Unjust Incarceration: limiting remand liability by maximum sentence¹
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Abstract:
Recent dramatic increases in the use of remand detention in Canada mean that adults and youth in remand now outnumber those in sentenced custody. Managing the growing and unpredictable remand population poses various policy challenges, but this paper will address two specific types of injustice created by current practices around remand. High use of remand is coupled with increasing case processing times, with the median time from first appearance to case completion now over four months. Under such conditions, those accused of minor offences but denied bail may face a period of pretrial detention that greatly exceeds the maximum sentence for the offence. This disproportionate incarceration is inflicted on those presumed innocent, but is unjust whether they are ultimately convicted or not. The second form of injustice comes through the perverse incentive that is created to serve less time by pleading guilty, even if the accused is innocent or has a legal defence.

This paper proposes a straightforward policy remedy: limit the length of remand liability to the maximum sentence of the putative offence. Such a policy would bring the use of remand more into line with the fundamental principles of justice and considerations of proportionality that govern criminal punishment in Canada. It would reduce the incentive for false guilty pleas, while maintaining the option of plea bargains for reduced sentences where appropriate. Protection of the public would not be comprised as those accused of serious violent offences would be facing long sentences and correspondingly long remand liability.

A note to CPSA readers: My field of expertise is political theory, not law. This paper is thus a work of normative political theory that trespasses on the domain of law. It is a side project that grew out of conversations with practitioners rather than a deep knowledge of the relevant literature. For those readers better versed in the law, I would be interested to know: are these concerns discussed? Is there some well-known justification for current remand practices, which from the outside seem clearly unjust? The paper is also at an early stage, so any and all feedback about directions I could take it is most welcome.

Introduction
The use of pre-trial detention has increased dramatically in Canada to the point that, on any given day, there are more adults in provincial custody awaiting trial than convicted offenders in sentenced custody.³ This rapid shift away from traditional proportions of three quarters sentenced to one quarter remand has occurred despite falling levels of crime, and has been framed by some commentators as a bail problem and by others as a remand crisis.⁴ While the causes of this increase remain contested, its implications for the administration of justice have been criticized in several ways. Absent clear justification, the increased use of pre-trial detention would seem to erode the legislatively mandated presumption of release on the least onerous form of bail appropriate.⁵ The over-use of detention or routine imposition of onerous condition for release can in fact erode the presumption of

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innocence, by imposing punishment before a determination of guilt. The increasingly routine use of remand has a variety of direct costs, to both accused and society. Accused face detention in conditions that the Supreme Court has described as the “worst aspects of our correctional system”, with overcrowding and a lack of access to correctional programming. They and their families also face disruption and uncertainty, including to family relationships and employment. That disruption may impose costs on society, and certainly society bears the direct and considerable costs of incarceration.

A good deal of academic attention has been focused on the ways bail practices expand the disciplinary power and therapeutic control of the state in ways that are not clearly authorized by legislation or basic principles of justice. Bail conditions with therapeutic or disciplinary aims (such as abstinence from substance use) are routinely imposed without a clear connection to the authorized purposes of bail. Specialized courts, including domestic violence courts, drug treatment courts, and community court, openly use bail instrumentally to impose therapeutically justified, intrusive interventions that would not normally form part of a sentence. The imposition of bail conditions criminalizes behaviour that would not otherwise be illegal, such that refusing to attend a treatment program or even missing an appointment can constitute a criminal offence. This proliferation of conditions creates the possibility of additional criminal offences when a condition is not met, leading to a cyclical production of more rather than less crime. Administration of justice offences are now extremely common, constituting the most serious offence in over a fifth of all cases, and 5% of Canada’s overall reported crime rate. Because the likelihood of violating conditions of release increases with number and duration of conditions, the routine use of extensive, restrictive conditions has been described as setting accused up to fail. Even when initial charges are withdrawn, accused can find themselves facing additional charges for resulting administration of justice offences.

