (2017). Similar recommendations were subsequently made by the Auditor General of Ontario (2019).

2. COVID-19 Impact on Delay in the Courts

The COVID-19 pandemic struck in the midst of this delay, further exacerbating it (OAG, 2021; Paciocco, 2020) Though Canadian courts never strictly closed for the most part, the number of cases that could be dealt with slowed to a trickle as the country struggled to learn how to move forward in the context of a public health emergency. Most notably, courts across the country adjourned the majority of its matters for months such that only the most pressing matters were addressed. Typically, this involved giving priority to those cases in which the accused was in custody awaiting case resolution while adjourning out-of-custody matters (Paciocco, 2020). In Ontario more specifically, cases were initially adjourned from March to July of 2020 (Paciocco, 2020) but this practice ultimately continued to the end of November 2020 (Ontario Court of Justice, 2020). Importantly, there was another – albeit smaller - round of adjournments for out-of-custody trials and preliminary hearings between April and May 2021 due to a new wave of COVID-19 that was spreading through the province (OAG, 2021).

Concerns about these delays have been widely shared by members of Canada's judiciary as well as other members of the legal profession. Strong language has been used to describe the state of affairs. For example, several authors have voiced concern with the backlog that logically must have expanded during the extended case adjournments. Specifically, fears surrounding the ways in which this backlog will be addressed, the implications for the rights of the accused, as well as the reputation of the criminal justice system were raised (Action Committee on Court Operations, 2021; Bertrand, Ireland, Jochelson & Kerr-Donohue, 2021; Haigh & Preston, 2020; Matyas, Wills & Dewitt, 2022). Though not speaking about backlog, Johnson and Leclerc (2022) discuss how insufficient technological resources in prisons contributed to delay in processing the cases of those incarcerated awaiting trial.

3. Provincial Government Response to Delay

The Government of Ontario undertook several measures in an attempt to address case backlog in Ontario's criminal courts resulting from the pandemic bottleneck. According to the

OAG, the Ministry of the Attorney of General of Ontario (MAG) authorized the hiring of "31 temporary full-time-equivalent staff at the end of 2020. Since then, the Division has added 20 summer and articling students and 34 additional temporary legal and business professional positions…to assist with addressing the backlog of cases created during the pandemic." (OAG, 2021:278). Further, at the end of 2021, the Government of Ontario introduced a new initiative to further address court delay and court backlog in Ontario. Specifically, it pledged to invest over $72 million over the following two years to address the "unprecedented backlog of criminal cases that have accumulated in the justice system as a result of the pandemic" (Government of Ontario, 2021b: para. 1). In particular, this money would help to hire additional Crown attorneys.

Notably, their efforts to address delay were not restricted to hiring staff. New guidelines were also issued which stress "reducing the number of cases entering the criminal justice system, seeking faster resolutions for cases already in the system and updating processes to shorten the time it takes to move a case to trial" (Government of Ontario, 2021b). Importantly, the government pointed to an updated COVID-19 Recovery Directive which emphasizes charge screening, and the public interest in prosecution in the context of increased delay and backlog in Ontario's courts[56].

In a 2021 follow-up report, before the government's new initiative could take effect, the Auditor General of Ontario stated that MAG had made little or no progress on the recommendation that the Ministry "review best practices from other jurisdictions and establish targets for key performance indicators such as timeliness in disposition of cases" in order to better "measure efficiency and effectiveness of court operations in contributing to a timely, fair, and accessible justice system" (2021: 275). Indeed, while some headway was made on some recommendations made in 2019, the OAG found little to no action on many of their recommendations to improve delay issues in Ontario (2021)[57]. In sum, despite some efforts to address delay such as increasing staffing levels and modifying screening procedures, it is unclear

[56] The relevant section of the Crown Prosecution Manual can be found here: https://www.ontario.ca/document/crown-prosecution-manual/d-38-covid-19-recovery#:~:text=COVID%2D19%20covid%2019%20Recovery,-The%20effects%20of&text=The%20Prosecutor%20must%20review%20each,COVID%2D19%20covid%2019%20pandemic.

[57] Some recommendations were not acted upon as MAG believed it outside of their jurisdiction to do so.

if they have had a noticeable impact. Further, inaction or refusals to act on various recommendations from the OAG that may positively impact on delay and backlog is concerning.

4. Current Study

The speed at which criminal cases are resolved, and the resources used to do so are problems that predate COVID-19, that were exacerbated by it, and will doubtlessly remain for many years after it is gone. Increased time to case resolution can weigh heavily on victims and accused persons, while also costing the State substantial sums of money. Legislative efforts in some countries to address this widespread delay have failed.

In Canada, existing literature has shown that most case processing indicators such as time to case resolution and case appearances in Canada have been steadily increasing for the past 20 years (Karam, Lukassen, Miladinovic & Wallace, 2020; Pereira & Grimes, 2002). However, this pre-existing trend was further exacerbated by the unprecedented global pandemic that shuttered courts in early 2020, forcing them to rethink many aspects of their operation. Canadian criminal courts were acutely aware that cases would accumulate as they could not be resolved. As such, it is not unreasonable to think that courts would react in some way to address this almost certain predicament[58]. Nevertheless, what remains unclear is the precise degree to which COVID-19 has impacted our courts. Specifically, the specific type(s) and degree of damage caused remains largely unknown (or at least described in any systematic and global way). By extension, we remain largely ignorant of what must be overcome.

Understanding the responses of the criminal justice system in a crisis will help us understand the trajectory of this system going forward. It will also assist us in understanding current conditions in the criminal courts and the challenges that may or may not lie ahead. Further, examining these trends might also offer guidance on where, when, and how to invest resources in the system to address a significant issue in ensuring justice in Canada.

[58] Of course, no change in behaviour to this slowly building crisis that is delayed cases would also be noteworthy.

Consequently, this work asks*: How have case processing practices in Ontario's criminal courts evolved over the last decade?*

It has three main objectives: (1) to quantify the number of cases received and resolved, and how they have evolved over time, (2) to detail the time to and timing of case resolution during this temporal period, and (3) to detail changes in case resolution in Ontario during the pandemic. Together, these interrelated issues will provide an understanding of the current workings of a criminal justice system under pressure as well as the responses of criminal justice actors tasked with delivering justice during this time. In so doing, it can serve as an example of what is possible in this system.

While the COVID-19 pandemic, and the responses of Ontario's criminal courts during this time remain an integral part of this analysis, the goal is to situate these changes within a more long-term context. Indeed, a more historical analysis provides a richer understanding of trends in Ontario's criminal courts which will, in turn, provide an indication of the system's current trajectory and perhaps even where it will continue in the future. With this information, more evidence-based policy decisions can be made to respond to stressors – both old and new.

5. Methods

Using publicly available court data from the Ministry of the Attorney General of Ontario (MAG), this work will explore how Ontario's courts have processed criminal cases over the past 10 years, including throughout the pandemic. Specifically, case processing data (such as the number of cases received, resolved, and the manner of case resolution) between calendar years 2012 and 2022 (i.e., January – December) will be analyzed to highlight changes that occurred in the province over time.

Limited interview data will also be used to engage with findings from the MAG data. Notably though, this data source provides insights into case processing practices up to the fall of 2021. A total of 15 interviews were conducted with Defence attorneys and Ontario judges

between November 2020 and September 2021. While participants discussed a variety of topics concerning their experiences practicing law during the COVID-19 pandemic, a specific section of the interview dealt with case processing practices, the *Jordan* decision and how it may or may not come into play during the COVID-19 pandemic.

Similarly, some data from court observations will be integrated into this work when it can meaningfully engage with the statistical data from MAG. A total of 125 days of court observation were conducted in 8 criminal courts across Ontario from January to October 2021. Observations were conducted in bail, sentencing and remand courts (see Table 1). A small number of observations were conducted in trial courts.

Interview and observation data were analyzed using content analysis techniques. Specifically, a process of open, and later, closed coding was used. Any emerging trends that initially emerged from these data were coded and subsequently consolidated as necessary, concentrating on the most salient themes (Rubin, 2021).

Table 1: Observation Days

	Total Court Days	**Bail Days**	**Bail Decisions**	**Bail Adjournments**	**Sentencing Days**	**Sentencing Decisions**	**Sentence Adjournments**	**Remand Court Days**	**Trial & Motions**
Court 1	45	21	62	48	19	55	49	5	0
Court 2	4	1	7	40	1	2	5	2	0
Court 3	4	1	4	4	1	3	3	2	0
Court 4	17	9	8	6	3	6	2	5	0
Court 5	11	4	5	13	5	7	5	2	0
Court 6	22	6	10	15	10	18	19	3	3
Court 7	8	4	1	7	4	6	3	0	0
Court 8	12	3	5	5	7	10	9	2	0
Ontario Court of Appeal	2	-	-	-	-	-	-	-	2
Totals	125	49	102	138	50	107	95	21	5

This analysis will rely predominantly on an examination of statistical trends over time. Specifically, it will involve the review of a number of descriptive statistics (e.g., various averages and proportions). However, we will supplement these data with qualitative data collected through in-depth interviews in order to contextualize province-wide statistics and link them with local practices.

In order to meet our first objective, we begin by highlighting the number of cases received and cases resolved in Ontario's criminal courts over time. These initial analyses will involve using the clearance rate - a measure calculated by MAG that captures the number of cases resolved as a proportion of all cases received. In order to examine the impacts of these cases in the system (and, as such, achieving our second objective), we will examine average time and number of case appearances to case resolution over time, stratified by the stage of its resolution in an attempt to gain a more granular understanding of when and how cases were resolved. Finally, to meet our third objective, we will employ yearly figures from MAG which contain disposition type. We place particular emphasis on cases which are resolved by way of a guilty plea or through withdrawal precisely because when taken together, these two case outcomes make up almost the entirety of all cases in the system.

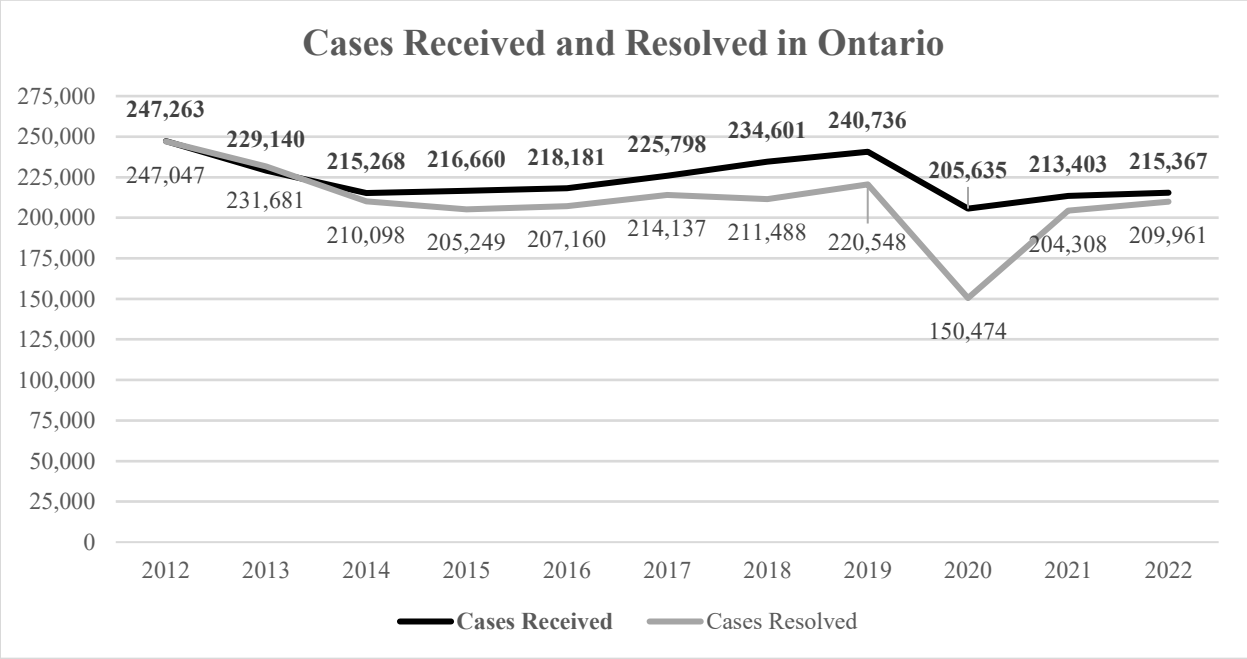
6. Results

6.1 Cases Received & Resolved

As a first picture of the way in which the Ontario Court of Justice processes cases, Figure 1 presents graphically both the number of cases received as well as the number resolved in the OCJ from 2012 to 2022. While the number of cases received is out of the immediate control of the courts, they are exclusively responsible for the number resolved. Figure 1 shows that the number of cases received as well as resolved have varied over time. In 2012, 240,263 cases were received. However, the number subsequently declined until 2014 (215,268 cases received) at which point cases began to climb again to a high of 240,736 in 2019. Between 2019 and 2020, the number of cases received by the criminal courts dropped roughly 14.6% to 205,635 cases.

Yet, in the most recent two years, cases received have begun to rise again to 213,403 and 215,367 respectively (year-over-year increases of roughly 4% and 1% respectively)[59]. Despite these small increases though, the number of cases received since the pandemic remains lower than in any other year prior to 2020. Stated otherwise, the years since the onset of the pandemic represent periods with the lowest number of cases received since at least 2012[60].

Figure 1



Cases resolved follow a similar trajectory to that of cases received: decreasing until 2015, then increasing slightly until 2019, followed by a sharp drop in 2020 at the outset of the pandemic. Specifically, between 2019 and 2020, the number of cases resolved by the criminal courts dropped roughly 32% to 150,474. This low is staggering. However, with the unprecedented closure of criminal courts, an unprecedented drop is perhaps unsurprising. As a rough estimate, one could conclude that courts lost about one third of their court time in 2020-2021. Assuming a steady rhythm of case resolutions throughout the year, one might also assume that courts did not resolve about one third of the cases that they may have otherwise resolved.

[59] Some literature has begun to demonstrate that police officers were charging and arresting fewer people during the pandemic, accounting for the drop in cases received. This is congruent with data from Statistics Canada which show that the police-reported crime rate decreased 9% in 2021, followed by a nominal 1% increase in 2021 (Moreau, 2022).

[60] Of course, the numbers for 2014 are roughly the same as those in 2022, with 101 fewer cases received.

This would equate to about 50 thousand cases, which would bring the total number of cases to over 200 thousand - a level similar to other pre-COVID years.

Importantly, the number of cases resolved rebounded by a staggering 36% in 2021 and then a more modest 3% year-over-year into 2022. Such a marked increase may be attributable to the fact that courts were all but closed for roughly 4 months in 2020; consequently, courts only had about 8 months in 2020 to resolve cases. Conversely, 2021 did not see closures of the same order. As such, it is expected that there would be some rebound in the number of cases resolved.

Nevertheless, in the two years since the arrival of the pandemic during which courts were open, the number of cases resolved remained lower than most other years since at least 2012. This is concerning as the courts had previously been able to resolve a greater number of cases, despite receiving many more of them. Thus, despite any legislative and practical changes to processing cases that may have occurred during the pandemic, the trend of fewer case resolutions appears to endure. This begs the question as to why so few cases were resolved in recent years.

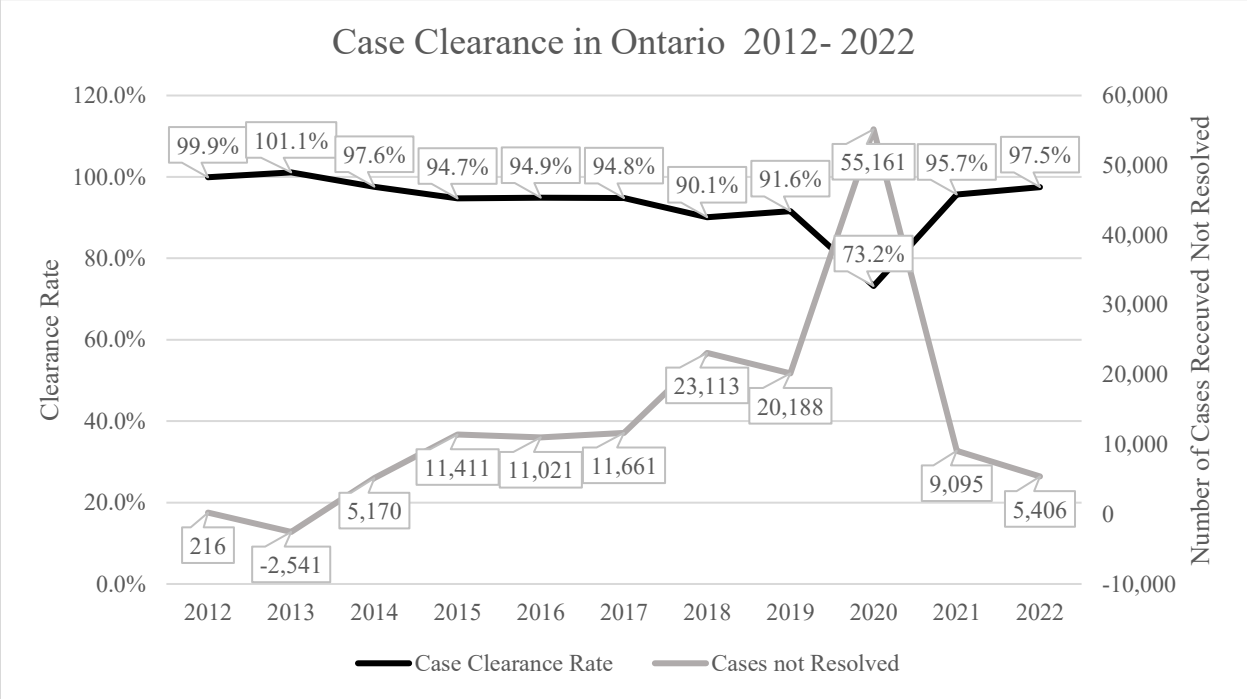
6.2 Backlog

The reader likely understands that any incoming cases not resolved will contribute to Ontario's backlog of cases. Figure 2 models this discrepancy with the case clearance rate (i.e., cases received/cases resolved). Logically, as cases resolved typically did not surpass cases received, the clearance rate has almost always been under 100% since 2012. Further, this clearance rate had been declining slowly between 2012 and 2019 from 99.9% to 91.6%. It fell a further 18.4 percentage points to 73.2% in 2020.

Similar questions arise from Figure 2 as from Figure 1. Despite the fact that between 2012 and 2019, the number of cases received and resolved decreased and increased at different times, the clearance rate declined steadily throughout this period. In other words, it has become

increasingly more difficult to clear all cases received in a given year despite the changing volume of these inputs.

Figure 2



While this reiterates the concerning trend of fewer case resolutions over time occurring in the Ontario Court of Justice, credit must be given to the courts. The clearance rate rebounded an astonishing 22.5 percentage points in 2021 to 95.7% and then 97.5% in 2022 - levels not surpassed since 2014. Notably, this is also the first year-over year increase since 2012-2013.

Figure 2 quantifies the number of cases received that were not resolved in any given year which are, logically, added to the case backlog[61]. The graph shows that the number of cases received that were not resolved had been increasing substantially from 2013 to 2018. Notwithstanding a drop in the cases left unresolved in 2019, this number skyrocketed in 2020 to a staggering 55,161 cases. As suggested by the clearance rate however, the number of cases left

[61] Importantly, we do not use the backlog figures provided by MAG. This is because the backlog figures are skewed by their exclusion of cases where a bench warrant is issued. Given that bench warrants increased in Ontario during the pandemic, the backlog figures underestimate the true size of the overall backlog. For this reason, we use a simpler indicator: cases received that were not resolved. In this way, we can estimate the number of cases that are being added to the backlog even if we cannot accurately estimate the case backlog itself.

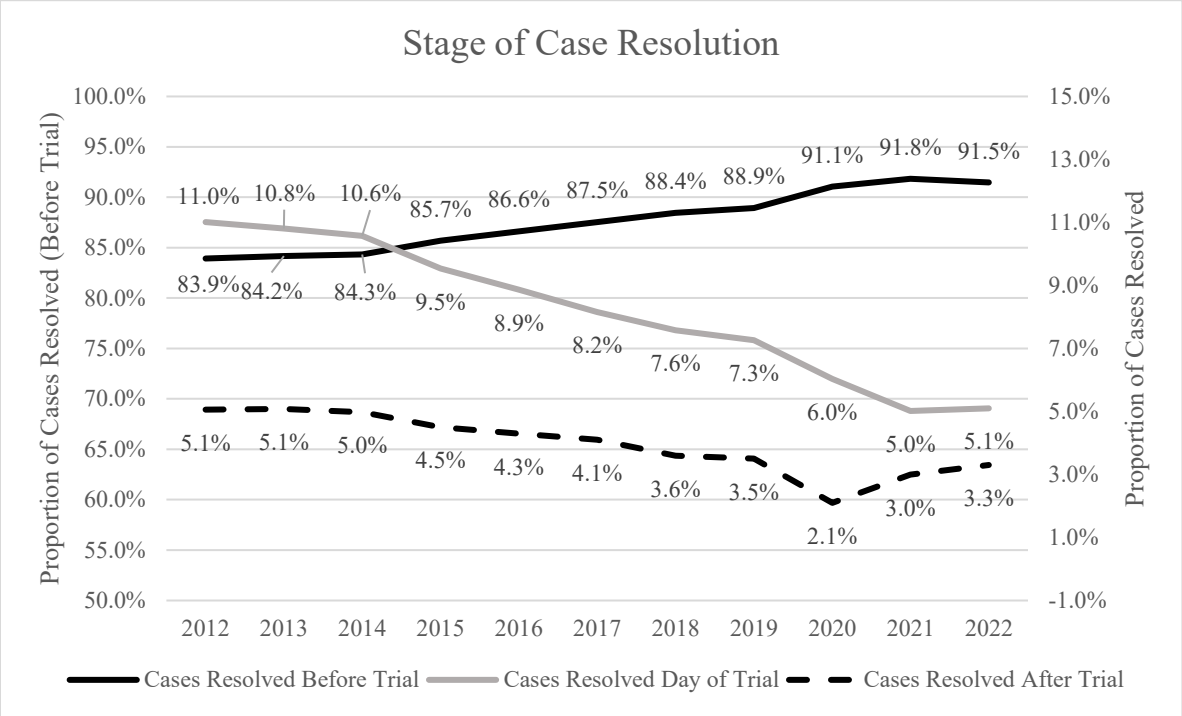
unresolved in 2021 and 2022 improved. While there were still many cases unresolved in these years, the numbers dropped a great deal from 2020 and are similar to levels not seen since 2014.

Notwithstanding this praise for - and recognition of - the actions taken by court actors to change long-standing practices, Figure 2 also reinforces concerns raised earlier rooted in fewer case resolutions. First, though the number of cases not resolved has decreased since 2020, these still represent significant increases year-over-year to Ontario's case backlog. Second, knowing that 2020 was an outlier, the trend seen for clearance rates almost seem to be a continuation from 2019. In other words, should we remove 2020 from this graph, the line could appear to be a natural progression from 2019 to 2022. Thus, courts appear to remain in a similar situation in 2022 to that of 2019. While this would certainly mark an improvement over the 2020 pandemic realities, 2019 and other recent years do not represent the epitome of efficiency in case processing. Indeed, while the clearance rate has remained high, court backlog continues to increase.

6.3 Stages of Case Resolution

One oft-cited method to reduce delay and increase efficiency in the resolution of cases is through the avoidance not just of trials themselves but also of collapsed (or "cracked") trials, whereby a trial does not take place after having been set due to a last-minute resolution. This strategy necessarily means favouring the resolution of cases before a trial date is ever set. Figure 3 illustrates the stage of case resolution as a percentage of all cases resolved. It makes clear that cases resolved before trial have long been – and continue to be – the primary means of case resolution, whether that lead to a finding of guilt or not. While the rate of pretrial resolutions had been increasing slowly between 2012 and 2019, a 2.2 percentage point jump occurred in 2020, surpassing the 90% threshold for the first time since at least 2012. The number continues to hover around slightly over 91%.

Figure 3



For this increase in the proportion of cases resolved before trial to occur, the rate of cases resolved either on the day of trial without a trial, or after a trial must have decreased. Figure 3 confirms this logic, showing long-term decreases in the proportion of cracked trials as well as actual trials. Noticeably, the proportion of cracked trials has decreased by over half since 2012. However, between 2019 and 2020, the largest percentage point decrease since at least 2012 was reported. Between 2020 and 2021 the third largest is recorded (after the 1.1 percentage point decrease between 2014 and 2015)[62].

These trends in the trial and collapsed trial rates are, once again, expected as trial options were severely limited during the pandemic. Indeed, if a trial could be set, it would frequently take place many months or even years later. It may also have been more difficult to organize the logistics of a trial such as convening juries, summoning witnesses, etc. This assertion is further

[62] The analysis in Figure 3 was rerun using the total number of cases received as the denominator. Trends in this secondary analysis corroborated what was shown in Figure 3. This allowed us to ensure that the trends presented were not significantly impacted by the number of cases received in any given year.

reinforced by the slight rebound in the trial rates in 2021 and 2022 when trials could once again be held with fewer restrictions.

Regardless of the reason(s) for these trends over time, they have been positive in terms of case processing and efficiency. Since 2012, there has clearly been an attempt to avoid trials where possible. It is evident that court actors have successfully shifted resolutions to the pretrial stage, finding various ways to resolve a case without setting a trial. As trials can be resource-intensive, this practice is certainly one way to increase case processing efficiency and, potentially, to reduce delay[63].

Another notable element emerges from Figure 3. As with the clearance rate and backlog shown earlier, if one were to disregard 2020, appending 2021 data to that of 2019, it would again appear that this trend largely constitutes the continuation of pre-pandemic trends. While the yearly changes in this stage of case resolution are relatively small and slow, they maintain the same direction. For this reason, it cannot be determined whether COVID-19 impacted these trends, much less caused them. These trends predate the pandemic and, as such, the effects of the COVID-19 pandemic cannot be disentangled easily.

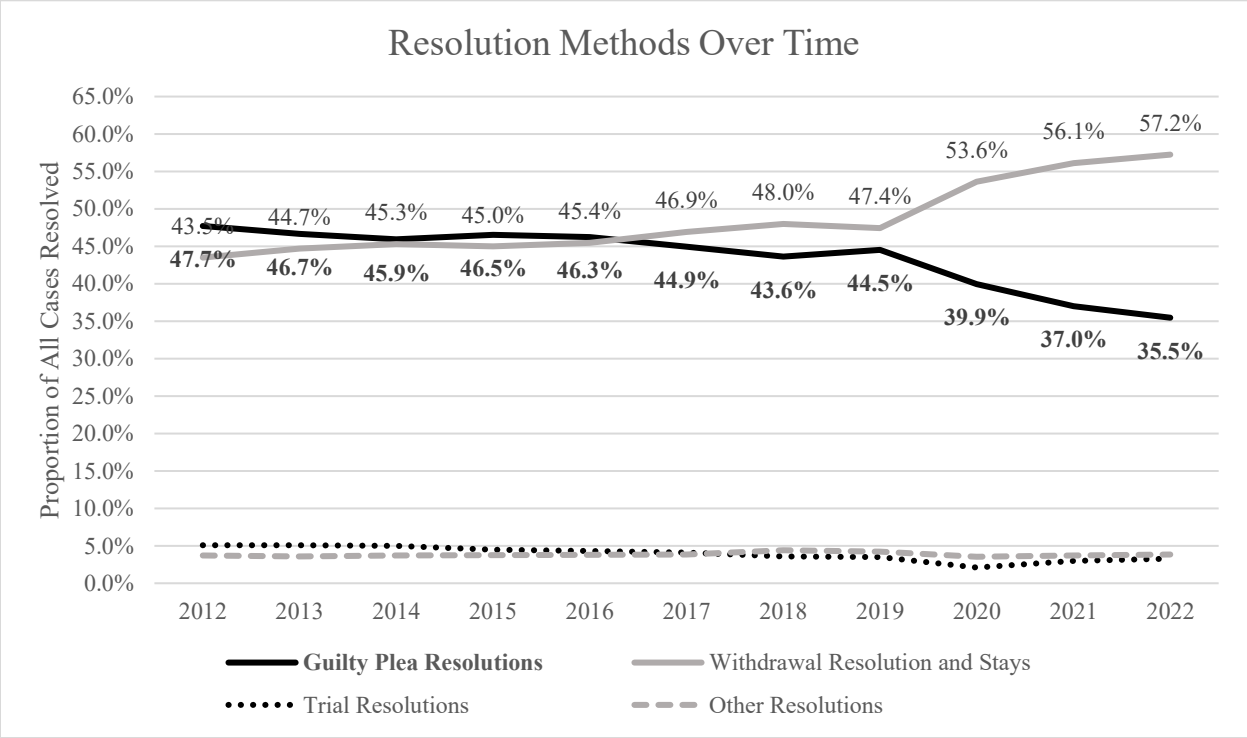
6.4 Methods of Case Resolution

Another logical manner to examine the ways in which case processing has changed over time in Ontario's courts is to examine the mechanism through which cases are resolved. Figure 4 graphs the method of resolution for all resolved cases. It shows that, since at least 2012, withdrawals and stays, as well as guilty pleas continue to make up more than 90% of all case resolutions, depending on the year. Yet, while the proportion of these resolution methods was nearly equal for several years, 2017 marked the first year in which withdrawals and stays

[63] The trial and cracked trial rates have dropped to levels that are so low that we wonder how much more can be done to reduce them further. Indeed, there will always be a need for trials, and some will inevitably resolve on the proverbial front steps of the court.

accounted for a greater proportion of resolutions than guilty pleas. While this gap widened slightly between 2017 and 2019, it diverged significantly in 2020. Indeed, while withdrawals and guilty pleas represented 47% and 45% of all resolutions, respectively, these figures jumped to 56% and 37% in 2020 and 57% and 35% in 2022[64].

