# *R. v. Antic* and Justices of the Peace: Analysing the Impact of Bail Reform

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Honours Thesis

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**Abstract**

Recent bail reform, including *R. v. Antic* (2017), highlights the need for change to ensure that judicial decisions about bail follow bail legislation. However, the impact of bail reform is understudied. Bail releases often do not follow bail legislation and case law as they ignore the ladder principle and include conditions that do not appear to relate to the risks of release or the alleged crime. The trend reflects a reluctance of Justices of the Peace (JPs) to ensure that their decisions abide by legal rules. The current study uses 132 bail cases from a mid-sized city in southwestern Ontario to examine the impact of bail reform on judicial decisions about bail releases. The results show that bail reform decreases the severity of forms of release, increases the average number of conditions per case, impacts the application of onerous conditions, increases the amount of JP disagreement with Crown attorney requests, and influences how JPs explain their bail decisions. The study also finds significant variation in decisions between JPs.

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## 1. Introduction

On June 1, 2017, the Supreme Court of Canada shared its decision in *R. v. Antic*. The court case focused on bail in Canada. It discussed the ladder principle which states that the default form of release is the lowest form of release, or an undertaking without conditions. Bail court actors must justify every step up the ladder to a stricter release and every new condition, and each must directly relate to the accused's crimes and risks. The Supreme Court case also criticised the unwillingness of JPs to challenge onerous Crown requests for forms of release and conditions. After the Supreme Court released its decision, JP Three brought multiple hard copies of the decision into the courtroom. He had the copies neatly stapled, and after he entered the courtroom, he handed them out to the Crown attorneys and duty counsel. A lawyer from duty counsel had an extra copy, and he gave it to the researcher. JP Three stressed the importance of *Antic* – it was a new precedent, and it was the court's responsibility to ensure strict adherence to the decision. In the following months, the researcher observed how *R. v. Antic* and the Ontario Attorney General's response to it influenced JP decisions. JPs referenced *Antic* in their judgments, and in one case, JP Three referred to his decision-making process as the "*Antic* analysis." As parts of the city's bail process shifted, the researcher sought to determine the extent that bail reform influences JP decisions about bail.

*R. v. Antic* highlights that the current state of bail is concerning because of the way it impacts accused people. In Ontario, 67 percent of the custodial population is in pre-trial custody, and the number continues to rise, despite lower crime rates and relatively stable incarceration rates (Reitano, 2017; Myers, 2017). One reason for the high remand population is the time it takes to have a bail hearing due to a culture of adjournment and delays in court processes (Myers, 2015). The delays are problematic because the experience in pre-trial custody can

negatively impact a person's life. Accused in remand do not have access to rehabilitative or recreational programs, and they face uncertainty about the length of their incarceration, medical treatments, housing, employment, and contact with loved ones (John Howard Society, 2007, p. 8). Another reason for the high remand population is the lack of uniformity in bail proceedings which leads to decisions that do not follow legislative rules (Wyant, 2016; Myers, 2009). People who receive bail often have onerous releases that fail to relate to the accused's risk or their alleged crime (Myers, 2009). Strict orders that are difficult to comply with can lead to criminal charges for breaches and a revolving door as accused go back to custody for behaviour that would otherwise be non-criminal (Sprott and Myers, 2011). *R. v. Antic* addresses these concerning realities and reiterates the correct way to approach bail across the country. It seeks to ensure that accused people have access to reasonable bail and JPs follow the ladder principle.

*R. v. Antic* and the Ontario Attorney General's response to it in its Bail Directive for Crown Attorneys indicate that bail reform is happening right now. It is vital to assess the potential impact of bail reform on the bail process as new case law and policy occur. No previous studies discuss or analyse *R. v. Antic* or bail reform or its potential influence on the bail process. Further, research on JPs is limited. Thus, the purpose of the current study is to determine whether and to what extent bail reform impacts the bail process and judicial decisions about bail releases.

**Study Overview**

The current study has six sections. The second section is the literature review. It discusses the law on bail, theoretical approaches to bail, including risk and judicial behaviour, the modern evolution of bail, and its current state. It also sets up the present study. The third section describes the study's methodology. It discusses the data collection procedure, the dataset and the final sample, the relevant data analyses, and the limitations of the methodological approach. The

fourth section reports the results of the data analyses and describes findings for pre- and post-bail reform cases. Section five discusses the results and relates them to prior literature and theories. It also discusses the study's policy implications. Finally, section six presents concluding remarks, the study's limitations, and suggestions for future research about the impact of bail reform on judicial decisions about bail.

## 2. Literature Review

### Introduction

The literature review section includes an overview of the literature on bail in Ontario. First, it discusses the current legislation on bail. It also analyses theoretical approaches to bail, including risk and risk management, risk management techniques, the political sociology of risk management, and other theories about judicial behaviour. Further, it traces the modern evolution of bail. Prominent modern developments include the 1972 Bail Reform Act, the 1982 *Charter of Rights and Freedoms*, and Supreme Court cases like *R. v. Pearson* (1992), *R. v. Morales* (1992), and *R. v. Hall* (2002). Next, it discusses the current state of bail and *R. v. Antic*'s 2017 response to the current state of bail. Finally, it outlines the current study and the research question.

### The Law on Bail

The law on bail outlines essential concepts such as the rights of accused people and the responsibilities of court actors. The *Criminal Code* offers an extensive overview of how bail should operate and supports quick releases with conditions that only address primary, secondary, and tertiary grounds concerns.

The *Criminal Code* outlines when a bail hearing should happen and when bail denial is appropriate. Judges and JPs have the immediate power to release people who face most charges, except severe charges such as treason. Section 515(10) outlines the primary, secondary, and tertiary grounds that justify detention:

> (a) where the detention is necessary to ensure attendance in court;
>
> (b) where the detention is necessary for the protection or safety of the public, […] including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

> (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
>
> (i) the apparent strength of the prosecution's case, (ii) the gravity of the offence, (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

A suitable bail plan must address all of these concerns; otherwise, the accused must remain in custody.

Section 503(1) states that an arrested person has the right to appear before a judge or JP within twenty-four hours, or as soon as possible if the judge or JP is not available. A bail hearing should occur within three days of an accused's arrest unless they consent to a longer period in custody (s. 503(2)). Bail hearings are either contested or consent-to-release. In contested hearings, the Crown does not agree to the accused's release, and thus, they often do not suggest conditions. Instead, the defence and the JP suggest conditions that address the accused's risk. In consent-to-release hearings, the Crown agrees to release. The Crown works with the defence attorney to determine what conditions are appropriate to address the accused's risks of release, and they usually come to a general agreement about appropriate conditions. The Crown presents the condition requests to the JP, and the JP decides whether they are necessary. The JP often agrees with the Crown's proposal (Wyant, 2016). While most bail hearings result in a release on bail, the time it takes to craft an acceptable bail plan often takes days, weeks, or even months.

The *Criminal Code* acknowledges the importance of speediness, but the court process remains slow and strenuous which reduces access to reasonable bail (Myers, 2015).

Other sections of the *Criminal Code* address the ladder principle (forms of release) and reverse onus situations. Section 515(1) states that an accused should receive the lowest form of release (an undertaking without conditions) unless the Crown can justify the necessity of detention or a higher kind of release. The approach is known as the ladder principle. Steps up the ladder include an undertaking with conditions, a recognisance without a surety with or without a cash deposit, and a recognisance with a surety with or without a cash deposit. Most releases contain conditions, and typical conditions include non-communication orders, address requirements, and no weapons. Conditions should address the concerns in s. 515(10). In a reverse onus situation, the burden of proof is on the accused to show why their release is appropriate. In practice, the current bail process does not reflect the *Criminal Code*'s provisions, and risk helps to explain the disparity.

## Theoretical Approach

Risk frameworks are useful for understanding bail. As such, this study uses concepts related to risk to understand JP decision-making. This subsection discusses risk in the criminal justice system and the introduction of risk management techniques. It also discusses the proliferation of risk management techniques and their problems. Next, it explains the political sociology of risk management and how it affects criminal justice actors. Finally, it briefly discusses other theories of judicial behaviour.

### Risk and Risk Management.

Concerns about how to manage an accused individual's risk have increased in the past few decades. In the mid-1980s, criminologists began to discuss the shift from the focus on

reforming offenders toward behavioural and risk management techniques (O'Malley, 2010). Scholars question why this change occurred. Beck (1992) takes a macro approach and argues that a preoccupation with risk captures the modern information society. The new 'risk society' exists to deal with the insecurities and risks that modernisation and economic change create (Beck, 1992, p. 21). The modern obsession with safety and the future leads to a risk avoidance outlook that is simply concerned with preventing 'bads' (e.g., crime) rather than doing something 'good' (e.g., challenging structural injustice) (Beck, 1992). As risk becomes more ingrained as the framework for dealing with society's issues, more risks are revealed, which heightens risk consciousness and fear (O'Malley, 2010). In the context of bail, the macro approach helps to explain the preoccupation with preventing risks like offending while on a bail order. However, Beck argues that modernisation brings new risks, yet concerns about recidivism have always been a part of bail. The gap in Beck's approach is that it fails to explain why existing risks like recidivism gradually became more important in the context of bail.

Academics criticise Beck's theory and state that the macro approach is too broad. They argue that the recent prominence of risk is not due to a macro shift in exposure to threats, but instead, a new institutionalisation of risk assessment and management. According to O'Malley (2010), demand for risk-based security is not because of an explosion of risks due to modernisation, but because of its appeal due to its perceived effectiveness. When people view risk management as an effective way to predict and manage criminal behaviour, it becomes institutionalised to reduce the risk of the offender, such as the risks in the primary, secondary, and tertiary grounds of bail (Hannah-Moffat, 2005). People favour this rather simple approach to complicated issues because it creates the opportunity for the prediction and control of crime, and it contributes to practical policy approaches like the *Criminal Code* (Walklate, 2007). Risk

management explains why judicial actors are increasingly directed to make pretrial release decisions that efficiently manage criminal justice populations (Dabney, Page, and Topalli, 2017). For example, many bail releases include sureties who acts as 'civilian jailers' who ensure that accused individuals follow their bail conditions, show up for their court dates, and do not re-offend. The use of sureties is an uncomplicated way to monitor and manage the accused's risks while in the community. Thus, rather than the explosion of new risks, the institutionalisation of risk management explains the criminal justice system's shift from reforming offenders to risk management techniques.

**Risk Management Techniques.**

The increase of surety releases shows that in recent decades, there has been a massive increase in the use of tools to assess, predict, and manage risk. Dabney, Page, and Topalli (2017) argue that the shift in pretrial decision-making towards risk management is an indication of new penology. Feeley and Simon's new penology theory discusses changes in three areas of criminal justice. The first is the replacement of clinical diagnosis and retributive discourses with probability and risk, and the second is new techniques that target offenders as groups to control instead of individuals to rehabilitate (Feeley and Simon, 1992). These shifts are evident as court actors craft bail orders based the probabilities of an accused's primary, secondary, and tertiary risks, and how to control the risks. The third is the replacement of traditional objectives like rehabilitation with newly systemic goals (e.g., efficient control of internal system processes) (Feeley and Simon, 1992). Bail reform's emphasis on a uniform approach to bail proceedings reflects this shift. The new penology uses risk assessment tools to identify, organise, and manage 'risky' or 'dangerous' groups (Feeley and Simon, 1992, p. 452). According to their proponents,

risk calculations are objectively based on probabilities, which means individuals can portray risk assessment and management as an objective science.

The construction of risk assessment and management as scientific benefits court actors and political actors. This technocratic rationalisation can protect institutions from social concerns because it presents solutions to every problem (Feeley and Simon, 1992). However, it subjectively chooses which issues to address, and ignores complicated ones that do not have simple solutions (Hannah-Moffat, 1999). For example, if there is a risk that an accused person with substance use issues will offend while on bail, a common condition will direct them not to consume drugs. In this approach, the court does not have to consider how a condition not to consume drugs is often unrealistic for people who experience addiction and can lead to breaches. In turn, court actors are protected from criticism because they try to manage the risk, and political actors do not have to address the link between substance use and criminalisation. Risk technologies (e.g., bail conditions) also produce the expectation that the individual will govern themselves and avoid 'risky' behaviours, situations, and populations, such as substance use and substance users. Thus, the accused person becomes responsible for their actions due to the subjective determination of note-worthy issues in their life, which lets criminal justice actors avoid responsibility for social issues (Hannah-Moffat, 1999). The notion of risk assessment as scientific insulates state and judicial actors from social concerns and backlash, but it takes a subjective approach.

The problem, then, is that risk assessment and management are not objective and lead to subjective decision-making due to the room for judicial discretion, which the new penology does not adequately address. The subjective calculation of risk by judicial actors is evident in their assumptions about what it means to be risky for offenders. For example, JPs and Crown

attorneys often skip steps on the ladder principle and require a surety, the most onerous form of release, even for cases where the accused presents little risk (Wyant, 2016). The overuse of sureties is not objective as it comes from the assumption that accused people are inherently risky. Further, in Dhami's (2005) study, he finds that judges in Britain have different risk judgments and decisions for identical bail cases, and higher perceptions of risk lead to more punitive decisions. Wiseman (2016) also notes that judicial discretion leads to subjective, arbitrary justice as the same defendant could receive vastly different bail outcomes depending on which judge sits at the proceeding and how the judge perceives the defendant. *R. v. Antic* (2017) is an example of the arbitrariness of bail hearings. In Antic's bail hearing, the JP rejected the proposal of a surety release with a $10,000 pledge from Antic's grandfather (*R. v. Antic*, 2017, p. 520). The JP did so because he speculated that Antic assumed the government would not seize his grandfather's money if he breached (*R. v. Antic*, 2017, p. 520). The JP's arbitrary speculation had the effect of denying bail and the Supreme Court overturned it (*R. v. Antic*, 2017, p. 520). Thus, risk assessment and management are subjective processes of judicial discretion that arbitrarily limit the accused's right to reasonable bail.

The effectiveness of risk assessment and management is also questionable regarding specialised courts and bail treatment conditions. While new penology asserts that crime governance is no longer concerned with individuals or rehabilitation, specialised courts and treatment conditions show the opposite. However, the co-existence of rehabilitation, risk, and punishment is problematic. Hannah-Moffat and Maurutto (2012) show how specialised courts in Canada have an individual, rehabilitative focus. As discussed above, conventional courts often fail to address social issues like substance use. In contrast, specialised courts like drug treatment courts offer an alternative route to manage difficult issues (Hannah-Moffat and Maurutto, 2012).