The interaction of remand with plea bargaining is particularly concerning. Although many or even most cases are resolved by plea bargains, the process is largely invisible to social science because of its informality and the confidentiality of police documentation. In one study of bail cases in Toronto, however, pre-trial detention was found to be significantly increase the likelihood of a guilty plea. When interviewed, many accused said they would plead guilty if denied bail. This was particularly true if pleading guilty could result in a sentence of time served, but was also true for some who wanted to escape overcrowded remand detention for the better conditions of sentenced custody. Such behaviour can be rational simply in minimizing exposure to punishment, but are additionally rational considering that pre-trial detention increases the likelihood of conviction and of receiving a custodial sentence, even controlling for factors such as type of charge or past criminal record. Of major concern is that the incentive to plead guilty in such cases applies to those who may be innocent or have a valid defence, as the “time an accused spends awaiting trial in custody can often exceed the

6 Myers, “Eroding the Presumption of Innocence.”
8 Webster, Doob, and Myers, “The Parable of Ms Baker,” 100.
9 Ibid.
10 Myers, “Eroding the Presumption of Innocence,” 670.
12 Myers, “Eroding the Presumption of Innocence,” 676.
13 Ibid., 678–79.
14 Sprott and Myers, “Set Up to Fail.”
15 Ibid., 404.
17 Ibid., 197, 201.
18 Ibid., 199–200.
19 Ibid., 187.
eventual sentence of the court.”

Distinct from but related to the remand crisis are widespread, unreasonable delays in bringing cases to trial. In 2016 in R. v. Jordan, the Supreme Court of Canada gave expression to the right to be tried within a reasonable time (s.11(b) of the Charter of Rights and Freedoms) in the form of deadlines: 18 months for trials in provincial court and 30 months for superior court, unless exceptional circumstances can be proved by the Crown. After this lead to the delay-based withdrawal of first-degree murder charges in Alberta, courts have been scrambling to triage remaining cases to ensure deadlines are met. In many cases, this means a dramatic increase in the use of plea bargaining. In particular, it places substantial pressure on the prosecution to ensure that plea bargains are accepted to reduce the number of cases going to trial. Denial of bail, as outlined above, can increase the likelihood of an accused pleading guilty. There is thus an incentive for police and Crowns to encourage the use of pre-trial detention in order to secure guilty pleas.

This paper focuses on two specific injustices that result from the combination of long case processing times with increased use of pre-trial detention. Firstly, if denied bail, many of those accused face a period of pretrial detention that greatly exceeds the maximum sentence for the offence in question. This disproportionate incarceration is inflicted upon the legally innocent, that is, upon those who have not yet been found guilty of a crime. It is, however, unjust whether they are ultimately determined to be guilty or not. The second form injustice comes from the perverse incentives generated by this system for the innocent or those with a valid legal defence to plead guilty in order to serve less time. These two injustices can be compounded by their combination with patterns of systemic discrimination in the criminal justice system.

**Disproportionate punishment**

Whatever the purpose of pre-trial detention, it restricts the liberty of the accused and courts have thus recognized it as a form of punishment. The quality of pre-trial detention is certainly experienced as punitive, with accused often held in overcrowded, high-security facilities without access to programming. Given lengthy case-processing times, if an accused is denied bail they may face considerable time incarcerated under such conditions. The median case length in Canada is stable around 120 days (four months), and the supreme court's “presumptive ceiling” - which courts are struggling to meet – is 18 months. For those accused of more minor crimes, being denied bail means facing a period of incarceration longer than the maximum sentence for the crime with which they are charged – and substantially longer than the average sentence. Given that this incarceration can fairly considered to be punishment, it is then clearly disproportionate punishment; accused can face terms of imprisonment before trial that could not legally be applied as a sentence. This violates the fundamental principle of justice that punishment should be proportionate to the offence.