Figure 4



This drastic change in resolution method in 2020 may have been a result of different Crown attorney thought processes. First, this willingness to withdraw and stay charges may be linked to efforts to avoid bringing cases to trial. Indeed, Crowns may have felt that they did not have to hold such a hard-line regarding case resolutions and sentences during the pandemic, offering them flexibility and the justification to resolve cases without a formal finding of guilt. Indeed, some Defence attorneys and judges interviewed in the course of this research mentioned that withdrawals and other more "reasonable" sentencing positions were more frequently arrived at due to the stress that COVID-19 placed on the system.

[64] Trial resolutions and other resolutions are also represented in this graph so that totals equal 100%. They will not be addressed as trial rates have already been discussed. As well, "Other Resolutions" represent so few cases.

In fact, it was suggested that Crowns were 'given permission' by this unprecedented emergency to put forward resolution positions that might otherwise appear to be too lenient absent the pandemic. One judge interviewed explained that "post-COVID [she] was actually pleasantly surprise[d], particularly with the Crown's office, at how well they went to actually *looking* at somebody's cases and weeding out cases. [She] didn't see that beforehand" (J3). Thus, she highlights that Crowns were resolving cases and staying proceedings with a greater frequency, later adding that upwards of 15 trials were avoided through resolution discussions because of the pandemic. She made it clear that this was a substantial number of trials in her courthouse. Similar considerations were laid out in the new COVID-19 Recovery section of the Crown Prosecution Manual for Ontario which was explicit in naming concerns of delay and backlog as relevant considerations in the pursuit of criminal charges.

There were also practical concerns that may have contributed to such a large increase in the use of withdrawals and stays: the reduced possibility of setting trial dates[65]. Indeed, an impending trial date may help to convince an accused to plead guilty given the inherent uncertainty of trials. However, during the pandemic, when trials were being scheduled many months - if not years - in the future, there was less incentive to plead guilty immediately. Most judges interviewed discussed how it was the actual assignment of a date for trial that pushes individuals to act and decide how to proceed. In other words, accused persons may have had more ability to wait out negotiations as trial dates were far into the future while prosecutors were left with the option to withdraw or stay the charges on a file if they wanted to resolve cases and avoid an even quicker accrual of backlogged cases a strategy noted by some American prosecutors (Metcalfe & Kuhns, 2023: 358).

Again, regardless of the reason why withdrawals and stays became more common over time, this trend also began slightly before the onset of the pandemic. While the disparity is

[65] This reality was confirmed by nearly every interviewee, stating that trials were being scheduled between 12 and 24 months from any given date in 2020 and 2021.

clearly more pronounced post-2020, guilty pleas became less common than withdrawals and stays in 2017, and this trend has continued.

This is another positive sign in the court from both a public safety - and perhaps also an efficiency - point of view. A withdrawal or stay does not leave an accused with the stigma of a criminal record and, as such, is beneficial for them going forward as it may aid in social reintegration[66]. From an efficiency perspective, withdrawals and stays may potentially be less work intensive for the parties. Indeed, because of the lack of criminal record attached to these resolution types, a person may have less to bargain for with the Crown, lightening their workload; a guilty plea on the other hand may require much more negotiation in terms of accepting the plea and sentencing conditions.

However, while COVID-19 may explain the large jump in withdrawals seen in 2020 and perhaps how the case backlog was reduced so drastically in 2021, it does not explain the switch occurring between withdrawals and stays, and guilty pleas which began a few years earlier. This may still represent a change in practice for court actors. Nevertheless, our argument that withdrawals and stays may be less labour-intensive and therefore more efficient than a guilty plea stands.

6.5 Time to Case Resolution

When discussing court delay and case processing efficiency, special attention to the time and number of appearances required to resolve cases is fundamental. While we have explored other important metrics up until this point, evaluating time and appearances will reveal to reveal whether any efforts taken by the court have had a positive impact in increasing case processing efficiency, and – by extension - reducing court delay.

Unfortunately, the data on case processing efficiency are not promising as they appear to largely continue pre-pandemic trends (much like other factors reviewed up until this point). Time

[66] However, we recognize that a withdrawal may still appear on files held by the justice sector (such as in vulnerable sector checks), and negatively impact accused even without a formal criminal record.

and appearances to case resolution continue their march ever upwards. Figure 5 graphs the proportion of cases resolved in various timeframes between 2015 and 2022[67] as well as the average time to resolution based on the stage of case resolution. Cases taking less than 10 months represent the large majority of all resolved cases. However, there has been a gentle decline in this proportion from 87.4% in 2015 to 81.4% in 2022 (with 2021 constituting a notable exception to this decrease). Consequently, cases resolved between 10 and 18 months, as well as those surpassing the Jordan ceiling, saw proportional increases, reaching record highs during this time.

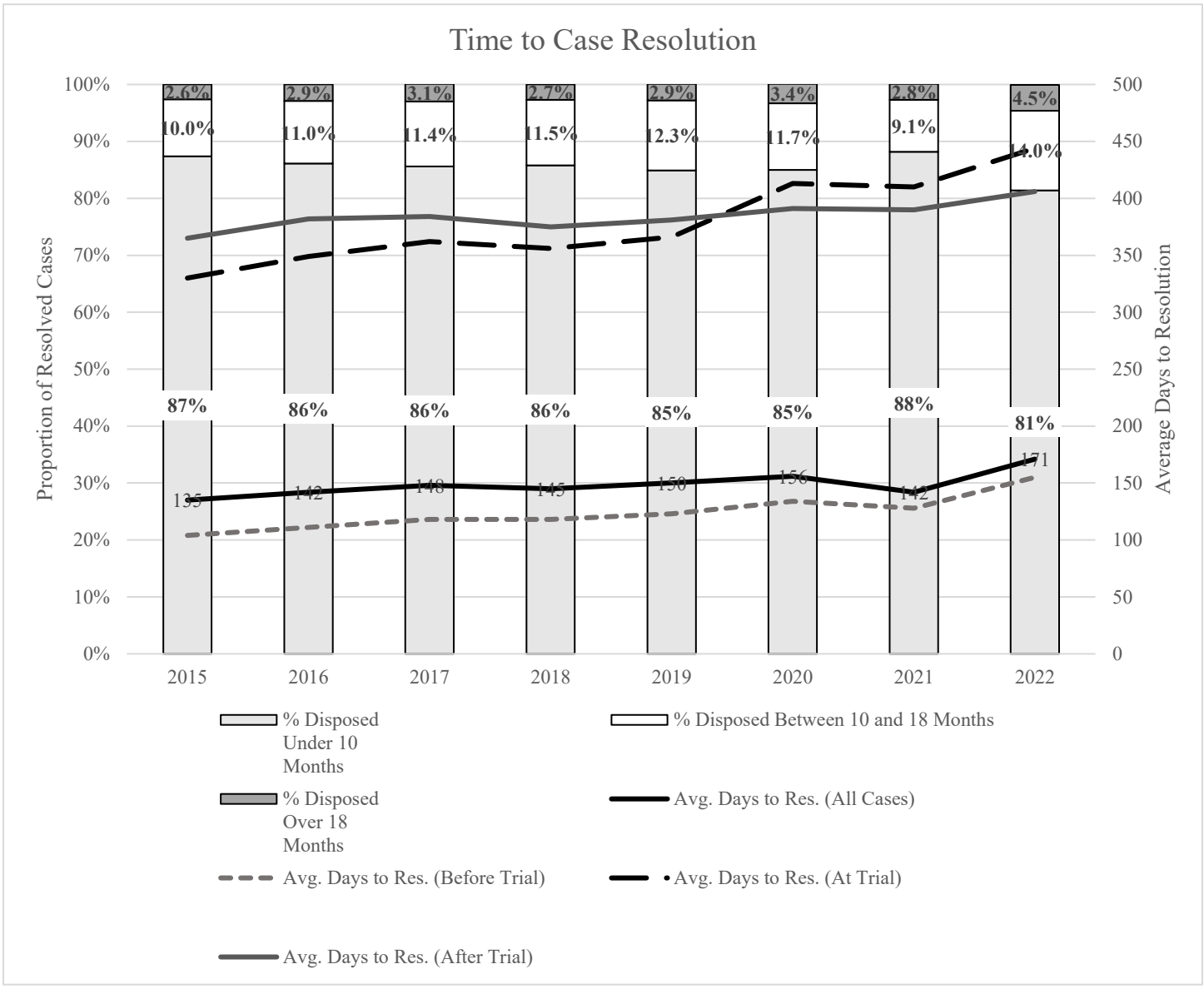
In brief, cases are taking longer to resolve. The average time to case resolution supports this conclusion. While there was a slight dip in the average time to resolution in 2021, 2022 posts a record high at 171 days, on average, to resolution for all cases. Further, for cases resolved before, at trial without a trial, and after trial, record highs are also set[68]. Readers should recall that these highs have occurred at a time when the number of cases received and resolved were at lower levels compared to the years preceding the pandemic.

While a dip in 2021 may have been the result of courts trying to deal with the backlog more quickly by using stays and withdrawals which may have been less labour intensive to negotiate, 2022 compensates – with interest - for this decrease. 2022, a year still impacted by the COVID-19 pandemic, appears to continue the trend set prior to 2020. Once more, this year reflects the increase in time to case resolution seen over the last few decades. That is, it is seemingly just one more in a long line of year-over-year increases to the average.

[67] Data were only used from 2015 onwards in this section because in 2015 MAG changed the case processing time categories from a typology of three, to one of four (adding a category for over 18 months (likely in a response to the 2016 *Jordan* decision which set this period as a benchmark for delay). There is overlap between groups and, as such, are not comparable. However, the trends prior to 2015 are largely similar to those seen after this point: increasing time to resolution.

[68] These trends are not shown here as they skew the scale of the graph as the averages are in the 300-400 days range. Given their relative rarity, their absence is not crucial to the overall storyline.

Figure 5



The average number of case appearances reveals a similarly distressing trend as that for the average number of days to resolution. Figure 6 graphs this average, disaggregated by offence type to assuage those who may think that offence type, and particularly more serious offences, might be the cause of this increase in 2021 and 2022. Beginning with total offences, another record has been set, whereby the number of appearances to resolution hit an average of 8.2 appearances, up from 8.1 in 2020, the next highest level. Again, despite fewer cases received and resolved as well as the increased use of stays and withdrawals, the average number of appearances inched up once again.

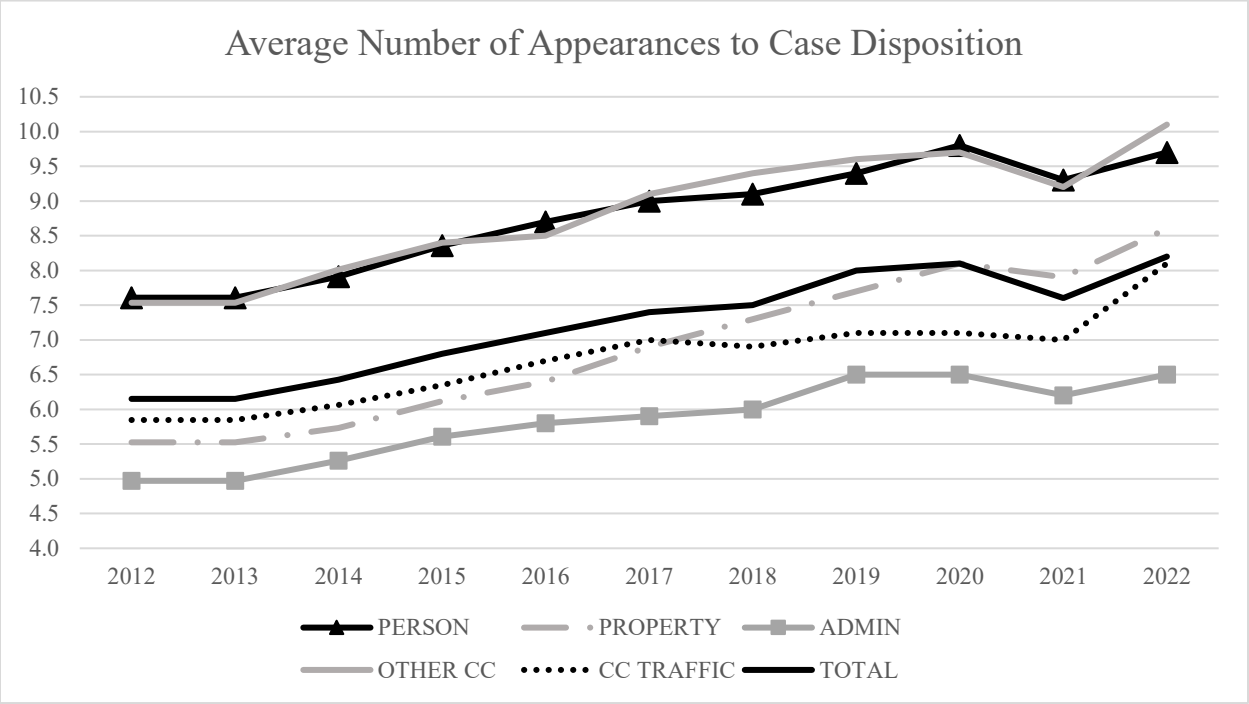
Nevertheless, 2021 deserves more attention as it is the only year-over-year decrease noted since 2012[69] and is lower or on par with levels seen in 2017-2019. This is a noteworthy accomplishment as court actors found ways to resolve cases with fewer appearances being required, essentially turning back the clock and reversing the nearly constant growth in the average number of appearances taken to resolve cases since 2015.

Some distinguishing descriptors for 2021 include relatively high case resolution rates, and a significant decrease in the backlog from the previous year (as seen in Figure 2). At the same time, the average number of appearances decreased. This is precisely the trend that stakeholders have sought. Unfortunately for those seeking improvements though, this one year is an outlier in the overall trend.

It is also useful to note that, even if the average number of appearances dropped in 2021, adjournments at bail and sentencing remained quite frequent. Indeed, observation data in Table 1 shows that there were more adjournments than decisions made. Specifically, while 207 decisions were made on bail and sentencing, there were 233 total instances where the case was adjourned to be addressed at a later date. Importantly, the issue of adjournments appeared more serious at bail than at sentencing where the decision to adjournment ratio was 102 to 138 compared to 107 to 95 for sentencing decisions. Though comparisons cannot be made to levels of adjournments seen prior to the pandemic, this still highlights a frequent use of adjournments at a time when courts were struggling to address court backlog and delay.

[69] There was a 3-day drop in the average from 2017 to 2018. However, given its relatively small size coupled with another increase in 2019 that was higher than 2017, we do not consider this especially meaningful.

Figure 6



A review of these trends – broken down by individual offence categories reinforces our findings and ensures that they are robust. While the starting point for each group's average is different (as would be expected), the upward trajectory since 2012 is common across all offence types and is surprisingly uniform. Importantly, as with the overall average number of appearances, each category displays a small drop in 2021, followed by a subsequent increase in 2022[70].

In this way, these trends do not appear to be the result of one particular offence category skewing the average. Further, the offence distribution of cases received, resolved, as well as the case backlog are remarkably stable over time[71].

[70] Though not shown here, a similar analysis was performed on the average number of days to case disposition. Similar findings resulted.

[71] The distribution of offences among cases received, resolved and the overall case backlog were compared over time, though they are not presented here. Nevertheless, the proportion of offences over time has changed remarkably little, notwithstanding some small movement.

We would also draw attention to administration of justice offences as this broad offence classification has frequently been cited as playing an important role in court delay (SSCLCA, 2017). By addressing it, it might constitute a simple or easy solution, at least in relative terms. Nevertheless, it also increased between 2012 and 2019, and subsequently held steady at roughly 6.5 appearances since that point, with a drop to 6.2 in 2021. Within this context, the broader court delay appears to be concerningly widespread even among cases that might be considered "less serious" and potentially easier to solve due to their typical lack of complexity.

6.6 What to Make of These Various Trends?

These results have highlighted that the courts struggled to complete their work in 2020. While finding various strategies to resolve cases during this year, these efforts could not make up for multiple months of near shutdown. In 2021, the courts became more adept at navigating the pandemic, changing their practices, finding new solutions and increasing their workload. However, nobody can work at such high levels indefinitely. Courts appear to have lost some of their ability to work at levels seen in 2021. For this reason, the figures from 2022 more closely resemble those from years just prior to the onset of the pandemic than from 2020 and 2021.

In this summary of the court's work, we see two major stories, one more positive and short term, while the other longer term, and negative. While these data show that courts reacted and adapted, changing the manner in which they processed cases in an attempt to deal with the backlog that developed post-shutdown, they also reveal the struggle against long-standing issues of delay endemic to Ontario's criminal courts.

Some positive indicators include a high clearance rate and a notably smaller increase in cases not resolved in 2021 and 2022 following the stunning high seen after the onset of the pandemic. Post-2020, courts dramatically increased the proportion of cases resolved before trial, largely through resolutions by way of withdrawal rather than guilty pleas. Not surprisingly, trial

rates and other resolution types also remained at historic lows. Each of these changes has the potential to increase efficiency in the criminal justice system, thereby tackling one of its largest issues.

At the same time, both the average time and the average number of appearances to resolution have increased since the onset of COVID-19, despite the aforementioned positive steps in increasing case processing efficiency. Further, the proportion of cases surpassing the *Jordan* ceiling has also grown. The frequency of adjournments also raises concerns about the culture of adjournments that was denounced even prior to the pandemic (Myers, 2015). Importantly though, these trends predate the pandemic but may worsen in the coming years. Indeed, there are inevitably cases still in the system dating from the pandemic that continue to be adjourned and have yet to be resolved. These older cases - once resolved - may increase average resolution times and the number of appearances required to do so. These unresolved cases in the backlog remain numerous, and with every passing day that they age, they inch closer to the *Jordan* ceiling and beyond.

These figures have also shown that 2020 and 2021 could largely be removed from the data as outliers such that most trends explored here would represent a continuation from 2018-2019. Indeed, 2020 represented a clear break with several prior trends such as the number of cases resolved due to the conditions of the pandemic, while 2021 represented a major correction to that anomaly. Progressing into 2022, the trends are again different from the previous year; instead, they appear to be more in line with trends prior to the pandemic. That is, courts seem to have responded to the immediacy of the pandemic, attempting to right what went wrong following the closure of the courts. Yet, these responses were either curtailed or lost steam as we move forward into the future. Such a return is concerning.

A few participants hinted at this state of affairs. In one interview, a judge explained that there were positive changes in the aftermath of COVID-19 in terms of resolving cases quickly but that slippage in the approach to delay soon emerged:

> But…we slipped, we clearly slipped back…We're back to the same problem…. And one of the reasons they didn't last is because of this human condition I told you about. Certain people benefit by matters not proceeding quickly or with reasonable dispatch, efficiently. And so they're going to slow things down. But even those that feel they know what's going on, they don't really think about the case until the rubber hits the road the day before the trial or two days before the trial …, but the reason is that they have that date. (J1)

Thus, this judge ascribes this return to court delay partially on preparedness in courts, only looking at cases shortly before they are due to appear in court, and for what they describe as the "human condition" and the benefits some individuals gain in delaying or progressing a case.

Many interviewees also mentioned how procedures developed post-Jordan to ascribe delay to one party or another. While they were careful to say that Jordan had garnered greater attention toward the issue of delay, participants also expressed concern that this new attention to delay and the person(s) responsible for it has become an administrative matter rather than a flag to tackle the delay. One explained that:

> Virtually every case now turns into a, basically, a little speech from the Crown attorney trying to talk a little bit about what happened since the last court appearance and try to blame as much as they can on defence counsel and defence counsel sniping back. There was always an element of protecting the record before Jordan, but it seems to be all the more important now and you are seeing way more of that as a result. (D5).

In this way, most participants voiced some concern that the outcomes sought in *Jordan* have not been realized. Though none suggested that this landmark decision had accomplished nothing, many hinted that its calls had yet to be fully answered. Thus, while courts may have won the battle against COVID-19 in terms of the backlog it created (or at the very least salvaged a stalemate), they are losing the war, and are now – yet again- on the defensive, against court delay more generally.

7. Discussion:

7.1 The Return of the Culture of Complacency

Successes and defeats permeate these data. What does this say about the current state of Ontario's courts? We suggest that our courts have begun to re-acclimatize to high levels of backlog and delay following unprecedented efforts to tackle them. Like a slowly boiling pot, court actors become accustomed to the pressure and heat. This return to longer delay and increasing number of appearances suggests that this culture of complacency vis-à-vis court delay has returned, despite significant decreases during the pandemic.

In Jordan, the Supreme Court of Canada underlined the hallmarks of the culture of complacency. They explain that "unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay" (para: 40). These lead to an acceptance of delay. Thus, while the practices of individuals, such as the decision to adjourn hearings, contribute to this culture, the court also points to procedural and resourcing issues that combine to allow delay to increase. Stated otherwise, it is not simply delay-causing actions, but also intentional or unintentional inaction that foster the culture of complacency toward delay in Canadian courts.

While significant delay was identified before the pandemic (SSCLCA, 2017), this emergency undoubtedly increased the strain on criminal courts to a breaking point. Indeed, increased delay was virtually inevitable due to court closures. Setting dates for trial became almost meaningless with multiple rounds of adjournments in the court. Nevertheless, it appears that courts have somewhat acclimatized to these new highs in delay. Indeed, rather than 2022 continuing to be a year to further reduce the accumulated backlog and delay in the previous years, it has seemingly returned to normal quite quickly despite the number of cases received, the composition of this caseload as well as that of the existing backlog being largely similar to that seen prior to the pandemic. In this way, 2022 may represent a return to the culture of complacency identified in Canadian courts (Fehr, 2023; 2021; *R. v. Jordan*), where delay has

continued to mount due to inefficient practices, unnecessary adjournments, and insufficient resources (*R. v. Jordan*).

We do not suggest that court actors do not care about delay and are doing nothing; several interviewees mentioned their desire to overcome this blight on the system and outlined the steps that they have attempted to implement to do just that. Unfortunately, overall trends in case processing do not necessarily reflect these efforts. Adjournments continue to be frequent occurrences in court. Every year the average time and number of appearances required to resolve cases increases. Indeed, delay statistics considered unreasonable 20 years ago may seem a triumph if achieved today. For instance, if the average number of appearances was 4.8 as it was in 1999/2000, or the average time to resolution was 84 days (Pereira & Grimes, 2002), these outcomes would represent significant reductions from the levels seen since 2012. Achieving these numbers now, however, appears to be a Sisyphean task.

The difficulty of this task and the continued failure of the courts to rein in this culture of complacency may create resignation that little can be done to overcome it, particularly given how long it has pervaded the system. Indeed, the SSCLCA quoted a lawyer from the *Jordan* decision who bemoaned the delay in courts, linking it to a certain resignation of the courts in the face of insufficient resourcing (SSCLCA, 2017: 34). This resignation may then lead to tolerance and a greater acceptance of delay through feelings of powerlessness. Though interview participants did not necessarily mention resignation, nearly every participant expressed trepidation at the mounting delay in the system. In this way, these feelings of resignation may feed a vicious cycle where actors feel unable to meaningfully decrease delay, then becoming accustomed to a higher level of delay which becomes a more daunting challenge to overcome with every passing day.

While we hesitate to infer too much from a single data point, it is striking that 2022 represented a noteworthy break in the trends seen in the years prior. Further, COVID-19 remained a feature of Canadian society, and the criminal justice system at this; it is reasonable to

assume that similar efforts and trends would continue into 2022. Indeed, how could courts not continue with their efforts to address COVID-19 related delay when the pandemic continued to impact Canada? Perhaps it is that courts grew fatigued with such extraordinary practices in the two or so years since its onset. Indeed, others have suggested that courts quickly got over the pandemic, speaking of a certain fatigue with new norms (Myers, 2021). Others have suggested that a certain burnout has occurred among the legal profession, pushed to their limits and no longer able to overcome the insatiable hunger of the criminal justice system (Fore & Stevenson, 2023; Koneval-Brown, 2021).

Restated, because COVID-19 remained an important reality in Canada into 2022 like in 2020 and 2021, the fact that 2022 frequently breaks with case processing trends with these other years is noteworthy. That 2022 appears more in line with pre-pandemic years also provides us with some confidence in asserting that courts may have begun to return to their previous ways of functioning (or malfunctioning).

7.2 Risk Aversion and Decision Making

We also suggest, like the Office of the Auditor General (2021), that withdrawals and stays take too long to decide. If the government has indeed been hiring new Crown attorneys to bolster their ranks, these individuals may be new or early in their career[72]. It is possible that new Crown attorneys may be especially risk-averse given their relative inexperience and their new place in a workplace; they may avoid potentially controversial decisions[73]. Therefore, they may be taking a great deal of time to agree to the withdrawal or stay of charges, for fear of being seen as too lenient, whether by their managers or by the public.

[72] If they are not new to the role in Ontario, this means they came from another jurisdiction, thus not impacting the overall level of staffing in the province.

[73] Indeed, a study of judges, Boyea (2010) noted that American judges were more willing to dissent and go against local norms when more experienced. Baker and Hassan (2021) conclude similarly that prosecutors may feel less pressure to conform to organizational norms with more experience.

This risk aversiveness is not new. Many have discussed this pre-pandemic (Doyle & McKendy, 2019; Myers, 2009; Johnson, 2021; Webster, Doob & Myers, 2009). Courts, and court actors, avoid situations such as trial in which the outcome is not easily predicted (Bradley-Engen et al. 2012; Euvrard & Leclerc, 2015). However, in the COVID-19 context, the first time in many years where so many indicators are positive, what may set this time apart may be an influx of junior staff. Indeed, the provincial government aimed to increase staffing levels to deal with the COVID-19 backlog. Consequently, a new and inexperienced cohort of Crown attorneys may be able to complete more cases, though taking more time to do so.

We suggest that allowing these staff the authority, and support, to *not* take cases to the courtroom doors, to *not* require a guilty plea may be helpful in improving time and appearances to case resolution. While any Crown attorney ostensibly has this ability, stronger language, and more evident support may provide them with the justification they may have felt they possessed during the COVID-19 pandemic to resolve cases. Perhaps another addition to the Crown attorney handbook, such as that added by the Ontario government in 2021, could have a positive impact in this respect.

8. Policy Implications and Conclusion

Moving forward post COVID-19, it remains a question if the trends in 2022 represent the new normal, or rather the "old" normal returning or if the actions taken to improve case processing in 2020 and 2021 will return. Only time will tell where these trends grow; however, certain lessons can be distilled from these trends in Ontario criminal courts.

First, courts can change their case processing practices quickly when required to do so. Ontario's criminal courts, at the most basic level, changed their way of resolving cases in the face of unprecedented backlog and unprecedented workload. This is contrary to more traditional conceptions of the criminal justice system as slow and unchanging. Unlocking the mechanisms

for such changes will be key to any future attempts to modify criminal justice practices moving forward.

A second related point is that the culture of complacency is hard to shake. As we discussed, there is some indication that these changes may have been short-lived and that the weight of routine and tradition overcame the last reserves of COVID-19-fueled openness to change. While it is important to understand the mechanisms that triggered changes in criminal justice practices during the pandemic, it is equally important to understand what stopped or slowed them once they had begun. We believe that the culture of complacency had some role in this. As such, we contend that this culture must continue to be addressed and altered if the delay in Ontario's criminal justice system is to be brought back from the edge of catastrophe.

Limits:

Our conclusions reflect the limitations imposed upon us, primarily, by data availability. Specifically, due to the limited number and types of variables and the unavailability of microlevel data, more advanced modelling techniques were not employed. For example, without data concerning staffing and budget levels in Ontario's courts, we were unable to say to what degree variable staffing levels may have been responsible for various changes noted. Further, without access to microdata, we were forced to rely on average values in our analysis. With microdata access, we could have run more sophisticated models.

Another limit of our analysis is our inability to discuss results in causal terms; to do so would require, additional data, an expanded number of variables, and an ability to analyze longitudinal trends at a much finer level. Instead, relationships are highlighted with caution, recognizing that other potentially moderating or mediating variables may influence the relationships explored in this work. For example, while offences against the person typically take longer to resolve, we were unable to estimate the length of time that it would take when other relevant variables were considered such as a guilty plea, prior offence history, or pretrial detention status which all can impact the time a case takes to resolve; indeed, in each of these situations, the estimated time to resolution would likely vary.

Nevertheless, when possible, rudimentary controls were conducted; specifically, analysis was stratified by relevant variables in order to identify possible differences that might be hidden behind global trends. For example, trends in clearance rates over time were examined as an aggregate, as well as using typical offence category groupings (i.e., offences against the person, against property, etc.). Such an analysis was also conducted at finer levels of offence classification such as assault, mischief, failure to comply, etc.

On a similar note, more precise data would be helpful to explore the trends we have highlighted. Given that over 80% of cases are consistently resolved in under 10 months, but that 10 months remains a significant amount of time for justice participants, it would be important to know what the distribution is within that group. Knowing if most cases are resolved in under a month or two would shed different knowledge than if most cases are coming in at just under 10 months. The average number provided in this article is insufficient for that task.