Drug treatment courts have a harm reduction focus and provide an individual with treatment plans and access to services that may otherwise be unavailable. Risk management in the form of treatment appears to erase its otherwise punitive elements in support of harm reduction and rehabilitation. However, punitive elements persist, and they can create risks for accused people (Moore and Lyons, 2007). Treatment conditions in specialised courts, like ones in bail court, compel self-governance to hold the accused responsible for their behaviour, yet they can put an accused in risky situations that are hard to avoid. The situations can lead to punishment, such as failure to comply charges due to the state's emphasis on personal responsibility (Moore and Lyons, 2007). For example, if a charged person fails to attend drug treatment, even when it is not necessarily their fault (e.g., fails due to the fear of a person in the treatment group who is violent toward them), they can receive punishment through criminal charges for breaches or removal from the program. Like conventional courts, the responsibilisation of the offender isolates court actors from criticism and protects their reputations because substance use remains the individual's problem (Hannah-Moffat and Maurutto, 2012). Therefore, while rehabilitative measures are still present, they can expose accused to more risks and criminalisation while they simultaneously shield court actors from criticism.

**The Political Sociology of Risk Management.**

Since the current state of risk management is problematic, a key factor to consider is whether policy or case law can influence how criminal justice actors manage risk. The *Criminal Code* gives judicial actors considerable discretionary power when it comes to risk management and bail decisions, which can lead to significant variations in decisions. Since bail decisions have a massive impact on accused people's lives, it is crucial that judicial actors exercise their discretion according to legislation and precedent. There may be a reduction in punitive decisions

and the lack of uniformity if they follow the law on bail. However, several authors find that both court and political actors do not follow legislation and case law (Wyant, 2016; Myers, 2017; Webster and Doob, 2015). For example, in Ontario courthouses, Wyant (2016) notes that some JPs do not understand the law on bail, onus provisions, or the presumption of innocence, and defer to the Crown's judgments too often. Wyant (2016) argues that JPs' lack of legal knowledge is because they do not need law degrees. The training they receive is not adequate to replace the knowledge people attain in law school. Thus, while the law on bail is clear, court actors, including JPs, do not follow it (Wyant, 2016).

Some scholars argue that the state and criminal justice actors do not follow the law on bail because they seek to insulate themselves from criticism (Myers, 2009). In bail court, the bail decision requires the assessment of two risks. The first is the risk to the community after the accused is released, and the second is the criminal justice system's reputational risk if the accused commits an offence while on bail (Power, 2004, p. 32). Court actors must address public concerns to protect their legitimacy. However, 'the public' does not view risks the same way experts do (Douglas, 1992, p. 11). The difference in views is apparent in the public's persistent concern about crime, despite its continued decline, and sensationalist media pieces about the criminal justice system. When something goes wrong, such as when a person offends while on bail, the public's first question is "Whose fault is it?" (Douglas, 1992, p. 15). In this 'blame system', the belief is that someone is always at fault and blameworthy when something goes wrong (Myers, 2009). The public often holds the court responsible for the actions of the offender (Wiseman, 2016). In turn, court actors onerously respond to risks and look to preventative action to manage the public's concerns and their reputation (Power, 2004, p. 35; Douglas, 1992, p. 16; Wiseman, 2016, p. 428). As a result, court actors become hesitant to make decisions they are

held responsible for because they fear the potential reputational and occupational consequences (Myers, 2009, p. 129). The reluctant attitude leads to an avoidance of risky people and risky situations by court actors. Thus, it also leads to an unwillingness of JPs to challenge Crown attorneys when they request strict forms of release (e.g., surety) or conditions (e.g., treatment, house arrest, curfew) (Wyant, 2016). The primary goal is to avoid backlash and responsibility, and court actors accomplish this through risk avoidance and management of their own risk.

**Other Theories of Judicial Behaviour.**

Several studies show that risk affects the decisions judges and JPs make, although there are other theories about factors that influence judicial behaviour. The legal model of judicial decision-making claims that judging is a mechanical process and that judges apply the law objectively (Macfarlane, 2013). While judges have discretion, they are also bound by precedent, the text of the constitution, statutes, and rules (Macfarlane, 2013). Critics argue that legal rules create an inadequate constraint on judicial discretion, so judging is not objective or mechanical. The attitudinal model argues that judges base their decisions on their ideological preferences and not solely on legal rules (Macfarlane, 2013). Critics claim that the model is reductionist as it dismisses numerous other factors that influence judicial behaviour and decisions (Macfarlane, 2013). Historical institutionalism challenges the attitudinal model and claims that norms, values, and ideas influence judicial behaviour (Macfarlane, 2013). What informs a judge's behaviour is their sense of obligation or duty to act according to expectations and responsibilities or their sense of recognition that their actions are meaningful (Macfarlane, 2009, p. 41). Critics claim that historical institutionalism is a theory that cannot be proven because any decision can be consistent with its criteria (Macfarlane, 2009, p. 44). The different theories explain several

factors that may influence judicial behaviour and decisions, although legislation and case law are always important when one discusses judges and JPs.

## The Modern Evolution of Bail

The following section analyses significant pieces of legislation and case law in the modern evolution of bail. It discusses the 1972 Bail Reform Act and changes that occur shortly after it which stray from its original objectives. It also discusses the 1982 *Charter of Rights and Freedoms* and how it relates to bail. Finally, it traces crucial Supreme Court cases, including *R. v. Pearson* (1992), *R. v. Morales* (1992), and *R. v. Hall* (2002).

### The Bail Reform Act (1972).

The Bail Reform Act passed on January 3, 1972, due to recommendations about how to improve the bail system. Before 1972, the bail system mainly revolved around cash deposit, which the Act departed from (*R. v. Antic*, 2017). Detention was also presumed unless an accused applied for bail (*R. v. Antic*, 2017). The Act entirely changed the administration of bail. It gave the police expanded powers to avoid unnecessary arrests and detentions, and it created new forms of release (Myers, 2013, p. 7). It also put the onus on the Crown to justify detention, limited the use of cash deposits, and expanded the secondary grounds for detention (Myers, 2013, p. 7). The changes sought to advance the rights of accused and gave more scope to JPs to determine whether a release was appropriate. In turn, the broader scope became an "exercise in risk prediction" and risk management (McLellan, 2010, p. 59). Under the Act, judges had to consider primary and secondary grounds concerns. To make their decisions, they predicted the possibilities of risk and acted accordingly. If they deemed a person too risky, they denied their bail application. In contrast, if they assumed that bail conditions managed an accused person's risk, they approved their request. The Act made risk prediction and management more of a

responsibility for the accused person, their lawyer, and the Crown attorney. All three participated in the formulation of a bail plan that addressed concerns about the release. Despite the expanded presence of risk management, the Act still defined release as the standard and custody as the exception (McLellan, 2010). While the Act created many changes to advance the rights of accused people, and parts of it still exist, its original format did not last for long.

Only a few years later, bail legislation took a punitive turn. In 1976, the state created the first reverse onus provisions in the *Criminal Code*. McLellan (2010) argues that there was no empirical justification for the introduction of reverse onus provisions, and reverse onus policy planning included no consultation with experts in criminal justice policy. Such an approach to legislation that marginalises experts from outside the government and disregards empirical evidence has become increasingly common in criminal justice policy (Webster and Doob, 2015). Reverse onus requirements shift the onus from the Crown, who would otherwise have to justify the detainment of the accused, to the accused, who must explain why the JP should not detain them. Risk management and the responsibilisation of the offender are especially apparent in reverse onus cases. In Crown onus cases, the accused person participates in the formulation of a bail plan to manage their risks. In reverse onus cases, an accused is already stigmatised as riskier than other offenders due to the onus. They not only have to create a bail plan, but it is also their responsibility prove to the state why they are not too risky for release. Today, when an accused person breaches their bail, which is more likely when releases are more onerous, the police charge them with failure to comply, and they must attend bail court again in the stigmatised reverse onus position (Sprott and Myers, 2011). The enactment of reverse onus provisions puts the onus on the accused, which makes a quick and straightforward release harder to obtain

compared to Crown onus provisions. *The Charter of Rights and Freedoms* has been used to challenge reverse onus provisions.

### ***The Charter of Rights and Freedoms* (1982).**

The 1982 *Charter of Rights and Freedoms* is an amendment to the Canadian Constitution, and its primary purpose is to protect people's rights and freedoms, including the rights and freedoms of accused people. The *Charter* has sections that address issues concerning bail and remand. Section 7 protects the right to life, liberty, and security of the person, and a person cannot be deprived of these rights unless the state produces legally compelling reasons to do so. Further, s. 9 protects people from arbitrary detainment or imprisonment. Section 11(d) protects an accused's right to the presumption of innocence until their guilt is proven. The section prevents the imposition of punishment by the state until the person is found guilty (Schumann, 2013, p. 4). However, in practice, Wyant (2016) finds that some JPs fail to acknowledge the s. 11(d) *Charter* guarantee. Finally, s. 11(e) states that accused have the right not to be denied reasonable bail without just cause, which does not always happen in practice, as *R. v. Antic* (2017) shows. The *Charter* is useful because it is an instrument to challenge the state's treatment of marginalised and criminalised people. For example, in *R. v. Oakes* (1986), the accused argued that the reverse onus situation of s. 8 of the Narcotics Control Act was unconstitutional. The Court ruled that s. 8, which equated possession of drugs with possession for the purposes of trafficking unless the accused proved otherwise, violated s. 11(d) of the *Charter*, or the presumption of innocence. The case seemed to support the accused's rights rather than support the state's power. Thus, the *Charter* dictates explicit protections for criminalised people, but the state does not always adhere to its outlines.

## Supreme Court Cases.

### *R. v. Pearson (1992).*

The Supreme Court considered the *Charter* and bail and reverse onus provisions in *R. v. Pearson* (1992). The case addressed general issues of release. The Court wrote that individuals have the right to obtain bail and the right to reasonable bail conditions. Moreover, denial should only occur when it is necessary to achieve the proper functioning of the bail system, and in a narrow set of circumstances when an accused cannot justify their release. These arguments supported the release of individuals pending trial. *R. v. Pearson* also addressed reverse onus provisions. In the case, the accused faced five counts of trafficking in narcotics which put him in a reverse onus situation. The accused failed to get bail and argued that his detention was unconstitutional. The Court ruled otherwise. It stated that reverse onus provisions are reasonable because they address the unique risks of pre-trial recidivism and absconding problems in drug trafficking cases. The focus on risks further demonstrates how bail decisions are exercises in risk prediction and risk management. The presumption of innocence erodes as specific accused (e.g., those who face drug trafficking offences) experience stigmatisation due to the assessment that they are riskier than others. In turn, the stigmatisation makes it harder for them to justify their release. While this case leaned toward the support of release, it also supported the government's punitive actions in reverse onus cases. The example illustrates an interesting paradox: bail denial should only occur in exceptional circumstances, but reverse onus provisions and risk create added challenges for successful bail applications.

### *R. v. Morales (1992) and its Response.*

The Supreme Court addressed the validity of grounds to deny bail in *R. v. Morales (*1992). Under the 1985 *Criminal Code*, justices could detain individuals if their detention was

"necessary in the public interest." The Court ruled that bail denial on the grounds of "public interest" was unconstitutional due to its vagueness and its allowance for unlimited judicial discretion. It stated that bail denial is only constitutional when there is a significant likelihood of an accused committing an offence, interfering with the administration of justice (e.g., not showing up to trial), or jeopardising public safety and protection. Due to its unconstitutionality, the Court struck the public interest phrase from the *Criminal Code* and limited the scope to deny bail.

However, Parliament's 1997 response added a new provision for detention that, like reverse onus provisions, expanded the possibilities for bail denial and risk management and aversion. The amendment to the 1985 *Criminal Code* provided a new ground for detention – to "maintain public confidence in the criminal justice system." McLellan (2010) argues that there was no clear justification for Parliament's response to *Morales*. It occurred five years after the case and was not a pressing matter, and there was no suggestion that the bail system threatened the public interest (McLellan, 2010, p. 60). The legislation appeared to be purely political and risk-averse. It took a "tough on crime" approach that enabled Parliament to appear sensitive to the public's concerns about crime and gave judicial actors more discretion and room for bail denial (Schumann, 2013, p. 30). In *R. v. Hall* (2002), the Supreme Court upheld the constitutionality of Parliament's response and appeared to support the government's punitive actions. Although *R. v. Morales* (1992) struck down the "public interest" justification to deny bail, the "public confidence" amendment is deeply related to notions of public interest (Schumann, 2013, p. 30). For example, a JP can take a risk-averse approach and deny bail for someone who commits a serious offence based on the public's outrage and the desire to protect their reputation. The wide scope of "public confidence" and its political nature increased the

difficulties of successful bail applications. Therefore, despite instances of legislation and case law that seek to create a functional bail system, a combination of the political climate, legislation, and case law can also lead to a dysfunctional bail system (McLellan, 2010).

## The Current State of Bail

Academics and Supreme Court judges describe the current bail system in Ontario as unreasonably onerous, dysfunctional, and unconstitutional (Sprott and Myers, 2011; Wyant, 2016; *R. v. Antic*, 2017). Accused individuals often spend multiple days in remand before their bail hearing. When they receive bail, their orders frequently fail to follow legal rules about bail, which is evidenced by a high number of conditions, onerous conditions, and deviations from the ladder principle.

### Delays.

The current state of bail in Ontario is concerning due to constant delays. Even though most accused receive bail if they apply for it, hearings are often pushed back because of adjournments and the desire to propose a bail plan that the Crown approves to avoid contested hearings (Myers, 2015). In her study of Ontario courthouses, Myers (2015) finds that court actors adjourn 53.2 percent of cases to another day, and almost a quarter of adjournment requests offer no explanation for the adjournment. The high percentage of adjournments exists despite the law on bail which stresses that bail decisions should be made soon after an arrest. Moreover, the probability of a case's remand to a different day is constant regardless of the number of court appearances of an accused (Myers, 2015). A significant number of adjournments leads to an acceptance of unproductive court appearances and delays. Wyant (2016) acknowledges other factors that influence delays in the bail process. For example, physical limitations of courthouses with limited interview rooms postpone interviews with accused people and cause delays in the

development of bail plans (Wyant, 2016). Further, delays exist due to flaws in the legal aid system, court actors who unnecessarily call witnesses and sureties to testify in bail hearings, a lack of access to information about cases, a lack of opportunity for communication between an accused and their defence, and an overreliance on sureties. (Wyant, 2016). Due to these faults, accused spend a median of eight days in remand (Correctional Services Program, 2017). When they finally receive bail, most accused must follow multiple conditions.