This disproportionate punishment is inflicted on the legally innocent. Although any punishment of the legally innocent erodes the presumption of innocence, some measure can be justified as an incidental and unavoidable consequence of upholding the administration of justice. Section 11(e) of the Charter of Rights and Freedoms protects the right of Canadians “not to be denied bail without just cause.” The Criminal Code is clear that to be justified, detention in custody must be necessary either to ensure the accused appear in court, to protect the safety of the public from the “substantial likelihood”

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20 Ibid., 200.
22 Fine, “Courts Shaken by Search for Solutions to Delays.”
23 Myers, “Eroding the Presumption of Innocence,” 667.
of the accused committing a criminal offence, or to maintain confidence in the administration of justice. Thus, where necessary, the legally innocent can be detained – and thus the concomitant necessary degree of punishment of the legally innocent can be justified. However, even valid use of bail cannot justify the disproportionate punishment of the legally innocent. If a given period of incarceration would not be allowed after conviction on the high evidentiary standard of beyond a reasonable doubt, then it cannot be justified – preventively – on the relatively low standard of substantial likelihood. To allow this is to vitiate the presumption of innocence, and greatly expand the state's powers of preventive detention at the cost of individual liberty rights. To justify such a violation of rights would require overwhelming evidence that those accused of crimes pose some kind of special threat to public safety, over and above that posed by those convicted of crimes. Such evidence does not exist, and it is hard to imagine how it could exist. If we read the Charter and the Criminal Code together, it is reasonable to presume that legislators did not contemplate the probability that pre-trial detention would exceed maximum sentence lengths, but instead set out conditions to justify relatively short periods of remand.

**Perverse Incentives**

If denied bail, accused face strong incentives to plead guilty. The longer an accused spends in pre-trial detention, the more likely it is that a plea can be made for time served, resulting in immediate release; at the very least, the remainder of the term of incarceration could be served in the better conditions of sentenced custody.\(^{25}\) The temptation to applaud this incentive as cutting down on administration of justice costs, however, directly contradicts the presumption of innocence guaranteed by section 11(d) of the Charter. Crucially, the pressure of facing a lengthy period of pre-trial detention is applied to the legally innocent. Even if the charges are relatively weak, accused can face long periods before charges are dropped. In one study in Toronto, among those denied bail even those whose charges were eventually dropped entirely were incarcerated for an average of 103 days.\(^{26}\) Where the period of remand exceeds the maximum sentence, the incentive applies with equal force to those who are innocent or have a valid legal defence as it does to the guilty. Even if an innocent accused refuses to plead, goes to trial, and is found not guilty, they will still have been subject to incarceration as if guilty. Unlike a wrongful conviction, they will not be compensated for this unjust punishment, unless the bail decision – which is justified on a much lower evidentiary standard – is found to be wrongful. The only possible benefit is the avoidance of a criminal record, which must be weighed against the cost of lengthy imprisonment and attendant disadvantages, including likely loss of employment and housing. Thus, the incentive faced by the innocent and those with a valid defence is perverse: they are encouraged to falsely plead guilty in order to reduce their liability to punishment. This offends not only the presumption of innocence but the fundamental principle that the truly innocent should not be punished as if they were guilty. It also perverts the truth-seeking function of the justice system by creating structural incentives to false guilty pleas.

Although the short-term rational calculation favours pleading guilty, doing so can have long-term costs. The criminal record that results from a guilty plea can be used against the “offender” in future interactions with the criminal justice system. It can make individuals more likely to be subject to scrutiny by law enforcement, more likely to be charged with future offences, and more likely to be denied bail if charged. Thus, being denied bail on one occasion can set up a self-perpetuating vicious cycle. If we ask how this cycle gets started – that is, how one might be wrongfully accused in the first place – we discover interactions with preexisting forms of injustice.