Chapter 4: Unthinkable, thinkable, and back again: The use of incarceration in Ontario during the COVID-19 pandemic

In collaboration with Chloé Leclerc
Accepted for publication by the *Canadian Journal of Law and Society*

The arrival of COVID-19 added potentially deadly consequences to incarceration. In response, jurisprudence developed allowing for some to be spared the deprivation of their liberty. However, there is insufficient empirical evidence that this avoidance of incarceration occurred in practice in Ontario. Using fieldwork methods conducted in Ontario criminal courts coupled with data from Statistics Canada, we investigate if a change in the use of incarceration during the COVID-19 pandemic occurred, and if friction emerged between those who may and may not espouse this new outlook. We find a notable and persistent decrease in the use of incarceration, that this was welcomed by many court actors but also that a fatigue with such leniency grew among others. We discuss what this fatigue might signify for the potential longevity of this more exceptional use of incarceration and more largely what this can signify about changes in Canada's criminal justice system.

The use of incarceration in criminal justice has long been and continues to be an important area of study. It is natural then to examine how these practices may have changed in the face of the COVID-19 pandemic which has impacted Canada, and its criminal justice system so profoundly. In this article, we undertake this work. Specifically, we seek to confirm if and in what ways COVID-19 pushed criminal courts and criminal justice actors in Ontario to alter their use of incarceration.

To do so, we begin with a brief exploration of incarceration in bail and at sentencing in Canada, followed by a review of COVID-19's impacts on custodial facilities. After presenting the methodology employed in this study, we present our results which are divided into two sections: the first discusses emerging leniency in the use of incarceration while the second reveals a potential reversal of this trend. Subsequently, we discuss the boundaries of what changes may and may not be possible in Ontario's criminal justice system.

Incarceration via Bail and Sentencing in Canada

Whether pending case resolution, or as a sentence for an individual found guilty of a criminal offence, Canada's legal framework strongly emphasizes that the use of incarceration should be a last resort (Manson, Healy, Trotter, Roberts & Ives, 2016). Indeed, section 718 of the *Criminal Code of Canada* outlines the purposes and principles of sentencing; among other objectives, it states that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" (s.718.2 (d)) and that "all available sanctions, other than imprisonment, that are reasonable in the circumstances…should be considered for all offenders…" (s.718.2 (e)). Furthermore, the *Canadian Charter of Rights and Freedoms* grants individuals a constitutional right not to be denied reasonable bail (11(e)). In this way, there are strong legal imperatives to avoid the use of incarceration unless absolutely necessary.

Of course, while these may constitute tenets of Canada's justice system, this is not necessarily reflected in practice. Manson and colleagues (2016) explain that incarceration is overused as a sanction, far from the exception in sentencing. Custodial sentences have remained stable for many years, representing roughly one-third of all sentences (Manson et al., 2016; Webster & Doob, 2007), far less exceptional than one might expect.

While the use of incarceration in Canada has remained relatively stable over many decades, the makeup of this population has changed drastically (Manikis & De Santi, 2020). Indeed, those in pretrial detention have outnumbered the number of sentenced individuals since 2004/2005 and continues to grow (Malakieh, 2019). Unsurprisingly then, many have called Canada's bail system broken (Canadian Civil Liberties Association, 2014; Myers, 2017; Webster, 2015; Webster, Doob, and Myers 2009).

Effects of the Pandemic on the Use of Custodial Facilities

One important reason for attempting to make the use of custody exceptional is that in many ways custodial facilities are unhealthy institutions (Burningham, 2022; Malakieh, 2020). The relationship between custodial facilities and the health of those within their walls has long been shown to be negative. Rates of communicable diseases and mental health issues are drastically higher among Canada's prison population compared to those not incarcerated (Johnson, Bien-Aimé & Dubois, 2021; Kouyoumdjian et al., 2016; Standing Senate Committee on Human Rights [SSCHR], 2021).

Many of these same health issues have been exacerbated by the COVID-19 pandemic (Iftene, 2020; Sapers, 2020). Some authors have detailed the deteriorated conditions in prisons both in Ontario and in Canada more widely (Fayter, Mario, Chartrand & Kilty, 2021; SSCHR, 2021). Most obviously, detainees were exposed to a high risk of catching COVID-19 within prison walls, worsened by a population constantly cycling in and out of provincial facilities (Iftene, 2020). Quite simply, the public health situation within prison walls was in crisis, putting many at serious risk to a virus that officials knew little about for a significant period of time.

For these reasons, and in an effort to reduce the risk to public health, courts reacted in various ways (Burningham, 2022; Statistics Canada, 2021). Canadian jurisprudence has largely recognized COVID-19 is a serious factor when considering the incarceration of an individuals at bail and in sentencing (Burningham, 2022; Kerr & Dubé, 2020, 2021). Within months after the

emergence of the pandemic in Canada, the courts began addressing if, when, and why COVID-19 ought to have an impact in these decisions.

Authors highlight strong jurisprudential deference to COVID-19 and the granting of leniency when deciding to incarcerate someone. Burningham explains that "Generally speaking, cases demonstrate a judiciary alive and responsive to COVID-19 concerns, favouring release when possible (for example, in the absence of safety or flight concerns)" (2022: 590). Further, exploring court decisions available to them in the first year of the pandemic, several authors demonstrate how courts in Ontario took judicial notice of the pandemic; some methods of doing so include granting release on bail more easily due to COVID-19 conditions in jails as well as handing down lighter sentences than offenders might have received absent the pandemic, and offering enhanced credit for pretrial custody (Kerr & Dubé, 2020, 2021; Gorman, 2021; Skolnik, 2020).[74]

Notwithstanding this openness to reducing the use of incarceration, some authors have discussed how leniency was not uniform in that it was not always granted in all cases where incarceration could be ordered (Kerr & Dubé, 2020; Myers, 2021). Indeed, Kerr and Dubé (2020) describe how some Ontario courts have required specific evidence of hardship in prison before granting enhanced pretrial credit rather than taking judicial notice of the pandemic's impacts on incarceration. Justice Gorman also explains that "While COVID-19 is a serious consideration, it has not produced a moratorium on incarceration. Nor would such a result be feasible or desirable" (Gorman, 2021: 22-23).

Thus, the issue of COVID-19 in custodial facilities does not appear to have a singular, predictable impact in courts. This suggests that "tensions have emerged" (Burningham, 2022: 601) in court rulings between the granting of leniency in the use of incarceration and the status quo; this has resulted in "business as usual" in some courts where legal norms remain largely unchanged except in some exceptional circumstances (Burningham, 2022: 594).

[74] Discussions on this topic are extensive and focus a great deal on individual health risks. For a greater exploration of these discussions, see Kerr and Dubé (2020).

Notwithstanding these rulings, it is commonly held that a gap exists between legal policy and practice (Phelps, 2011; Rubin, 2019). As such, it is important to review data, however sparse, which can speak to practices in the field during the pandemic.

First, Statistics Canada revealed that provincial and territorial remand populations across the country fell roughly 24% from March to April 2020, but increased 10% from July to September 2020; meanwhile the sentenced population dropped about 11% from March to April 2020, continuing to decrease slightly through September 2020 (Statistics Canada, 2021). In this way, though it only addresses data until the autumn of 2020, there appears to have been shifts in the use of incarceration as the pandemic wore on.[75]

Second, in an observational study conducted in the early months of the pandemic, Myers (2021) suggests that bail is relatively unchanged after the onset of the pandemic; specifically, conditions of bail release appear to be largely similar to pre-pandemic trends. She also suggests the prevalence of oral arguments on the topic of COVID-19 was low, and that it became rarer as time went on. Through a jurisprudential analysis, Burningham (2022) suggests similarly that as "COVID-19 becomes endemic and living with it becomes the 'new normal' for judges, it no longer brings with it the same urgency for release" (:596).

In this way, court rulings demonstrate openness to avoiding imprisonment. Nevertheless, incarceration remained a possibility and giving little to no weight to the pandemic remains an option. Further, while court practices have suggested that changes in the level of incarceration occurred in the initial onset of the pandemic, questions have been raised as to how widespread and long-lasting these changes have been.

Conceptual Framework

How change in criminal justice can emerge has been studied from various perspectives. However, recent criminal justice scholarship has begun to pay greater attention to the importance

[75]These numbers are average counts in custody, rather than simply new admissions. Thus, these counts can be impacted by special temporary measures taken by prisons to release individuals early (Statistics Canada, 2021).

of local actors in kindling, fueling, or smothering these changes (Garland, 2018). The agonistic framework as developed by Goodman, Page, and Phelps (2017) is one such approach. It theorizes how friction between justice stakeholders occurs constantly even if, superficially, the criminal justice system appears to be stable. More specifically, it posits that friction between justice stakeholders with differing philosophies is omnipresent and that certain events can allow some parties to gain the upper hand in their struggle to bring about changes they seek.

They outline three aspects of their framework: 1) "Penal development is the product of struggle between actors with different types and amounts of power" (Goodman, Page & Phelps, 2017: 8), 2) "Contestation over how (and who) to punish is constant; consensus over penal orientations is illusory" and 3) "Large-scale trends in the economy, politics, social sentiments… affect (or condition)—but do not determine—struggles over punishment and, ultimately, penal outcomes." (Goodman, Page & Phelps, 2017: 13).

Importantly, in later works they modified the second point to acknowledge that a "conflictual consensus" exists. Specifically, they state that "consensus among agonists helps to explain perceptions of stability, since much of the conflict in any given time and place is over small-scale tweaks to the status quo" (Page, Phelps & Goodman, 2019: 824).

Relatedly, Koelher (2019), explains that these "small-scale tweaks" do not alter boundaries of acceptable criminal justice practice. Thus, should change arise from friction, the boundaries of acceptable or conceivable change are rarely if ever modified due to a certain level of consensus among stakeholders on what can or ought to be changed in the system.

Stated otherwise, change in the criminal justice system occurs when friction between groups becomes large enough, and when those seeking change avail themselves of an opportunity to press their position. This can come from conditions in society at large such as times of turmoil. However, this change is not typically radical in nature, as the fundamental elements of the system are rarely questioned or pushed against by criminal justice actors.

This approach has several strengths in its approach to studying change in the criminal justice system. First, it places strong emphasis on the roles of individuals in criminal justice change, something that has until relatively recently been underutilized (Garland, 2018). Further, this approach allows for great latitude for individuality within a larger context bounded by local cultures and larger societal realities. In this way, it helps highlight fracture and variation between stakeholders, something some authors have called for in studying penality (Rubin & Phelps, 2017). In so doing, this approach highlights the micro, while not ignoring meso- and macrosociological conditions.

Consequently, this flexible framework is well positioned to understand how change may have come about during the COVID-19 pandemic, and how this struggle to implement change played out in the criminal justice system at that time.

Current Study

Court rulings demonstrated COVID-19 to be an important factor in bail as well as in sentencing, though COVID-19 was not meant to be dispositive in such decisions. However, beyond jurisprudence, there is limited empirical evidence on the topic in Canada, particularly beyond late 2020 despite the pandemic continuing to rage for at least another two years.[76]

This potential discrepancy may not be altogether surprising as we know that law on the books is not necessarily indicative of law in practice; indeed, we know individuals are responsible for implementing policy and that conflicting views can coexist. It is possible courts may have mobilized these decisions in various ways or may not have done so at all. Thus, to understand the impacts of COVID-19, we must understand the actions taken by decisionmakers on the ground. There is a strong incentive then to study how courts grappled with this jurisprudence in practice as it is through friction between stakeholders that changes can occur or be smothered.

[76]At the time of writing, more than two years have passed since this data was collected. Meanwhile the pandemic is still present in Canada and within Canadian custodial facilities, even if popular attitudes may have changed.

Consequently, this article aims to detail *how COVID-19 impacted the use of incarceration in Ontario during the pandemic*. We have two objectives in doing so: 1) to confirm and detail how, in practice, there was a break in how Ontario courts used incarceration during the pandemic, and 2) to illuminate potential struggles that occurred between members of the courtroom in the context of such change.

This research will contribute to empirical evidence on the topic of courts' use of incarceration during the pandemic that is currently underdeveloped. It will contribute more recent data beyond 2020 where most of the existing literature focuses, and on a more local scale. It will also attend to changes over the course of the pandemic, which some literature has suggested is essential. Further, it will add to our understandings of how of penal change can occur, and to what consequence.

This research will confirm that a notable and persistent break in the use of incarceration occurred due to the onset of the COVID-19 pandemic. Specifically, a noticeable reduction in the use of imprisonment in Ontario was observed both pending trial and at sentencing. While there was considerable consensus on such a move, there were certain actors who appeared to oppose or at least grow weary of the new state of affairs, advocating for the return of the pre-pandemic status quo. Consequently, we suggest that the longevity of changes in the use of incarceration is imperilled.

Methods

This research was undertaken in the context of a larger project exploring adaptations of criminal courts during the COVID-19 pandemic. It uses qualitative and quantitative data collected in Ontario criminal courts. We mobilize three principal data sources: 1) public court and corrections data from Statistics Canada, 2) in-depth interviews, and 3) court observations. To a lesser degree, we lean on information from informal conversations with court actors undertaken during data collection.

First, we make use of data from Statistics Canada.[77] Specifically, we use quarterly sentencing data from Ontario as well as yearly correctional data to address both our first and second objectives. At the time of writing, data are available from April 2019 until the end of September 2022. It includes all criminal code and other federal statute offences[78] as well as offenders sentenced to either provincial or federal facilities. Yearly correctional data are more limited and are only available up to 2021/2022 (i.e., March 2022).

Second, we conducted sixteen virtual in-depth interviews with judges and defence counsel in Ontario between October 2020 and October 2021.[79] Interviewees were asked a series of questions about their experiences practicing criminal law throughout the COVID-19 pandemic. Specific questions were asked about the sentencing landscape during the pandemic and how it may or may not differ from before its onset. Interviews were transcribed and analyzed using NVivo software. Using thematic analysis (Clarke & Braun, 2015), we proceeded through a process of open coding to understand the underlying patterns. This was followed by a process of focused coding, targeting instances in which incarceration was discussed (Emerson, Fretz, & Shaw 2011).

Third, we also integrate data collected during fifty days of observation in sentencing courts and forty-nine days in bail courts across eight Ontario courts between January and October 2021 (Table 1). Observations were conducted remotely, using Zoom, the *Justice Video Network*,[80] or, on occasion, conference call. Over 400 pages of field notes taken during observations were used to create analytic sheets outlining the essential facts of cases when a bail or sentencing decision was rendered. Though not an exhaustive list, these sheets detailed the date, names of court actors involved, offender characteristics such as age and gender, charges, sentence type and conditions, reasoning for the decision, as well as any mentions of COVID-19 and from whom.

---

[77] Online table 35-10-0176-01.
[78] Including other federal statutes did not greatly alter trends. However, their exclusion is difficult to justify as these remain part of the caseload courts face and must decide upon.
[79] Crown attorneys were not interviewed due to the difficulty in gaining access to this group. Individuals were canvassed by the authors, but consent could not be obtained.
[80] This is system like Zoom in that is allows for virtual appearances. See [redacted reference for peer review] for further discussion of this technology.

A brief note on Ontario's correctional facilities will help situate this current research in the larger Canadian context. In the province, there are twenty-five provincial facilities[81] of varying sizes housing roughly one third of the country's provincial detainees (Malakieh, 2020). There are also seven federal institutions[82] for adults. While observations were undertaken in eight Ontario courts, these interacted with eleven provincial and two federal facilities in the province at least once. This provided a sizeable cross section of different institutions from across the province for analytical purposes. Due to privacy reasons, we do not identify these facilities in this work.

Table 1 Sentencing and Bail Hearing Descriptive Statistics

	Sentencing Days	Sentencing Decisions	Bail Days	Bail Decisions
Court 1	19	55	21	62
Court 2	1	2	1	7
Court 3	1	3	1	4
Court 4	3	6	9	8
Court 5	5	7	4	5
Court 6	10	18	6	10
Court 7	4	6	4	1
Court 8	7	10	3	5
Totals	50	107	49	102

Finally, this analysis is supported by numerous informal conversations with criminal justice actors, as well as court support staff, community practitioners such as victims aid workers, and diversion program workers. Notes were taken after conversations and total roughly thirty pages. Though they will not be quoted directly, these conversations allowed us to discuss emerging patterns in the data with those knowledgeable about the courts, validating or nuancing what we had previously seen in court or heard from interview participants.

These methods will all be used in conjunction to address our second objective of documenting potential struggle between court actors, while also offering support to our first objective of confirming a break in the use of incarceration. These methods are well suited to the

[81] A list of provincial facilities can be found here: https://www.ontario.ca/page/correctional-facilities#section-3.
[82] A list of federal facilities can be found here: https://www.csc-scc.gc.ca/institutions/001002-3000-en.shtml.

task as, to fully evaluate the impact COVID-19 had on arguments surrounding the use of incarceration, it is beneficial to incorporate fieldwork methods where participants can be seen mobilising such arguments and where they can explain this mobilisation. These will be used to contextualize and reinforce trends found in data from Statistics Canada. However, in some instances, no such statistics exist; as such, these qualitative data will be presented without statistical support. Extra care will be taken in these situations to not generalize or conclude beyond what is reasonable.

These results present common themes emerging from this analysis. Quotes and examples were chosen for their representativity of the data. While the fieldwork data cannot possibly be generalized to all Ontario courts, court actors, nor to every period of the pandemic, they supplement and contextualize the statistical data we explore. Thus, this analysis is able to advance an understanding of court decision-making when extreme stressors are introduced to the criminal justice system.

Results

Inspired by the agonistic framework and guided by our two objectives, these results are presented in two sections. First, we will explore the emergence of an alternate, and more lenient approach to incarceration that differs from the pre-pandemic status quo among court actors. The second section will detail the resistance to such a different approach to incarceration. Both sections will mobilise data collected on the topics of bail and sentencing, two decision points in the criminal justice system which trigger the possibility of being incarcerated. Together, they will demonstrate that a new "conflictual consensus" emerged among court actors after the onset of the COVID-19 pandemic, where the limits of what was thinkable and unthinkable shifted when deciding on the use of incarceration.

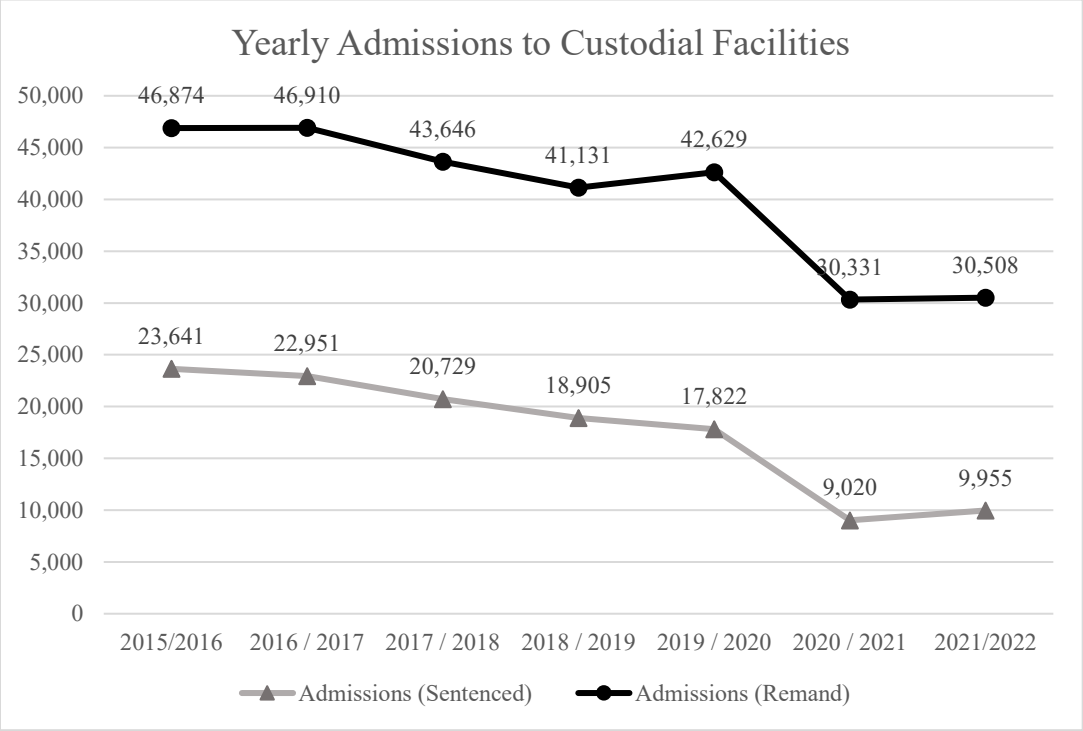
The Push Towards Reduced Incarceration

Data confirm that an approach to the use of incarceration, different from that preceding the pandemic, appeared and that it continued past late 2020. Figure 1 graphs the number of

admissions to all custodial facilities in Ontario from April 2015 to March 2022[83] in order to present changes in both the use of pretrial detention and incarceration as a sentence.

Figure 1 shows that, while the number had been declining slowly for a few years prior to the pandemic, new custodial sentences fell a staggering 49% from 17,822 to 9,020 between 2019/2020 and 2020/2021. This number rebounded slightly the following year, increasing roughly 10% by the end of 2021/2022. The number of remand admissions followed a similar trajectory falling a remarkable 28.9% from 42,629 to 30,331 between 2019/2020 and 2020/2021, then remaining at a similar level until the end of March 2022. Quite simply, this graph indicates that courts were sending far fewer individuals to custodial facilities to await the resolution of their cases or as a sentence.

Figure 1



Source: Statistics Canada Table 35-10-0014-01

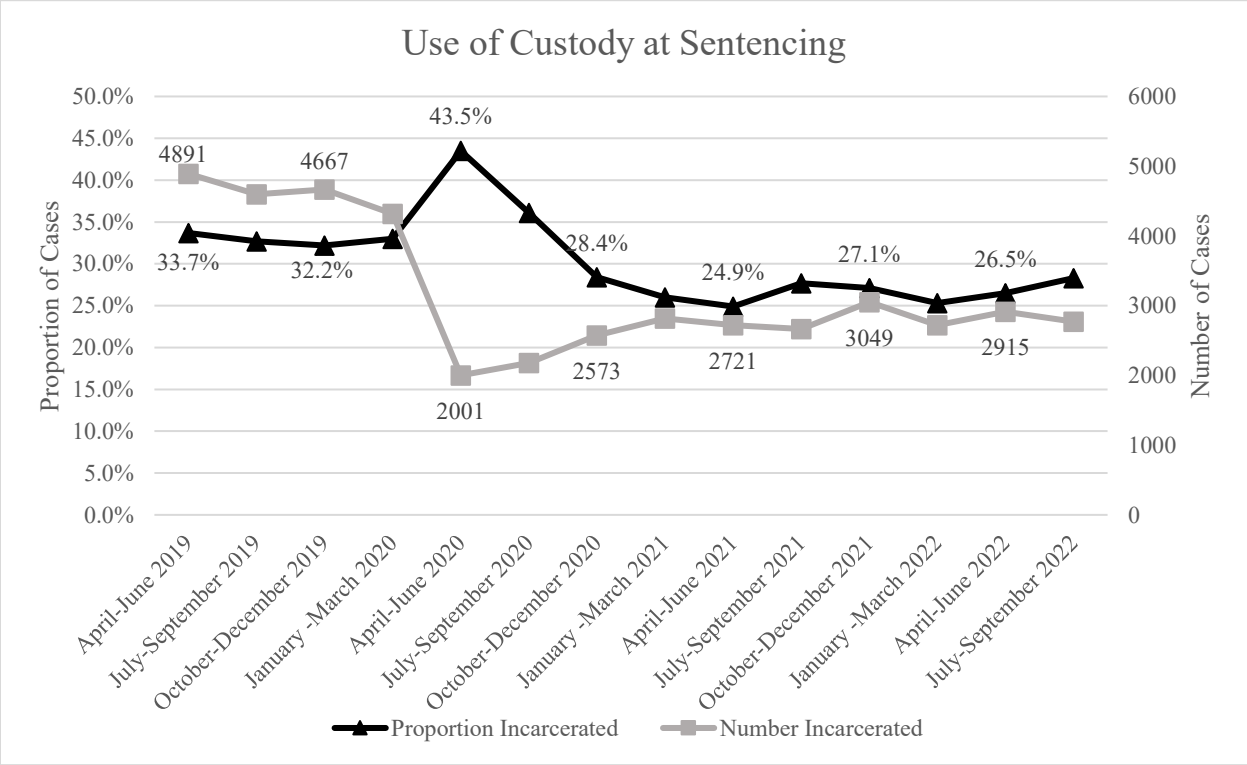
[83] These are fiscal years and as such they count years from April to March. More recent admissions data were not publicly available at the time of publishing.

Importantly, this drop occurred during a time when it was difficult to know when case resolution might occur as mass adjournments were common, creating an unprecedented backlog in Ontario's criminal justice system. Indeed, from April 2020 through March 2022 uncertainty still existed as new waves of COVID-19 overtook Ontario time and again. With such uncertainty in the state of the pandemic, it is understandable that courts would try to avoid the use of incarceration.

Where Figure 1 suggests increased restraint in the use of incarceration during the pandemic, quarterly data collected by Statistics Canada also supports and nuances this.[84] Figure 2 show that in the fiscal quarter preceding the onset of the COVID-19 pandemic (January-March 2020), approximately 4319[85] or 33.7% of all resolved cases resulted in a custodial sentence.[86] In the most recent data available, roughly 2772 people (or 28% of all guilty cases) were given a custodial sentence, though this dipped as low as 24.9% and 25.3% in April-June 2021 and January-March 2022, respectively.[87] Despite a slight rebound in the number of people incarcerated between April and December 2020, a stable level of incarceration, below that preceding the pandemic, has endured until the most recent period of data availability.

[84] Quarterly corrections data to investigate the use of pretrial custody were not available.
[85] Numbers were calculated by multiplying the number of cases provided by Statistics Canada by the percentage of all cases found guilty and receiving a custodial sentence. The same method was used when any raw number is provided for Statistics Canada data save, of course, for the number of cases.
[86] This rate is generally stable in prior quarters and is congruent with trends in the use of incarceration over the past 10 to 15 years in Canada.
[87] A high of 43.5% was encountered in April-June 2020, just as the pandemic struck. However, we would not emphasize this figure as it may be an artifact of the unique context in the immediate aftermath of COVID-19's arrival and the quasi-closure of Ontario's courts. This high may instead reflect an effort to quickly resolve more serious cases (thus perhaps requiring custody) which could not be adjourned whereas less serious cases could reasonably be delayed.

FIGURE 2

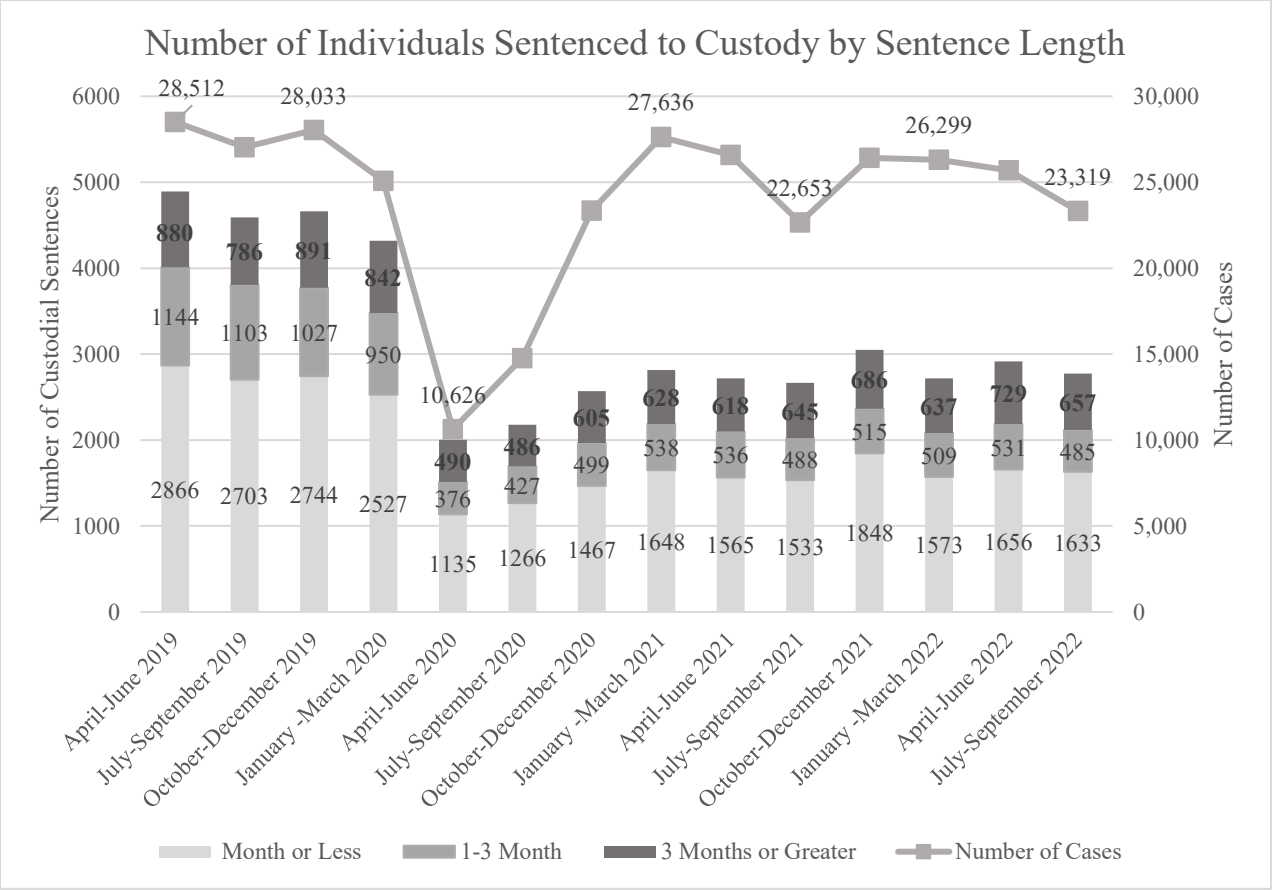


Source: Statistics Canada Table: 35-10-0176-01

Thus, while a decreasing number of resolved cases in the system is certainly responsible for part of the drop in the raw number of custodial sentences seen in Figures 1 and 2, the decreased proportion of these sentences confirms there was also a lower relative use of incarceration. This reduced use of incarceration is especially notable given the evolution of public health policy and public attitudes towards the COVID-19 pandemic in Canada.