**Onerous Releases and the Revolving Door.**

The *Criminal Code* addresses the ladder principle and stresses that court actors must justify higher forms of release and bail conditions. In practice, concerns about risk influence court actors to ignore the ladder principle and impose higher forms of release without justification (Myers, 2009). Conditions should address the primary, secondary, and tertiary grounds concerns in the *Criminal Code*. However, court actors often fail to justify why conditions are appropriate and apply them due to subjective risk assessment and management and risk-aversion (Wyant, 2016). For example, a surety release is the most onerous one, yet it is the norm in many courts in Ontario, even for non-serious offenders (Myers, 2009). Another example is the use of treatment conditions. In their study of a youth court in Toronto, Sprott and Doob (2010) find that girls are significantly more likely than boys to receive treatment conditions for minor, non-violent offences. Treatment conditions at the bail stage are questionable due to how little the court knows about the accused at that stage. Sprott and Doob's study also raises concerns about the over-pathologisation of girl offenders and the court's subsequent attempts to manage their risk through onerous conditions. Further, studies show that bail release orders have a high number of average conditions, such as 6 in Myers's (2011) study and 7.8 in Myers's more recent study (2017). One of the implications of onerous releases with

multiple conditions is the revolving door of the criminal justice system. Strict forms of release and multiple conditions are usually difficult to follow and frequently lead to breaches (Sprott and Myers, 2011). Consequently, the most common admission to remand is a failure to comply (Porter and Calverley, 2011). Together, delays and onerous releases lead to a dysfunctional bail system and a high remand population, and *R. v. Antic* is a response to this.

**Onerous Conditions.**

Some conditions are especially onerous because they are difficult for an accused person to follow and often lead to breaches. Examples of onerous conditions include a surety, not to possess illegal substances or alcohol, curfew, house arrest, and treatment or counselling. Myers (2009) and *R. v. Antic* (2017) address how a surety release is overused and is the most onerous form of release due to the surety's constant surveillance to ensure the accused follows their conditions. Further, a condition to not possess illegal substances or alcohol is onerous because it can set an accused up to fail if they struggle with substance use issues or alcoholism and cannot reasonably follow the condition (Wyant, 2016). Curfew and house arrest conditions follow the same pattern. They can set an accused up to fail because they are difficult to abide by and can unduly interfere with employment, employment opportunities, and daily life (Wyant, 2016). Finally, treatment conditions are onerous because they seek to change an accused person's behaviour while the court has little knowledge of the accused. JPs often apply such conditions to particular marginalised accused like females and people with substance use and mental health issues (Sprott and Manson, 2017). Often, it is not clear how these onerous conditions relate to the accused's risk or their alleged crime, and the conditions criminalise ordinary behaviour via breaches (Myers and Dhillon, 2013). Researchers and Supreme Court justices condemn such onerous conditions because they can create additional risks of breaches and court actors apply

them unevenly and subjectively (Moore and Lyons, 2007; Sprott and Doob, 2010; *R. v. Antic*, 2017).

### *R. v. Antic* (2017): A Response to the Current State of Bail.

Before *R. v. Antic* (2017), Supreme Court decisions failed to adequately address the consequences of punitive and risk-centric approaches to bail. Academics, government reports, and organisations like the John Howard Society have reported their concerns about bail and risk-centric approaches for many years. In *R. v. Antic*, the Supreme Court displayed its worries, and it re-emphasised accused peoples' right to reasonable bail. In the decision, the Court criticised the government as it stressed the importance of the consistent and fair application of *Criminal Code* legislation across the country. The Court explicitly addressed the requirement to adhere to the ladder principle and stated that "release is favoured at the earliest reasonable opportunity on the least onerous grounds" (*R. v. Antic*, 2017, p. 511). If the Crown proposes a release that is higher on the ladder than an undertaking without conditions, the Crown must justify why it is necessary. Court actors must consider and reject each step of the ladder before consideration of a more restrictive release. If court actors disagree about the terms of release and the JP orders the more restrictive form, the JP must justify why it is necessary. Further, court actors should only propose a recognisance with sureties after the consideration and rejection of all other forms of release. Moreover, a recognisance has the same coercive effect as cash bail, and cash bail cannot be so high that an accused cannot pay it and must remain in detention. Finally, conditions should only relate to primary, secondary, and tertiary grounds concerns. Conditions cannot seek to "change an accused's behaviour or punish an accused person" which means that treatment conditions are inappropriate (*R. v. Antic*, 2017, p. 511). These judgments call attention to delays and the prevalence of onerous releases and order their discontinuance. In *R. v. Antic*, the Supreme Court

rules that quick release must be the norm and custody should be the exception, and terms of release must not set people up to fail.

### The Bail Directive for Crown Attorneys (2017).

The Bail Directive for Crown Attorneys (2017) is a response to *R. v. Antic* from the Ministry of the Attorney General of Ontario that seeks to reduce onerous releases. It coaches Crown attorneys on the appropriate approach to judicial interim release, and it is essentially a reiteration of *R. v. Antic*. It states that prosecutors "must act with objectivity, independence, and fairness" and their decisions must follow legal rules and avoid "outside pressures or considerations" (Attorney General, 2017). Like *R. v. Antic*, the Bail Directive stresses that releases must follow the ladder principle and that Crown attorneys must consider and reject a less onerous release before they request a more onerous one (Attorney General, 2017). It also explicitly mentions *R. v. Antic* and states that the default position is an unconditional release (Attorney General, 2017). Further, conditions should only relate to the three grounds for detention, the specific circumstances of the accused person and the offence, have a realistic expectation that the accused can comply, and be minimally intrusive and proportionate to any risk (Attorney General, 2017). The emphasis on objectivity, the ladder principle, limited considerations for conditions, realistic conditions, and proportionality to risk reflects an intervention in the influence of non-legal factors like risk aversion and risk management. Like *R. v. Antic*, the Bail Directive is an intervention that seeks to address the current issues of the bail system, including onerous releases and the revolving door.

## The Present Study

Since bail reform seeks to reduce onerous releases that do not follow legal rules, it is essential to determine whether bail reform influences court actors to follow bail legislation. It is

vital to study bail reform because it may have a substantial impact on judicial decision-making and behaviour in bail court and the nature of bail releases. The purpose of the study is to understand the connection between risk, bail reform, and judicial decisions about bail. The current literature on bail has significant gaps about the impact of bail reform and JP decision-making and behaviour. Thus, the current study focuses on two things – bail reform and JPs. The research question is "To what extent does bail reform, or *R. v. Antic* and the Bail Directive for Crown Attorneys, impact judicial decisions about bail releases?" The study refers to bail reform as both *R. v. Antic* and the Bail Directive, but it mostly focuses on *R. v. Antic* for two reasons. First, the research question only concerns JPs, and the Bail Directive is for Crown attorneys. In contrast, *R. v. Antic* directly addresses JPs and is precedent from the Supreme Court. However, it is possible that the Bail Directive impacts judicial decisions, so the study includes it under the term 'bail reform'. Second, the study only includes 16 cases from after the publication of the Bail Directive, so if it influences judicial decisions, its influence may be quite small. The study compares what bail processes and outcomes should look like, as *R. v. Antic*, the Bail Directive, and the *Criminal Code* outline, with actual bail processes and outcomes.

**Conclusion**

This section includes an overview of bail literature. It discusses current bail legislation and theoretical approaches to bail, including risk and theories about judicial behaviour. It also traces the modern evolution of bail, including legislation and Supreme Court cases. Further, it explains the current state of bail and how bail reform seeks to change the current state of bail. Finally, since the impact of bail reform on judicial behaviour is missing from the literature, it proposes how the current study will address the gap with its research question. The following section discusses the data and methods the study uses to answer the research question.

# 3. Data and Methods

## Introduction

This section explains the data, sample, statistical analyses, and measures the study uses to examine the relationship between bail reform and JP decision-making. First, it describes the method of collection for the study's data and its sample. Second, it describes the analytic techniques, which include qualitative analyses and quantitative descriptive statistics that measure frequencies, compare means, and create crosstabs. Finally, the section describes the methodological limitations of the study.

## Data Collection

### Courtroom Observations.

The study uses data collected at one provincial courthouse in southwestern Ontario to assess the extent that bail reform influences JP decisions about bail. The data include participant observation in bail court from May 2016 to January 2018. The author collected the data from June 2017 to January 2018, and other researchers collected the data from May 2016 to May 2017. The data are part of a larger study conducted by Dr. C. Yule (REB number 17-02-033).

The data require specific characteristics to examine the relationship between bail reform and JP decision-making. First, the data need information about pre- and post-*Antic* cases to determine whether bail reform impacts the court process and causes variations. The post-*Antic* era also includes the new Bail Directive changes to the Crown Prosecution Manual. Second, the data require Crown submissions and JP decisions to determine whether bail reform leads to more disagreement between Crowns and JPs and whether it affects the types of conditions and releases. Crown submissions and JP decisions are necessary because the purpose of bail reform is to address ongoing concerns about onerous conditions and deviations from the ladder principle

(*R. v. Antic*, 2017, p. 511). Third, the data require different JPs to control for variations in judicial behaviour. Specific judicial behaviour pre- and post-*Antic* helps better determine the strength of the relationship because it measures whether some JPs influence the results more than others or whether the change is constant across JPs. Pre- and post-*Antic* cases, Crown submissions, JP decisions, and JP names are essential for understanding the relationship.

A detailed checklist was used during bail hearings to ensure systematic data collection (see Appendix – Bail Court Checklist). This form of participant observation is especially useful because bail hearings are free to attend and open to the public. The checklist, designed by Schumann (2013), includes the date and information about the JP, such as their name, gender, and bail decision. It also has detailed information about the accused, such as their name, age, current charges, criminal history, and whether they have substance use or mental health issues. Further, it collects data about Crown and defence submissions. The checklist has both open- and closed-ended questions to collect qualitative and quantitative data. The combination of qualitative and quantitative data provides a rich dataset that contains detailed information about each case.

**Sample**

The sample includes 132 consent-to-release bail hearings. There is concern that JPs merely agree with every Crown request, but contested hearings often do not have Crown requests for conditions or forms of release (Wyant, 2016). Thus, the study only uses consent-to-release cases because they can measure the extent of disagreement about conditions and types of release between Crowns and JPs. Of the 132 cases, 68 are pre-*Antic* (before June 1, 2017) and 64 are post-*Antic* (after June 1, 2017). Many of the pre-*Antic* cases do not include the JP's name, so the

study filters for three out of eight known JPs with the most recorded cases.[1] The study also briefly mentions JP A, JP B, and JP C who are not JPs One, Two, or Three.

Table 1. Sample characteristics. (N=132)

| | **Pre-*Antic*** | **Post-*Antic*** | **Total** |
|---|---|---|---|
| **JP One** | 4 | 18 | 22 |
| **JP Two** | 10 | 18 | 28 |
| **JP Three** | 9 | 9 | 18 |
| **JP A** | 0 | 9 | 9 |
| **JP B** | 8 | 6 | 14 |
| **JP C** | 3 | 3 | 6 |
| **Other** | 4 | 1 | 5 |
| **Missing** | 30 | 0 | 30 |
| **Total** | 68 | 64 | 132 |

## Analytic Strategy

The study uses a mixed methods approach. The combination of qualitative and quantitative data utilises the strengths of both approaches while avoiding their weaknesses. Quantitative statistics provide a good overview of the relationship under investigation, but they lack a deep understanding of the issue. In contrast, qualitative data provide richer insights and are more likely to reveal nuances in the relationship between bail reform and JP decision-making.

### Thematic Analysis.

The study analyses qualitative data from open-ended responses with thematic analysis. The thematic analysis identifies, analyses, organises, describes, and reports themes that occur in a dataset (Braun and Clarke, 2006). Themes capture essential information that relates to the overall research question and links the data together (Braun and Clarke, 2006). The study follows Nowell, Norris, White, and Moules's (2017) model. Themes about forms of release, types of

[1] Other missing data include five pre-*Antic* cases that have no information about conditions and four pre-*Antic* cases that have no information about the forms of release.

conditions, JP disagreements with Crown requests, and JP references to *R. v. Antic* are prevalent in the data set.

The qualitative data help determine whether a relationship exists between bail reform and JP decisions about bail releases. First, the author records and counts the form of release based on the three types of release in the ladder principle (an undertaking, a recognise without a surety, and a recognise with a surety). Second, the author examines conditions. While the original data includes all conditions, the analysis only looks at specific onerous conditions and their frequency (see Literature Review – Conditions). Third, the author counts every time a JP disagrees with Crown requests for conditions or forms of release. The statements' categories include three possible results of disagreement: a less strict condition, a stricter condition, and a less strict release. Finally, the author looks at specific mentions of *R. v. Antic* in the post-*Antic* cases and counts every time a JP refers to *Antic*. The statements include three common themes, and each reference has one or more of the three themes. The themes include the ladder principle, conditions, or a statement that the release follows *Antic*. This approach shows the influence of *Antic* on JP decisions and bail outcomes.

***Key Measures.***

The first and second key measures are the forms of release and the types of conditions. The forms of release include the three possible releases according to the *Criminal Code* that the study mentions above. The dataset also records all conditions but focuses on five that are especially onerous. The five conditions include a surety, no drugs or alcohol, curfew, house arrest, and treatment.

The third key measure is the prevalence of JP disagreement with the Crown's submission. *R. v. Antic* encourages JPs only to apply conditions that address the criteria for detention and

ensure the accused's release, and it stresses the importance of the ladder principle (2017, p. 511). However, research shows that Crown attorneys often ask for conditions or forms of release that do not relate to the accused's charges and that JPs often do not disagree with unnecessary requests (Myers, 2009; Wyant, 2016). Thus, the study categorises disagreement into disagreements about conditions that are either more or less strict and disagreements about the forms of release that are less strict. The measure of disagreement provides evidence that JPs independently consider bail proposals and ensure that the releases follow legislation.

The last key measure is specific references to *R. v. Antic* by JPs. It categorises the references into three categories. The first is whether the comment relates to the ladder principle or the form of release. The second is if it relates to the types of conditions. The third is whether the reference states that the release follows *R. v. Antic*. The statements highlight how JPs interpret and apply *Antic*.