**Systemic Discrimination**

26 Ibid., 201.
These two forms of injustice – disproportionate punishment and a perverse incentive to falsely plead guilty – are magnified when considered in conjunction with prevailing forms of systemic discrimination in the criminal justice system. For instance, research has found that Aboriginal and black accused are more likely to be subject to pre-trial detention. Some evidence also suggests black Canadians may be more likely to be falsely accused, given that a dramatically higher proportion of black accused held in custody had all their charges dropped (16.9% vs. 8.3%). There is also extensive evidence of police engaging in racial profiling in order to more frequently stop Aboriginal and black people. Aboriginal people are substantially overrepresented in both remand and sentenced custody. Racial bias emerges through informal assessments of the riskiness of accused and offenders. Aboriginal inmates, for instance, are more likely to be informally assessed as dangerous and denied early or even statutory release. Overly negative police assessments of the riskiness of black males explains the increased likelihood of pre-trial detention based on race. It should be clear, then, that racialized individuals may be more likely to be targeted by police intervention, more likely to be falsely accused, and more likely to be held in remand once accused. Racialized accused are thus disproportionately subject to the twin injustices of disproportionate punishment and a perverse incentive to falsely plead guilty and get caught up in a self-perpetuating vicious cycle of wrongful targeting by the criminal justice system.

A modest proposal

I propose a modest change to the bail regime: it should not be possible to hold an accused on remand longer than the maximum sentence for the charges they face. This would not solve all the problems raised, but it would moderate the degree of injustice without commensurate costs. The benefits of such a change include upholding principles of fundamental justice, reducing perverse incentives for guilty pleas, and considerable cost savings. For greater clarity, so long as some degree of extra credit for pre-sentence custody is standard when determine sentences after a finding of guilt, that ratio should be used in determining the length of remand. Thus, if a two-to-one ratio is standard, then the actual maximum period of remand should be half the maximum sentence. The question of appropriateness of a given ratio can be settled external to the normative argument of this paper, but the results of that determination should be incorporated into the model I propose.

Capping the liability for pre-trial incarceration proportionate to the maximum sentence of the charges faced would eliminate the possibility of inflicting disproportionate punishment as an incidental effect of the administration of justice. This would uphold a fundamental principle of justice, and eliminate the injustice of excessive punishment of the guilty. It would merely limit the injustice of punishing the innocent that results from the pre-trial detention of the innocent. However, limitation of injustice is better than nothing at all. In order to more fully address the problem of pre-trial detention of the innocent, other measures would be required. This could include a higher evidentiary standard for justifying pre-trial detention, or some form of determination of the reasonableness of charges with possible compensation along the lines of wrongful conviction if charges are found to have been unreasonable. These solutions, however, have costs that do not occur with the interim measure of limiting injustice by capping pre-trial detention.

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27 Ibid., 187.
28 Ibid., 201.
29 Comack, Racialized Policing, 35-36, 162.
Limiting pre-trial detention also reduces the incentive for guilty pleas. Rather than facing an indefinite period of incarceration followed by the uncertain outcome of a trial, accused will know the maximum time they can be held. That maximum time will also be reduced, with a proportionate reduction in the incentive to plead guilty in order to serve less time. For the guilty, this is of neutral effect. They may still plead guilty in exchange for a reduced sentence, where appropriate. Alternatively, they may serve the maximum allowable sentence, which is justice of a sort. The reduced incentive is particularly beneficial to the innocent or those with a valid legal defence, for whom the difference between a plea bargain and maintaining their innocence will be substantially reduced. While there may still be an incentive to falsely plead guilty, this is more likely to be effectively counterbalanced by the costly prospect of accepting a criminal record. This is another case where the moral hazard would not be eliminated, but a reduction would still be desirable. Reducing the availability of the threat of disproportionately lengthy pre-trial detention also reduces the ability of prosecutions to rely on such threats to extract guilty pleas, which may make them more likely to drop charges or resolve the case in other ways.

The cost savings associated with decreased length of pre-trial incarceration are a derivative benefit to the public. While cost savings could be significant, this would not be an independent benefit; justice is, after all, worth spending a great deal of money to achieve. Injustice, however, is not worth a cent, so saving costs by reducing injustice is doubly warranted. Furthermore, there would be non-monetary benefits to reducing the use of remand, by reducing overcrowding in detention facilities and enabling correctional resources to be put to better use.