In addition to the decision to incarcerate at bail or sentencing, it is equally important to investigate the length of custodial sentences to understand the use of incarceration during the pandemic more fully. Figure 3 supports the contention of a new, more lenient approach to sentencing occurring in Ontario's courts during the pandemic. This continued until at least September 2022.

Figure 3



Source: Statistics Canada Table 35-10-0176-01

As in Figure 2, we see a staggering drop in the number of cases being sentenced to custody at the onset of the pandemic. The number of sentences of thirty days or less and one to three months decreased substantially. Indeed, the numbers were more than halved, with sentences of thirty days or less numbered at 2527 in the quarter preceding the onset of the pandemic, falling to 1135 once the pandemic struck; sentences of one to three months fell from 950 to 376. These represent drops of 54% and 60% respectively. While the number of these sentences have increased as the pandemic wore on, they remain significantly below levels seen pre-pandemic. In the most recent quarter, sentences of one month or less and one to three months were still noticeably lower than those prior to April 2020 (35% and 49% lower respectively).

Interestingly, while longer sentences of three months or greater dropped by roughly 42% from 842 to 490 at the onset of the pandemic, this was still smaller than those of shorter

sentences. Further, while these sentences also remain below pre-pandemic levels, in the most recent quarter they are only 22% below the level seen just before the pandemic. Stated otherwise, of the three groups, sentences greater than three months are closest to their pre-pandemic levels.

This is perhaps not surprising. Shorter sentences are precisely the cases one could assume would be reduced during the pandemic. If a short sentence is required, it is likely that public safety is not the greatest issue at sentencing. This is not necessarily the case with those circumstances leading to longer sentences. Logically then, these shorter sentences might be the cases that could be served in the community under certain circumstances.

Together these figures demonstrate that, at least at the larger provincial level, there were remarkable decreases in Ontario criminal courts' use of incarceration as a sentence and pending resolution. Decreases of 50% or greater in the number of cases receiving a custodial sentence were not uncommon as time wore on. Notably, this drop in the number of custodial sentences does not appear to be solely linked to a decrease in cases in the criminal justice system. There is a significant, logical link between the number of cases in the system and the number of custodial sentences rendered; however, the fact that the number of custodial sentences did not increase to pre-pandemic levels when the number of cases returned to these levels indicates there was an undeniable and continued change in practice. Despite this trend, the above figures show that incarceration levels have begun to increase from pandemic lows even if COVID-19 continues to impact Canada and its custodial facilities.

Fieldwork methods corroborate these province-wide trends. As with the quantitative data, several defence counsel noted that they felt bail decisions were agreed upon more easily than before the pandemic. There was particular emphasis on the reduced need for sureties. One spoke about a client held in pretrial detention during the early days of the pandemic who "wasn't getting out no way no how. Certainly, wasn't getting out without a surety". However, he added that:

> Soon as the pandemic hit, the crown agreed to release that individual with no surety, as long as he had an address and was going to report by phone to the police on a weekly basis so that we knew he wasn't disappearing on us. I mean, he was just basically sent on his way which was virtually unheard-of pre-pandemic. (D5)

Here then, the pandemic pushed crowns to consent to the release of an accused with few conditions when this would not have happened prior to the pandemic.

In terms of sentencing, the most common refrain from interview participants was that sentences rendered during the pandemic accounted for the harsh conditions an accused already faced in jail while in pretrial custody, or the conditions they were liable to suffer should they be incarcerated. More specifically, they attempted to be more lenient, either avoiding incarceration or shortening custodial sentences. These were commonly called "COVID deals" by participants:

> So as a result of COVID-19 the crown's office has been offering what's called "COVID deals". They're deals that essentially are made for COVID in mind to be a little lighter or a little more focused on getting someone out of custody than they necessarily would have been beforehand. So there's been a level of leniency that was reintroduced in the system that we wouldn't necessarily have seen before COVID. (D1)

Another stated similarly that he believed "what was also adopted a lot was to take into consideration the pandemic as a mitigating factor in the imposition of the prison sentence to be imposed. This is the approach judges preferred, I believe" (D2, translated from French by authors). Such evaluations came from both defence counsel and judges interviewed; indeed, participants were nearly unanimous in this evaluation.[88] One judge explained how defence and the crown "made some very reasonable offers to resolve a lot of cases. And a lot of cases are either getting stayed, withdrawn or they're resolved with reasonable deals" (J5), corroborated by the lower number and proportion of custodial sentences discussed previously. Another provided a closer examination of their thought process when deciding on the potential incarceration of an offender:

> At the time [the goal] was to avoid them being in prison in the summer when there were fears that the spread was going to be even greater. When we realized that the second wave was not going to miss us, it was the question "Can we impose a lesser sentence or can we impose a sentence within the community rather than traditional imprisonment" … Our Court of Appeal has clearly indicated that it is quite justified to impose lesser sentences so that people are less likely to be exposed to the virus. (J2, translated from French by authors)

Similarly, the majority of participants noted that counsel tried very hard to work together and find common ground on files that may otherwise have been contentious. For example, D5 stated

[88] Of the 9 defence counsel interviewed, three did not comment on sentencing. Of the 6 judges, 2 did not.

that judges and "particularly more liberally inclined judges were coming up with everything but the kitchen sink to keep people from entering the jail and get them out of the jail as quickly as possible" (D5). Further, like every other judge who spoke on sentencing mentioned, one judge interviewed expressed that he "was pleasantly surprised at how hard the parties worked to resolve a number of matters" (J3). Stated otherwise, this judge was pleased crown and defence endeavoured to reconcile disparate sentencing positions during their negotiations. Thus, given their knowledge of jail conditions, court actors were creative in finding ways to avoid custodial sentences where they judged feasible.

Data from observations, informal conversations and formal interviews suggest this more lenient framework, one which avoids incarceration as much as possible even in cases where it might otherwise be necessary, was conceivable due specifically to the pandemic. Frequently, court actors would utter the seemingly magic words "but for COVID-19" when imposing a "light" sentence they may not have pre-pandemic. One interviewee described how, particularly for crowns, the pandemic gave tacit permission to act in this way because it would not set a precedent:

> It's almost as if, it's going to sound strange, but COVID-19 gave them [crown attorneys] a bit of an excuse to take a lighter position and to feel that it wasn't creating precedent. And that's fair…So I think that's freed them up a bit because they've been able to say "Look, *but for* COVID I would've said *X* but this is COVID-19" and I think that has sort of given them a little bit more freedom. And again, because as a crown…I get it. You have to be able to justify your position to a whole bunch of people (J3, emphasis in original).

These data make clear there was certainly a change in approach to the use of incarceration. Participants made it clear that great efforts were made in court as well as in resolution discussions to not send individuals into custodial facilities unless they felt it was absolutely necessary. Court actors were aware of the issues of incarcerating individuals during a health crisis, and they changed the way they evaluated offenders and the merits of incarceration in any given case. These trends necessarily speak to cooperation and shared understandings of the current pandemic environments. Actors spoke of the exceptional nature of the times and found solutions that may not have been accepted "but for COVID". While fieldwork was conducted principally throughout 2021, the quantitative sentencing data reaches into 2022 shows that this reduced incarceration endures. Importantly then, this avoidance of incarceration appears to still be holding in Ontario's criminal justice system. Of course, data on remand admissions are

currently only available until March 2022 and as such, we cannot say if this reduction in admissions has continued.

The Pull Back to Increased Incarceration

Notwithstanding the emergence of this pandemic-era approach to incarcerating individuals, data also suggest some individuals on the ground pushed back against this change, if only in some limited ways. Typically, this pushback emerged from crown attorneys, but there were some judges or justices of the peace who also exhibited such tendencies. This struggle between different actors is precisely what the agonistic perspective suggests occurs constantly in the criminal justice system. This was evidenced primarily through field methods rather than quantitative data from Statistics Canada. Nevertheless, this pushback on the ground may serve as a precursor to larger scale trends that are visible in provincial-level statistics.

Resistance to COVID-19 leniency in the use of incarceration in the bail context was discussed by several defence counsel interviewed. One characterized bail as a disaster generally but "even more so with COVID-19". She went on to explain that:

> at the very beginning [of the pandemic] there was all this case law coming out…and we thought that…submissions about incarcerating people who are at risk and it's a global pandemic would be convincing and noteworthy for a justice of the peace. And I think it very quickly withered, I don't think that became a very convincing argument…So, now I'd say that it's probably about the same that it was pre-pandemic in terms of rates of release. I don't think that people are less likely to be detained because of COVID. (D8)

Interestingly another participant corroborated this leniency and its downfall:

> I had a lot of consent releases [early on in the pandemic] but now I have noticed more often than before…Before there was almost a presumption in favour of release. Which of course supposed to be the norm. But now, it is more nuanced now. They are looking at it again and saying, "OK we don't think this guy should be released, we're going to have to run show-cause on him". (D9)

It is noteworthy that this participant characterizes this presumption of release as what bail *ought* to be normally but insinuates this is not the case. Nevertheless, this is further confirmation of an initial leniency in the use of incarceration by courtroom actors; nevertheless, they also highlight a certain pushback, or weariness to this new state of affairs on the part of some crown

attorneys and justices of the peace. Indeed, this suggests that there was a desire to return to pre-pandemic norms where cases could more easily end in a custody.

Several defence counsel made an important addition to this pushback against more liberal bail practices. They were skeptical that bail releases had ever become more frequent or lenient after the onset of the pandemic; instead, they felt police officers were releasing individuals they would not have prior to the pandemic. One explained that:

> When I went to bail court…I didn't feel any differences in terms of how the crown would exercise their discretion…So, for *me*, I cannot say that because of COVID I've seen a change…inside of the courtroom. I've seen a change in terms of how the police officers exercise their discretion to release people that would otherwise end up brought to the station or brought in, ultimately to the courthouse to have a justice of the peace determine their release. (D3)

Thus, while there are those who felt bail had become more accessible due to the pandemic, most participants describe the change as minimal, or at very least short-lived. They either felt that either crowns or justices of the peace had never bought into a more lenient approach to incarcerating individuals pending trial, or that they simply stopped at some earlier point in the pandemic. In other words, there was a resistance from some actors.

This is not to say that this resistance was widespread. Indeed, notwithstanding potential differences in proportional terms, Figure 1 showed a decrease in the number of bail admissions, at least up until March 2021. This might be attributable to police releasing more individuals rather than courts taking a more lenient approach. Indeed, Myers seems to briefly hint at police releasing more individuals rather than holding them for bail (2021: 15).

Despite noteworthy and at times creative efforts to avoid imposing custody, several participants, judges and defence alike, mentioned that they felt the strength of COVID-19 as an argument against the incarceration of an offender was waning at the time of data collection. One judge was particularly succinct in summarizing such a phenomenon at sentencing:

> I think there was probably a bit of a falling off period where it looked like the pandemic was under control…And again people get fatigued right? People get tired of hearing the same thing 'Ah the lawyers keep saying the same thing about, you know, got to give the guy a better deal or he's going to go in a middle

> of a pandemic'. There's a fatigue about it and I think there was a period of time when the commitment by some people in the process, to using real COVID-geared solutions might have waned a little. (J6)

In this way, they suggest that dedication to avoiding custodial sentences was not what it may have been at the outset of the pandemic. One defence counsel even suggested this "fatigue" set in as early as August 2020. Figure 3 supports this suggestion. While it shows the number of individuals sentenced to custody decreased remarkably at the outset of the pandemic and remains lower than pre-pandemic levels, it also shows this number began to grow again, at least minimally, in the latest fiscal quarters.

Another aspect of sentencing during the pandemic offers support for the assertion that there was pushback against the pandemic-era leniency when incarcerating offenders. Kerr and Dubé (2021) discussed how some appellate courts in Ontario and beyond provided credit for pretrial custody beyond 1.5 days for every day spent in pretrial custody, known as *Duncan* credit. In the few cases where these arguments arose during court observations however, they were strongly opposed by crown counsel.[89] This trend was confirmed in interviews.

Of the 107 full sentencing hearings observed, *Duncan* credit arguments were only made in five. In four of these, credit above 1.5:1 was granted.[90] Notably, in one of these four, the judge specifically stated that it "should not serve as precedent" (Observation Notes) given unique factors of the case, strengthening our earlier argument around the importance of avoiding setting precedent at sentencing. In each of these five cases however, Crown attorneys argued Duncan credit should not be granted, either explaining that pretrial discussions had been predicated on credit of 1.5:1 or that greater credit had already been baked into the resolution agreement. Crowns also demanded the defence proffer evidence of uniquely harsh conditions experienced by a detainee to justify this credit.

In a noteworthy exchange during court observations, a crown attorney implied that an accused who had previously been detained during the pandemic had knowledge of these poor jail conditions and thus should not be rewarded with increased, COVID-19-related leniency in their

[89] Of course, we cannot know if the subject arose during resolution discussion between the parties.
[90] Judges did not provide these ratios. Instead, they calculated pretrial custody at 1.5 to 1, and then took off an additional number of days at 1 to 1 which led to an effective ratio of greater than 1.5 to 1.

current bail hearing (Observation Notes). While the judge challenged and disavowed the crown's logic, the fact that it was raised as an argument is suggestive of a thought process that may exist among some crown attorneys.

Similar crown opposition to *Duncan* credit was also discussed by several interview participants. Several participants felt crown attorneys pushed back against such the granting of greater credit, "Well definitely some crowns are not happy with the level of pre-sentence custody that is being attributed. We have been getting some pretty amazing deals where it is two for one…and they [crowns] are kind of arguing against that" (D9).

While only a single judge discussed this topic, he felt that existing legislation did not allow for its granting:

> …by statute, a person who is spending time in custody is not entitled to more than 1.5 days credit…There have been some authorities that have suggested that COVID can change that. And my view, based on the various authorities, that absent a Charter application as a court of statute, I don't have the jurisdiction to do that." (J3).

Thus, while not expressing opposition to it, this participant felt there was insufficient jurisprudential guidance at the time of our interview. Nevertheless, taken together, this data suggests that, despite the noted and widely acknowledged conditions of jails during COVID-19 and the possibility of mobilizing *Duncan*, courts, but especially crown attorneys appeared reluctant to allow the granting of Duncan credit. However, the infrequency with which it was argued and granted makes more nuanced conclusions difficult.

These extracts have shown that, while there were no explosive conflicts between various members of the courtroom, there were certainly differing points of view and different, evolving approaches to the use of incarceration among court actors during the pandemic. It is these undercurrents of resistance than can, and sometimes do, come to define penal practices more widely.

Discussion

Fulfilling our first objective, these results have shown there was indeed a break in sentencing practice in Ontario, an opportunity that emerged from the onset of the pandemic and the dire health consequences associated with imprisoning individuals during this time. Both the number and proportion of cases receiving a custodial sentence dropped noticeably and, in 2022, continued to be lower than before the arrival of the pandemic. Participants described "COVID deals" and "coming up with everything but the kitchen sink" to avoid custodial sentences as one defence lawyer stated. However, we also highlighted potential resistance among certain actors to leniency in the use of incarceration. When some pushed against these new norms, arguing for release on bail, for a non-custodial sentence, or for increased pre-trial credit, resistance arose from other actors who could not abide by such decisions. We suggest, like Myers (2021) and Burningham (2022), that a pandemic fatigue set in among some court actors who may have felt that arguments for avoiding incarceration began to hold less sway.

What these results have highlighted then is a low-level struggle between those open to new norms surrounding the use of incarceration and those hesitant or even hostile towards such a change, meeting the second objective of this work. Koehler (2019) explains that frequently struggles in penal development such as those elaborated here do not move beyond certain presumptively legitimate boundaries, beyond what is "thinkable". Here then we hold that it was thinkable for court actors to *temporarily* reduce incarceration due to the conditions in custodial facilities, particularly for short sentences, but it was not thinkable for some crown attorneys to solidify this leniency into a precedent that may outlast the pandemic. It was thinkable to reduce the use of custody at the outset of the pandemic, but again, this could not continue indefinitely.

Considering Koehler's (2019) idea of thinkable and unthinkable in the context of penal change, Page, Phelps, and Goodman (2019) adapted the agonistic framework to incorporate the idea of a "conflictual consensus" that exists in criminal justice systems. This is to say that while resistance and contestation are ever-present, there is a tacit agreement about the parameters of the system; again, there is agreement about what is legitimate and conceivable in the system. The framework holds that conflictual consensus hinders radical transformations of the system,

keeping change within acceptable boundaries, by "not questioning the legitimacy of the [system]" and making only small, incremental changes (Page, Phelps & Goodman, 2019: 824).

Given the extent of the drop in incarceration, how can we still assert that the change was not radical? We begin by retracing some of the existing boundaries around incarceration in Canada's criminal justice system. First, restraint in incarceration was not a fringe idea prior to the pandemic. Statute and jurisprudence frequently mention it. Even if in practice the exceptional use of incarceration is dubious as suggested by some authors (Manson et al., 2016), there is at least a *prima facie* legitimacy for court actors to avoid incarceration when possible. However, just as jurisprudence and statute can permit the avoidance of incarceration, it can be mandated or strongly encouraged through these same mechanisms. For example, mandatory minimum penalties can require the imposition of a custodial sentence. Within these boundaries however, court actors, and crown attorneys especially, possess a great deal of discretion in seeking custody (Manson et al., 2016).

With boundaries so wide on the acceptable use of incarceration, radical can only take so many forms. One such possibility might have been suspending the use of incarceration, even temporarily. The data show that this did not occur, and sentences both short and long continued to be handed down. Further, no actors vocalized the possibility to completely avoid incarceration during this exceptional time despite the danger of the pandemic. It is perhaps Justice Gorman who said it most clearly that a moratorium on incarceration would not be "feasible or desirable" (2021: 21-23), espousing what Burningham characterizes as the "business as usual" approach (2022: 594).

In the current analysis then, it can be said that the conflict and friction we have discussed operated within a consensual framework surrounding acceptable uses of incarceration. The reductions in incarceration, though unprecedented, were not radical in that they did not truly break beyond acceptable boundaries of practice. We concur with Burningham who states that "The result [of COVID-19] is far from the dramatic shift in ethos that some called for at the beginning of the pandemic" (Burningham, 2022: 596). It did not allow for more radical approaches to reducing incarceration even if restraint in its use grew. Indeed, one participant

described the “leniency” in bail during the pandemic as what ought to have been regular practice before the onset of this health emergency.

Stated otherwise, while incarceration became more infrequent during the pandemic, this change only brought its use more in line with what it should be: exceptional. It is our contention that such sparing use of incarceration should not considered a radical change for if it is, greater concerns emerge about the trajectory of criminal justice moving forward.

Conclusion

These results raise questions about the potential for decarceration movements in Canada. Some have highlighted the strengthening of prison abolition movements during the COVID-19 pandemic in Canada due to the worsening conditions in custodial facilities across the country (Anthony & Chartrand, 2022; Chartrand, 2021). However, as these conditions recede, one may question if these efforts can continue. Indeed, having grown out of the pandemic, it is reasonable to ask if this leniency might endure or if it will succumb to those opposing this pandemic-era sentencing framework.

While some trends suggest the prevalence of incarceration remains lower than pre-pandemic, this could change. Indeed, some authors raise concerns about the longevity of changes emerging from disasters such as the COVID-19 pandemic. While cooperation emerges between various groups alongside new norms (Quarantelli, 2000; Perry, 2017; Vollmer, 2013), these can evaporate with the passing of the disaster, returning relationships and routines to their pre-disaster forms (Wenger, 1978). This may hint that avoidance of incarceration may not endure much longer past the end of the COVID-19 pandemic as some have suggested is the case internationally (Maruna, McNaull & O’Neil, 2022).

The pandemic presented certain individuals the opportunity to favour decarceration (Chartrand, 2021; Maruna, McNaull & O’Neil, 2022); however, it is possible another event may come to pass only to reinforce the use of incarceration. One need only think to the variety of news stories deploring the so-called “soft-on-crime” approach Canada’s criminal justice system

allegedly espouses. Recent concern for public safety and leniency in bail following the deaths of police officers in Canada[91] is but one recent example of an opportunity taken to demand greater incarceration. It is clear then that such events offer fertile ground to undo progress towards decarceration.

For this reason, proponents of this movement must capitalize on the opportunity for positive change if decarceration is their goal. There may be a chance for this new incarceration framework to remain in place should it gain sufficient acceptance and legitimacy among criminal justice actors. Indeed, changes that are beyond the boundaries of acceptability in the criminal justice system are not likely to develop deep roots given that buy-in from the actors on the ground is fundamental for successful implementation of policy change (Campbell, 2011; Rubin & Phelps, 2017; Webster, Sprott & Doob, 2019).

Of course, buy-in from actors may depend on a variety of factors. One such factor is the utility of a proposed change. Indeed, Feeley explains that one of the impediments to change in criminal justice is that "there is little incentive for those engaged in day-to-day administration of the criminal courts" to do so (Feeley, 2013 [1983]: 192). Therefore, if an incentive can be found, this could help ensure buy-in from actors responsible for carrying out a given change in their day-to-day work. For example, if it could be demonstrated that seeking fewer custodial sentences would result in faster and more efficient case resolutions, it is possible court actors may be more inclined to do so due to the benefit it could bring them.

As such, we contend that those seeking change and reform must seek incentives for those responsible for carrying out said reforms. The current work reinforces these assertions, that without this buy-in, changes will struggle to endure, either during an emergency, and even beyond. Importantly, buy-in likely requires working within the boundaries of acceptability, which is to say that radical changes may be difficult to implement.

Finding these incentives would ideally be done in partnership with relevant stakeholders as suggested by Webster, Sprott, and Doob (2019). If collaboration is not possible, advocates

[91] For example, see Cook and Stone (2023).

may need to identify potential benefits with support from existing literature. For example, if a link between seeking fewer custodial sentences and decreased litigation and therefore criminal court workloads could be uncovered and highlighted, this may serve as sufficient incentive for court actors given widely publicized issues of delay in Canadian criminal courts.

Future research aimed at better understanding the perceptions and values of court actors would provide evidence on how to ensure court actors might support and enact legal change. While these actors may outwardly support those larger, system-wide values, their own may come into conflict with them, creating a fertile ground for resistance. In understanding and identifying potential areas of consensus and resistance, scholars and other stakeholders may more easily identify potential areas of intervention that are more likely than others to succeed. These may help advocates of decarceration to advance their causes post-pandemic.

Furthermore, future researchers would be well served monitoring this contestation with particular emphasis on a micro sociological level. In this way they can bear witness more easily to the friction that can hide beneath a surface that appears relatively stable, as contended by the agonistic framework. Further, a deeper analysis of COVID-19-era changes as a case study on decarceration and abolitionism would be especially fruitful. If crown attorneys can be incorporated into any such study, this would be particularly illuminating. Nevertheless, once more detailed court data is available, it is imperative to monitor these statistical trends to identify if those discussed here have continued or if they give way to a more traditional approach to incarceration. This will help nuance trends found “on the ground”.

Chapter 5: Discussion and Conclusion - Lessons Learned About Criminal Justice and Change in a Disaster Context

My original research goal was to study the response of criminal courts and criminal courts following the 2016 decision in *R. v. Jordan*. With the arrival of the COVID-19 pandemic, I was blown onto a different course, shifting to an examination of how criminal courts in Ontario reacted and adapted to this extraordinary public health crisis. I sought to explore the transition to remote appearances, to detail changes in case processing practices in Ontario criminal courts over the last decade and through the COVID-19 pandemic, and also to highlight potentially new approaches to incarcerating individuals during the pandemic.

I made use of both qualitative and quantitative research methods to collect information on these topics. These transformed and adapted as time went on and data became more readily available. I combined ethnographic field methods with administrative court data to gain an appreciation for province-level tendencies alongside field-level practices.

In Chapter 2, I found that while virtual appearances had significant potential for expanding access to justice, their use during the pandemic risked undermining this pillar of the justice system for rural, self-represented, and incarcerated litigants. This arose largely from the inadequacy of remote technologies during the first year or so of the pandemic. Nevertheless, I detailed how this was at times overcome through the actions of certain justice actors who worked especially hard to ensure that justice was achieved during the upheaval of the pandemic.

In Chapter 3, I showed how backlog in Ontario's criminal justice system increased significantly with the onset of the pandemic, but that efforts were undertaken to tackle this in the years following. Notwithstanding these efforts, the long trend toward increased delay in Ontario's criminal justice system continues. I raised concerns about the potential return of the culture of complacency in the system and how it has inched precipitously close to catastrophe in terms of delay and the backlog awaiting attention.

Chapter 4 reviewed the use of incarceration during the pandemic, both in a pretrial and post-sentencing context. I confirmed that the number of individuals incarcerated during the pandemic dropped a staggering amount. I demonstrated that many individuals were spared custodial sentences that they would have received absent the pandemic. I discuss how courtroom

actors may have felt justified, or permitted to take such action, but how a certain fatigue and resistance have emerged among some courtroom actors and that a return to the status quo surrounding the use of incarceration has commenced.

Together, these articles raise questions about how the criminal justice system can accommodate change and for how long. They also beg the question of how to predict whether certain changes will endure or not. In the first section of this chapter, this is what I will explore by categorizing the changes I have highlighted in this thesis. I hope this will offer tools to justice stakeholders to implement, or even resist changes to the justice system as well as to academics interested in the topic.

In the second portion of this chapter, I will explore some theoretical and methodological implications for studying change that emerge from this research; specifically, I will explore an alternative theory of change that could have been used to examine change in criminal courts during the pandemic. Next, I will underline the importance of data triangulation and research timing in these circumstances where change is not a deliberate action of stakeholders. I will then end this Chapter on a brief reflection of my hopes for the future of our criminal justice system as Canadian courts continue to distance themselves from the COVID-19 pandemic.

1 Implications for Studies on Change: A Rudimentary Typology of Disaster Changes

Change in a disaster context has important differences with changes occurring in more routine moments in time. For example, disasters frequently precipitate a great deal of cooperation and consensus among various groups as individuals try to deal with the impacts of the disaster (Quarantelli, 2000a, 2000b). Another important assertion of disaster sociology is that many changes that emerge during these tumultuous times are temporally limited (Eshghi & Larson, 2008; Lepointe, 1991); indeed, most changes to routines during an emergency will recede, giving ways to traditional ways of working. Importantly however, the framework leaves open the possibility that some changes may endure.

This may lead the reader to ask, "How might it be possible to know which changes might stand the test of time?". Disaster sociology is not particularly specific about what changes might be those that outlive an emergency. This may be due in part to the framework's concentration on the timeframe of the disaster itself more so than what might follow in the months and years after its resolution. Nevertheless, this work suggests that not all changes which occur in a disaster context are created equal. Some may have better chances than others of being adopted long term.

In an effort to outline these changes in criminal justice, I will describe two broad types of change that occurred during the COVID-19 pandemic: those **short-lived changes** and those with a **longer-lasting impact**. Their characteristics are listed in Table 1. These categories are contrasted against one another for comparison purposes. Some of the characteristics defining them are of a qualitative nature and thus the cut-off points between "little" or great" may be nebulous. Nevertheless, they serve to differentiate changes and highlight areas that can be observed for indications of the longevity of a given change[92].

Stated otherwise, these two groupings are imperfect. The changes observed throughout this research may not always fit squarely within one group or the other. Further, as we only begin to distance ourselves from the pandemic, it remains unknown what may come in the following months and years. Indeed, at the time of writing, criminal courts, as well as custodial facilities continue to grapple with pre-pandemic stressors. These have not disappeared. Therefore, I cannot conclude with absolute certainty on the complete extinguishment of a change as vestiges may remain. Similarly, I cannot conclude how much longer other changes will last. Nevertheless, I can and will explore the trends with support from theory and existing research.

Finally, it is important to note that it is not any one of these factors alone, listed in Table 1, that imperil the longevity of a pandemic-era change, but rather their cumulative influence. For example, just because there is resistance to a change does not mean it will fail.

---

[92] For this reason, it may be safer to conceptualize these changes as "secure" or "at risk". Secure changes would be those with a more stable rooting in the courts while at risk changes are those that may be swept aside imminently. However, for ease of writing, I will still refer to short live and longer-lasting change.

Similarly, simply because a change is costly does not guarantee failure. Instead, when a change in the system has most or all of these characteristics, they may be consigned to a short existence if they even manifest in the first place. Further, while some of these characteristics on their own might apply outside the context of an emergency, it is once again the aggregation of these factors together that distinguishes its use in disaster scenarios.

Table 1: Characteristics of Short- and Long-Lasting Changes Arising from Disaster

Short-Lived Changes	**Longer-Lasting Change**
1. Little precedent prior to pandemic	1. Precedent prior to emergency
2. Less consensus & Greater resistance	2. Greater consensus & Less resistance
3. High Cost/Effort	3. Low Cost/Effort
Examples: • Chapter 3: Reduced delay followed by record high delay. • Chapter 4: Avoidance and rebound in the use of incarceration.	*Examples*: • Chapter 2: Use of virtual technology • Chapter 3: Increased avoidance of trials and the increase in withdrawals and stays

1.1 Short-Lived Changes

This work has shown that certain changes experienced in Ontario's courts may have been short-lived, or at least show them as being under assault by the return of pre-pandemic norms. These changes have several characteristics that distinguish them and may in fact explain *why* they were short-lived.