It is important to note that the study does not look at the specific influence of the Bail Directive for Crown Attorneys. It is impossible to determine the extent of its influence because no court actors make specific reference to it. Further, the sample only includes 16 cases from after its official implementation which means that any potential results are not significant. While the influence of *R. v. Antic* is more directly determinable, the impact of the Bail Directive is not, so the study includes both in the term 'bail reform'.

**Descriptive Statistics**

Descriptive statistics provide information about the general impact of bail reform. The author codes quantitative data (number of conditions) and the themes discussed above into statistical variables. Frequency measures, compare means, and crosstabs are appropriate to measure pre- and post-*Antic* differences. Frequency measures are compatible with many types of

data because they determine the frequency of a variable. Compare means is appropriate because the sample contains two groups, pre-*Antic* and post-*Antic*, and the two groups each have a mean number of conditions. Further, crosstabs reveal the relationship between the independent variable (bail reform) and the dependent variable (judicial decisions about bail releases). The lowest level of measurement of the variables is ordinal, so tau-b or tau-c is appropriate to determine the strength and direction of the relationship. Statistical significance is not necessary for any analyses in the study. Statistical significance is useful for a random sample from a population because it determines the likelihood that the results are due to chance and allows for generalisations. Since the current study only includes 132 non-random hearings from one courthouse, it is not possible to generalise beyond the sample. Together, the analyses help to determine the impact of bail reform.

**Key Measures.**

***Independent Variable.***

The independent variable is whether the cases are pre-*Antic* or post-*Antic*. The literature review discusses the possibility that *R. v. Antic* has an impact on the bail process. Earlier research shows that bail releases often do not follow the ladder principle in the *Criminal Code* (Myers, 2009). Releases also contain conditions that are either extremely difficult for an accused person to follow (e.g., house arrest) or conditions that seek to change their behaviour (e.g., treatment) (Wyant, 2016; Sprott and Doob, 2010). Further, pre-*Antic* research shows that it is common for JPs to simply approve Crown requests and not ask the Crown to justify why a condition or form of release is necessary (Wyant, 2016). *R. v. Antic* (2017) declares that this reality of bail is unconstitutional, and it challenges court actors to change their behaviour. Thus,

the independent variable is a scale variable, and its codes are 0 for pre-*Antic* cases and 1 for post-*Antic* cases.

***Dependent Variables.***

There are five dependent variables. The first dependent variable is the type of release. The ordinal variable is coded as 1 for an undertaking, 2 for a recognisance without sureties, and 3 for a recognisance with sureties. The second dependent variable is the average number of conditions per case, and the number of conditions in each case ranges from 0 to 11. The third dependent variable is the types of conditions based on the onerous conditions discussed previously. The variables include surety, possession, curfew, treatment, and house arrest. The codes for the onerous conditions are all 0 for no condition and 1 for the presence of the condition. Potential changes in conditions pre- and post-*Antic* may mean that *Antic* influences the number and types of conditions in bail release orders. The fourth dependent variable is JP disagreement with Crown requests for conditions or releases. Disagreement is a clear indicator that JPs play an active role in the creation of bail release orders. Its codes are 0 for no disagreement and 1 for disagreement. Disagreement is further broken down into the three possible types of disagreement mentioned above. The codes are 0 for no and 1 for yes. The fifth dependent variable is whether JPs specifically mention *Antic,* and the codes are 0 for no and 1 for yes. The mention of *Antic* is a clear indicator that JPs consider it in their decision-making. It is further broken down into the three types of references mentioned above. While the dependent variables can tell a lot about the extent that bail reform impacts JP decisions overall, controlling for JPs determines whether the results are consistent across the sample.

Table 2. Independent and dependent variables for the study's analyses.

| Analysis number | Independent variable | Dependent variable |
|---|---|---|
| **One** | Bail reform | Type of release |
| **Two** | Bail reform | Number of conditions per case |
| **Three** | Bail reform | Number of onerous conditions |
| **Four** | Bail reform | JP disagreement with Crown requests |
| **Five** | Bail reform | JP mentions of *R. v. Antic* |

***Control Variable.***

The analyses also focus on within-person change for three JPs because only three have an adequate number of cases. It is essential to determine whether the findings are consistent for the entire sample pre- and post-*Antic*, or whether there are significant variations in bail decision-making between JPs pre- and post-*Antic*. There are many different theories about judicial behaviour. For example, the legal model argues that judicial decision-making involves objectively applying the law, which would lead to consistent results (Macfarlane, 2013). In contrast, the attitudinal model states that judicial decision-making is a result of conscious and unconscious preferences and prejudices (Macfarlane, 2013). Differences in preferences and prejudices would lead to differences in risk judgments and decisions on identical cases, and thus, variations in results (Dhami, 2005). Thus, the analyses determine the extent to which variations in judicial behaviour exist in the sample.

**Limitations**

There are several limitations to this study. First, it was not possible to use a random sample in the study which limits its generality. Second, it uses data from one courthouse in southwestern Ontario. However, different jurisdictions across Ontario may have different court cultures which shape the outcomes of bail hearings (Wyant, 2016). Future research should adopt a comparative approach that uses data from several cities to observe the differences and similarities across jurisdictions, but that is beyond the scope of this project. The lack of

randomness and comparative analyses means that the results are not generalisable beyond the sample. Third, the dataset does not control for the type of crime the accused allegedly commits or their criminal history because its small sample size does not allow for multivariate analyses. The type of crime and criminal history could significantly influence Crown requests and judicial decisions, and thus, an accused individual's bail outcome. Fourth, the study only analyses the differences in three JPs. A larger sample could study differences in more JPs and make stronger conclusions about judicial behaviour. Despite the limitations, the study still produces valuable results.

**Conclusion**

The data and methods section outlines the methodological approach the study uses to determine whether bail reform influences JP decisions about bail. The study utilises 132 cases from participant observation in one southwestern Ontario courtroom from May 2016 to January 2018 and analyses the data with a mixed methods approach. Thematic analysis and descriptive statistics measure differences in bail decisions pre- and post-*Antic*, and the JP control variable measures variations in judicial behaviour. The section discusses the data approaches and relevant variables in detail. It also discusses the limitations of the study. Despite the limitations, the analytic framework can adequately address the research question. The following section presents the findings of the data analyses.

# 4. Results

## Introduction

This section presents the results of the analyses to assess the impact of bail reform on JP decisions about bail. First, it reports the findings about forms of release. Second, it outlines the results about the number of conditions. Third, it reports the types of onerous conditions. Fourth, it discusses JP disagreement with Crown requests, and finally, it presents specific judicial references to *R. v. Antic*. Each step controls for the JP One, JP Two, and JP Three to analyse variations in individual JP behaviour. The results reveal valuable information about the impact of bail reform on judicial decisions about bail releases in the sample.

## Forms of Release

The *Criminal Code* delineates three possible types of release when an accused receives bail. Table 3 presents a crosstab which includes the three types of release: an undertaking (the least severe) to an own recognisance (the middle form of release) to a surety (the most severe) and their differences pre-*Antic* and post-*Antic*.

Table 3. Crosstab: Type of release by pre-*Antic* and post-*Antic*. (N=132)

| **Type of release** | **Pre-*Antic*** | **Post-*Antic*** | **Total** |
|---|---|---|---|
| **Undertaking** | 4.4% (3) | 25% (16) | 14.4% (19) |
| **Own recognisance** | 48.5% (33) | 50% (32) | 49.2% (65) |
| **Surety** | 47.1% (32) | 25% (16) | 36.4% (48) |
| **Total** | 100% (68) | 100% (64) | 100% (132) |

Tau-c = -0.320

Table 3 shows that there are significant differences in types of release pre-*Antic* and post-*Antic*. Only 4.4% of the pre-*Antic* sample receives an undertaking release versus 25% of the post-*Antic* sample. Own recognisance releases do not change drastically as 48.5% of pre-*Antic* cases and 50% of post-*Antic* cases receive a release on their own recognisance. Like undertaking releases, surety releases also change drastically. In pre-*Antic* cases, 47.1% of accused individuals

need a surety, while only 25% of post-*Antic* cases do. Tau-c is -0.320 which indicates a strong, negative relationship between the independent variable (pre- or post-*Antic*) and the dependent variable (the type of release). The table shows that bail reform influences JP decisions about forms of release as more cases include less severe forms of release.

There are clear differences in forms of release for pre- and post-*Antic* cases. For instance, a case from December 29, 2016 involves an accused individual who commits offences while on a police undertaking and receives a surety release. Neither the Crown nor the JP justifies why the escalation from a police undertaking to a surety release is necessary. A case from August 3, 2017 also involves an accused individual who commits offences while on a police undertaking but differs immensely from the above case. When the Crown requests an own recognisance release for the accused individual, JP A reminds him of *R. v. Antic* and the ladder principle. JP A argues that to go from an officer in charge undertaking to an own recognisance release is to skip a step on the ladder. Unlike the similar pre-*Antic* case, the JP asks the Crown to defend their submission. JP A disagrees with the Crown's argument and orders a judicial undertaking release. These cases illustrate how bail reform mitigates the overuse of sureties and influences JP decisions about bail releases, which results in less strict forms of release that decrease the likelihood of breaches (Myers, 2009).

**Variation Between JPs for Type of Release.**

The JP control variable measures the type of release by pre- and post-*Antic* for JP One, JP Two, and JP Three to determine whether there are variations between JPs.

Table 4. Crosstab: Type of release by pre-*Antic* and post-*Antic* (JP One). (n=22)

| **Type of release** | **Pre-*Antic*** | **Post-*Antic*** | **Total** |
|---|---|---|---|
| **Undertaking** | 0% (0) | 16.7% (3) | 13.6% (3) |
| **Own recognizance** | 50% (2) | 55.5% (10) | 54.6% (12) |
| **Surety** | 50% (2) | 27.8% (5) | 31.8% (7) |
| **Total** | 100% (4) | 100% (18) | 100% (22) |

Tau-c = -0.182

Table 5. Crosstab: Type of release by pre-*Antic* and post-*Antic* (JP Two). (n=28)

| **Type of release** | **Pre-*Antic*** | **Post-*Antic*** | **Total** |
|---|---|---|---|
| **Undertaking** | 0% (0) | 27.8% (5) | 17.9% (5) |
| **Own recognizance** | 50% (5) | 44.4% (8) | 46.4% (13) |
| **Surety** | 50% (5) | 27.8% (5) | 35.7% (10) |
| **Total** | 100% (10) | 100% (18) | 100% (28) |

Tau-c = -0.332

Table 6. Crosstab: Type of release by pre-*Antic* and post-*Antic* (JP Three). (n=18)

| **Type of release** | **Pre-*Antic*** | **Post-*Antic*** | **Total** |
|---|---|---|---|
| **Undertaking** | 11.1% (1) | 22.2% (2) | 16.7% (3) |
| **Own recognizance** | 44.45% (4) | 33.3% (3) | 38.9% (7) |
| **Surety** | 44.45% (4) | 44.5% (4) | 44.4% (8) |
| **Total** | 100% (9) | 100% (9) | 100% (18) |

Tau-c = -0.062

Table 4 shows that there are differences in types of release pre-*Antic* and post-*Antic* for JP One, but the differences are not as strong as the results for all JPs in the aggregate results. JP One heard 22 cases. None of the pre-*Antic* cases involve an undertaking release, while 16.7% of post-*Antic* cases are undertakings, which is less than the aggregate results. Own recognisance releases for JP One are like the aggregate results, although the percentage of post-*Antic* cases is slightly higher. Fifty percent of pre-*Antic* cases and 55.5% of post-*Antic* cases have an own recognisance release. Surety releases are also similar to the aggregate results as 50% of pre-*Antic* and 27.8% of post-*Antic* cases are surety releases. The tau-c for JP One is -0.182 versus -0.320 for the aggregate results. There is a moderate, negative relationship between bail reform and JP One's decisions about types of release, but it is not as strong as the overall relationship.

Table 5 shows that there are differences in types of release pre- and post-*Antic* and that the relationship is stronger for JP Two's sample than for the entire sample. Like JP One, JP Two has no undertaking releases pre-*Antic*, but that raises significantly to 27.8% of post-*Antic* cases, which is more than JP One and the whole sample. The same trend of about half of the cases as own recognisance releases appears in JP Two's sample, but she has slightly less own recognisance releases post-*Antic* (44.4%) compared to the full sample and JP One. The surety release results are 50% for pre-*Antic* cases and 27.8% for post-*Antic* cases which are the same as JP One and similar to the full sample. Tau-c is -0.332. The strong, negative relationship between bail reform and JP Two's decisions about the type of release is stronger than both the full sample and JP one.

Table 6 shows that the differences in types of release pre- and post-*Antic* are weakest for JP Three. JP Three has the smallest sample of the three justices, and the weaker relationship could be due to other factors of the sample, such as the accused individual's criminal record.[2] 11.1% of pre-*Antic* cases have an undertaking release, which is more than the full sample and the other two JPs, and 22.2% of post-*Antic* cases are undertakings, which is more than JP One but less than JP Two and the entire sample. JP Three has the smallest amount of own recognisance releases with 44.45% of pre-*Antic* and 33.3% of post-*Antic* cases. The amount of surety releases remains consistent, unlike the full sample and the other two justices, which show a drop post-*Antic*. Tau-c indicates a weak, negative relationship between the IV and the DV. However, the overall sample and the three JPs consistently show that bail reform leads to judicial decisions about types of release that are less restrictive and decrease the likelihood of breaches.

[2] The lack of control variables for an accused's criminal record could affect all cases and justices, but it seems like it could be especially relevant for JP Three and his lack of dramatic change in forms of release based on further analyses that reveal his commitment to *R. v. Antic*.

## Conditions

### Number of Conditions Imposed.

The following table uses descriptive statistics in the form of a compare means table to shows the difference in the mean number of conditions for pre- and post-bail reform cases.

Table 7. Mean number of conditions by pre-*Antic* and post-*Antic*. (N=127[3])

| | **Mean/standard deviation** | **N** |
|---|---|---|
| **Pre-*Antic*** | 3.98 (1.773) | 63 |
| **Post-*Antic*** | 4.37 (2.250) | 64 |
| **Total** | 4.18 (2.029) | 127 |

The table shows that there is a slight increase in the mean number of conditions pre- and post-*Antic*. There are 63 pre-*Antic* cases with an average of 3.98 conditions per case, and there are 64 post-*Antic* cases with an average of 4.37 conditions per case. The growth in the average number of conditions per case is interesting because it occurs alongside the decrease in the severity of forms of release. The growth increases the likelihood of breaches (Sprott and Myers, 2011).