Potential Concerns

Some observers locate an increased aversion to risk throughout the criminal justice system as the cause of the increased use of remand. Given the risk-avoidant focus on public safety, one possible objection to this proposal is that it would increase the risk of releasing dangerous serious or dangerous offenders who might be a threat to public safety. The risk of doing so is, however, very low. The model has a built-in calibration to the seriousness of offences: the more serious the charge, the longer the attendant sentence, and thus the longer an accused can be held on remand. Those charged with serious, violent crime will still be able to be held until trial – or at least until the presumptive ceilings for case processing establishing in R v. Jordan. This would only be a valid concern if a serious, violent criminal was arrested and charged with a relatively minor crime as pretext to get them into detention. To endorse such a practice would be to endorse a greatly expanded power of preventive detention in the hands of police, with relatively little judicial oversight. Preventive detention could be justified based purely on the demonstrating the substantial likelihood of an offence. Absent such a revision to our commitment to the presumption of innocence, the major remaining concern is political, rather than legal or ethical. That is, politicians may worry that they will be held responsible for any crimes committed by those released as a result of this policy. While such electoral dynamics exist in the politics of criminal justice, maintenance of a just system of the rule of law depends precisely in not succumbing to them.

A second and more valid concern is that such a change would reduce the incentive to ever hold trials for more minor offences (that is, for any offence with a maximum sentence shorter than the time to trial). From the perspective of the prosecution, if people can be held for the maximum sentence without a trial, what is the incentive to take a case to trial and risk a lesser sentence? Would it not be more rational to focus efforts on ensuring that bail is denied – which after all demands a lower evidentiary standard? To the extent that this is a real concern, it exists now in a more severe form. After all, denying bail can mean incarcerating someone for longer than the maximum sentence (or, more

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33 Webster, Doob, and Myers, “The Parable of Ms Baker,” 99.
commonly, producing a guilty plea). To start with, the proposed change is thus a form of harm reduction. Beyond that, there is the simple fact that a form of statutory release from bail would not be the same as a conviction, and thus there would be professional incentives to bring a case to trial to secure a conviction (or a to secure a guilty plea). In fact, given the reduced pressure for guilty pleas, there might in fact be increased incentive on prosecutions to speedily bring a case to trial. Alternatively, there might be reduced incentive for police and Crown to oppose bail unless absolutely necessary, as it would give them more time to prepare their case for trial. From the perspective of the defence and the accused, there remains incentive to fight a case at trial in order to clear their name, even if they have effectively already served the maximum sentence. Whether this is worth the costs of a trial would depend on the psychology of individuals. At the very least, the added cost of a criminal record would be avoided (if there is not trial and no conviction).

The most serious concerns pertain to the how criminal justice system actors would respond to such a change. If police and Crowns want to maintain the current incentives for guilty pleas, or are sufficiently risk averse to want to maintain current levels of pre-trial detention, they could respond by strategically overcharging accused. That is, they could charge accused with serious offences that could then justify lengthy periods of pre-trial detention, only to eventually withdraw the more serious charges and leave the less serious but warranted charges in place. Because of the opacity of such practices to social science and the lack of court monitoring, it is difficult to know whether charges that are withdrawn were ever warranted. Nevertheless, the rules could be structured to avoid such strategies, by mandating release if at any point the outstanding charges cannot justify the time already served. Some degree of systematic monitoring of charges that are subsequently withdrawn would nevertheless seem warranted.

Conclusion

The combination of lengthy case processing times with the increasingly extensive use of pre-trial detention creates the peculiar situation of those accused of minor crimes but denied bail facing longer periods of incarceration on remand than would be justified as a maximum sentence for the charges they face. This situation is unjust in two major ways: it is an instance of disproportionate punishment and it creates a perverse incentive for the innocent or those with a valid defence to falsely plead guilty. Capping the length of pre-trial detention at the maximum sentence for the charges faced would substantially reduce these injustices, without imposing significant costs to the administration of justice. More completely addressing these injustices would only be possible with much more extensive changes to the administration of justice.

34 Weinrath, “Inmate Perspectives on the Remand Crisis in Canada,” 375.
Works Cited