Changes that appear to have been short-lived in that they were present during certain moments of the pandemic but have mostly been discontinued share several characteristics. Changes that tended to be more short-lived (1) had little precedent prior to the emergency, (2) do not garner significant consensus among justice actors, increasing the possibility of resistance, and (3) entail high costs or great effort to implement.

In order to explore short-lived changes, I will primarily employ the examples as explored in Chapters 3 and 4. As discussed in Chapter 3, I will highlight how a culture of complacency appeared to decrease briefly in Ontario criminal courts before beginning its return in 2022. Specifically, I will refer to the momentary drop in case processing time and other efforts to

change case processing during the pandemic which were followed by a rebound in these indicators, highlighting a systemwide inability to stop delay in case processing from increasing (suggestive of the return of the culture of complacency). As discussed in Chapter 4, I will use the decreased use of incarceration alongside its potential return to explore the nature of short-lived, or "at risk" changes.

(1) Little Precedent Predating Emergency

Feeley (2013 [1983]) suggests that some of the difficulty of instituting changes within courts may lie with a tendency to privilege new changes over invigorating existing institutions and practices. Indeed, he urges caution with completely novel approaches to court reform. He explains that the desire to create new programs and new institutions, distinct from previous ways of working may be counterproductive for reform. He explains that such solutions may be enticing but that these new changes, institutions or practices "may be rooted in false premises about problems. They often have little power to alter the incentives of entrenched officials who support old practices" (Feeley 2013 [1983]: 199). Feeley suggests instead that "invigorating" existing institutions and practices is the better approach to aid in the implementation of a given change. In this way, innovations can become potential impediments to a long-lasting change.

Similarly, then, it may be that changes which have little connection to pre-existing systems of thought and ways of working in "normal" conditions are less likely to endure when such "normal" conditions return. If actors feel disoriented, lost, or unsure with the onset of a change in practice, it is understandable they may seek the comfort of a path previously trodden if they are no longer forced off it. It may feel safer to return to pre-pandemic practices of incarceration. It may feel safer to take one's time in processing a case and bringing it to resolution. Thus, should a change with little rooting in pre-pandemic thought and practice emerge during an emergency such as a pandemic, its justification and *raison d'être* may falter; it may then fail, reverting to those thoughts and practices which *do* have stronger roots in the justice system, where the path is clearer.

Neither of these two changes had significant precedent prior to the pandemic. For example, in Chapter 3 while the culture of complacency has been referred to by various justice stakeholders and was an impetus for the Supreme Court decision in Jordan, the data show that delay did not lessen in the years following; instead, it continued to increase. Again, I do not suggest that stakeholders ignored the issue completely, but rather that there was previously little to no indication it had receded before the onset of the pandemic. Stated otherwise, even if thought was given to the culture of complacency by justice actors, a lack of successful efforts to reduce it are indicative of its continued existence. Consequently, its seemingly momentary retreat during the pandemic is striking while its potential re-emergence following this emergency is perhaps less surprising.

Being forced to make decisions more quickly, with fewer appearances at the beginning of the pandemic to resolve matters when the pandemic struck may also have stuck court actors as difficult; they suddenly had time taken away from them. While this can be a disorienting feeling for any person thrust into a new environment or new context, this may be accentuated in a system where precedent is valued so highly. Indeed, several interviewees mentioned the difficulty navigating the early days of the pandemic due to the lack of precedent for their functioning and decision-making. Without concrete examples of practices which decrease delay, court actors may not know the best, or worst manners to do so.

Similarly, a fundamental, and impactful rethinking of incarceration by the courts was explored in Chapter 4. The drops in the custodial population in Ontario in the first months of the pandemic were precipitous and unprecedented. This was permitted by jurisprudence; though, of course, this was not a requirement and courts had the ability to decide just how heavily COVID-19 weighs in bail and sentencing determinations (Gorman, 2021; Kerr and Dubé, 2021).

However, a change of this degree in incarceration was largely the realm of abolitionists and reformers prior to the pandemic. To suggest that the prison population could decrease by roughly 22% (Department of Justice, 2023), that custodial sentences could fall by 49%, or that admissions to remand facilities could decrease almost 30% seems nearly unimaginable considering previous trends in imprisonment which saw increases, or, at best, modest decreases.

While these ways of thinking likely existed prior to the pandemic in certain circles, they were not popular in the courts prior to the pandemic; they were not being implemented on any large-scale. Again, the suggestion is not that nobody sought to reduce the use of incarceration or fight against the culture of complacency prior to the pandemic; instead, it is very likely some court actors did. However, these were not the prevailing trends in the criminal justice system as a whole and thus remained at the periphery of what was thinkable and unthinkable in terms of reform efforts.

(2) Little Consensus & Greater Resistance

Goodman, Page and Phelps (2017) make a strong argument that consensus and resistance are important factors when analyzing change in the criminal justice system. However, here I argue that these same concerns remain important in a disaster context and that they are important for the potential longevity of a change in the justice system following an emergency. Indeed, if there is a greater degree of dissensus, then the likelihood of individuals acting on these feelings increases. Restated, increasing the number of court actors with a particular divergent point of view increases the possibility that one or more of them will act on these feelings; in the current context, this refers to a resistance to the changes brought on by the pandemic.

Chapters 3 and 4 demonstrated that there was a lack of consensus regarding the changes they explored, leading to increased resistance to these changes. While some changes may be accepted temporarily, the consensus would deteriorate over time. These characteristics may impact the potential longevity of a change emerging out of a disaster.

Chapter 3 presents an imperfect example of this tendency. While it seems likely there is a general consensus that the culture of complacency is an obstacle to be overcome, what may be more difficult to garner consensus around what constitutes an appropriate amount of delay. Indeed, Chapter 3 demonstrated that average case time and appearances to resolution dropped in 2021 as the courts were working through the pandemic backlog, but that this increased again in 2022. In the thick of the pandemic, participants made it clear through their actions that cases

needed to be resolved quickly to deal with the backlog. However, when the pressure of the pandemic lessened, this need became less pressing. Time was regained to process and evaluate cases[93], and court actors may have returned to their previous evaluations of reasonable and unreasonable timeframes. In this way, then, there was a pushback against the requirements thrust upon them to work harder and resolve more quickly.

Chapter 4 presents a clearer picture than Chapter 3 in that it underlined differing opinions around the reduction in incarceration from the point of view of justice actors. It was also suggested that certain court actors were not in agreement that such a change should be made; consequently, there is some evidence that this lenient use of incarceration had already ended or *was* ending by the end of 2022 if not earlier. Competing visions of incarceration, and subsequent action on those visions by court actors is perhaps not surprising. Many authors suggest that the use of incarceration holds a central and integral part in the realm of criminal justice (Garland, 2001; Garcia, 2013; Lynch, 2011). However, participants suggested that the pandemic allowed them to re-evaluate the calculus of incarceration in a situation where the health and safety of those entering prisons could be at significant risk. However, this change in evaluation was temporary as views of the pandemic shifted from an emergency situation to a more banal, daily reality.

(3) High Cost or Effort

Underlying some of these issues which I argue have an impact on the longevity of a pandemic-era change are the costs to individual actors to implement that change. Costs may be considered in a large sense; they may entail physical, mental, or emotional burdens of doing something. Should this burden or this cost to implement a change become too high, actors may cease its implementation.

[93] I am not suggesting justice should be rushed. Cases will take the time they require. However, pressure to finish may help procrastination.

Some authors have discussed how the cost to modify behaviour can become high over time and that even if other options are more sensible or even efficient, that these other options will not take root (Martel, 2023; Rubin, 2023). Essentially, there is a sunken cost fallacy whereby so much time, effort, and money has gone into a particular way of functioning, that changing this may be – or at least appear to be – too costly.

Different from this point of view however is that in the context of the pandemic, such high-cost activities are feasible in the short-term, if perhaps not in the long-term[94]. In other words, while actors may deviate from a given course of action despite a high cost in the short term, there remains a potential to return to the lower-cost way of operating that existed prior to the change.

Chapter 3 demonstrates the importance of cost in assessing the potential longevity of changes precipitated by an emergency. If the culture of complacency toward delay receded during the pandemic only to return, it may not necessarily have been resistance of actors against working more efficiently or the novelty of trying to overcome this culture. Instead, the costs to work harder and longer to resolve cases during the pandemic may have become insupportable[95].

Relatedly, in Chapter 2 of this thesis, I discussed the various efforts justice actors took to ensure justice was done: working late, starting court early and telephoning other courts in the area with the aim of securing more time with the remote connections to prisons, and so on. Though not discussed in the articles, several interviewees mentioned the struggles they faced practicing during the pandemic due to the increased demands upon their time; informal conversations with other legal professionals reinforced these conclusions. Pandemic-related burnout has been noted in other works, and acknowledged in official communications (Erker, 2020; Fore & Stevenson, 2023; Koneval-Brown, 2021)[96]. Thus, the mental, emotional, and even physical costs of pushing back against the culture of complacency, of reducing the average time to case resolution was burnout on the part of justice actors.

---

[94] It is possible for resistance to increase once the costs become too high. For example, an individual may not necessarily resist a change even if they do not agree with it until the cost of doing so reaches a breaking point.
[95] Indeed, Chapter 2 detailed the efforts of some courtrooms to work long hours and late into the evening in order to resolve cases, particularly when they involved the incarceration of an accused.
[96] This was one theme that emerged from the interviews I conducted. However, it was one of several subjects that could not be integrated into this work.

Chapter 4 may also offer insights as to the place the costs of a change may occupy in its potential to persist after an emergency. As incarceration retains an important place in the criminal justice system, any change to its use may impact individuals who retain their own understandings of justice. In other words, changing the use of incarceration may interfere with an individual's sense of fundamental justice. Some may dislike the idea that an offender is spared a custodial sentence due to the pandemic, while others might be sympathetic to such a change. Should individuals be against this change, it may weigh on their conscience.

These changes may also conform with or push back against group norms, and local cultures. While the costs may remain at the level of group values, the cost of this change may also be professional. As discussed in Chapter 3, seniority plays into a prosecutor's sense of independence and influences their desire to use their personal discretion. Less senior lawyers may be unwilling to exercise discretion, so they do not appear out of sync with the priorities of their supervisors and, ostensibly, of the public.

Thus, prosecutors were able to be lenient at sentencing as long as their supervisors were comfortable with this. Indeed, the pandemic offered a justification to avoid incarceration. However, it receded, and this justification evaporated, with pre-pandemic norms returning soon thereafter. To continue being lenient in sentencing at this point without the pandemic as a justification may cause increased scrutiny and potentially cost the prosecutor professionally. Stated otherwise, they must toe the line or risk professional repercussions.

1.2 Longer-Lasting Changes

Other changes seem to possess some measure of longevity. While I cannot say how long they will endure, the fact that they outlasted other changes distinguishes them from other changes that occurred in Ontario's courts during the pandemic.

Changes with greater longevity share other characteristics that contrast with those of short-lived changes. These tended to (1) have some precedent prior to the emergency, (2)

garnered consensus among justice actors, decreasing the possibility of resistance, and (3) entail lower costs or effort to implement.

The results from Chapters 2 and 3 will be the primary examples of longer-lasting change in the criminal justice system. Specifically in Chapter 2, I am referring to the confident and continued use of audiovisual technologies to facilitate remote appearances. In Chapter 3, I am referring to the longer-term trends of favouring resolutions negotiated pretrial and also those that do not result in a criminal record (i.e., stays, withdrawals, etc.).

(1) Precedent Predating Emergency

Importantly, an indicator that a change may endure past the pandemic is if it has roots before the pandemic. Of course, this would mean that the change is not a result of the pandemic, but perhaps that the disaster *enhanced* or altered the trajectory of any given change. As discussed above, such precedent eased the extension of these trends to fill a pandemic need and continue beyond that specific emergency context.

Chapter 2 explored how the use of AV technologies have been used in Ontario's courtrooms for years prior to the pandemic, but that it was primarily for specific cases such as remote appearances for individuals held in custody. Once the pandemic arrived, these became the primary means of appearing in court. Though in the time since the writing of Chapter 2, in-person hearings have resumed, they remain more frequent than they were previously, becoming the default appearance type for appearances dealing with administrative matters (Ontario Court of Justice, 2023). It is evident then that these technologies were expanded during the pandemic and are now better enshrined in guidelines and legislation (e.g., Bill S-4).

Similarly, Chapter 3 demonstrated that the use of trials and withdrawals underwent notable shifts at the outset of the pandemic and that they show signs of continuing into the future[97]. However, both tendencies began prior to the pandemic. Indeed, the privileging of case

[97] Although I raised some hesitancy around the potential longevity of these trends in Chapter 3, this was coupled with the increasing delay and the culture of complacency rather than resolution strategies which show positive trends. These two trends together are partly what made analyzing and presenting those data difficult.

resolutions before arriving at the doors of the court is a long-standing trend, but where a notable jump occurred during the pandemic and remains at a historic high in 2022. A similar trend exists for the use of withdrawals and stays over guilty pleas. Such strategies have been laid out in the Standing Senate Committee on Legal and Constitutional Affairs' report in 2017 and are logical steps in attempting to reduce delay. They have followed a relatively linear trend and do not show signs of faltering. Thus, there appears to be the semblance of a path before court actors to follow even if the pandemic allowed them to take larger strides down it.

Another reason the history of these changes may have helped them take root is the fact that increased use of technology, decreased use of trials, and an increase in pretrial resolutions have long been suggested as ways to modernize and improve the criminal justice system (Ontario Ministry of the Attorney General, 1993; SSCLCA, 2017). In this way, these changes at least formed part of larger discussions of criminal justice reform and had received buy-in from policy-makers and high-level officials in the criminal justice system.

This reiterates the important of historical context when analyzing change in the criminal justice system. Indeed, changes do not happen in a vacuum, and this larger context helps define what is and is not thought of as possible (Goodman, Page & Phelps, 2017; Rubin, 2019). Again, while only the future will tell if these changes will endure in the system in the years to come, their link to the past increases the probability they will.

(2) Consensus & Little Resistance

A great deal of consensus can be found in the two changes I have described as having a greater probability of enduring past the confines of the pandemic. Chapter 2 revealed that almost all participants viewed virtual appearances positively and wanted to see them continue post-pandemic. In this way, there was an impressive consensus surrounding their use. Further, though some concerns were raised on the part of interview participants, these were largely shared by most participants. In both situations, the desire to, and probability of resistance emerging from participants is reduced.

Chapter 3 also suggests there was a general consensus surrounding the increased use of pretrial resolutions, especially by way of withdrawals and stays of proceedings. Particularly when speaking about pretrial resolutions, the fact that over 90% of all case resolutions continue to be before trial demonstrates that there is a major consensus around the appropriateness of such resolutions. Further, as this number has continued to increase over time suggests that there be no indication of resistance against this change. The fact that a majority of cases are resolved by way of a withdrawal or stay of proceedings suggests similarly, that they are appropriate or acceptable and that this is permitted by local cultures.

The increased recourse to withdrawals or stays of proceedings may have been accepted so readily by court actors for various reasons, some explored previously, and others that will be discussed in the following section. First, the fact that reducing the frequency of trials, as well as cracked trials, has long been a strategy of the courts (Ontario Ministry of the Attorney General, 1993; SSCLCA, 2017) may have prepared, or acclimatized court actors to such efforts. I will also discuss shortly how a decreased workload may be the incentive for Crown attorneys to work in such a fashion.

Beyond those reasons, however, it is possible that withdrawals may not be viewed by local cultures and local actors as a decision impacting the overall goals of justice (i.e., rehabilitation, denunciation, etc.) but instead a way to more efficiently and effectively conduct their work. By withdrawing or staying charges, prosecutors are able to focus on those which have a stronger change of conviction in the criminal justice system. Indeed, the SSCLCA report in 2017 specifically noted that withdrawals may be a response of court actors to clean up overcharging by police (SSCLCA, 2017:113). Thus, by withdrawing or staying some charges, they gain the ability to dedicate more time and resources to the prosecution of more substantial, and potentially concerning charges.

In this way, court actors were charged with carrying out pandemic-era changes with which they appear to largely agree. Consequently, they have less reason to overturn such a change. Those that may disagree with these changes appear to be a minority and thus any efforts

to resist these changes may not be highly visible or have noticeable impacts[98]. Together, these have contributed to the staying power of these pandemic-era changes.

(3) Low Cost or Effort

As discussed in the context of short-term changes, the cost and effort to implement and maintain a change emerging during a pandemic may influence if it is carried forward beyond the emergency. If the cost or effort is low to maintain a change already undertaken, then the likelihood of it enduring increases.

Chapter 2 discussed the ongoing use of virtual technologies and the relatively positive reception of these technologies among court actors, notwithstanding the access to justice concerns raised. Two years on, these technologies continue to be used in courts and have been embraced by the various courts across Ontario and even Canada; they continue to be seen as part of the criminal justice system's future (ACCORC, 2022; Department of Justice, 2022).

To implement these changes, to appear using remote technologies rather than in person, was relatively low effort. Court actors simply had to obtain the connection information to appear from wherever they happened to be[99]. Of course, this may have required getting permission from their clients to appear virtually. However, this would not likely add greatly to their workload as forms could be signed at the same time as other documents clients would otherwise be required to sign.

This change did not alter the goals of the justice system. It simply changed the medium through which justice was conducted. It did not question personal values or the values of a local culture. Justice had to be done and it continued to be done. What changed was a relatively simple

[98] However, as discussed in this thesis, even small amounts of resistance can eventually result in change. As such, this minority should not be discounted even if in the short term their impact might be low.
[99] While some interviewees discussed initial confusion about accessing these virtual courts in the early stages of the pandemic, this is reasonably expected in the early days of the pandemic where this transition was occurring at a breakneck pace.

procedural matter. It may even be considered a managerial change, meant to facilitate access to the justice system.

Importantly in this case, this change may have endured past the pandemic not only because the costs were low, but because there was a benefit or incentive for legal practitioners to conduct their work remotely. Indeed, several interviewees mentioned how virtual appearances allowed them to appear in various districts in the same day without wasting time driving there, increasing their productivity. Thus, it may not simply be the absence of cost, but the presence of a benefit that has helped this change solidify after the pandemic has receded.

Chapter 3 also demonstrates how low costs, or even a benefit to court actors can help a change become entrenched beyond the immediate circumstances of its emergence. This chapter highlighted a noticeable decrease in the occurrence of both trials themselves as well as cracked trials as well as an increased use of stays and withdrawals. Both of these tendencies likely involve little cost, and significant benefits to justice stakeholders.

The SSCLCA has reiterated how resource-intensive trials are (2017). They are also uncertain in their outcome. Cracked trials, though a result is made certain, the resources used to get to this point are still tremendous as the court will have put everything in order for a trial to occur. For it to fall through at the last moment may or may not allow for other matters to be seen in the time previously set aside for a trial. Thus, resolving a case without the need for a trial is an incredible benefit to lawyers, judges, and the criminal justice system as a whole.

Similarly, the increased use of stays and withdrawals may provide significant benefit to court actors. These resolutions can be agreed upon between lawyers outside of court. This can be presented to the presiding judge but is not subject to their approval. The decision to lay and pursue charges rests with the Crown. As such, should they decide to not pursue charges any longer, they no longer need to appear in court for the matter, and they do not need to prepare submissions for the presiding judge. Further, a stay or withdrawal is most certainly in the interest of an accused when the other option is a finding of guilt. This is one of the most favourable outcomes for an accused and their Defence attorney. They have fewer reasons to push

negotiations further. While these types of resolutions certainly still require work, and proper justification, there are fewer parties to satisfy in such a situation compared to seeking a finding of guilt.

Admittedly, the use of stays and withdrawals may come with a certain cost depending on the local court culture; should great emphasis be placed upon obtaining convictions in a given office, prosecutors may face professional repercussions by increasing the use of stays and withdrawals, just as they might for avoiding incarceration. However, given the tendency to increase the use of stays and withdrawals over several years prior to the pandemic suggests they are not looked upon unfavourably, at least at an aggregate level.

These low-cost changes, especially when accompanied by some benefit to court actors and the system more widely, thus become quite attractive. The change becomes easier to extend beyond the context in which they emerge, as they can be justified for the benefits they bring. Goodman, Page and Phelps cite Rothman when discussing the viability of justice reform; specifically, they note that convenience is a large, and even deciding factor in the success or failure of a given change or reform (2017:55). Though I argue it is one of several important factors, convenience cannot be forgotten or underestimated in any attempt at implementing change in the criminal justice system.

1.3 Potential Lessons for Changing the Criminal Justice System

Feeley stated quite frankly that "criminal justice scholars are endlessly surprised at the mind-numbing repetition of failures in the criminal process" (Feeley, 2018:677). It is my hope these two categories offer characteristics upon which changes from an emergency situation can be judged in order to predict which may have a better chance at taking root within the criminal justice system. If this can be evaluated, then perhaps more deliberate, planned action can have a chance at success too.

Underpinning this thesis is the importance of individual actors in the success or failure of changes in the criminal justice system. While actors on the ground are not immune to, or in

control of factors outside the system, the agonistic framework of change in the criminal justice system holds that:

> Economics matter. Crime trends matter. Racial, ethnic, and gender inequality matter. Wars, depressions, moral panics about gruesome violence— they all matter. But they do not matter in a vacuum. People make them matter. And people make them matter in particular ways (and not others) in the face of opposition from other actors who have competing visions of crime, punishment, justice, rights, freedom, and a host of other ideologically inflected issues." "(Goodman, Page & Phelps, 2017:123).

Thus, criminal justice actors still operate within the confines of the larger social, and legal environment, but can exert control on how these social realities translate into practice. Several studies have shown that buy-in from the actors charged with implementing change in the criminal justice system is fundamental for successful implementation (Campbell, 2011a, 2011b; Feeley, 2013 [1983]; Kemp, 2008; Rubin & Phelps, 2017; Webster, Sprott & Doob, 2019). This work reinforces these assertions, that without this buy-in, changes will struggle to endure, either during an emergency, and even beyond.

Indeed, while I stated earlier that the potential longevity of a change arising out of an emergency is not dependent on a *single* characteristic presented in Table 1, they are related to the actions of court actors and their reception of a given change. For example, if there is some measure of consensus, and little pushback from actors on the ground, the change has a stronger base to remain in effect moving forward. This of course implicates their ideas of fundamental justice and justice procedure. Once again, these feelings are held by individuals responsible for the day to day of the administration of justice.

Feeley also reiterates the importance of the actions of these individuals. Indeed, he discusses how one of the impediments to change is a lack of desire to change in the sense that "there is little incentive for those engaged in the day-to-day administration of the criminal courts to think about systemwide changes or, when they do, to pursue them vigorously." (Feeley, 2013 [1983]: 192).

This serves as a call to better understand the perceptions and values of court actors. While theories like the *rationalité pénale moderne* (Garcia, 2013) outline high-level

considerations and discourses, this is not necessarily what those on the ground hold to be true. While these actors may outwardly support those larger, systemwide values, their own may come into conflict with them, creating a fertile ground for resistance. In understanding, and identifying potential areas of consensus, and resistance, scholars and other stakeholders may more easily identify potential areas of intervention that are more likely than others to succeed.

This is also a call to re-examine local court cultures in the aftermath of the pandemic as the characteristics listed in Table 1 could be distilled to a single question: How and to what degree are local court communities and their norms being challenged? If challenged significantly, implementing change faces an uphill battle, even if achievable. If not challenged significantly, the change may stand a better change of becoming entrenched. The costs associated with these changes may also influence this calculus.

Many scholars have discussed how important local norms are for the daily functioning of actors (Eisenstein, Flemming, & Nardulli, 1999; Dandurand, 2014; Ulmer, 1997). In this work I have also referred to local norms influencing evaluations of appropriate and inappropriate actions of local actors. As these norms changed during the pandemic, the impacts of local court cultures remain unclear. Researchers may ask if there are certain local court cultures more or less likely to push back on reduced incarceration, the increased use of stays and withdrawals or the use of remote appearances. While I have shown diverging opinions and openness to new ideas among some actors and even linked some of them to larger cultures, a more concerted effort to study changes in the culture since the pandemic would be useful.

We must question, then, what incentives might push court actors to think more widely, and to pursue these changes more vigorously. We must also question how to make these changes appealing to local court cultures. Perhaps it lies in a consensus around certain needs of the criminal justice system as well as the costs and benefits surrounding them. Indeed, no matter the incentives for a change, if resources are not sufficient to implement it, then it is doubtful any amount of desire and goodwill can overcome this.

In the context of this work, this might have taken the shape of a shared understanding that the system was pushed to a breaking point during the pandemic in terms of delay, backlog, and fundamental justice, and that without an appropriate response, it would fail. This may have been an impetus to think differently, disincentivizing dissensus and resistance. These changes may also have been the most expedient ways to deal with a crisis, that avoided the highest costs to the actors responsible for finding a way to conduct justice even at the height of the pandemic. In other words, it may have been the perfect storm of conditions to allow for some short term, and some long-term changes to the criminal justice system.

2 Implications for Research: The *How* of Studying Change in Criminal Courts During Disasters and Beyond

Fundamental to this thesis has been the process of reorienting and reimagining my study on the functioning of criminal courts following the arrival of the COVID-19 pandemic in 2020. Like many other researchers, my original research plans were interrupted by the arrival of COVID-19, forcing me to re-evaluate my approach to studying the courts. Adapting to this new reality has taught me invaluable lessons about change in the criminal justice system that I believe can contribute to larger understandings of how research can be done and should be considered by other researchers. These may help researchers more clearly situate themselves and their research, allowing for better comparison in research methods and research findings moving forward. In turn, this will hopefully allow for more successful, evidence-based reforms in the criminal justice system.

2.1 Revisiting Theories of Change in Criminal Justice

This research began under the assumption that because a disaster was unfolding globally, a theoretical framework focused on disasters was necessary to studying how the criminal justice system was reacting to these unique circumstances. Existing theories of institutional change appeared less appropriate for the unique circumstances of a disaster with COVID-19's profile. For this reason, disaster sociology was used to guide this work, supported by other theories and perspectives such as the agonistic perspective (Goodman, Page & Phelps, 2017).

However, what has become clearer as work on this research project advanced was that a system is still a system, and the institution remained intact. The criminal justice system would persist and establish itself somehow. With this benefit of hindsight, I might have chosen to make use of another theoretical framework to analyze changes in Ontario's criminal justice system during the pandemic. Specifically, I may have chosen to make use of path dependence, a framework originating in economics seeking to understand the persistence of various courses of action despite being suboptimal (Guiney, Rubin & Yeomans, 2023; Rubin, 2023).

Path dependence is a historical institutional approach that could be used to study change in criminal justice (Martel, 2023; Rubin, 2023). Though acknowledging that there are different approaches in path analysis, the main tenet of the approach is that prior history influences the course of future developments in a given area. It truly can be conceived of as a person walking down a path, punctuated by various decision points, sometimes marred by the conditions surrounding this path.

Two principal components of the framework are that the first person or product in a new area is likely to "succeed in the longterm" (Rubin, 2023: 267). This is to say that should a policy or practice be put in place, if it does not displace an existing policy or practice, it will have increased potential to become entrenched. Second, feedback effects play a large role in change. Rubin explains that these "clearly related consequences of early policies…directly cause, facilitate, or constrain downstream efforts to change or introduce new policy" (2023: 267). A more recent development of the framework can be distilled into the idea of inertia, that "once someone or something sets down a path, they stay on that path" unless forced off of it, often by outside events (Rubin, 2023: 268-70).

Many of these assertions map closely with what I explored in this thesis. Indeed, I witnessed instances of change, instances of resistance (that could be characterized as stasis), as well as a regression to previous ways of functioning. Further, Table 1 in this chapter mentioned high and low costs of change influencing if the change witnessed during the pandemic would persist. In this way, we could perhaps infer that, because the original path the criminal justice system was on prior to the pandemic, it was difficult to branch off. The original state prior to the pandemic may have a "first mover advantage", stifling change.

I see this as but one simple example of why path analysis could have been useful in this thesis, as well as why it could be useful in future studies on change in the criminal justice system. I offer two explanations for not having done this originally. First, quite simply, discussions of path dependence analysis in criminological and penological publications was not common at the outset of this project (Rubin, 2023). While some literature existed on the topic, it was rarely explicit it its use of path dependence frameworks.

Second, and more importantly, not knowing how long the pandemic would last, or what consequences it might bring, disaster sociology appeared to be a perspective that could tolerate uncertainty. Indeed, path dependence frameworks typically make use of various concepts such as institutional inertia, or breakpoints (i.e. points in history where behaviours and institutions are shocked into new behaviours) that require an historical perspective. In other words, this framework typically requires a retrospective examination of a series of events. Arguably, the potential for a retrospective review of the courts during the COVID-19 pandemic is only becoming possible at the time of writing where a beginning, middle, and end of the pandemic can be defined.

With that said, path dependence could offer a unique perspective for future studies seeking to understand changes in the criminal justice system during the COVID-19 pandemic. It may help explain in greater detail how certain changes emerging in the pandemic occurred and, potentially, even how they persisted.

2.2 Disaster Change and Data Triangulation

The collection of data on court actors and court outcomes is difficult in the best of times. Court actors are a population that is difficult to reach, can be considered an elite group, "hidden-by choice … from the public" (Noy, 2007 :331)[100]. In an emergency situation, this proved even more difficult as the country shut down to various degrees and access to people, and courts were virtually eliminated.

One manner to overcome data availability issues is through data triangulation. This is almost always a strong methodological choice to increase the validity of a study as it allows for

[100] See also Atkinson and Flint (2004).