### *Variation Between JPs for Number of Conditions Imposed.*

The control variable continues to filter for JP One, JP Two, and JP Three. It measures the differences in the mean number of conditions for pre- and post-*Antic* cases for individual JPs.

Table 8. Mean number of conditions by pre-*Antic* and post-*Antic* (JP One). (n=22)

| | **Mean/standard deviation** | **N** |
|---|---|---|
| **Pre-*Antic*** | 4.75 (2.217) | 4 |
| **Post-*Antic*** | 4.78 (2.415) | 18 |
| **Total** | 4.77 (2.329) | 22 |

[3] The sample is 127 cases instead of 132 because 5 cases are unclear about the release order's total number of conditions.

Table 9. Mean number of conditions by pre-*Antic* and post-*Antic* (JP Two). (n=28)

| | **Mean/standard deviation** | **N** |
|---|---|---|
| **Pre-*Antic*** | 3.20 (1.687) | 10 |
| **Post-*Antic*** | 4.39 (1.975) | 18 |
| **Total** | 3.96 (1.934) | 28 |

Table 10. Mean number of conditions by pre-*Antic* and post-*Antic* (JP Three). (n=18)

| | **Mean/standard deviation** | **N** |
|---|---|---|
| **Pre-*Antic*** | 4.56 (2.128) | 9 |
| **Post-*Antic*** | 2.56 (1.590) | 9 |
| **Total** | 3.56 (2.093) | 18 |

Table 8 shows that the average number of conditions per case for pre- and post-*Antic* remains similar for JP One. The mean is 4.75 for pre-*Antic* and 4.78 for post-*Antic* which indicates that she imposes a higher number of conditions than the entire sample both pre- and post-*Antic*. The slight increase in the average number of conditions occurs alongside her post-*Antic* difference of less severe forms of release. Thus, JP One is less onerous in post-*Antic* bail orders regarding the form of release, but she continues to apply many conditions. The increase differs from *R. v. Antic's* goal of less onerous bail, and it increases the probability of breaches.

While JP Two consistently applies fewer conditions than JP One, Table 9 shows a more substantial increase in the mean number of conditions pre- and post-bail reform. Pre-*Antic* cases have an average of 3.20 conditions, and post-*Antic* cases have a mean of 4.39. The increase is more substantial than the entire sample's and JP One's increase, and it occurs alongside JP Two's increase in less strict types of release mentioned above. Thus, like JP One, JP Two applies less onerous forms of release post-bail reform, but she increases the average number of conditions per case. Like JP One, the increase is contrary to *R. v. Antic's* goal of less onerous bail, and it rises the likelihood of breaches.

Table 10 shows a significant decrease in the mean number of conditions pre- and post-*Antic* for JP Three. The decrease is different from the increase for the entire sample, JP One, and JP Two. It also occurs alongside the relative consistency in types of release for JP Three. The average number of conditions for pre-*Antic* cases is 4.56, and the mean number for post-*Antic* cases is two less at 2.56. Unlike the full sample and the other two JPs, the standard deviation lowers for post-*Antic* cases which shows less variation in the average numbers of conditions per case after bail reform. Thus, not only does JP Three lower the average number of conditions, but he is also relatively consistent about the lower number, which decreases the likelihood of breaches. JP Three does not add a higher number of conditions to lower forms of release because he strictly follows legislation and case law. For example, in a case from July 5, 2017, JP Three mentions *R. v. Antic* and states that the default release is an undertaking without conditions. He says that he considers a condition appropriate only if the absence of the condition would require the detainment of the accused individual. The case results in disagreements with the Crown about the form of release and the necessary conditions, and the JP orders an undertaking release with one condition. JP Three avoids applying multiple onerous conditions by strictly adhering to the *R. v. Antic* decision which explains why he is the only JP whose average number of conditions lowers. In sum, the entire sample, JP One, and JP Two are more onerous as the mean number of conditions and the standard deviation rises after bail reform, but JP Three displays the opposite.

**Types of Conditions Imposed.**

The study argues that certain conditions are more relevant regarding bail reform than others. As discussed in the literature review, the study looks at onerous conditions that include a surety, possession, curfew, treatment, and house arrest. The following tables show the prevalence

of the conditions pre- and post-*Antic* and the strength of the relationship between the IV (pre- or post-*Antic*) and the DV (the type of condition).

Table 11. Crosstab: Type of condition by pre-*Antic* and post-*Antic*. (N=127[4])

| **Condition** | **Pre-*Antic*** | **Post-*Antic*** | **Total** | **Tau-b** |
|---|---|---|---|---|
| **Surety** | | | | |
| Yes | 50% (32) | 25% (16) | 37.5% (48) | -0.258 |
| No | 50% (32) | 75% (48) | 62.5% (80) | |
| Total | 100% (64) | 100% (64) | 100% (128) | |
| **Possession** | | | | |
| Yes | 38.1% (24) | 35.9% (23) | 37% (47) | -0.022 |
| No | 61.9% (39) | 64.1% (41) | 63% (80) | |
| Total | 100% (63) | 100% (64) | 100% (127) | |
| **Curfew** | | | | |
| Yes | 14.3% (9) | 12.5% (8) | 13.4% (17) | -0.026 |
| No | 85.7% (54) | 87.5% (56) | 86.6% (110) | |
| Total | 100% (63) | 100% (64) | 100% (127) | |
| **Treatment** | | | | |
| Yes | 15.9% (10) | 6.3% (4) | 11% (14) | -0.154 |
| No | 84.1% (53) | 93.8% (60) | 89% (113) | |
| Total | 100% (63) | 100% (64) | 100% (127) | |
| **House arrest** | | | | |
| Yes | 7.9% (5) | 3.1% (2) | 5.5% (7) | -0.105 |
| No | 92.1% (58) | 96.9% (62) | 94.5% (120) | |
| Total | 100% (63) | 100% (64) | 100% (127) | |

Table 11 shows differences in conditions pre- and post-*Antic*. Half of the pre-*Antic* cases have a surety condition while only a quarter of the post-*Antic* sample has a surety condition. Next, 38.1% of pre-bail reform cases have a possession condition, while 35.9% of post-bail reform cases do. Further, 14.3% of the pre-*Antic* sample has a curfew condition, along with 12.5% of the post-*Antic* sample. Like possession, there is not a dramatic difference. Treatment

[4] There are 128 cases for surety and 127 for the rest because one case has information about the type of release but not about the conditions (except for surety). A surety is a type of release and a condition (e.g., reside with a surety or follow the surety's rules).

conditions show more difference in pre- and post-*Antic* cases than possession and curfew. 15.9% of pre-bail reform cases have a treatment condition, while only 6.3% of the post-*Antic* sample requires treatment. Finally, a house arrest condition is present in 7.9% of pre-*Antic* cases and 3.1% of post-*Antic* ones. Tau-b shows a moderate, negative relationship for surety, house arrest, and treatment, and a weak, negative relationship for possession and curfew. In sum, there is a noticeable decrease after bail reform in JPs' application of some onerous conditions that are difficult to follow (surety, house arrest, and treatment), but not others (possession and curfew).

***Variation in JPs in Type of Conditions Imposed.***

The control variable filters for differences in JPs for the type of conditions in bail releases pre- and post-*Antic*.

Table 12. Crosstab: Type of condition by pre-*Antic* and post-*Antic* (JP One). (n=22)

| **Condition** | **Pre-*Antic*** | **Post-*Antic*** | **Total** | **Tau-b** |
|---|---|---|---|---|
| **Surety** | | | | |
| Yes | 50% (2) | 27.8% (5) | 31.8% (7) | -0.184 |
| No | 50% (2) | 72.2% (13) | 68.2% (15) | |
| Total | 100% (4) | 100% (18) | 100% (22) | |
| **Possession** | | | | |
| Yes | 75% (3) | 38.9% (7) | 45.5% (10) | -0.280 |
| No | 25% (1) | 61.1% (11) | 54.5% (12) | |
| Total | 100% (4) | 100% (18) | 100% (22) | |
| **Curfew** | | | | |
| Yes | 25% (1) | 11.1% (2) | 13.6% (3) | -0.156 |
| No | 75% (3) | 88.9% (16) | 86.4% (19) | |
| Total | 100% (4) | 100% (18) | 100% (22) | |
| **Treatment** | | | | |
| Yes | 25% (1) | 5.6% (1) | 9.1% (2) | -0.261 |
| No | 75% (3) | 94.4% (17) | 90.9% (20) | |
| Total | 100% (4) | 100% (18) | 100% (22) | |
| **House arrest** | | | | |
| Yes | 25% (1) | 5.6% (1) | 9.1% (2) | -0.261 |
| No | 75% (3) | 94.4% (17) | 90.9% (20) | |
| Total | 100% (4) | 100% (18) | 100% (22) | |

Table 13. Crosstab: Type of condition by pre-*Antic* and post-*Antic* (JP Two). (n=28)

| **Condition** | **Pre-*Antic*** | **Post-*Antic*** | **Total** | **Tau-b** |
|---|---|---|---|---|
| **Surety** | | | | |
| Yes | 50% (5) | 27.8% (5) | 35.7% (10) | -0.222 |
| No | 50% (5) | 72.2% (13) | 64.3% (18) | |
| Total | 100% (10) | 100% (18) | 100% (28) | |
| **Possession** | | | | |
| Yes | 60% (6) | 38.9% (7) | 46.4% (13) | -0.203 |
| No | 40% (4) | 61.1% (11) | 53.6% (15) | |
| Total | 100% (10) | 100% (18) | 100% (28) | |
| **Curfew** | | | | |
| Yes | 20% (2) | 16.7% (3) | 17.9% (5) | -0.042 |
| No | 80% (8) | 83.3% (15) | 82.1% (23) | |
| Total | 100% (10) | 100% (18) | 100% (28) | |
| **Treatment** | | | | |
| Yes | 10% (1) | 0% (0) | 3.6% (1) | -0.258 |
| No | 90% (9) | 100% (18) | 96.4% (27) | |
| Total | 100% (10) | 100% (18) | 100% (28) | |
| **House arrest** | | | | |
| Yes | 10% (1) | 5.6% (1) | 7.1% (2) | -0.083 |
| No | 90% (9) | 94.4% (17) | 92.9% (26) | |
| Total | 100% (10) | 100% (18) | 100% (28) | |

Table 14. Crosstab: Type of condition by pre-*Antic* and post-*Antic* (JP Three). (n=18)

| **Condition** | **Pre-*Antic*** | **Post-*Antic*** | **Total** | **Tau-b** |
|---|---|---|---|---|
| **Surety** | | | | |
| Yes | 44.4% (4) | 44.4% (4) | 44.4% (8) | 0 |
| No | 55.6% (5) | 55.6% (5) | 55.6% (10) | |
| Total | 100% (9) | 100% (9) | 100% (18) | |
| **Possession** | | | | |
| Yes | 44.4% (4) | 33.3% (3) | 38.9% (7) | -0.114 |
| No | 55.6% (5) | 66.7% (6) | 61.1% (11) | |
| Total | 100% (9) | 100% (9) | 100% (18) | |
| **Curfew** | | | | |
| Yes | 22.2% (2) | 11.1% (1) | 16.7% (3) | -0.149 |
| No | 77.8% (7) | 88.9% (8) | 83.3% (15) | |
| Total | 100% (9) | 100% (9) | 100% (9) | |
| **Treatment** | | | | |
| Yes | 11.1% (1) | 0% (0) | 5.6% (1) | -0.243 |
| No | 88.9% (8) | 100% (9) | 94.4% (17) | |
| Total | 100% (9) | 100% (9) | 100% (18) | |
| **House arrest** | | | | |
| Yes | 0% (0) | 0% (0) | 0% (0) | No |
| No | 100% (9) | 100% (9) | 100% (18) | relationship |
| Total | 100% (9) | 100% (9) | 100% (18) | |

Tables 12, 13, and 14 show differences for the three JPs compared to the entire sample and each other. For JPs One and Two, 50% of the pre-*Antic* sample and 27.8% of the post-*Antic* sample have a surety condition, which is similar to the whole sample (50% to 25%). JP Three's surety condition remains consistent at 44.4% both pre- and post-bail reform. Further, there is a significant decrease in possession conditions pre- and post-*Antic* for JPs One and Two (75% to 38.9% and 60% to 38.9%), compared to the slight decrease in the full sample (38.1% to 35.9%). Possession conditions for JP Three drop from 44.4% to 33.3% which is weaker than JPs One and Two but stronger than the entire sample. Further, the percentage of the curfew condition decreases more for JPs One and Three (25% to 11.1% and 22.2% to 11.1%) than JP Two (20% to 16.7%). However, all three decreases are more significant than the entire sample's shift

(14.3% to 12.5%). Next, treatment conditions reduce for all three JPs more strongly than the entire sample. For JPs Two and Three, treatment conditions reduce to none after bail reform, while JP One still has one treatment condition post-*Antic*. The presence of a treatment condition for JP One is interesting because *R. v. Antic* states that bail conditions cannot seek to change a person's behaviour (2017, p. 511). Thus, JPs Two and Three follow that part of *R. v. Antic* more closely than JP One. Finally, house arrest decreases for JPs One and Two (25% to 5.6% and 10% to 5.6%), although JP One's decrease is stronger than the full sample while JP Two's is weaker than the entire sample. JP Three has no cases with a house arrest condition both pre- and post-*Antic*. Thus, there are differences in the reduction of onerous conditions for individual JPs, but there are also similarities.

In sum, the full sample shows a noticeable decrease in some onerous bail conditions (surety, house arrest, treatment), but a less significant decrease in others (house arrest, curfew). Unlike the full sample and the other two justices, JP One indicates a noticeable decrease after bail reform in the application of all onerous conditions. In contrast, JP Two has a more prominent decrease post-*Antic* in some conditions (surety, possession, and treatment) than others (curfew, house arrest). Further, for JP Three, there are no differences post-bail reform for surety and house arrest (no cases have house arrest), but there are noticeable decreases in possession, curfew, and treatment. While there are differences, all JPs follow the general trend of a reduction in onerous conditions after bail reform which reduces the likelihood of breaches and relatively follows *R. v. Antic*.

**JP Disagreement with Crown Requests**

The thematic analysis reveals that JPs sometimes disagree with Crown requests for conditions or types of release. The data show three ways JPs can disagree with Crowns. The JP

can disagree with the Crown and opt for either a less strict type of condition or a stricter one, and the JP can disagree with the Crown and decide on a less strict form of release (no disagreements result in a stricter form of release). The following tables show the amount and type of disagreement in pre- and post-*Antic* cases.