"cross validation by compensating for the weaknesses of one technique by implementing another so that convergences support and divergences or inconsistencies introduce scepticism" (Hochstetler & Copes, 2016:503).

This became all the more important in a disaster context as data can be difficult to collect in these scenarios. Indeed, it is well understood that data collection in a disaster scenario can be particularly difficult, fraught with not only practical limitation, but ethical quandaries (Ausbrooks, Barrett, & Martinez-Cosio, 2009; Louis-Charles, 2020; Stallings, 2007).

Fortunately, "The more data sources you use, the less data you need from any particular source" (Rubin, 2021:243). This was precisely the strategy used in this research. Importantly, these various data sources all revealed important, yet differing pieces of information that helped compare and contrast my findings. More specifically, they helped uncover various layers of change that would have been otherwise invisible. I would argue that I could have come to completely different conclusions if I did not use all of these methods in conjunction with one another.

I will now provide some examples in how this could have occurred. I will address my various methods individually, noting areas of congruence but also of divergence among them.

(1) Statistics

The availability of statistics relating to the pandemic was an unexpected, but pleasant surprise when collecting data for this project; indeed, it can take years for court data to become available to the public (Stallings, 2007). Nevertheless, they were available rather quickly and provided this research with some of the strongest indications about the workings of the court in the early, middle, and late stages of the pandemic.

Data from Statistics Canada as well as from the Ministry of the Attorney General of Ontario allowed me to quantify the inputs and outputs of the system. It allowed me to quantify

how case numbers dropped and then soared during the pandemic, how the use of incarceration certainly dropped both as a proportion and as a raw number. These numbers are important because, while other data sources such as interviewees could suggest these same things, this would not carry the weight of having official confirmation from province-wide data. Stated simply, the critique of being anecdotal can become a significant challenge to overcome without these data.

These statistics confirmed certain trends in case processing. Interviewees had suggested that cases were being resolved before trial, and that they were doing so at an unprecedented frequency. Again, this bore out in the statistics. Chapter 3 showed that the backlog decreased notably in the year following the pandemic and that a record level of pretrial resolutions were achieved.

Despite some agreement, some trends in the province-wide statistics revealed points of contradiction or diverging experiences uncovered in fieldwork data. While I certainly would not qualify the experiences of research participants wrong, some of their assertions may have only been applicable to their local surroundings rather than more generally; indeed, some assertions were not reflected in the larger provincial figures. For example, in Chapter 4, some court actors asserted that the use of incarceration had returned to pre-pandemic levels. However, the statistics plainly show that, while there was a rebound in the number of custodial sentences[101], it remained significantly lower than pre-pandemic levels. Thus, without the use of statistics, my conclusion could have been significantly different.

Nevertheless, this same chapter also revealed that time and appearances to case resolution had also increased to new highs. Though this was not an issue discussed in much detail by interviewees, the use of official statistics allowed for an exploration of these various trends even if court actors did not think to bring them up. Once again, these statistics allowed for a larger look beyond what any individual actor might see, feel, or ponder.

[101] As mentioned earlier when discussing short-lived changes, it is entirely possible, and perhaps even *plausible* that this return to pre-pandemic levels of incarceration has continued. This may reveal some level of resistance. However, at the time of data collection, this was not a widespread trend and thus may not have characterized practice at the time.

In this way, statistics allowed for an analysis of large tendencies province-wide, over a significant period of time using several important indicators for the functioning of justice. However, these trends remain just that: trends. The intricacies that lay behind them may be invisible or uninterpretable. For this reason, I also made use of fieldwork methods, notably court observations and in-depth interviews. Consequently, I chose to enrich these quantitative analyses by placing them "into the context of interpretive understandings and verbal explanations offered by participants" (Hochstetler & Copes, 2016:502).

Given the benefits of using statistical methods, I join other researchers in exclaiming their virtues, particularly when used alongside qualitative methods. Indeed, the choice to couple statistical methods with qualitative data has also been used by other scholars to study criminal courts. For example, Kohler-Hausmann (2018) dedicates significant effort describing the context in which Broken-Windows policing arose in New York City, as well as its eventual impacts on arrest rates; however, this is undertaken before a much more in-depth exploration of fieldwork in the criminal justice system. Alternatively, Ulmer (1997) uses linear regression techniques to understand the impact sentencing legislation had on the work of judges. His analysis is supported by subsequent interviews with criminal justice agents. Like my current research, both authors were able to explore large-scale trends while contextualizing their work.

(2) Fieldwork Methods - Observations & Interviews

Of course, as alluded to above, statistics cannot tell the full story behind statistical trends. As such, the observations and interviews conducted allowed me to either confirm and add to trends found in statistics or to nuance these data. Indeed, they offered a simple explanation for certain findings while contextualizing other seemingly contradictory trends. Once again, without the information taken from court observations, and collected during interviews, interpretations of these trends may have been significantly different, and potentially erroneous.

For example, interviewees explained sentencing trends seen in statistical data, and jurisprudence explored by other authors. Specifically, in Chapter 4, several participants mentioned that a number of custodial sentences were being avoided which would not have been

possible before the pandemic. Several court actors observed mentioned that "but for COVID-19", their sentencing positions would have looked much different. This is in agreement with those authors who had explored these trends through jurisprudence earlier in the pandemic (Burningham, 2022; Gorman, 2021; Kerr & Dubé, 2020)[102].

With this data, jurisprudence on sentencing was confirmed, while statistical data was nuanced. Indeed, fieldwork data confirmed that guiding jurisprudence had indeed filtered down to the working level of court actors and that it was being used as intended in these leading decisions. However, it also specifically linked the pandemic to leniency in sentencing, something that would not be possible with statistics alone.

Similarly, in Chapter 4, interviewees discussed an increased use of withdrawals and stays, something that was confirmed in the quantitative analyses of Chapter 3. Importantly, they offered nuance, explaining that this was, in their estimation, the only way to cut through the backlog that had accumulated over the first year of the pandemic when the courts were shut down for several months. While, intuitively, this may have been my personal explanation for this increase, confirmation from court actors themselves that this was truly the case was invaluable. Such an interpretation can also be gleaned in the new COVID-19 guidelines for prosecutors in Ontario (Government of Ontario, 2021a) which explain that withdrawals can be used when there is no public interest in prosecution; further, in this same document, they explain that the public interest during COVID-19 includes concerns for delay and backlog in the courts.

On another level, however, interview data allowed for an exploration of issues not available in official statistics. In Chapter 2, I explored the relationship between access to justice and the use of AV technologies; unfortunately, data on these topics are not routinely collected in Ontario. Consequently, the only way to collect data on them was to collect it myself through court observation and interviews with justice actors. This method remains the sole manner of exploring this topic. Indeed, even at this point in time, a statistical exploration of this change to remote appearances in Ontario is still lacking. Nevertheless, the qualitative data collected shows

[102] However, as alluded to previously in the section on statistical data, there is some nuance to this idea that sentencing was more lenient, and some weaknesses in interview data in this regard.

that a fuller examination of trends province-wide would be useful in assessing the impact of remote appearances on access to justice moving forward beyond the pandemic.

Similarly, this same data from Chapter 2 allowed me to discuss access to justice issues in prison; more specifically, the issues were at the junction of courts and prison[103]. Again, this information was not available through other sources. Nevertheless, the inability of prisons to bring detainees forward during the pandemic is a significant issue that had not been explored widely save for opinion pieces written by lawyers about their practice (Spratt, 2021). Like Spratt (2021), I uncovered some shocking instances where prison staff would simply refuse the directions of the presiding judge and walk away from the AV equipment in the prison, thereby walking out on the judge.

(3) Jurisprudence

Formal written decisions that form jurisprudence, and that are used in research studies, are not the average case; instead, they often represent atypical cases that offer novel interpretations or findings. For instance, new findings on how COVID-19 ought to and ought not be considered by courts was the subject of a great deal of judicial attention. A study relying on jurisprudence without the support of statistical data or fieldwork methods would have missed important nuances in studying change during the COVID-19 pandemic. Further, I would argue that such an analysis may not have been entirely helpful for the objectives I set out earlier in this thesis. Nevertheless, the work conducted by Kerr and Dubé (2021), Gorman (2021) and Burningham (2022) formed a truly integral part of the background for this research.

To underscore this point, I will return briefly to some findings in the jurisprudence. These authors discussed differing views on how and why COVID-19 should be considered; some courts were more open to using it than others, some requiring specific evidence of hardship while others simply accepted that COVID-19 would negatively impact justice involved individuals.

[103] Indeed, a fair bit of research on access to justice issues in prisons themselves exists.

However, these novel, or potentially atypical cases are not seen every day in the court and courts were provided a degree of latitude in judging the impacts of the pandemic in any given case.

Understandably then, these decisions may not provide a full and clear answer to how the pandemic was considered during the pandemic. These cases, stuck in time, could not perfectly respond to the new daily realities that COVID-19 brought up in Canada, in Ontario, and its courts. New questions and concerns emerged which could impact a court's decision-making process. Further, these decisions overlook significant parts of the court's daily functioning such as the "COVID deals" negotiated between Crown and defence which, of course, occur off the record.

One example of a finding that may have been overlooked was the fatigue surrounding leniency in incarceration discussed in Chapter 4. Using fieldwork, corroborated by statistical figures, I discuss how a fatigue set in with the new pandemic-era attitudes toward incarceration. Jurisprudence would likely not have captured this unless judges were willing to openly state this on the record. Instead, what may have been visible would be a drop in the number of written decisions mentioning COVID-19, or an increase in cases stating openly that COVID-19 was no longer an important factor.

What appears more likely, however, is that mentions of COVID-19 would have dwindled; indeed, Myers (2021) discusses how mentions of COVID-19 decreased in courts, even relatively early on in the pandemic despite the pandemic raged on. However, this did not mean it did not form part of the thought process for courts as evidenced by my own research. Indeed, Myers states that for courts, COVID-19 may simply have become "a given" (:21). Thus, if something is a given, it is unlikely to appear in the types of atypical cases that find themselves in the more exceptional record of written court decisions.

Nevertheless, there are certainly trends that may have emerged should a jurisprudential analysis have been undertaken in this thesis. For example, a high-level understanding of how higher courts are directing lower courts to continue or discontinue considerations of COVID-19 could have offered greater nuance to my findings. While Burningham's analysis was published

in 2022, it could not have considered all jurisprudence that emerged after submission of the work, nor of any decisions that have emerged in 2023. This may have been a period of change in guidelines as Canada, and the world as a whole, shifted back toward pre-pandemic normalcy[104].

2.3 The Importance of Data Collection Timing

In this study, I became acutely aware that the various data sources were not all collected simultaneously[105]. This made comparing different data sources difficult at times. Indeed, while data triangulation can help compare and contrast, because of different collection times for the data, contrasting or conflictual trends may not necessarily reveal actual disagreement or conflicts; rather, they may have been artefacts of the period in which the supporting data was collected.

Chapter 4 is a prime example of this issue. Jurisprudence analyzed by Kerr and Dubé (2020, 2021), Gorman (2021) and Burningham (2022) told similar stories, though there was evolution in the jurisprudence reviewed as each study was published at slightly different points in time. Nevertheless, they revealed that courts were more or less receptive to more lenient uses of incarceration. My own fieldwork showed this was the case, though, like Myers (2021) I discuss how a sense of fatigue settled in whereby court actors became less open to reduced sentences due to the ongoing pandemic.

Should another researcher have relied simply on initial jurisprudence, they may have come away with the impression that courts continued to emphasize COVID-19 in their bail and sentencing decisions. This would have been incorrect. Indeed, Myers (2021) would go on to show that, only a few months into the pandemic, leniency in the use of incarceration had waned. My own work undertaken almost entirely after Myers' data collection had finished showed a renewed deference to the pandemic in Ontario courts followed by fatigue once again.

---

[104] Of course, it is arguable if and how such normalcy can be achieved, as well as what such normalcy looks like; here I simply refer to ways of functioning that do not revolve around concerns for COVID-19.
[105] Though, there was certainly overlap.

Likewise, Puddister and Small (2020) characterize the reception by Canadian courts of remote appearances to have been conservative. However, this research was conducted in the initial months of the pandemic. In Chapter 2, I discuss how courts and justice stakeholders were rather zealous in their adopting of these technologies, notwithstanding access to justice issues this created.

Importantly, my data collection spanned several waves of the pandemic which likely explains contrasting conclusions as health hazards in prisons increased and decreased with every new wave. There was then a waxing and waning of concern for the pandemic based on the conditions at the time of data collection.

This process of waxing and waning is another reason for researchers to situate their findings in time. In the current case, concordance between the findings of Myers (2021) and myself might give the impression that fatigue with the use of COVID-19 in the use of incarceration was ever-present from the summer of 2020 onwards. However, the fatigue encountered by Myers (2021) is not exactly the same fatigue I encountered as, between these two distinct periods, was another period where COVID-19 *was* taken seriously by the courts. This may mean that, the fatigue during this second or third wave of the pandemic might actually have been worse, with court actors having already passed through the same situation months earlier.

Thus, different conclusions were arrived at depending on the timing of the research. However, one study does not disprove or necessarily even contradict the other. These findings can, theoretically, coexist without any indication of contradiction because the reality of the pandemic at any moment in time can vary. This is a key concept used by disaster sociologists: phase analysis. Inherent in the study of a disaster is that it has a life cycle with different trials and tribulations depending on where in the life cycle of the emergency one finds themselves (Thornton & Voigt, 2010). The conditions of a disaster, and responses to them can vary within the span of the very same emergency.

Though this is a concept used in disaster sociology, I believe the applicability of phase analysis goes beyond disasters such as the COVID-19 pandemic. Many events may not

necessarily be considered an emergency, but they may still represent significant shifts away from normal societal functioning, even if some may be on a small scale. For example, the protests that erupted across the United States following the death of George Floyd in 2020 could be considered as having a particular life cycle. The timeline of these protests stretches far (Bryson Taylor, 2021). It would be reasonable to think that the initial responses of protesters after hearing of Mr. Floyd's death were different than what may have been the case weeks and months into the future.

Using an example closer to criminal courts, the decision of the Supreme Court of Canada in *Askov* in 1990 led to thousands upon thousands of cases being dismissed because of unreasonable delay in case processing. Obviously, this created significant waves in the courts and was reflected in the media (Baar, 1993; O'Malley, 1991; Tyler, 1991). However, soon this case was integrated into the criminal justice system, causing much less controversy than it did initially; so much was this the case that in 2016, the Supreme Court of Canada decision in *Jordan* was needed to clamp down on unreasonable delay once again. In both cases, studies done at the outset may have come to vastly different conclusions compared to those completed at a later time.

What this research calls for is not necessarily an analysis of each different time period of a given phenomenon. Rather, it is a call for researchers to situate themselves temporally and consider more strongly what about the timing of the topic under study, the data collection efforts, and the writing of their report that might be impacted by the characteristics of a given moment in time.

Some researchers have begun to do this. For example, Rubin (2018) uses historical analyses to analyze change in the criminal justice system. Specifically, she details the development and evolution of prisons in the United States from colonial to present times. The penal antagonism framework presented by Goodman, Page and Phelps (2015, 2017) also places an emphasis on historical analyses and changes over time. They discuss how ideals of rehabilitation have come into and fallen out of favour in the justice system over several decades.

However, this research has demonstrated that sometimes history may be measured in weeks and months rather than years and decades.

Thus, any effort to review the changes and impacts related to COVID-19 cannot simply look at the 3-year period from 2020 to 2023[106]; a more fruitful level of analysis might instead be each wave of the pandemic as they frequently represented times of increased or decreased pandemic-related responses from the courts.

2.4 The Result

Together, all of these methods have worked in concert to compare and contrast one another, to offer perspectives at different times of the pandemic. They allowed me to navigate an arena where data availability changed as frequently as the conditions of the pandemic.

I emphasize that, while this research approach was iterative, and forced to adapt, it ended up working together to create a solid base for academic inquiry. I believe that part of the contribution of this thesis is precisely that: even outside of disaster contexts, the methods one uses, and the timing of their use can heavily influence findings. While this may seem like a banal assertion for experienced researchers, demonstrating what I specifically could have missed or misinterpreted provides a strong example, and a strong endorsement of my methods.

However, I acknowledge that social science research can follow a non-linear path, rife with dead ends and switchbacks[107]. These are not new assertions. Rather, this discussion served to reiterate these points and delve down these paths not taken to better understand the usefulness of concepts from disaster sociology and how research on change in disaster scenarios and beyond can be conducted.

---

[106] This is the period from the declaration of a worldwide pandemic to the announcement that the pandemic was over by the World Health Organization (Associated Press, 2023).

[107] For example, see Rubin (2021, Chapter 5) for a larger discussion of non-linear research designs when conducting qualitative research.

3 Future Hopes for Canada's Courts

The data and related the discussion raise important points around the potential for change in the criminal justice system and particularly its courts. They have shown that change is possible, and in short order if truly required. However, the longevity of these changes may be endangered by the action or inaction of court actors. At times, this ability to resist and undermine may be used to combat undue political influence on the justice system. At other times, this may thwart more legitimate adjustments being made to the system that are in desperate need of implementation.

It is my hope that the changes witnessed during the COVID-19 pandemic, no matter how short or long-lived, have allowed justice stakeholders to see different futures, where what was perceived as possible and thinkable has changed. Indeed, Goodman, Page and Phelps assert that "large-scale trends unfolding in the 2010s condition the sorts of penal reforms now seen as possible" (2017:133). I contend similarly that the context of the pandemic has conditioned what is now considered possible in Canadian courts. Specifically, I hope that the boundary between acceptable and unacceptable decarceration practices has retreated in favour of the former, that remote technologies which expanded during the pandemic continue to be seen as legitimate and acceptable tools for the expanding of access to justice.

It is also my hope that some of these reflections may help court actors in evaluating their personal approaches to incoming change and that policy-makers find these reflections useful in crafting evidence-based policy. Specifically, I hope this research has underlined the importance of court actors on the ground and that their points of view are fundamental to the success of any initiative. While finding consensus so as to avoid resistance from these actors may be difficult at times, I believe any policy with these features will be more likely to succeed and effect the changes sought. Finding the proper incentives for justice actors will be essential to this exercise. However, that is a larger question and I invite future researchers, as well as their research participants, "What will it take to change?" and "How far are you willing to go to get there?".

Notwithstanding these hopes for improvements in the criminal justice system and criminal justice policy, I must urge caution. Change should not be sought for its own sake. Not all change is good or desirable change. Reducing delay in case processing but undermining constitutional and other legal protections for those accused of criminal wrongdoing is not an optimal outcome. Similarly, conducting hearings exclusively by remote appearance, though potentially more convenient for some, can severely hinder access to justice for others. Tensions between these competing interests and competing rights did not suddenly appear with the arrival of the pandemic. Rather, they were exacerbated and pushed into a new context where balancing them required new calculus.

Stated more simply, modifications in policy and practice can bring about unforeseen challenges in addition to their potential benefits. Policy-makers, scholars, and criminal justice actors should be attentive to these issues in proposing, developing, and actioning new justice policy. Consequences of these change can be unpredictable and are frequently unequal between various groups in society. To forget this is to invite increased injustice into our justice system.

Bibliography

Action Committee on Court Operations in Response to COVID-19 (2021). *Progress Report 2020-2021*. Retrieved from: https://www.fja.gc.ca/COVID-19/pdf/Action-Committee-Progress-Report.pdf.

Action Committee on Court Operations in Response to COVID-19 (2022*a*). *Progress Report 2021-2022*. Retrieved from: https://www.fja.gc.ca/COVID-19/pdf/Progress-Report-Action-Committee-Bilan-Comite-daction-202122-eng.pdf.

Action Committee on Court Operations in Response to COVID-19 (2022*b*). Virtual hearing platforms – Functionalities and suggested settings for participants and observers. Retrieved from: https://www.fja.gc.ca/COVID-19/Virtual-Platform-Settings-Reglages-Plateformes-Virtuelles-eng.html.

Action Committee on Court Operations in Response to COVID-19 (2022*c*). Roadmap to recovery: Orienting principles for reducing court backlog and delays. Retrieved from: https://www.fja.gc.ca/COVID-19/Orienting-Principles-Reducing-Backlog-and-Delays-Principes-d-orientation-reduire-les-engorgements-et-delais-eng.html.

Adach, K. (2020). A Ministry steeped in tradition goes virtual: Public Service innovation and leadership during COVID-19. *Public Policy* Forum. https://ppforum.ca/publications/a-ministry-steeped-in-tradition-goes-virtual.

Adams, V. (2013). Markets of sorrow, labors of faith: New Orleans in the wake of Katrina. Durham: Duke University Press.

Adeola, F. O., & Picou, J. S. (2016). Hurricane Katrina-linked environmental injustice: Race, class, and place differentials in attitudes. *Disasters*, *41(2)*, 228-257.

Alkon, C. (2022). Criminal court System failures during COVID-19: An empirical study. *Ohio State Journal on Dispute Resolution*, *37(4),* 453-532.

Anderson, C. (2021, 18 March). Thunder Bay's COVID-19 crisis: The story so far. *TVO Today.* Retrieved from: https://www.tvo.org/article/thunder-bays-covid-19-crisis-the-story-so-far.

Anthony, T., & Chartrand, V. (2022). States of prison abolition: COVID-19 and anti-colonial and anti-racist organising. *Justice, Power and Resistance 5*(1-2), 46-66.

Associated Press (2023, May 5). WHO downgrades COVID pandemic, says it's no longer a global emergency. *CBC News*. Retrieved from: https://www.cbc.ca/news/health/who-pandemic-not-emergency-1.6833321.

Association du Barreau de l'Ontario [ABO] (2021). The three Chiefs: Interviews with the three Chief Justices of Ontario on the courts' response to COVID-19 and the modernization of the justice system. Retrieved from: https://www.oba.org/Sections/Civil-Litigation/Articles/Articles-2021/January-2021/The-Three-Chiefs-Interviews-with-the-Three-Chief?lang=fr-ca.

Atkinson, R., & Flint, J. (2004). Snowball sampling. In M. Lewis-Beck, A. Bryman, & T. Futing Liao, *The SAGE Encyclopedia of Social Science Research Methods* (p. 1044). Sage Publications.

Audesse, A. (2019). Dérives et misères populistes : Analyse des politiques pénales érigées, modifiées et abrogées sous le gouvernement de Stephen Harper, 2006-2015. Master's Thesis. Université Laval.

Ausbrooks, C. Y. B., Barrett, E. J., & Martinez-Cosio, M. (2009). Ethical issues in disaster research: Lessons from Hurricane Katrina. *Population Research and Policy Review*, *28*(1), 93-106. https://doi.org/10.1007/s11113-008-9112-7.

Azpiri, J. & Daya, R. (2020, June 8). Court backlog due to COVID-19 could put justice in jeopardy, B.C. lawyer warns. *Global News*. https://globalnews.ca/news/7042564/bc-court-backlog-coronavirus/.

Baar, C. (1993). Criminal court delay and the Charter: The use and misuse of social facts in judicial policy making. *Can. B. Rev.*, *72(3)*, 305-336.

Baar, C. (1997). Court delay data as social science evidence: The Supreme Court of Canada and "trial within a reasonable time". *Justice System Journal*, *19*(2), 123-144.

Baldwin, J. M., Eassey, J. M., & Brooke, E. J. (2020). Court operations during the COVID-19 pandemic. *American Journal of Criminal Justice*, *45*(4), 743-758.

Bailey, J. (2012). Digitization of court processes in Canada. *Working Paper n° 2*. Laboratoire de Cyberjustice. Retrieved from: https://www.cyberjustice.ca/files/sites/102/WP002_CanadaDigitizationOfCourtProcesses20121023.pdf.

Bailey, J., Burkell, J. et Reynolds, G. (2013). Access to justice for all: Toward an expansive vision of justice and technology. *Windsor Yearbook of Access to Justice*, 31*(2)*, 181-207.

Barnett, L., Charron-Tousignant, M., Dupuis, T., Nicol, J., Valiquet, D., & Walker, J. (2019). Legislative Summary - *Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*. Library of Parliament. Retrieved from: https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c75-e.pdf.

Barnhorst, R. (2012). Youth justice policy reform: The Youth Criminal Justice Act. In K. Ismaili, J. Sprott, & K. Varma, K. (Eds.), *Canadian criminal justice policy: Contemporary perspectives* (pp. 110-134). Oxford University Press.

Barnshaw, J., Letukas, L. & Quarantelli, E. (2008). The characteristics of catastrophes and their social evolution: An exploratory analysis of implications for crisis policies and emergency management procedures. Disaster Research Center, University of Delaware.

Beckett, K., Reosti, A., & Knaphus, E. (2016). The end of an era? Understanding the contradictions of criminal justice reform. *The Annals of the American Academy of Political and Social Science*, *664* (1), 238-259.

Berger, D. (2009). Constructing crime, framing disaster: Routines of criminalization and crisis in Hurricane Katrina. *Punishment & society*, *11*(4), 491-510.

Bertrand, M., Ireland, D., Jochelson, R., et Kerr-Donoghue, K. (2021). Dispensing digital justice: COVID-19, courts, and the potentially diminishing role of jury trials. *The Annual Review of Interdisciplinary Justice Research,* 10, 38-58.

Birkland, T. A., & Schneider, C. A. (2007). Emergency management in the courts: Trends after September 11 and Hurricane Katrina. *Justice System Journal*, *28*(1), 20-35.

Blair, A., Purnia, A., & Siddiqi, A. (2021). A time-series analysis of testing and COVID-19 outbreaks in Canadian federal prisons to inform prevention and surveillance efforts. *Canada Communicable Disease Report,* 47(1), 1-8.

Boin, A. (2005). Back to nature? A reply to Stallings. In R. Perry, & E. Quarantelli (Eds.), *What is disaster? New answers to old questions* (pp. 280-285). International Research Committee on Disasters.

Boland, M. L. (2007). Will your criminal justice systems function in the next disaster. *Criminal Justice*, 22(1), 28-35.

Bolin, B. & Kurtz, L. (2017). Race, class, ethnicity, and disaster vulnerability. In H. Rodriguez, W. Donner, J. Trainor (Eds.) *Handbook of disaster research* (2nd edition), (pp. 181-204). New York: Springer.

Boyea, B. D. (2010). Does seniority matter? The conditional influence of state methods of judicial retention. *Social Science Quarterly*, *91*(1), 209-227.

Boynton, S. (2023, 23 January). More than 50,000 Canadians have died from COVID-19 since pandemic began. *Global News*. Retrieved from: https://globalnews.ca/news/9414775/covid-canada-deaths-50-thousand/.

Bradley-Engen, M. S., Engen, R., Shields, C., Damphousse, K., & Smith, B. (2012). The time penalty: Examining the relationship between time to conviction and trial vs. plea disparities in sentencing. *Justice Quarterly*, 29(6), 829-857.

Bridges, G. S. (1982). The Speedy Trial Act of 1974: Effects on delays in federal criminal litigation. *Journal of Criminal Law & Criminology*, *73(1),* 50-73.

Brodkin, E. Z. (2021). Street-level organizations at the front lines of crises. *Journal of Comparative Policy Analysis: Research and Practice*, *23*(1), 16-29.

Brown, D. M. (2020, October 29). COVID-19 and Ontario's court system: How to seize the pandemic's silver lining. *Presentaiton to the Thunder Bay Law Association*. Retrieved from: https://www.ontariocourts.ca/coa/en/ps/publications/2020.Thunder.Bay.LA.pdf.

Bryson Taylor, D. (2021, 5 November). George Floyd Protests: A Timeline. *The New York Times.* Retrieved from: https://www.nytimes.com/article/george-floyd-protests-timeline.html.

Bucerius, S. M., & Ricciardelli, R. (2021). COVID-19 and its impacts on Criminal Justice Institutions and Actors. *Canadian Journal of Sociology*, *46*(4), 1-9.

Bucerius, S., Ricciardelli, R., Berardi, L., Dünkel, F., Harrendorf, S., & van Zyl Smit, D. (2022). COVID-19 in prisons: Country report - Canada. *The Impact of Covid-19 on Prison Conditions and Penal Policy.* Routledge.

Buchanan, M., Castro, E. D., Kushner, M., & Krohn, M. D. (2020). It's F** ing chaos: COVID-19's impact on juvenile delinquency and juvenile justice. *American Journal of Criminal Justice*, *45*(4), 578-600.

Bureau de la vérificatrice générale de l'Ontario [BVGO] (2019). Rapport annuel 2019. Rapport sur les services correctionnels et l'administration des tribunaux. Retrieved from: https://www.auditor.on.ca/fr/content-fr/annualreports/arreports/fr19/2019AR_v3_fr_web.pdf.

Burkell, J. et di Valentino, L. (2012). Literature review summary: Working paper *n°* 4. *Laboratoire de cyberjustice.* Retrieved from: https://www.cyberjustice.ca/files/sites/102/WP004_VideoconferencingLiteratureReviewSummary.pdf.

Burningham, S. (2022). Reflections on COVID-19 and criminal law: How does judicial doctrine Function in Crisis?. *Alberta Law Review,* 59(3), 587-610.

Bushway, S. D. (2011). So policy makers drive incarceration now what. Criminology and Public Policy, 10(2), 327-334.

Butler, P. (2016). The system is working the way it is supposed to: The limits of criminal justice reform. *Georgetown Law Journal 104 (6)*, 1419-1978.

Campbell, M. C. (2007). Criminal disenfranchisement reform in California: A deviant case study. *Punishment & Society*, *9*(2), 177-199.

Campbell, M. C. (2011a). Ornery alligators and soap on a rope: Texas prosecutors and punishment reform in the Lone Star State. *Theoretical Criminology*, *16*(3), 289-311.