Table 15. Crosstab: Cases with JP disagreement with Crown requests for conditions or releases by pre-*Antic* and post-*Antic*. (N=129[5])

| **Disagreement** | **Pre-*Antic*** | **Post-*Antic*** | **Total** |
|---|---|---|---|
| **Yes** | 9.2% (6) | 32.8% (21) | 20.9% (27) |
| **No** | 90.8% (59) | 67.2% (43) | 79.1% (102) |
| **Total** | 100% (65) | 100% (64) | 100% (129) |

Tau-b = 0.290

Table 16. Crosstab: Result of JP disagreement with Crown requests for conditions or releases by pre-*Antic* and post-*Antic*. (n=27)[6]

| **Disagreement** | **Pre-*Antic*** | **Post-*Antic*** | **Total** | **Tau-b** |
|---|---|---|---|---|
| **Less strict condition** | | | | |
| Yes | 83.3% (5) | 71.4% (15) | 74.1% (21) | -0.113 |
| No | 16.7% (1) | 28.6% (6) | 25.9% (7) | |
| Total | 100% (6) | 100% (21) | 100% (27) | |
| **Stricter condition** | | | | |
| Yes | 16.7% (1) | 14.3% (3) | 14.8% (4) | -0.028 |
| No | 83.3% (5) | 85.7% (18) | 85.2% (23) | |
| Total | 100% (6) | 100% (21) | 100% (27) | |
| **Less strict release** | | | | |
| Yes | 0% (0) | 28.6% (6) | 22.2% (6) | 0.286 |
| No | 100% (6) | 71.4% (15) | 77.8% (21) | |
| Total | 100% (6) | 100% (21) | 100% (27) | |

Tables 15 and 16 show that there is a relationship between bail reform and JP disagreement with Crown requests for conditions and forms of release. Table 15 reveals that JPs disagree with Crown requests in 9.2% of pre-*Anti*c cases and that the percentage of disagreement increases to 32.8% of post-*Antic* cases (tau-b is moderately strong at 0.290). When bail reform

[5] Three cases are unclear about whether the JP disagrees with the Crown.
[6] While there are 27 cases with disagreement, some cases have more than one disagreement. Thus, there are 31 disagreements in total.

occurs, the prevalence of JP disagreement increases. Table 16 shows that 83.3% of pre-*Antic* disagreements and 71.4% of post-*Antic* disagreements result in a less strict condition (tau-b is moderate at -0.113). Next, 16.7% of pre-bail reform disagreements and 14.3% of post-bail reform disagreements lead to a stricter condition (tau-b is very weak at -0.028). Further, no pre-*Antic* disagreements are about a less strict release, while 28.6% of post-*Antic* disagreements result in a less strict release (tau-b is moderately strong at 0.286). Thus, bail reform leads to more judicial disagreements with Crown requests, and it changes the types of disagreements that occur. The shift shows that JPs offer more obvious independent consideration in the creation of bail orders and do more to ensure that bail orders follow the law on bail and *R. v. Antic*.

**Variations in JP Disagreement.**

The control variable filters for differences in JPs for the number and types of disagreements in pre- and post-*Antic* cases.

Table 17. JP disagreement with Crown requests for conditions or releases by pre-*Antic* and post-*Antic* (JP One). (n=22)

| **Disagreement** | **Pre-*Antic*** | **Post-*Antic*** | **Total** |
|---|---|---|---|
| **Yes** | 0% (0) | 11.1% (2) | 9% (2) |
| **No** | 100% (4) | 88.9% (16) | 91% (20) |
| **Total** | 100% (4) | 100% (18) | 100% (22) |

Tau-b = 0.149

Table 18. JP disagreement with Crown requests for conditions or releases by pre-*Antic* and post-*Antic* (JP Two). (n=28)

| **Disagreement** | **Pre-*Antic*** | **Post-*Antic*** | **Total** |
|---|---|---|---|
| **Yes** | 0% (0) | 22.2% (4) | 14.3% (4) |
| **No** | 100% (10) | 77.8% (14) | 85.7% (24) |
| **Total** | 100% (10) | 100% (18) | 100% (28) |

Tau-b = 0.304

Table 19. JP disagreement with Crown requests for conditions or releases by pre-*Antic* and post-*Antic* (JP Three). (n=18)

| **Disagreement** | **Pre-*Antic*** | **Post-*Antic*** | **Total** |
|---|---|---|---|
| **Yes** | 33.3% (3) | 100% (9) | 61.1% (11) |
| **No** | 66.7% (6) | 0% (0) | 38.9% (7) |
| **Total** | 100% (9) | 100% (9) | 100% (18) |

Tau-b = 0.707

Tables 18 and 19 show the prevalence of disagreements for JPs One and Two. Unlike the general sample, JPs One and Two do not have any disagreements with Crown requests in their pre-*Antic* cases. JP One disagrees with the Crown in 11.1% of her post-*Antic* cases (two out of eighteen, tau-b equals 0.149), and JP Two disagrees with the Crown in 22.2% of her post-bail reform cases (four out of eighteen, tau-b equals 0.304). JP One's two cases include two disagreements – one results in a less strict condition and one leads to a stricter condition. In contrast, JP Two's four cases include four disagreements that result in four less strict conditions. Thus, JP Two disagrees more than JP One, and her disagreements do not lead to a more onerous condition.

Table 20 shows that unlike the other JPs, JP Three disagrees in 22.2% (two out of nine) of his pre-*Antic* cases and 100% (all nine) of his post-*Antic* cases (tau-b is 0.707). JP Three's eleven cases with disagreement account for 40.7% of the total 27 cases with disagreement. His eleven cases include thirteen disagreements (three pre-bail reform and ten post-bail reform). Three pre-*Antic* and seven post-*Antic* disagreements result in a less strict condition, and three post-*Antic* disagreements lead to a less strict release. Thus, while the other two justices have no pre-*Antic* disagreements and only a few post-*Antic* disagreements about conditions, JP Three disagrees more than them in both pre-*Antic* and post-*Antic* cases, and his disagreements result in less strict conditions and releases. Disagreements that lead to less strict releases show that despite the consistency in forms of release for JP Three, bail reform does influence less onerous

forms of release in his cases. JPs Two and Three are less onerous than JP One, but JP Three is the least onerous as his substantial number of disagreements consistently result in more lenient bail releases for accused, which decreases the likelihood of breaches. In sum, bail reform leads to an increase in disagreements with Crown requests for conditions or forms of release for all three JPs which shows that JPs do more to ensure that accused people receive reasonable bail.

**JP Mentions of *R. v. Antic***

The thematic analysis reveals that JPs sometimes cite *R. v. Antic* when they justify their decisions for bail releases. The citation either involves references to the ladder principle (forms of release) or conditions or a statement that the release follows *Antic*.

Table 20. Number of cases with JP mentions of *R. v. Antic* in decisions for bail releases. (n=15)

| **Does JP mention *R. v. Antic*?** | **Amount** |
|---|---|
| **Yes** | 23.4% (15) |
| **No** | 76.6% (49) |
| **Total** | 100% (64) |

Table 21. Type of JP mentions of *R. v. Antic* in decisions for bail releases. (n=18)

| **What does *Antic* mention relate to?** | **Amount** |
|---|---|
| **Ladder principle (form of release)** | 33.3% (6) |
| **Conditions** | 33.3% (6) |
| **States that the release follows *Antic*** | 33.3% (6) |
| **Total** | 100% (18) |

Tables 20 and 21 show that JPs mention *R. v. Antic* in 23.4% (15) of the 64 post-*Antic* cases. JPs mention the Supreme Court case a total of eighteen times. Of those mentions, six relate to the ladder principle, six relate to conditions, and six references state that the bail release follows the outlines of *Antic*. JP B, who is not part of the study's three JPs, makes all six references which state that the release follows *Antic*. The prevalence of specific mentions of *R. v. Antic* shows that generally, JPs consider the court case when they make their decisions.

### Variations in JP Mentions of *R. v. Antic*.

There are differences in references in *R. v. Antic* when the data filters for JP One, JP Two, and JP Three. JP One only mentions the court case in 5.6% of her cases (one out of eighteen), which is once about the ladder principle. JP Two does not mention the court case in any of her eighteen decisions. In contrast, JP Three references *Antic* in 66.7% of his cases, or in six out of nine of them, and mentions the court case eight times. Two references relate to the ladder principle, and six relate to conditions. Like the disagreement analyses, JP Three is an outlier as he mentions *Antic* much more than JPs One and Two, and even refers to his decision-making process as the "*Antic* analysis." Eight (44.4%) of the eighteen mentions of *Antic* and six (40%) of the fifteen cases that mention *Antic* are due to JP Three. Thus, JP Three overtly considers *R. v. Antic* in his decision-making more than JPs One and Two which shows that the precedent influences how he formulates and justifies bail releases. JP B also significantly influences the results as he is responsible for six (33.3%) of the eighteen *Antic* mentions (all state that the release follows *Antic*) and six (40%) of the fifteen cases that mention *Antic*. While it appears that generally, JPs consider *R. v. Antic*, JP Three and JP B significantly influence the overall results (77.7% of the mentions and 80% of the cases).

## Conclusion

There is a relationship between bail reform and JP decision-making in the sample. Post-*Antic* cases include fewer surety releases and more undertaking releases, but there are some differences between JPs. Further, the average number of conditions for the sample and JPs One and Two increase post-*Antic*, although JP Three shows the opposite. The types of conditions for the whole sample and individual JPs also change after bail reform as onerous conditions generally decrease, although some decrease more than others. Bail reform also leads to more JP

disagreement with Crown requests for conditions and forms of release, although JP Three disagrees more than JPs One and Two. Finally, JPs cite *R. v. Antic* in their decisions, but JP Three cites the case much more than JPs One and Two. Bail reform leads to less strict forms of release and conditions, more JP disagreement, and JPs who cite *Antic*. The following section discusses the significance of the findings.

# 5. Discussion

## Introduction

The current study seeks to determine whether bail reform influences JP decision-making. The post-bail reform differences indicate that bail reform does indeed influence JP decision-making in the sample. More specifically, the results reveal four key findings of bail reform. First, the number of undertaking releases increases and the number of surety releases declines. Second, the average number of conditions per case increases after bail reform. Third, there is a decrease in onerous conditions, but the use of onerous conditions continues. Fourth, bail reform influences JPs to follow legislation and precedent in varying degrees. The study offers new insight into the influence of bail reform and how to improve the current bail system. This section discusses the study's significant findings and relates them to existing literature. It also considers policy implications.

## Forms of Release: The Rise of Undertakings and the Decline of Sureties

The study's results show that bail reform leads to less strict forms of release. Before bail reform, only 4.4% of the cases receive an undertaking release, and almost half (47.1%) get a surety release. While the percentage of surety releases is high, it is not as high as other studies, such as Myers's (2017) study of southern Ontario bail courts which finds that 76.1% of releases require a surety. In contrast, after bail reform, there is an increase of undertaking releases to 25% of the cases, and there is a decrease of surety releases to 25% of the cases. JPs One and Two follow a similar trend. The shift in the number of surety releases is much lower than the percentage of such releases in other southern Ontario cities before bail reform, so bail reform clearly impacts forms of release in the sample. Thus, bail reform influences JP decisions about forms of release and leads to less restrictive forms of release.

The results support the work of several authors who argue that there is an overuse of sureties in Ontario and that it indicates a severe flaw in the bail system (Myers, 2009; Wyant, 2016). The current study shows that the overuse of sureties is an issue in sample's pre-*Antic* cases. Before bail reform, JPs often approve Crown requests and do not ask the Crown attorneys to explain why a surety is necessary to address the risks of release. The overuse of sureties in the sample supports Myers's (2009) arguments that bail releases do not follow the ladder principle and often resort to the most severe form of release. It also supports Wyant's (2016) arguments that JPs either do not understand the law on bail or choose not to follow it and that they defer to Crown judgements too often. In contrast, obvious changes occur after *R. v. Antic* (2017) specifies that an undertaking is the default form of release and that court actors must consider and reject each step up the ladder before they consider a surety release. The pre-*Antic* overuse of sureties compared to the post-*Antic* increase in undertakings and decrease in sureties indicate that bail reform influences JPs to adhere to bail legislation, specifically the ladder principle. When JPs adhere to legislation, it leads to less restrictive forms of release, which decreases the likelihood of breaches and increases an accused's access to reasonable bail (Myers, 2009).

**Number of Conditions: A Post-*Antic* Increase**

Although there is an increase in less restrictive forms of release, the overall sample (3.98 to 4.37), JP One (4.75 to 4.78), and JP Two (3.20 to 4.39) display an increase in the average number of conditions per case after bail reform. The increase is an important observation because a high number of conditions can set an accused individual up to fail and lead to more bail breaches and time spent in pre-trial custody (Sprott and Myers, 2011). Although the numbers in the sample are high, with an average of 3.98 in pre-*Antic* cases and 4.37 in post-*Antic* cases, they are less than other studies. For example, Sprott and Myers's (2011) study of Toronto youth

finds an average of 6 conditions per case and Myers's (2017) study of southern Ontario bail courts finds an average of 7.8 conditions per case. The observation is also important because a lack of justification for an increase suggests that JPs may not uniformly follow *R. v. Antic*, which states that conditions are only necessary to the extent that they address the risks of release and ensure the accused person's release (*R. v. Antic*, 2017). However, JP Three is an outlier as his average number of conditions decrease after bail reform from 4.56 to 2.56 which reflects the legal model as he follows case law and legislation more closely than other JPs (Macfarlane, 2013). While the average in the current study is less than other studies, the increase shows that after bail reform, JPs are more onerous when it comes to the number of conditions, unlike forms of release, which increases the likelihood of breaches.

The increase in the average number of conditions suggests that despite bail reform's goal of less onerous conditions, new ways of applying onerous conditions emerge. For example, a pattern appears to emerge as a bail verification program condition on an own recognisance release replaces a surety release. Instead of the necessity to follow the rules of a surety, an accused person must follow the rules of a bail verification program and numerous other conditions. The study's sample only includes seven cases with a bail verification program condition, but some facts suggest that the condition may act as a substitute for a surety release, and the form of release has a very high average number of conditions. For example, a case from August 3, 2017 involves an accused who breaches his recognisance release. The release does not move a step up the ladder to a surety; instead, the Crown requests a bail verification program condition. JP A agrees with the request and all other Crown requests for a total of nine conditions on the release order. Another example is a case from August 8, 2017, which includes an accused woman who also breaches her recognisance bail order. The Crown states that they will not seek a

step up to a surety release or contest her release because of the availability of the bail verification program. JP A is also in complete agreement with the Crown requests, and the accused woman also receives a total of nine conditions. Each of the seven cases with a bail verification program condition includes a higher number of conditions than the 4.37 average for the post-*Antic* sample with an average of 6.57 conditions per case. Thus, it may be that the bail verification program and a higher number of conditions instead of a surety release perform an alternate type of an onerous conditional release. The alternative approach may ease JP and Crown concerns about the accused's risk on a lower form of release. Again, multiple conditions increase the likelihood of breaches.

**Types of Conditions: Onerous Conditions Decrease but Continue.**

There is a negative relationship between onerous bail conditions and bail reform, but there are notable exceptions to the trend. The study shows that a goal of *R. v. Antic* (2017) and bail reform, which is to decrease the use of onerous conditions, occurs post-bail reform in the sample. Conditions like a surety, curfew, or house arrest decrease as JPs enforce bail release orders that include less commonly onerous conditions. The decrease is a positive development because such conditions often criminalise ordinary behaviour and can lead to failure to comply charges because they are difficult to follow (Sprott and Myers, 2011). However, there are exceptions to the post-*Antic* decrease. The exceptions align with previous literature which argues that judicial decision-making can lead to the arbitrary bail orders based on different judicial interpretations of accused that go beyond legal factors (Wyant, 2016; Dhami, 2005; Wiseman, 2016; *R. v. Antic*, 2017). Arbitrary decision-making results in conditions that do not obviously relate to the accused's risk or their alleged crime (Myers and Dhillon, 2013). For example, some cases include a curfew condition that does not relate to the time of the alleged crime, and neither

the JP nor the Crown presents any justification for a curfew. A case from January 2, 2018 includes a man who breaches his officer in charge undertaking at 6:05 a.m. by contacting someone he is not supposed to and showing a fake weapon to intimidate people when he is not supposed to have any weapons. The charges are severe enough to warrant new conditions and steps up the ladder principle. However, the Crown attorney requests to add a curfew from 9 p.m. to 6 a.m. when the accused man's alleged offences do not occur in that timeframe. JP C does not ask the Crown attorney to justify the curfew condition and approves it along with a live-in surety condition, which is very strict. Thus, the post-bail reform decrease in onerous conditions is not uniform due to discretionary and arbitrary decision-making that goes beyond the legal facts of the case.

The decline of treatment conditions in the post-*Antic* sample reflects the literature and *R. v. Antic* (2017), which both criticise the use of treatment conditions (Sprott and Manson, 2017). Treatment is controversial for many reasons. For example, it criminalises non-criminal behaviour and leads to breaches (e.g., mental health treatment condition for an unrelated offence) (Sprott and Doob, 2010; Sprott and Myers, 2011). It is also gendered (Sprott and Doob, 2010). Further, the bail stage is too early to determine whether treatment is appropriate because the court knows little about the accused person (Sprott and Myers, 2011). *R. v. Antic* states that JPs cannot impose terms of release to change an accused person's behaviour; in other words, treatment is not an acceptable condition for bail release orders (2017, p. 511). Bail reform influences the decline of treatment conditions in the sample as JPs follow bail legislation.

However, the absence of the elimination of treatment conditions means that JPs still do not uniformly follow case law. This finding reflects the literature which argues that judicial actors make arbitrary assumptions and decisions about the accused's risk that go beyond the facts

of the case (Wyant, 2016; Dhami, 2005; Wiseman, 2016; *R. v. Antic*, 2017; Macfarlane, 2013). Four post-*Antic* cases include a treatment condition, so the use of treatment conditions persists, even though the Supreme Court considers it inappropriate. The persistence reflects the court's attempts to manage an accused person's risk through onerous conditions (Myers, 2013). Further, JPs' desire to 'sneak around' the *R. v. Antic* rule about treatment so they do not overtly violate precedent reflects how JPs seek to protect their legitimacy and reputation (Myers, 2009; Wiseman, 2016). For example, in three of the four post-*Antic* cases with a treatment condition, the JPs do not directly apply the condition; instead, they require treatment as directed or required by the bail verification program. Further, a surety can still imply that they will make rules about treatment. This occurs in a case with an accused man with substance use issues who spends months in remand before the surety agrees to bail him out if he follows strict rules that include treatment. Thus, the JPs do not directly conflict with *R. v Antic* as they assign the violation of precedent to the bail verification program or defer to the surety. In the fourth post-bail reform case with a treatment condition, JP One directly conflicts with case law as she requires that the accused man attend the Canadian Mental Health Association (CMHA). His charges include theft under $5000, breach of recognisance, and failure to attend court, and he admits that he has mental health problems due to a head injury. The CMHA condition does not appear to relate to his charges, and it violates *Antic*, but no court actors object to it, even though the defence in a previous case objects to the same condition and states that it violates *Antic*. Thus, not all JPs follow the legal model as they fail to follow *R. v. Antic's* outlines and reveal their preferences to impose treatment as a risk management technique (Macfarlane, 2013). Despite bail reform, onerous conditions that violate *Antic* and do not clearly relate to the accused's risks or their alleged crime continue.

**Disagreement: Bail Reform Influences JPs to Follow Legislation (In Varying Degrees)**

JPs should ensure that bail release orders follow bail legislation and case law and do not set an accused individual up to fail, but JPs do not consistently do this. When Crown attorneys request conditions or forms of release that violate case law or bail legislation, JPs must intervene to shut down the requests. However, the pre-*Antic* literature shows that JPs tend to defer to Crown requests for bail release orders without any form of disagreement, even when the requests fail to follow bail legislation and case law or are unrealistic because an accused person cannot abide by them (Wyant, 2016). The pre-*Antic* sample also reflects the lack of initiative JPs take to ensure adequate bail release orders because JPs rarely disagree with Crown attorneys or ask them to justify their requests. Only 9.8% of pre-*Antic* cases include a form of JP disagreement which means that JPs rarely offer obvious independent consideration in bail court. To put it simply, when a JP consistently defers to the Crown, which is often the case in pre-*Antic* data, they do not follow the law on bail.

Post-*Antic* data shows that bail reform influences JPs to disagree with Crown requests more often to ensure that bail orders adhere to bail legislation and case law and do not set accused individuals up to fail. In the sample, the amount of JP disagreement with Crown requests increases post-bail from 9.2% to 32.8% as JPs challenge Crown attorneys to justify the necessity of conditions or forms of release. The increase shows that JPs assert their authority in the creation of bail orders to ensure access to reasonable bail, which contrasts with the pre-*Antic* pattern of deference to Crown attorneys (Wyant, 2016). As JPs challenge Crown attorneys more often, they also reject their explanations more often, which shows an increased amount of independent consideration by JPs. In turn, the rejection influences a drop in onerous conditions, so more conditions directly relate to the accused's risk and their alleged offence, as legislation

and case law require (e.g., *R. v. Antic*, 2017). It also influences a decrease in surety releases (the highest form of release) which means that more releases follow the ladder principle (Myers, 2009). Overall, JPs do more to ensure that bail releases do not deviate from legislation and case law which reduces the likelihood of breaches because of reasonable bail orders.

It is vital to recognise the outliers as some JPs appear to follow legislation more often than others, or they disagree with Crown requests more often and display more clear examples that they follow case law. As argued above, disagreement can ensure that bail releases follow bail legislation and case law. Further, specific references to *R. v. Antic* and a lack of decisions that contradict *Antic* strongly indicate that JPs adhere to case law. JP Three is an example of a JP who appears to follow the law on bail consistently. He mentions *R. v. Antic* in six out of nine of his post-bail reform cases and disagrees in every case, which is much higher than JP One and JP Two. He also does not order any treatment conditions, unlike JP One. Further, his average number of post-*Antic* bail conditions decreases, unlike the whole sample, JP One, and JP Two, which suggests a higher likelihood that more of JP Three's conditions directly relate to the accused's risk and their alleged crime. However, JP Three's behaviour does not reflect other JP behaviour. The study's results support the literature that finds a lack of uniformity in judicial behaviour (Macfarlane, 2013; Dhami, 2005; Wiseman, 2016; *R. v. Antic*, 2017). The implication is that bail reform only influences JPs to follow the law on bail in varying degrees. Despite the criticism in *R. v. Antic* (2017) about the variation in judicial behaviour in the bail process and the encouragement of a more consistent approach to bail, extreme variation continues. Since the study's results show that JPs continue to follow legislation and case law on an inconsistent basis, bail reform has not done enough to create more uniform approaches to bail.

**Theoretical Implications**

The findings suggest that risk influences the creation of bail release orders and that its influence decreases because of bail reform, with some exceptions. The results also suggest that the law influences JP behaviour, but other factors do as well, such as risk.

Pre-bail reform data shows that JPs are less likely to challenge themselves and Crown attorneys when they react to an accused person's risk and their alleged crime in an onerous way. An onerous response to risk makes JPs deviate from bail legislation and become reluctant to challenge Crown attorneys when they request onerous conditions or strict forms of release (Myers, 2009; Wyant, 2016). The pre-*Antic* sample shows that Crown attorneys often present bail plans to JPs that skip steps in the ladder principle and include conditions that do not clearly relate to an accused individual's risk or their alleged crime. Like Wyant's (2016) study, it is uncommon for JPs to assert their authority and question Crown attorneys or disagree with them. In turn, strict forms of release that violate bail legislation and case law often occur (Myers, 2009; Schumann, 2013). Since JPs do not follow bail legislation, other factors must influence their behaviour, such as an over-responsiveness to risk. JPs in the sample avoid occupational and reputational risks as they order strict releases in an attempt to prevent the likelihood of an accused person offending while on bail (Myers, 2009). The use of strict releases also indicates that they use onerous risk management techniques like extensive surveillance and isolation (e.g., surety, curfew, house arrest, and treatment) to avoid the possible consequences if a person offends while on bail (Power, 2004; Douglas, 1992; Wyant, 2016; Myers, 2009). Pre-*Antic* data shows that the influence of risk aversion and risk management creates bail orders that are onerous and deviate from case law and legislation.

In contrast, the post-*Antic* sample shows bail reform decreases the extent that JPs consider accused individuals 'risky'. The active participation of JPs in the formulation of a bail release plan can control an onerous response to risk if JPs act as a check on onerous Crown requests (Wyant, 2016). When Crown attorneys present bail plans to JPs that violate the ladder principle or include questionable conditions, JPs are more likely to question or reject them to ensure that bail orders follow case law and legislation. Thus, bail reform influences JPs to apply bail release orders that have less to do with their concerns about occupational and reputational risks and more to do with their concerns about the accused's risks on the primary, secondary, and tertiary grounds. It also influences JPs to mitigate the prevalence of an onerous response to risk by both JPs and Crowns. JPs are more likely to carefully and critically consider the risk management techniques of bail conditions because of their obligation to follow precedent (*R. v. Antic*, 2017). As a result, they are less likely to apply onerous conditions. The influence of risk aversion and risk management decreases because of bail reform.

However, bail reform does not eliminate the influence of risk for bail conditions because the average number of bail conditions increases after bail reform. The application of bail conditions is inherently a risk management technique, and more conditions mean more ways to manage an accused individual's risk. Bail conditions are a form of risk management because they intend to reduce the risk that an accused person will not show up to their court date, will commit a crime, or will reduce the public's confidence in the administration of justice (*Criminal Code*, s. 515(10)). Although the severity of the forms of release decreases, the post-*Antic* increase in the average number of bail conditions means that JPs use a risk management technique (releases with a high number of conditions) more often than before to manage an accused individual's risk. Some JPs may be mitigating the perceived increase in the risk of a

lower form of release instead of a higher one by adding more conditions to manage the accused's risk. The lingering influence of risk management in post-*Antic* cases aligns with the literature that argues that JPs subjectively determine an accused person's risk and subjectively apply risk management techniques (Bramhall and Hudson, 2007; Hannah-Moffat, 2004; Dhami, 2005; Sprott and Manson, 2017; Wyant, 2016; *R. v. Antic*, 2017). Thus, the way risk management and risk-aversion play out changes, but bail reform does not erase them.

The presence of treatment conditions in the post-*Antic* sample also indicates that subjective applications of risk management techniques continue to influence JP decisions about bail. Treatment conditions are useful risk management techniques for JPs because they make it the accused person's responsibility to address their (apparent) mental health or substance use concerns (Hannah-Moffat and Maurutto, 2012). If an accused person offends while on bail and the offence appears to relate to mental health or substance use issues, it is the individual's fault, not the JP's. In turn, the responsibilisation of the accused person isolates JPs from the occupational and reputational risks that come with criticism of a release order because the JP takes steps to 'prevent' the offence with a treatment condition (Myers, 2009). Bail reform seeks to reduce the subjective application of treatment conditions as a form of risk management. For example, *R. v. Antic* (2017) states that the controversial treatment condition is unacceptable at the bail stage of the court progress. A treatment condition is an extremely subjective risk management technique because JPs know little about the accused person at the bail stage, so it should not occur in post-*Antic* cases (Sprott and Myers, 2011). However, some JPs approve treatment conditions for accused people with mental health or substance use issues after case law declares it innapropriate, so subjective risk management continues.

Risk management does not uniformly influence JPs as JP Three aligns more with the legal model of judicial behaviour. JP Three appears to apply the law more often and more objectively than others and makes statements that show that precedent binds him (Macfarlane, 2013). He is the only justice whose average number of conditions per case drops after bail reform, and it decreases substantially. He also disagrees in every post-*Antic* case and often mentions *R. v. Antic*. Further, since the forms of release are consistent pre- and post-*Antic*, but JP Three often decides on a lower form of release than the Crown requests, he also does not add a higher number of conditions to mitigate the risk concerns of lower forms of release. The decrease in conditions and the increase in disagreements suggests that JP Three manages risk in a more objective way than others as he follows precedent and legislation. For him, the legal model mitigates the influence of risk management on conditions and forms of release and encourages disagreement as he strictly follows precedent (*R. v. Antic*) and rules (bail legislation) (Macfarlane, 2013).

**Policy Implications: Past Bail Reform Is Not Enough to Fix the Current Bail System**

Two main policy implications arise from the study. The first is that bail reform needs to do more to ensure that releases are the least onerous as possible regarding types of conditions and the number of them. The second is that bail reform must take action to create a more uniform approach to bail with reasonable releases that follow legal rules.