Campbell, M. C. (2011b). Politics, prisons, and law enforcement: An examination of the emergence of "law and order" politics in Texas. *Law & Society Review*, *45*(3), 631-665.

Campbell, M., Schoenfeld, H., & Vaughn, P. (2020). Same old song and dance? An analysis of legislative activity in a period of penal reform. *Punishment & Society*, *22*(4), 389-412.

Canadian Bar Association (2020, 19 August). Media access to the courts in times of COVID. Retrieved from: https://www.cba.org/Our-Work/cbainfluence/Public-Policy-and-Advocacy/2020/August/Media-access.

Canadian Civil Liberties Association (2014). Set up to fail: Bail and the revolving door of pretrial detention. Toronto: Canadian Civil Liberties Association.

Caplow, T., & Simon, J. (1999). Understanding prison policy and population trends. *Crime and Justice*, 26, 63-120.

Capp, M. (2021). Will the COVID-19 crisis help us trace a path toward more equitable access to justice? *The Annual Review of Interdisciplinary Justice Research,* 10, 121-142.

Carns, T. W., & Kruse, J. (1991). A Re-evaluation of Alaska's plea bargaining ban. *Alaska Law Review*, *8(1)*, 27-69.

Carroll, J. E. (2020). Pretrial detention in the time of COVID-19. *Northwestern University Law Review*, *115*, 59-87.

Cavender, G. (2004). Media and crime policy: A reconsideration of David Garland's The Culture of Control. *Punishment & Society*, *6*(3), 335-348.

Cavise, L. (2013). Post-earthquake legal reform in Haiti: In on the ground floor. *Brooklyn Journal of International Law*, *38(3)*, 879-924.

Chartrand, V. (2021). Abolitionism in the land known as Canada in the wake of COVID-19. *Current Issues in Criminal Justice 33*(1), 138-143.

Cheliotis, L. K. (2006). How iron is the iron cage of new penology? The role of human agency in the implementation of criminal justice policy. *Punishment & Society*, *8*(3), 313-340.

Church, T. (1985). Examining local legal culture. *American Bar Foundation Research Journal*, 10(3): 449-518.

Clarke, V., Braun, V., & Hayfield, N. (2015). Thematic analysis. In *Qualitative psychology: A practical guide to research methods* (3rd Edition)*, (*Ed.), Smith, J.A.: 222-248. New York: Sage Publishing.

Connell, R. (2020). COVID-19/Sociology. *Journal of Sociology*, *56*(4), 745-751.

Commission Européenne pour l'Efficacité de la Justice (2016). Lignes directrices sur la conduite du changement vers la cyberjustice. Retrieved from: https://edoc.coe.int/fr/efficacite-de-la-justice/7498-lignes-directrices-sur-la-conduite-du-changement-vers-la-cyberjustice-bilan-des-dispositifs-deployes-et-synthese-de-bonnes-pratiques.html.

Cook, D., and L. Stone. (2023, July 10). Public safety and bail reform at top of agenda as Canada's premiers meet in Winnipeg. *Globe and Mail*. Retrieved from https://www.theglobeandmail.com/canada/article-public-safety-and-bail-reform-at-top-of-agenda-as-premiers-meet/.

Cour de justice de l'Ontario (2021). Règles en matière criminelle de la cour de justice de l'Ontario. Retrieved from: https://www.ontariocourts.ca/ocj/files/rules/criminal-rules-FR.pdf.

Criminal Code of Canada, R.S.C., 1985, c. C-46.

Currie, A. (2004). Surfer sur la crête de la troisième vague : Redéfinir l'aide juridique en matière pénale à l'intérieur d'un cadre d'accès à la justice. Ministère de la Justice Canada : Division de la recherche et de la statistique. Retrieved from: https://www.justice.gc.ca/fra/pr-rp/sjc-csj/ajc-ccs/rr03_5/rr03_5.pdf.

Dagan, D., & Teles, S. M. (2014). Locked in? Conservative reform and the future of mass incarceration. *The ANNALS of the American Academy of Political and Social Science*, *651* (1), 266-276.

Dagan, D., & Teles, S. M. (2015). The social construction of policy feedback: Incarceration, conservatism, and ideological change. *Studies in American Political Development*, *29*(2), 127.

Dagan, D., & Teles, S. M. (2016). Prison break: Why conservatives turned against mass incarceration. Oxford University Press Chicago.

Dandurand, Y. (2014). Criminal justice reform and the system's efficiency. In *Criminal Law Forum*, *25*(3), 383-440.

David, J. D., Leclerc, C., & Johnson, B. (2023). Reconsidering penal stability in Canada through a new sentencing severity index. *International Criminology*, *3*(1), 26-37.

Davis, A. Y. (2003). *Are Prisons Obsolete*? Seven Stories Press.

Davis, M. M., & Lynch, J. (2021, 15 January). How COVID-19 changes practice of law. *The Lawyer's Daily*. Retrieved from: https://www.lexisnexis.ca/en-ca/ihc/2021-02/how-covid-19-changes-practice-of-law.page.

Denis, H. (2002). La réponse aux catastrophes : Quand l'impossible survient. Montréal : Presses Internationales Polytechnique.

Department of Justice (2006). The final report on early case considerations of the Steering Committee on Justice Efficiencies and Access to the Justice System. Retrieved from: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/esc-cde/pdf/ecc-epd.pdf.

Department of Justice (2019). Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament). Retrieved from: https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/c75.pdf.

Department of Justice (2022). State of the Criminal Justice System: Impact of COVID-19 on the Criminal Justice System. Retrieved from: https://www.justice.gc.ca/eng/cj-jp/state-etat/2022rpt-rap2022/pdf/RSD-2022-SOCJS_Covid-19_Report-en.pdf.

Department of Justice (2023). JustFacts: Sentencing in Adult Criminal Courts in Canada in 2020-2021. *Research and Statistics Division.* Retrieved from: https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2023/pdf/RSD_JF2023_Sentencing-in-Canada-EN.pdf.

Diaczuk, D. (2021, 11 February). Health unit issues Section 22 order, expands testing to contain COVID-19 outbreaks. *TBNewsWatch.com*. Retrieved from: https://www.tbnewswatch.com/local-news/health-unit-issues-section-22-order-expands-testing-to-contain-covid-19-outbreaks-3420608.

Donner, W. et Diaz, W. (2017). Methodological issues in disaster research. In H. Rodriguez, W. Donner & J. Trainor (Eds.) *Handbook of disaster research* (2e edition) (pp. 289-310). New York: Springer.

Doob, A. N., & Webster, C. M. (2006). Countering punitiveness: Understanding stability in Canada's imprisonment rate. *Law & Society Review*, *40*(2), 325-368.

Doob, A. N., & Webster, C. M. (2016). Weathering the storm? Testing long-standing Canadian sentencing policy in the twenty-first century. *Crime and Justice*, *45*(1), 359-418.

Doyle, A., & McKendy, L. (2019). Risk aversion and the remand population explosion in Ontario. In (Eds.) Hannem, S., C.B. Sanders, C.J. Schneider, A. Doyle, & T. Christensen.

Security and Risk Technologies in Criminal Justice: Critical Perspectives, 199-224. Canadian Scholars Press.

Drabek, T. L., & McEntire, D. A. (2002). Emergent phenomena and multiorganizational coordination in disasters: Lessons from the research literature. *International Journal of Mass Emergencies & Disasters*, *20*(2), 197-224.

Dubé, R., & Cauchie, J. F. (2007). Enjeux autour de l'évolution du droit criminel moderne : Quand les variations de la périphérie défient l'autorité redondante du centre. *Déviance et Société*, *31*(4), 465-485.

Dubé, R. (2013). Les angles d'observation de la rationalité pénale moderne et la recherche empirique. In *La rationalité pénale moderne : Réflexions théoriques et explorations empiriques*, (Eds.). Richard Dubé, Margarida Garcia, and María Rocha Mochado, pp. 15-34. Ottawa : Presses de l'Université d'Ottawa.

Dubé, R., Garcia, M., & Rocha Machado, M. (2013). La rationalité pénale moderne : réflexions théoriques et explorations empiriques. Ottawa : Presses de l'Université d'Ottawa.

Dumoulin, L. et Licoppe, C. (2015). La visioconférence comme mode de comparution des personnes détenues, une innovation « manageriale » dans l'arène judiciaire. *Droit et Société*, 90(2), 287-302.

Dumoulin, L. et Licoppe, C. (2016). Videoconferencing, new public management, and organizational reform in the Judiciary. *Policy & Internet*, 8(3), 313-333.

Durkheim, E. (1973). Two laws of penal evolution. *Economy and Society*, *2*(3), 285-308.

Eisenstein, J., Flemming, R. B., & Nardulli, P. F. (1999). The contours of justice: Communities and their courts. Boston: Little, Brown.

Emerson, R., Fretz, R. et Shaw, L., (2011). Writing ethnographic fieldnotes. Chicago: University of Chicago Press.

Empson, L. (2018). Elite interviewing in professional organizations. *Journal of Professions and Organization*, *5*(1), 58-69.

Eshghi, K. and Larson, R.C. (2008), "Disasters: Lessons from the past 105 years", *Disaster Prevention and Management, 17*(1), 62-82. https://doi.org/10.1108/09653560810855883.

Erker, S. (2020, June 5). Managing your mental health through COVID. *Canadian Bar Association*. Retrieved from: https://www.oba.org/Sections/Law-Practice-Management/Articles/Articles-2020/June-2020/Managing-your-mental-health-through-COVID?lan.

Euvrard, E., & Leclerc, C. (2017). pretrial detention and guilty pleas: Inducement or coercion?. *Punishment & Society,* 19(5), 525-542.

Fayter, R., Mario, B., Chartrand, V., and Kilty, J.M. (2021). Surviving the pandemic on the inside: From crisis governance to caring communities. *Canadian Journal of Sociology*, 46 (4), 37-66.

Feeley, M. (2013 [1983]). Court reform on trial: Why simple solutions fail. Quid Pro Books.

Feeley, M. (2018). How to think about criminal court reform. *Boston University Law Review*, *98(3)*, 673-730.

Feeley, M. M., & Simon, J. (1992). The new penology: Notes on the emerging strategy of corrections and its implications. *Criminology*, *30*(4), 449-474.

Fehr, C. (2023). Remedying unreasonable delay. *Alberta Law Review*, 60(3), 739-754.

Ferdik, F., Frogge, G., & Doggett, S. (2022). "It's Like the Zombie Apocalypse Here": Correctional Officer Perspectives on the Deleterious Effects of the COVID-19 Pandemic. *Crime & Delinquency*. Retrieved from: https://doi.org/10.1177/00111287221131038.

Ferrara, A. J., Stillman, P. G., & Villmoare, A. H. (2012). The prison city of New Orleans: Law's responses to the disaster of Hurricane Katrina. In *Disasters, Hazards and Law*. Emerald Group Publishing Limited.

Fischer, H. W. (2003). The sociology of disaster: definitions, research questions, & measurements. Continuation of the discussion in a post-September 11 environment. *International Journal of Mass Emergencies and Disasters*, *21*(1), 91-108.

Fischer, H., & Drain, E. (1993). Local offices of emergency preparedness (LEMA) belief in disaster mythology: What has changed and why? *The International Journal of Disaster*.

Flanagan, R. (April 15, 2020). Does COVID-19 discriminate? This is how some Canadians are harder-hit. *CTV News.* Retrieved from: https://www.ctvnews.ca/health/coronavirus/does-covid-19-discriminate-this-is-how-some-canadians-are-harder-hit-1.4897298.

Fore, M., & Stevenson, E. (2023). The impact of Covid-19 pandemic on overall well-being of practicing lawyers. *Plos one*, *18*(3), 1-19.

Forman Jr., J. (2017). Locking up our own: Crime and punishment in Black America. Farrar, Straus and Giroux.

Forrest, T. (1978). Group emergence in disasters. In E. Quarantelli (Ed.), *Disasters: Theory and research* (pp. 105-125). Beverly Hills: Sage.

Foucault, M. (1979). Discipline and punish (A. Sheridan, Trans.). Vintage Books. *(Original work published 1975).*

Frailing, K., Harper Jr, D. W., & Serpas, R. (2015). Changes and challenges in crime and criminal justice after disaster. *American Behavioral Scientist*, *59*(10), 1278-1291.

Fritz, C. E. (1961). Disaster. In R. Merton & R. Nesbit (Eds.), *Contemporary social problems* (pp. 651–694). New York: Harcourt Publishers.

Gallant, J. (2023, 2 July). 'COVID-19 is not a magic incantation': Judges toss sex assault, firearms cases, warning against using the pandemic as an excuse for delay. *Toronto Star.* Retrieved from: https://www.thestar.com/news/gta/2023/07/02/covid-is-not-a-magic-incantation-judges-toss-sex-assault-firearms-cases-warning-against-using-the-pandemic-as-an-excuse-for-delay.html?rf.

Garcia, M. (2013). La théorie de la rationalité pénale moderne : Un cadre d'observation, d'organisation et de description des idées propres au système de droit criminel. In *La rationalité pénale moderne : Réflexions théoriques et explorations empiriques*, es. Richard Dubé, Margarida Garcia, and María Rocha Mochado, 37-72. Ottawa : Presses de l'Université d'Ottawa.

Garland, D. (1990). Punishment and modern society: A study in social theory. University of Chicago Press.

Garland, D. (2001). The culture of control: Crime and social order in contemporary society. University of Chicago Press.

Garland, D. (2013). Penality and the penal state. *Criminology*, *51*(3), 475-517.

Garland, D. (2018). Theoretical advances and problems in the sociology of punishment. *Punishment & Society*, 20(1), 8-33.

Garrett, B. L., & Tetlow, T. (2006). Criminal justice collapse: The constitution after Hurricane Katrina. *Duke Law Journal*, *56(1)*, 127-178.

Gibbs, P. (2017). Defendants on video–conveyor belt justice or a revolution in access. *Transform Justice*. Retrieved from: https://www.magistrates-association.org.uk/Portals/0/Files/Public/defendants-on-video-23-10-17.pdf.

Gill, N. (2021). Remote justice and vulnerable litigants: The case of asylum. *In* D. Cowan & A. Mumford (Eds.) *Pandemic Legalities: Legal Responses to COVID-19 – Justice and Social Responsibility,* pp. 27-39. Bristol University Press: Bristol.

Godfrey, B., Richardson, J. C., & Walklate, S. (2022). The crisis in the courts: Before and beyond COVID. *The British Journal of Criminology*, *62*(4), 1036-1053.

Goodman, P., & Dawe, M. (2016). Prisoners, cows and abattoirs: The closing of Canada's prison farms as a political penal drama. *British Journal of Criminology*, *56*(4), 793-812.

Goodman, P., Page, J., & Phelps, M. (2015). The long struggle: An agonistic perspective on penal development. *Theoretical Criminology*, *19*(3), 315-335.

Goodman, P., Page, J., & Phelps, M. (2017). Breaking the pendulum: The long struggle over criminal justice. Oxford University Press.

Gorman, W. K. (2021). Judging in the time of a pandemic: The impact of COVID-19 on bail and sentencing in Canada. *Court Review*, *57 (1)*, 22-32.

Government of Ontario (February 22, 2021a). Hansard Document February 22, 2021. Retrieved from: https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2021/2021-02/22-FEB-2021_L224.pdf.

Government of Ontario (October 29, 2021b). Ontario introduces new measures to address court backlog. Retrieved from: https://news.ontario.ca/en/release/1001076/ontario-introduces-new-measures-to-address-court-backlog.

Gramatikov, M., Barandrect, M., Laximarayan, M., Verdonschot, J.H., Klaming, L. & van Zeeland, C. (2010). A handbook for measuring the costs and quality of access to justice. Anvers : Maklu.

Grant, S. (2016). Constructing the durable penal agent: Tracing the development of habitus within English probation officers and Scottish criminal justice social workers. *British Journal of Criminology*, *56*(4), 750-768.

Gras, A. et du Marais, B. (2013). Vers un cyberjuge administratif - La numerisation de la justice administrative en France : Document de travail *n°* 13. *Laboratoire de cyberjustice*. Retrieved from: https://www.cyberjustice.ca/files/sites/102/GrasduMaraisWP13.pdf.

Green, D. A. (2015). US penal-reform catalysts, drivers, and prospects. *Punishment & Society*, *17*(3), 271-298.

Greener, M. (2021) 'COVID bail': the response of Victorian courts and prisons in navigating the impact of COVID-19. *Current Issues in Criminal Justice*, 33(1), 89-93.

Grimsdale, S R. (2019). The better way to stop delay: Analyzing speedy sentencing claims in the wake of Betterman v. Montana. *Vanderbilt Law Review*, *72(3)*, 1031-1073.

Guggenheim, M. (2014). Introduction: disasters as politics–politics as disasters. *The Sociological Review*, *62*(1), 1-16.

Guiney, T., Rubin, A., & Yeomans, H. (2023). Path dependence and criminal justice reform: Introducing the special issue. *The Howard Journal of Crime and Justice*, *62*(1), 3-10.

Haigh, R., & Preston, B. (2020). The court system in a time of crisis: COVID-19 and issues in court administration. *Osgoode Hall Law Journal*, 57(3), 869-904.

Harper, D. W., & Frailing, K. (2010). Crime and disaster in historical perspective. In. D.W. Harper & K. Failing (Eds.), *Crime and criminal justice in disaster* (pp. 7-28). Carolina Academic Press.

Harris, H. M. (2023). The impact of remote hearing policies on racial equity in criminal case outcomes during the pandemic. *The Russell Sage Foundation Journal of the Social Sciences*, *9*(3), 252-279.

Harris, J. C., & Jesilow, P. (2000). It's not the old ball game: Three strikes and the courtroom workgroup. *Justice Quarterly*, *17*(1), 185-203.

Hawks, L., Woolhandler, S., & McCormick, D. (2020). COVID-19 in prisons and jails in the United States. *Journal of the American Medical Association Internal Medicine*, *180* (8), 1041-1042.

Health Canada (2023). Post COVID-19 Condition (long COVID). Retrieved from: https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/symptoms/post-covid-19-condition.html.

Hinton, E. (2016). *From the war on poverty to the war on crime: The making of mass incarceration in America*. Harvard University Press.

Hochstetler & Copes (2016). Qualitative criminology's contribution to theory. In A. Piquero (Ed.), *The Handbook of Criminological Theory* (pp. 497-520). Oxford: Wiley.

Hollis, M. E., & Hankhouse, S. (2019). The growth of rural criminology: Introduction to the special issue. *Crime Prevention and Community Safety*, *21*, 177-180.

Hopwood, S. (2014). The not so speedy trial act. *Washington Law Review*, *89(3)*, 709-743.

House of Lords Select Committee on the Constitution (2021). COVID-19 and the Courts. Retrieved from: https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/257/257.pdf

Hughes, G., & Gilling, D. (2004). 'Mission impossible'? The habitus of the community safety manager and the new expertise in the local partnership governance of crime and safety. *Criminal Justice*, *4*(2), 129-149.

Iftene, A. (2020). COVID-19 in Canadian prisons: Policies, practices and concerns. In *Vulnerable: The law, policy and ethics of COVID-19,* (Eds). Flood, C., V. MacDonnell, J. Philpott, S. Theriault, and S. Venkatapuram, pp. 367-380. Ottawa: University of Ottawa Press.

Ismaili, J. Sprott, & K. Varma, K. (Eds.), *Canadian criminal justice policy: Contemporary perspectives* (pp. 58-78). Oxford University Press.

Jacobs, J. B. (1977). Stateville: The penitentiary in mass society. University of Chicago Press.

James, N., & Foster, M. (2020). Federal prisoners and COVID-19: Background and authorities to grant release. Congressional Research Service. Retrieved from: https://crsreports.congress.gov/product/pdf/R/R46297.

Jennings, W. G., & Perez, N. M. (2020). The immediate impact of COVID-19 on law enforcement in the United States. *American Journal of Criminal Justice*, 45(4), 690-701.

Johnson, B. (2021). Risk, restorative justice and the Crown: a study of the prosecutor and institutionalization in Canada. *The International Journal of Restorative Justice* 4*(2),* pp.283-304.

Johnson, B. & Leclerc, C. (2022). Accès à la justice dans les tribunaux criminels en temps de crise de COVID-19 : le recours aux tribunaux virtuels. *Criminologie*, 55(2), 147–170. https://doi.org/10.7202/1093868ar.

Johnson, C., Bien-Aimé, I., & Dubois, L. (2021). Weight gain and chronic disease progression among individuals incarcerated in Canadian federal penitentiaries: a retrospective cohort study. *International Journal of Prisoner Health*.

Johnson, M. et Wiggins, E. (2006). Videoconferencing in criminal proceedings: Legal and empirical issues and directions for research. *Law & Policy*, *28*(2), 211-227.

Karam, Lukassen, Miladinovic & Wallace (2020). Measuring efficiency in the Canadian adult criminal court system: Criminal court workload and case processing indicators. Retrieveed from: https://www150.statcan.gc.ca/n1/pub/85-002-x/2020001/article/00004-eng.htm.

Keenan-Pelletier, M. & Phillips, D. (2022). Legislative Summary – Bill S-4: An Act to amend the Criminal Code, the Identification of Criminals Act and to make consequential amendments to other Acts (COVID-19 response and other measures. Library of Parliament. Retrieved from: https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/44-1/44-1-S4-E.pdf.

Kelly, R. (2017). The Charter of the French Language and the Supreme Court of Canada: Assessing whether constitutional design can influence policy outcomes. In E. Macfarlane (Ed.), *Policy change, Courts and the Canadian constitution* (pp. 250-268). University of Toronto Press.

Kemp, V. (2008). Youth Court Research Project: a scoping study adopting a 'whole-systems' approach to the processing of cases in the youth courts. *Legal Services Research Centre*.

Kerr, L., & Dube, K. A. (2020). Adjudicating the Risks of Confinement: Bail and Sentencing During COVID-19. *Criminal Reports* (7th), 311-333.

Kerr, L., & Dube, K. A. (2021). The Pains of imprisonment in a pandemic. *Queen's Law Journal*, *46(2)*, 327-342.

Killian, L. (2002). An introduction to methodological problems of field studies in disasters. In R. Stallings (Ed.), Methods of disaster research (pp.49-93). International Research Committee on Disasters.

Kohler-Hausmann, I. (2018). *Misdemeanorland: Criminal courts and social control in an age of broken windows policing*. Princeton University Press.

Koehler, J. (2019). Penal (ant) agonism. *Law & Social Inquiry*, *44*(3), 799-805.

Koneval-Brown, (2021, December 4). Feel the Burn: Burnout in the Workplace. *Canadian Bar Association*. Retrieved from: https://www.oba.org/Sections/Young-Lawyers-Division/Articles/Articles-2021/December-2021/Feel-the-Burn-Burnout-in-the-Workplace?lang=en-ca.

Kouyoumdjian, F., Schuler, A., Matheson, F., & Hwang, S. (2016). Health status of prisoners in Canada: Narrative review. *Canadian Family Physician*, 62(3): 215-222.

Kouyoumdjian, F., Cheng, S., Fung, K., Orkin, A., McIsaac, K., Kendall, C., Kiefer, L., Matheson, F., Green, S., & Hwang, S. (2018). The health care utilization of people in prison and after prison release: A population-based cohort study in Ontario. Canada. *Plos One*, 13(8): 1-14. Retrieved from: https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0201592&type=printable

Kurlychek, M. C., & Kramer, J. H. (2019). The transformation of sentencing in the 21st century. In C. Spohn & P. Brennan (Eds.), *Handbook on Sentencing Policies and Practices in the 21st Century* (pp. 19-42). New York: Routledge.

Lacey, N., Soskice, D., & Hope, D. (2018). Understanding the determinants of penal policy: Crime, culture, and comparative political economy. *Annual Review of Criminology*, *1*, 195-217.

Lancaster, J. (June 4, 2020). How COVID-19 helped push Ontario's low-tech justice system into the 21st century. *CBC News*. Retrieved from: https://www.cbc.ca/news/canada/toronto/covid-19-technology-courts-ontario-1.5596643.

Landreville, P. (2007). Grandeurs et misères de la politique pénale au Canada : du réformisme au populisme. *Criminologie*, *40*(2), 19-51.

Leclerc, C. (2023). La boîte noire des tribunaux : les difficultés à comprendre, à mesurer et à améliorer les pratiques judiciaires. Revue de droit de l'Université de Sherbrooke, *52*(1), 233-250.

Leclerc, C. & Noreau, P. (2017). L'arrêt Jordan : le procès inattendu de notre système de justice. *In* Annick Poitras (Ed.), *L'État du Québec 2018. 20 clés pour comprendre les enjeux actuels* (pp. 158-164), Institut du nouveau monde, El Busso.

Lepointe, E. (1991). Le sociologue et les désastres. *Cahiers internationaux de sociologie*, *91,* 145-174.

Levin, M. A. (1975). Delay in five criminal courts. *The Journal of Legal Studies*, *4*(1), 83-131.

Lindell, M. K. (2013). Disaster studies. *Current Sociology*, *61* (5-6), 797-825.

Lofstrom, M., Martin, B., & Raphael, S. (2020). Effect of sentencing reform on racial and ethnic disparities in involvement with the criminal justice system: The case of California's proposition 47. *Criminology & Public Policy*, *19*(4), 1165-1207.

Loriggio, P. (2021, 16 February). Ontario moves to change judicial appointments in effort to boost access to justice. *Global News*. Retrieved from: https://globalnews.ca/news/7643960/ontario-moves-to-change-judicial-appointments/.

Loriggio, P., & Casey, L. (2020, 29 April). COVID-19 pandemic forces Ontario justice system 'stuck in the 1970s' to modernize. *CBC News*. Retrieved from https://www.cbc.ca/news/canada/toronto/ontario-courts-modernize-1.5549850.

Louis-Charles, H. M., Howard, R., Remy, L., Nibbs, F., & Turner, G. (2020). Ethical considerations for post-disaster fieldwork and data collection in the Caribbean. *American behavioral scientist*, *64*(8), 1129-1144.

Lum, C., Maupin, C., & Stoltz, M. (2020). The impact of COVID-19 on law enforcement agencies (Wave 2). Retrieved (September 27, 2020) from: https://www.theiacp.org/sites/default/files/IACP_Covid_Impact_Wave2.pdf.

Lum, C., Maupin, C., & Stoltz, M. (2022). The supply and demand shifts in policing at the start of the pandemic: A national multi-wave survey of the impacts of COVID-19 on American law enforcement. *Police Quarterly*, 10986111221148217.

Lundrigan, K. (2018). R v Jordan: A ticking time bomb. *Manitoba Law Journal, 41(4)*, 113-148.

Lynch, M. (1998). Waste managers? The new penology, crime fighting, and parole agent identity. *Law and Society Review*, 839-870.

Lynch, M. (2010). *Sunbelt justice: Arizona and the transformation of American punishment*. Stanford University Press.

Lynch, M. (2011). Mass incarceration, legal change, and locale: Understanding and remediating American penal overindulgence. *Criminology & Public Policy*, *10(3)*, 673–698.

Lynch, M., & Omori, M. (2014). Legal change and sentencing norms in the wake of Booker: The impact of time and place on drug trafficking cases in federal court. *Law & Society Review*, *48*(2), 411-445.

MacDonald, R. (1992). Accessibilité pour qui? Selon quelles conceptions de justice? *Les Cahiers de Droit*, 33(2), 457-484.

Malakieh, J. (2018). Adult and youth correctional statistics in Canada, 2016/2017. *Juristat: Canadian Centre for Justice Statistics*, 1-20.

Malakieh, J. (2019). Adult and youth correctional statistics in Canada, 2017/2018. *Juristat: Canadian Centre for Justice Statistics*, 1-26.

Malakieh, J. (2020). Adult and youth correctional statistics in Canada, 2018/2019. *Juristat: Canadian Centre for Justice Statistics*, 1-23.

Manikis, M., & De Santi, J. (2020). Punishment and retribution within the bail process: An analysis of the public confidence in the administration of justice ground for pretrial detention. *Canadian Journal of Law and Society/La Revue Canadienne Droit et Société*, 35(3), 413-435.

Manikis, M., & Grbac, P. (2017). Bargaining for justice: the road toward prosecutorial accountability in the plea bargaining process. *Manitoba Law Journal*, *40(3)*, 85-110.

Manson, A. (2012). A trip from thoughtful to thoughtless: Murder sentencing in Canada. In K.

Manson, A., Healy, P., Trotter, G., Roberts, J.V., & Ives, D. (2016). Sentencing and penal policy in Canada. Toronto: Emond.

Marenin, O. (1995). The state of plea bargaining in Alaska. *Journal of Crime and Justice*, *18*(1), 167-197.

Martel, J. (2023). Femmes incarcérées : Inertie institutionnelle dans l'emprisonnement au Canada et au Québec. Presses de l'Université de Laval.

Marvell, T. B., & Luskin, M. L. (1991). The impact of speedy trial laws in Connecticut and North Carolina. *Justice System Journal*, *15*(1), 343-357.

Massoglia, M., & Pridemore, W. A. (2015). Incarceration and health. *Annual review of sociology*, *41*, 291-310.

Matthewman, S., & Huppatz, K. (2020). A sociology of Covid-19. *Journal of Sociology*, *56*(4), 675-683.

Matyas, D., Wills, P. et Dewitt, B. (2022). Imagining resilient courts: From Covid to the future of Canada's court system. *Canadian Public Policy*, *48*(1), 186-208.

Maycock, M. (2022). 'Covid-19 has caused a dramatic change to prison life'. Analysing the impacts of the Covid-19 pandemic on the pains of imprisonment in the Scottish Prison Estate. *The British Journal of Criminology*, *62*(1), 218-233.

McAllister, S. R., Dihn, V., Chemerinsky, E., & Stone, C. (2002). Life After 9/11: Issues affecting the courts and the nation. *University of Kansas Law Review*, *51(2)*, 219-248.

McConville, M. & Marsh, L. (2023). Tipping the scales of justice: COVID-19 and Detention without trial. In (Ed) Johnston, E., *COVID-19 and criminal justice: Impact and legacy in England and Wales.* pp. 90-108.

McCowan III, C. (2010). The impact of Hurricanes Katrina and Rita on the Louisiana judicial system. Unpublished Master's thesis. Louisiana State University.

McDonald, A., Berardi, L., Tetrault, J., Haggerty, K., & Bucerius, S. (2023). More of the same, only worse: COVID-19 and the administrative burdens facing loved ones of incarcerated men. *The British Journal of Criminology*, *63*(2), 444-460.

McKay, C. (2018). The pixelated prisoner: Prison video links, court 'appearance' and the justice matrix. New York: Routledge.

McLachlin, B. (2021, February 18). Access to justice: Fragility and resilience: Lessons of 2020 and 2021 potential. *Lawyer's Daily.* Retrieved from: https://www.thelawyersdaily.ca/articles/23793/access-to-justice-fragility-and-resilience-lessons-of-2020-and-2021-potential-beverley-mclachlin.

McGarrell, E. F. (1991). Differential effects of juvenile justice reform on incarceration rates of the states. *Crime & Delinquency*, *37*(2), 262-280.

McNeill, F. (2019). Contesting probation in Scotland: How an agonistic perspective travels. *Law & Social Inquiry*, *44*(3), 814-821.

McNeill, F., Burns, N., Halliday, S., Hutton, N., & Tata, C. (2009). Risk, responsibility and reconfiguration: Penal adaptation and mis-adaptation. *Punishment & Society*, *11*(4), 419-442.

Merritt, N., Fain, T., & Turner, S. (2006). Oregon's get tough sentencing reform: A lesson in justice system adaptation. *Criminology & public policy*, *5*(1), 5-36.

Metcalfe, C., & Kuhns, J. B. (2023). Coping with limited prosecutorial resources: An assessment of the case processing and community impact from the perspective of prosecutors and staff in a southeastern county. *Criminal Justice Policy Review,* 43(4), 337-360.

Miladinovic (2019). Adult criminal and youth court statistics in Canada, 2016/2017. *Juristat.* Retrieved from: https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00002-eng.pdf?st=yo9LVdCg.

Miller, A. (2020, 4 November): Canada quietly updates COVID-19 guidelines on risk of airborne spread: Public Health Agency of Canada previously made no mention of aerosol transmission in federal recommendations. *CBC News*. Retrieved from: https://www.cbc.ca/news/health/coronavirus-canada-aerosol-transmission-covid-19-1.5789906.

Ministère de la Justice (2019). Document d'information législatif : Loi modifiant le Code criminel, la Loi sur le système de justice pénale pour les adolescents et d'autres lois et apportant des modifications corrélatives à certaines lois, tel qu'elle a été édictée (projet de loi C-75 lors de la 42e législature).

Ministre du Procureur Générale de l'Ontario (2020). Court recovery planning – Townhall. *Secrétariat de la reprise des activités*. Retrieved from: https://www.youtube.com/watch?v=VobOTqt6otw.

Monchalin, L. (2016). The colonial problem: An Indigenous perspective on crime and injustice in Canada. University of Toronto Press.

Moreau, G. (2022). Police-reported hate crime in Canada, 2020. *Juristat: Canadian Centre for Justice Statistics*, 1-66.

Mulcahy, L. (2021). Virtual poverty? What happens when criminal trials go online? *In* D. Cowan & A. Mumford (Eds.) *Pandemic Legalities: Legal Responses to COVID-19 – Justice and Social Responsibility.* pp. 41-52. Bristol University Press: Bristol.

Murakawa, N. (2014). The first civil right: How liberals built prison America. Oxford University Press.

Murphy, C. (2012). Canadian police and policing policy post-9/11. Manson, A. (2012). A trip from thoughtful to thoughtless: Murder sentencing in Canada. In K. Ismaili, J. Sprott, & K. Varma, K. (Eds.), *Canadian criminal justice policy: Contemporary perspectives* (pp. 5-29). Oxford University Press.

Murphy, J. R. (2021). Pandemic sentence remissions: A model for executive decarceration during and following COVID-19. *Current Issues in Criminal Justice*, *33*(1), 47-53.

Murphy, B., & Ferrari, T. (2020). Bail in the time of COVID-19. *Criminal Law Journal*, *44*(4), 247-263.

Myers, N. M. (2009). Shifting risk: Bail and the use of sureties. *Current Issues in Criminal Justice*, *21*(1), 127-147.

Myers, N. M. (2015). Who said anything about justice? Bail court and the culture of adjournment. *Canadian Journal of Law and Society/La Revue Canadienne Droit et Société*, *30*(1), 127-146.

Myers, N. M. (2017). Eroding the presumption of innocence: pretrial detention and the use of conditional release on bail. *British Journal of Criminology*, *57*(3), 664-683.

Myers, N. M. (2021). The more things change, the more they stay the same: The obdurate nature of pandemic bail practices. *Canadian Journal of Sociology*, 46(4): 11-36.

Neubauer, D. (1978). Reducing delay in the courts: An introduction to this issue. *Judicature*, *62*, 111-114.

Newburn, T. (2007). "Tough on crime": Penal policy in England and Wales. *Crime and Justice*, *36*(1), 425-470.

Nicolaides, E. & Hennigar, M. (2018). Carter conflicts: The Supreme Court of Canada's impact on medical assistance in dying policy. In E. Macfarlane (Ed.), *Policy change, courts and the Canadian constitution* (pp. 313-335). University of Toronto Press.

Norman, M., & Ricciardelli, R. (2022). "It's Pure Chaos Every Day": COVID-19 and the work of Canadian federal institutional parole officers. *European Journal of Probation*, *14*(1), 1-20.

Novisky, M. A., Nowotny, K. M., Jackson, D. B., Testa, A., & Vaughn, M. G. (2021). Incarceration as a fundamental social cause of health inequalities: Jails, prisons and vulnerability to COVID-19. *The British Journal of Criminology*, *61*(6), 1630-1646.

Noy, C. (2008). Sampling knowledge: The hermeneutics of snowball sampling in qualitative research. *International Journal of social research methodology*, *11*(4), 327-344.

Odendahl, T., and Shaw, A. M. (2002) 'Interviewing Elites', in Gubrium, J., and J. Holstein, (eds.) Handbook of Interview Research: Context and Method, pp. 299–331. Thousand Oaks: Sage.

Office of the Auditor General of Ontario [OAG] (2019). Annual Report 2019: Reports on Correctional Services and Court Operations. Retrieved from: https://www.auditor.on.ca/en/content/annualreports/arreports/en19/2019AR_v3_en_web.pdf.

Office of the Auditor General of Ontario [OAG] (2021). Annual Follow-Up on Value-for-Money Audits. Retrieved from: https://www.auditor.on.ca/en/content/annualreports/arreports/en21/AR_FU_en21.pdf.

Office of the Correctional Investigator (2018). *Annual Report 2017-2018.* Retrieved from: https://oci-bec.gc.ca/sites/default/files/2023-06/annrpt20172018-eng.pdf.

Office of the Correctional Investigator (2021). *Annual Report 2020-2021*. Retrieved from http://www.oci-bec.gc.ca/sites/default/files/2023-06/annrpt20202021-eng.pdf.

Ontario Court of Justice (n.d.). Criminal Rules of the Ontario Court of Justice. Retrieved from: https://www.ontariocourts.ca/ocj/criminal-court/criminal-rules/.

Ontario Court of Justice (November 18, 2020) COVID-19–Criminal Case Adjournment Dates–Out-of-Custody Accused: March 16, 2020 to November 27, 2020 (Updated November 18, 2020). Retrieved from: https://www.ontariocourts.ca/ocj/covid-19/criminal-list-adjournment/#:~:text=In%20courts%20that%20hold%20criminal,to%20the%20winter%20holiday%20season.

Ontario Court of Justice (April 21, 2021). COVID-19 Pandemic – Update re Criminal Proceedings: reducing out-of-custody trials and preliminary inquiries between April 26 and May 21, 2021. Retrieved from: https://www.ontariocourts.ca/ocj/covid-19/criminal-notice-april-21-21/.

Ontario Court of Justice (2023). Revised Guidelines re Mode of appearance for Ontario Court of Justice criminal proceedings. Retrieved from: https://www.ontariocourts.ca/ocj/notices/mode-of-appearance-guidelines/.

Ontario Ministry of the Attorney General (1993). Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure and Resolutions Discussions. The Honourable G. Arthur Martin, Chair (Martin Report).

Schumann, R., & Yule, C. (2022). Unbreaking bail?: Post-Antic trends in bail outcomes. *Canadian Journal of Law and Society/La Revue Canadienne Droit et Société*, *37*(1), 1-28.

O'Malley, S. (1991, Jul 20). Judge's day off may kill assault trial. *The Whig - Standard*. Retrieved from: https://www.proquest.com/newspapers/judges-day-off-may-kill-assault-trial/docview/353268873/se-2.

Page, J. (2011). Prison officer unions and the perpetuation of the penal status quo. *Criminology & Public. Policy*, *10(3)*, 735-770.

Page, J., Phelps, M., & Goodman, P. (2019). Consensus in the penal field? Revisiting Breaking the Pendulum. *Law & Social Inquiry*, *44*(3), 822-827.

Palen, L. & Hughes, A. (2017). Social media in disaster communications. In H. Rodriguez, W. Donner, J. Trainor (Eds.) Handbook of disaster research (2nd edition) (pp. 497-520). New York: Springer.

Paciocco, P. (2020). Trial delay caused by discrete systemwide events: The post-Jordan era meets the age of COVID-19. *Osgoode Hall Law Journal*, 57(3), 835-867.

Pereira & Grimes (2002). Case processing in criminal courts, 1999/00. *Juristat,* https://www150.statcan.gc.ca/n1/en/pub/85-002-x/85-002-x2002001-eng.pdf?st=40Cu9oET.

Perry, R. (2005). Disasters, definitions and theory construction. In R. Perry, & E. Quarantelli (Eds.), *What is disaster? New answers to old questions* (pp. 311-324). International Research Committee on Disasters.

Perry, R. (2017). Defining disaster: An evolving concept. In H. Rodriguez, W. Donner, J. Trainor (Eds.) Handbook of disaster research (2nd edition) (pp. 3-22). New York: Springer.

Pfaff, J. (2017). *Locked in: The true causes of mass incarceration-and how to achieve real reform*. Basic Books.

Phelps, M. S. (2011). Rehabilitation in the punitive era: The gap between rhetoric and reality in US prison programs. *Law & society review*, *45*(1), 33-68.

Phelps, M. S. (2013). The paradox of probation: Community supervision in the age of mass incarceration. *Law & policy*, *35* (1-2), 51-80.

Phelps, M. S. (2017). Mass probation: Toward a more robust theory of state variation in punishment. *Punishment & Society*, *19*(1), 53-73.

Phelps, M. S. (2020). Mass probation from micro to macro: Tracing the expansion and consequences of community supervision. *Annual Review of Criminology*, 3, 261-279.

Piquero, A. R. (2021). The policy lessons learned from the criminal justice system response to COVID-19. *Criminology & Public Policy*, *20*(3), 385-399.

Pires, A. P. (2001). La rationalité pénale moderne, la société du risque et la juridicisation de l'opinion publique. *Sociologie et sociétés*, *33* (1), 179–204.

Puddister, K. (2018). Protecting against cruel and unusual punishment: Section 12 of the Charter and mandatory minimum sentences. In E. Macfarlane (Ed.), *Policy change, courts and the Canadian constitution* (pp. 189-209). University of Toronto Press.

Puddister, K. (2021). How the Canadian sentencing system impacts policy reform: An examination of the Harper era. *Law & Policy*, *43*(2), 149-169.

Puddister, K. & Small, T. (2020). Trial by Zoom? The Response to COVID-19 by Canada's courts. *Canadian Journal of Political Science/Revue canadienne de science politique*, 53(2), 373-377.

Quarantelli, E. L. (1995). What is a disaster?. *International Journal of Mass Emergencies and Disasters*, *13*(3), 221-229.

Quarantelli, E. (2000a). Disaster Sociology. In E. Borgatta & R. Montgomery (Eds.), *Encyclopedia of sociology* (pp. 680-688). New York: Macmillan Reference.

Quarantelli, E. (2000b). Emergencies, disaster and catastrophes are different phenomena. Disaster Research Center, University of Delaware.

Quarantelli, E. (2005). A social science research agenda for the disasters of the 21st century: Theoretical, methodological and empirical issues and their professional implementation. In R. Perry, & E. Quarantelli (Eds.), *What is disaster? New answers to old questions* (pp. 325-396). International Research Committee on Disasters.

Quarantelli, E., Boin, A. & Lagadec, P. (2007). A heuristic approach to future disasters and crises: New, old, and in-between types. In H. Rodriguez, E. Quarantelli & R. Dynes (Eds.), *Handbook of disaster research* (pp. 16-41). New York: Springer.

Quirouette, M. (2018). Community practitioners in criminal courts: Risk logics and multiply-disadvantaged individuals. *Theoretical Criminology*, *22*(4), 582-602.

Rengifo, A. F., Flores, S. G., & Jackson, A. N. (2020). From bright plots to blind spots: Mapping departures in case review post-bail reform in two New Jersey courts. *Criminal Justice and Behavior*, *48*(1), 96-115.

Riddell, T. & Baker, D. (2018). The Charter beat: The impact of rights decisions on Canadian policing. In E. Macfarlane (Ed.), *Policy change, courts and the Canadian constitution* (pp. 169-188). University of Toronto Press.

Roach, K. (1999). The effects of the Canadian Charter of Rights on criminal justice. *Israel Law Review*, *33(3)*, 607-637.

Robbins, I. (2008). Lessons from Hurricane Katrina: Prison emergency preparedness as a constitutional imperative. *University of Michigan Journal of Law Reform*, *42(1)*, 1-70.

Roberts, J. V., & Pina-Sánchez, J. (2022). Sentence reductions for a guilty plea: The impact of the revised guideline on rates of pleas and 'cracked trials'. *The Journal of Criminal Law*, *86*(5), 327-335.

Robinson, G. (2008). Late-modern rehabilitation: The evolution of a penal strategy. *Punishment & Society*, *10*(4), 429-445.

Robinson, G. (2020). Probation practice in a velvet cage? Specialist court work after probation privatisation in England and Wales. *Punishment & Society*, *22*(1), 70-89.

Robitaille, D. (2020, May 6). 13 jurisdictions, 1 pandemic: How COVID-19 has impacted courts across Canada [Audio podcast episode]. In *The Lawyer's Lounge.* Emond Publishing.

Rossner, M., Tait, D. et McCurdy, M. (2021). Justice reimagined: challenges and opportunities with implementing virtual courts. *Current Issues in Criminal Justice*, 33(1), 94-110.

Rubin, A. T. (2018). The prehistory of innovation: A longer view of penal change. *Punishment & Society*, *20*(2), 192-216.

Rubin, A. T. (2019). Interrogating the penal pendulum: An introduction to the Review Symposium on Breaking the Pendulum: The long struggle over criminal justice. *Law & Social Inquiry*, *44*(3), 791-798.

Rubin, A. T. (2021). *Rocking qualitative social science: An irreverent guide to rigorous research*. Stanford University Press.

Rubin, A. T. (2023). The promises and pitfalls of path dependence frameworks for analyzing penal change. *Punishment & Society*, *25*(1), 264-284.

Rubin, A., & Phelps, M. S. (2017). Fracturing the penal state: State actors and the role of conflict in penal change. *Theoretical criminology*, *21*(4), 422-440.

Rudnicki, C. (2021). Confronting the Experience of Imprisonment in Sentencing: Lessons from the COVID-19 Jurisprudence. *Canadian Bar Review.* 99(3), 469-487.

Rusche, G., & Kirchheimer, O. (2007). *Punishment and social structure (3rd edition)*. New Jersey: Transaction Publishers.

Sapers, H. (2020). The case for prison depopulation: Prison health, public safety and the pandemic. *Journal of Community Safety and Well-Being,* 5(2): 79-81.

Sastry, N., & Van Landingham, M. (2009). One year later: Mental illness prevalence and disparities among New Orleans residents displaced by Hurricane Katrina. American Journal of Public Health, *99 (S3),* S725–S731.

Sentencing Council of England and Wales (2020). The application of sentencing principles during the Covid-19 emergency. Retrieved from: https://www.sentencingcouncil.org.uk/news/item/the-application-of-sentencing-principles-during-the-covid-19-emergency/.

Simon, J. (2001). Sanctioning government: explaining America's severity revolution. *University of Miami Law Review*, *56 (1)*, 217-254.

Skolnik, T. (2020). Criminal law during (and after) COVID-19. *Manitoba Law Journal*, *43(4)*, 145-179.

Spence, A. W. (2021). Pretrial release in the age of covid-19: what did we learn?. *Connecticut Public Interest Law Journal*, 21(1), 90-107.

Spierenburg, P. (1984). The spectacle of suffering: Executions and the evolution of repression: From a preindustrial metropolis to the European experience. Cambridge University Press.

Spratt, M. (2021, 14 May). Our criminal courts are controlled by unaccountable anonymous jail guards. *Canadian Lawyer.* Retrieved from: https://www.canadianlawyermag.com/news/opinion/our-criminal-courts-are-controlled-by-unaccountable-anonymous-jail-guards/356143

Standen, J. (1993). Plea bargaining in the shadow of the guidelines. *California Law Review*, *81(6)*, 1471-1540.

Standing Senate Committee on Human Rights (2021). Human Rights of Federally Sentenced Persons. Retrieved from: https://sencanada.ca/content/sen/committee/432/RIDR/reports/2021-06-16_FederallySentenced_e.pdf

Standing Senate Committee on Legal and Constitutional Affairs. (2016). Delaying justice is denying justice: An urgent need to address lengthy court delays in Canada- Interim Report Retrieved from: https://sencanada.ca/content/sen/committee/421/LCJC/reports/CourtDelaysStudyInterimReport_e.pdf.

Standing Senate Committee on Legal and Constitutional Affairs. (2017). Delaying justice is denying justice: An urgent need to address lengthy court delays in Canada – Final Report. Retrieved from: https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf.

Statistics Canada (2020). After three months of unprecedented declines, monthly decreases in the adult custodial population in Canada slowed in June. *The Daily*. October 27. Statistics Canada catalogue no. 11-001-X. Retrieved from: https://www150.statcan.gc.ca/n1/daily-quotidien/201027/dq201027b-eng.htm

Statistics Canada (2021, 10 March). The Daily - March 10, 2021. Retrieved from: https://www150.statcan.gc.ca/n1/en/daily-quotidien/210310/dq210310a-eng.pdf?st=P23mi1qO.

Statistics Canada (2022). Adult admissions to correctional services. Retrieved from: https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001401&pickMembers%5B0%5D=1.7&cubeTimeFrame.startYear=2016+%2F+2017&cubeTimeFrame.endYear=2020+%2F+2021&referencePeriods=20160101%2C20200101.

Stallings, R. (2007). Methodological issues. In H. Rodriguez, E. Quarantelli & R. Dynes (Eds.), *Handbook of disaster research* (pp. 55-82). New York: Springer.

Steiker, C. S., & Steiker, J. M. (2020). The rise, fall, and afterlife of the death penalty in the United States. *Annual Review of Criminology*, *3*, 299-315.

Stuart, F., Armenta, A., & Osborne, M. (2015). Legal control of marginal groups. *Annual Review of Law and Social Science*, *11*, 235-254.

Stuntz, W. J. (2011). *The collapse of American criminal justice*. Harvard University Press.

Suhomlinova, O., Ayres, T., Tonkin, M., O'Reilly, M., Wertans, E., & O'Shea, S. (2022). Locked up while locked down: Prisoners' experiences of the COVID-19 pandemic. *The British Journal of Criminology*, *62*(2), 279-298.

Thornton, W. & Voigt, L. (2010). Disaster phase analysis and crime facilitation patterns. In. D.W. Harper & K. Failing (Eds.), *Crime and criminal justice in disaster* (pp. 27-60). Carolina Academic Press.

Tiede, L. B. (2009). The swinging pendulum of sentencing reform: Political actors regulating district court discretion. *Brigham Young University Journal of Public Law, 24*(1), 1-48.

Tierney, K. (2019). Disasters: A sociological approach. Cambridge: Polity Press.

Tonry, M. (2007). Determinants of penal policies. *Crime and Justice*, *36*(1), 1-48.

Turner, J. I. (2022). Virtual guilty pleas. *University of Pennsylvania Journal of Constitutional Law*, 24(1), 211-275.

Turner, L. (2021, February 11). Thunder Bay Health Unit Takes 'Aggressive' Action to Control Inmate Discharges. But Some Ask Why Not Sooner?. *CBC News.* Retrieved from: https://www.cbc.ca/news/canada/thunder-bay/tbay-inmate-class-order-1.5909487.

Tyler, T. (1991, June 9). Trial delays: How long is too long?. *Toronto Star*. Retrieved from: https://www.proquest.com/newspapers/trial-delays-how-long-is-too/docview/436427720/se-2.

Ulmer, J. T. (1997). Social worlds of sentencing: Court communities under sentencing guidelines. SUNY Press.

Van Brown, B. L. (2020). Disaster research "methics": Ethical and methodological considerations of researching disaster-affected populations. *American behavioral scientist*, *64*(8), 1050-1065.

Vance, S. S. (2007). Justice after disaster: What Hurricane Katrina did to the justice system in New Orleans. *Howard Law Journal*, *51(3)*, 621-650.

Vance, S. E., & Oleson, J. C. (2014). Displaced discretion: The effects of sentencing guidelines on prosecutors' charge bargaining in the District of Columbia Superior Court. *Criminal Justice Policy Review*, *25*(3), 347-377.

Vermys, N. (2013). La cyberjustice et l'espace OHADA - Des outils virtuels pour une avance réelle. *Journal Africain du Droit des Affaires* : *Actes Forum OHADA Canada.*

Viglione, J., Peck, J. H., & Frazier, J. D. (2023). COVID-19 and courts: An exploration of the impacts of the pandemic on case processing and operations. *Victims & Offenders*, *18*(5), 818-841.

Vollmer, H. (2013). The sociology of disruption, disaster and social change: Punctuated cooperation. Cambridge University Press.

Wacquant, L. (2009). Punishing the poor: The neoliberal government of social insecurity. Duke University Press.

Wagner, R. (2020, June 18). Annual news conference with the Parliamentary Press Gallery. Retrieved from: https://www.scc-csc.ca/judges-juges/spe-dis/rw-2020-06-18-eng.aspx.

Wagner, R. (2021, June 17). Annual News Conference with the Parliamentary Press Gallery. Retrieved from: https://www.scc-csc.ca/judges-juges/spe-dis/rw-2021-06-17-eng.aspx

Ward, P. (2020). A sociology of the Covid-19 pandemic: A commentary and research agenda for sociologists. *Journal of Sociology*, *56*(4), 726-735.

Webster, C. M. (2009). Out of sight, out of mind: A case study of bail efficiency in an Ontario video remand court. *Current Issues in Criminal Justice*, 21(1), 103-126.

Webster, C. M., & Doob, A. N. (2007). Punitive trends and stable imprisonment rates in Canada. *Crime and Justice*, *36*(1), 297-369.

Webster, C.M. & Doob, A. N. (2012). Back to the future? Policy development in pretrial imprisonment policies in Canada. In K. Ismaili, J. Sprott, & K. Varma, K. (Eds.), *Canadian criminal justice policy: Contemporary perspectives* (pp. 30-57). Oxford University Press.

Webster, C. M., & Doob, A. N. (2014). US punitiveness 'Canadian style'? Cultural values and Canadian punishment policy. *Punishment & Society*, *17*(3), 299-321.

Webster, C. M., Doob, A. N., & Myers, N. M. (2009). The parable of Ms. Baker: Understanding pretrial detention in Canada. *Current Issues in Criminal Justice*, *21*(1), 79-102.

Webster, C. M., Sprott, J. B., & Doob, A. N. (2019). The will to change: Lessons from Canada's successful decarceration of youth. *Law & Society Review*, *53*(4), 1092-1131

Weiman, D. F., & Weiss, C. (2009). The origins of mass incarceration in New York State: The Rockefeller Drug Laws and the local war on drugs. In S. Raphael & M. Stoll (Eds.) *Do*

prisons make us safer? The benefits and costs of the prison (pp. 73-116). New York: Sage.

Wenger, D. (1978). Group emergence in disasters. In E. Quarantelli (Ed.), *Disasters: Theory and Research* (pp. 18-47). Beverly Hills: Sage.

Wooldredge, J., & Griffin, T. (2005). Displaced discretion under Ohio sentencing guidelines. *Journal of Criminal Justice*, *33*(4), 301-316.

Zinn, J. O. (2021). Conclusions: Toward a sociology of pandemics and beyond. *Current Sociology*, *69*(4), 603-617.

Cases Cited

R. v. Anthony-Cook [2016] 2 SCR 204.
R. v. Askov [1990] 2 SCR 1199.
R. v. Cody [2017] 2 SCR 204.
R. v. Duncan [2015] ONCA 928
R. v. Hearns [2020] ONSC 2365.
R. v. Jordan [2016] 1 SCR 27.
R. v. MacDougal [2020] ONSC 4989.

Appendices

Appendix A: Observation Guides

Bail

Name		
Date		
Arrest date		
Site		
Players and mode of appearance	Defence	
	Crown	
	JP	
	Other	
Charges		
Other case info	Duration?	
Consent & Onus		
Grounds for contesting release	Primary	
	Secondary	
	Tertiary	
Defence submissions		
Crown submissions		
Proposed conditions		
JP comments		
Release		
Release Conditions		
Surety		
Other info or comments		
Mentions of COVID-19	Defence	
	Crown	
	JP	
Technology Issues		

Sentencing

Date		
Site		
Players and mode of appearance	Defence	
	Crown	
	Judge	
	Other	
Charges		
Crown election		
Other case info	Duration?	
Joint Sub.		
Defence submissions		
Crown submissions		
Judge's comments		
Sentence & conditions		
Other information or comments		
Mentions of COVID-19	Defence	
	Crown	
	Judge	
Technology Issues		

Appendix B: Interview Guides

Judges:

A) **INTRODUCTION**

This is a brief reminder that this is an anonymous interview and any potentially identifying information will be hidden.
This project is concerned with the case processing and management practices of Canadian courtroom participants (judges, Crown attorneys, and Defence attorneys) in times of crisis and change.
Times of crisis and change refer principally to the state of emergency caused by the COVID-19 pandemic as well as the 2016 *Jordan* decision, to some extent. However, we can discuss other events or changes you consider noteworthy if you think it is pertinent.
Understanding the members of the judiciary sometimes work in multiple courthouses, we ask that you speak of the courthouse you consider to be your main place of work.
Adapting to Change:

1. **Many changes occurred throughout the pandemic. Can you walk me through how these measures have progressed since last year?**
    a. Can you talk to me about specific changes you have seen since the onset of COVID-19?
    b. As a judge, how has the pandemic impacted the daily functioning of your court?
    c. How has it impacted your personal work as a judge?
    d. How has it impacted your working relations with other members of the court community?
        i. How was communication between parties impacted?
    e. How has it impacted justice-involved individuals?
2. **What has been put in place in your workplace to address the pandemic (policies, directives, guidelines)?**
    a. Can you describe how this information flowed between courts, lawyers and their respective organizations?
3. **What do you make of these changes from the pandemic?**
        i. What has been the most challenging for you as a judge?
        ii. Have there been positive impacts? What are they?
        iii. Are there certain changes that should be retained post-COVID?
        iv. Are there certain changes that should not remain post COVID?
4. **Another important change in the criminal justice system recently was the *Jordan* decision. Can you talk to me about the changes resulting from this decision?**
    a. Can you talk to me about how this decision has come into play during the COVID-19 pandemic?
5. **Do you have any other comments regarding your responses and those of the criminal justice system in times of crisis and transition?**

Counsel:

B) **INTRODUCTION**

As a reminder, this interview is confidential. Any potentially identifying information, even if discussed, will be redacted and/or anonymized.
This project is concerned with the case processing and management practices of Canadian courtroom participants (judges, Crown attorneys, and Defence attorneys) in times of crisis and change.
Times of crisis and change refer principally to the state of emergency caused by the COVID-19 pandemic as well as the 2016 *Jordan* decision, to some extent. However, we can discuss other events or changes you consider noteworthy if you think it is pertinent.
Adapting to Change:

6. **Many changes occurred throughout the pandemic. Can you walk me through how these different measures changed over the months?**
    a. Can you talk to me about specific changes you have seen since the onset of COVID-19?
    b. How has the pandemic impacted the daily functioning of your court?
    c. How has it impacted your personal work?
    d. How has it impacted your working relations with other members of the court community?
    e. How was communication between parties impacted?
    f. How has it impacted accused individuals?
        i. Bail and sentencing issues
7. **What do you make of these changes from the pandemic?**
        i. What has been the most challenging for you?
        ii. Have there been positive impacts? What are they?
        iii. Are there certain changes that should be retained post-COVID?
        iv. Are there certain changes that should not remain past COVID?
8. **Another important change in the criminal justice system recently was the *Jordan* decision. Can you talk to me about the changes resulting from this decision?**
    a. Can you talk to me about how this decision has come into play during the COVID-19 pandemic?
9. **Do you have any other comments regarding your responses and those of the criminal justice system in times of crisis and transition?**