The decrease in onerous conditions post-bail reform might positively influence an accused person's ability to comply with their bail release and cost the state less money. Pre-bail reform research criticises the use of conditional bail, especially when it includes onerous conditions like surety, treatment, curfew, and house arrest which often lead to breaches (Myers, 2009; Sprott and Myers, 2011; Sprott and Doob, 2010; Wyant, 2016; Porter and Calverley,

2011). Such conditions are controversial because they criminalise normal behaviour and create failure to comply charges (Sprott and Myers, 2011). For example, the surety condition requires that an accused person follows the rules of their surety. Thus, if an accused individual disobeys their surety's rule, even if the rule has nothing to do with criminal behaviour, they may receive a failure to comply charge. However, when JPs only apply onerous conditions when it is necessary, release orders are easier to follow and align with bail legislation because they relate to the risks and circumstances of the accused person and their alleged crime (*R. v. Antic*, 2017). Easier to follow releases may also result in less failure to comply charges because they do not criminalise normal behaviour that easily creates breaches (Sprott and Myers, 2011). The current study shows that bail reform decreases controversial conditions which often criminalise ordinary behaviour, but some questionable conditions continue. Thus, the policy implication is that bail reform can reduce onerous conditions, which may decrease failure to comply charges, but it needs to do more to ensure that JPs only apply such conditions when it is necessary. Fewer failure to comply charges means less backlog in the courts and less time spent in remand. In turn, that means the state spends less money on remand facilities and court backlog and can divert the funds to other meaningful areas. A decrease in onerous conditions can ensure that bail release orders are easier to comply with and the state spends less money on the bail system.

The decrease in onerous conditions does not align with the increase in the average number of conditions per case, so bail reform needs to do more to ensure that the application of conditions follows case law and bail legislation, which might create fewer failure to comply charges. Although the current study did not run specific analyses to determine whether conditions clearly relate to the accused's risk and their alleged crime, there are obvious examples when the conditions do not do so, such as treatment conditions. An increase in conditions can do

the opposite of what the above paragraph mentions – it can set an individual up to fail as they are bound by multiple conditions that are more difficult to follow (Sprott, 2015). The more conditions an accused individual receives, the more likely it is that they will breach their bail order and receive a failure to comply charge (Sprott, 2015). In turn, as mentioned above, the accused person may spend time on remand, and the court backlog will create dysfunctionality in the courts, which costs the state more money. Thus, the state has an interest in ensuring that JPs apply conditions in a way that follows case law which requires reasonable conditions because the state can save money and divert funds elsewhere (*R. v. Morales*, 1992; *R. v. Antic*, 2017). The state also has an interest in protecting its citizens. Failure to comply charges lead to reverse onus situations that threaten the presumption of innocence and put accused people into more 'risky' categories (Schumann, 2013; Sprott, 2012). Experience in remand facilities is also usually isolating and harmful for accused individuals (John Howard Society, 2007; Schumann, 2013). JPs need more training, oversight, or audits to ensure that they apply conditions in a reasonable way that follows legal rules. In turn, JPs might apply fewer conditions or ones that are more reasonable, which might lead to less failure to comply charges, protect accused peoples' rights, and save the state money.

The significant variation in judicial behaviour means that bail reform needs to do more to ensure a more uniform application of case law and bail legislation in bail court. In the sample, some JPs take advantage of judicial discretion because they do not do enough to ensure that bail releases follow legal rules. The finding is similar to other studies that report a considerable variation in judicial decision-making (Dhami, 2005). Since higher perceptions of risk lead to more punitive decisions, JPs must exercise their discretion according to legislation and precedent. Bail reform can take multiple steps to encourage a reduction of risk aversion and risk

management, and in turn, create more objective and uniform bail release orders for accused people. For example, policies that support a culture of acceptance for appropriate exercises of discretion may reduce the tendency of JPs to apply onerous conditions. The organisational culture of the court, including JPs' colleagues and superiors, should openly and consistently endorse reasonable discretion that follows legal rules, regardless of whether an accused person offends while on bail (Wyant, 2016). If JPs exercise suitable judgment that they can defend based on legal rules, and their colleagues and superiors support their decisions, they may feel less pressured to resort to onerous releases. In turn, a more consistent approach to bail releases may occur. Further, policies that better equip JPs to follow legislation and case law and challenge Crown attorney requests for onerous release may lead to a more uniform approach (Wyant, 2016). More tests or audits on JPs' knowledge of bail and how they assert their authority in the courtroom, along with real consequences when problems arise, may influence more consistency. JPs also do not need law degrees even though they are responsible for applying the law, and some suggest that the lack of requirement leads to less through knowledge about legal rules (Wyant, 2016). Thus, a requirement that JPs have law degrees may also ensure that they follow legal rules. The suggestions may lead to more uniform approaches and reasonable bail releases. When JPs must prove that they follow legal rules, less variation in judicial behaviour and decision-making might follow.

## Conclusion

Consistent with the existing research on bail, the study finds that pre-bail reform, risk influences JPs to violate the ladder principle, apply onerous conditions, and defer to Crown judgments. After bail reform, the influence of risk decreases as JPs follow the law on bail more consistently, although some do so more than others. However, bail reform does not eliminate

JPs' application of onerous releases as conditions that do not clearly relate to the accused's risk or their alleged crime continue. Thus, the policy implications are that more needs to be done to ensure that JPs follow a uniform approach to bail that increases access to reasonable bail for accused individuals and reduces the likelihood of breaches. Reasonable bail reduces economic strain on the state and protects rights.

# 6. Concluding Remarks

## Limitations and Future Research

The study concludes by discussing its key limitations and suggesting how the limitations create avenues for future research on the relationship between bail reform and JP decisions about bail. First, while the study can draw conclusions about bail reform for its sample, the lack of a random sample means that the results are not generalisable beyond the sample. Further, the lack of comparative analyses between various bail courts means that the study does not account for differences across jurisdictions. Other studies show that courthouses in various cities have differences in research outcomes (Myers, 2017). Future studies should do two things. First, they should use a random sample. The collection of a random sample is possible if researchers request bail records from court clerks and choose random cases from the sample. Second, they should collect data from multiple courthouses in Ontario for comparative analyses. Using a random sample and comparing different jurisdictions leads to stronger conclusions.

The study also uses a small sample which makes it difficult to control for variations in judicial behaviour. Only three justices have enough cases to make meaningful analyses and conclusions possible. While it is clear that JP Three's behaviour and decision-making varies considerably from the other two justices and the sample in general, it is difficult to find more nuanced variations in judicial behaviour due to the small sample size. For example, an interesting factor that may influence behaviour and decision-making might be a JP's gender or race. Unfortunately, the study's sample is too small to consider gender or race. Future studies should use larger sample sizes that include multiple JPs.

Further, the study focuses entirely on judicial behaviour and decision-making, which might overstate the role of JPs in determining bail releases, and the study only focuses on bail

releases. Although JPs have more authority than Crown and defence attorneys, and thus have the final say in bail outcomes, the creation of a bail plan is a cooperative process that involves many actors. It involves accused individuals, police officers, potential sureties, community supports (e.g., available housing), bail verification programs, Crown and defence attorneys, and JPs. Bail proposals are based on how everyone (except the JP) interprets the accused individual's risk, and the speed and functionality of bail hearings largely depend on non-judicial court actors. Thus, other actors are relevant, and future studies should consider the involvement of other actors in determining bail releases. The study also only includes successful releases the Crown consents to because the study needs to focus on a limited research question due to time constraints and resource availability. Future research should look at judicial decision-making and other factors that contribute to bail outcomes for contested hearings. Studies that consider the input of a variety of court actors and all types of bail hearings can draw more conclusions about the impact of bail reform.

The study also uses a simple version of statistical analyses, and future studies should use more in-depth analyses. There are significant factors that may influence the results which the study does not consider. For example, the type of crime the accused individual allegedly commits and their criminal record influences decisions about the accused person's risk. In turn, the calculation of risk influences the bail proposal and the final decision about the release order. A more severe crime often warrants a more onerous bail plan with a higher form of release and more conditions, so controlling for the charges and criminal background may impact the study's results. More advanced forms of statistical analyses can control for multiple variables and determine whether factors such as the accused's criminal history influence the impact of bail reform. Thus, future studies should use control variables and advanced statistical techniques.

Finally, the study is missing the perspectives of court actors and accused people. The study's results may not align with what court actors or accused individuals believe about the bail process and what they think happens in bail court. It is vital to consider the insider perspectives of the people involved in the system. Such individuals offer invaluable insights because their experiences include direct involvement in the bail system through employment or alleged criminal offences. While some literature exists that involves the voices of judicial actors, accused peoples' voices are noticeably absent. Future research should interview court actors and accused individuals to measure their perceptions of and reactions to the bail process and bail reform. Studies should use qualitative interview data to determine whether the empirical trends about bail court in the literature reflect the interpretations of people directly involved with bail court.

## Conclusion

The current study fills a gap in the literature about the impact of bail reform on JP decision-making. The results lead to the conclusion that bail reform significantly impacts the bail process and JP behaviour and decision-making in the sample. However, flaws of the current bail system continue, and court actors, political actors, and the media are talking about them. On March 29, 2018, the Liberal government introduced *Bill C-75* into its First Reading which seeks to reduce the onerous releases that continue after bail reform. Justice Minister Jody Wilson-Raybould wants a culture shift to make the bail system more fair, modern, and efficient (Harris, 2018). Thus, *Bill C-75* incorporates the principle of judicial restraint into legislation as JPs must consider release "at the earliest reasonable opportunity and on the least onerous grounds" (*Bill C-75*, 2018). It also directly addresses the problem of breaches as it offers new ways to address them: through a warning, by varying the bail conditions, or by revoking bail (*Bill C-75*, 2018). Further, the state directly addresses social issues as it asks JPs to consider how marginalisation

(e.g., homelessness, Indigenous identity) affects peoples' ability to follow bail orders (*Bill C-75*, 2018). These changes may decrease onerous responses to risk and the revolving door. They may result in less onerous releases, fewer failure to comply charges, and fewer accused who go back to remand. While the legal community both applauds and criticises *Bill C-75*, it is a step in the right direction (Fine, 2018). After all, accused people have constitutional rights to reasonable bail and the presumption of innocence, and onerous approaches to bail violate their rights and create a slow and expensive bail system.

## 7. References

Beck, U. (1992). *Risk society: towards a new modernity*. London: SAGE Publications, Inc.

*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*. (2018). First Reading March 29, 2018, 42nd Parliament, 1st Session.

Bramhall, G., and Hudson, B. (2007). Criminal justice and 'risky' masculinities. In K. Hannah-Moffat and P. O'Malley (Ed.), *Gendered Risks*, 197-225. New York: Routledge-Cavendish.

Braun, V., and Clarke, V. (2006). Using thematic analysis in psychology. *Qualitative Research in Psychology 3*(1), 77-101.

Campbell, A. (2005). Keeping the 'lady' safe: The regulation of femininity through crime prevention literature. *Critical Criminology 13*(2), 119-140. doi:10.1007/s10612-005-2390-z.

Correctional Services Program. (2017). *Trends in the use of remand in Canada, 2004/2005 to 2014/2015.* (No. 85-002-X). Ottawa, Ontario: Correctional Services Program.

*Criminal Code*, R.S.C. 1985, c.46, s.503.

*Criminal Code*, R.S.C. 1985, c.46, s.515.

Dabney, D. A., Page, J., and Topalli, V. (2017). American bail and the tinting of criminal justice. *The Howard Journal of Crime and Criminal Justice 0*(0), 1-22. doi:10.1111/hojo.12212.

Dhami, M. K. (2005). From discretion to disagreement: Explaining disparities in judges' pretrial decisions. *Behavioral Sciences & the Law 23(*3), 367-386. doi:10.1002/bsl.619.

Douglas, M. (1992). *Risk and blame: Essays in cultural theory*. London: Routledge.

Fine, S. (2018, March 29). Liberals introduce legislation to speed up Canada's criminal justice system. *The Globe and Mail*.

Hannah-Moffat, K. (1999). Moral agent or actuarial subject: Risk and Canadian women's imprisonment. *Theoretical Criminology 3*(1), 71-94.

Hannah-Moffat, K. (2004). Losing ground: Gendered knowledges, parole risk, and responsibility. *Social Politics 11*(3), 363-385.

Hannah-Moffat, K. (2005). Criminogenic needs and the transformative risk subject: Hybridizations of risk/need in penality. *Punishment & Society 7*(1), 29-51.

Hannah-Moffat, K., and Maurutto, P. (2012). Shifting and targeted forms of penal governance: Bail, punishment and specialized courts. *Theoretical Criminology 16*(2), 201-219. doi:10.1177/1362480612443302.

Harris, K. (2018, March 29). Liberals propose major criminal justice changes to unclog Canada's courts. *CBC News*.

John Howard Society of Ontario. (2007). *Remand in Ontario: Second Report to the Board*. Committee on Prison Conditions in Ontario, 1-14.

Kellough, G., and Wortley, S. (2002). Remand for plea: Bail decisions and plea bargaining as commensurate decisions. *British Journal of Criminology 42*(1), 186-210. doi:10.1093/bjc/42.1.186.

Macfarlane, E. (2009). *The Supreme Court of Canada and the judicial role: An historical institutionalist account* (Doctoral dissertation). Retrieved from Collections Canada.

Macfarlane, E. (2013). *Governing from the bench: The Supreme Court of Canada and the judicial role*. Vancouver: University of British Columbia Press.

McLellan, M. (2010). Bail and the diminishing presumption of innocence. *Canadian Criminal Law Review 15*(1), 57-74.

Ministry of the Attorney General. (2017). *Bail directive – Judicial interim release*. Government of Ontario.

Moore, D., and Lyons, T. (2007). Sentenced to treatment/sentenced to harm: Women, risk and the drug treatment courts. In K. Hannah-Moffat and P. O'Malley (Ed.), *Gendered risks*, 283-318. New York: Routledge-Cavendish.

Myers, N. M. (2009). Shifting risk: Bail and the use of sureties. *Current Issues in Criminal Justice 21*(1), 127-147.

Myers, N. M. (2013). *Creating criminality: The intensification of institutional risk aversion strategies and the decline of the bail process* (Doctoral dissertation). Retrieved from TSpace.

Myers, N. M., and Dhillon, S. (2013). The criminal offence of entering any shoppers drug mart in Ontario: Criminalizing ordinary behaviour with youth bail conditions. *Canadian Journal of Criminology and Criminal Justice 55*(2), 187-214. doi:10.3138/cjccj.2011.E.07.

Myers, N. M. (2015). Who said anything about justice? Bail court and the culture of adjournment. *Canadian Journal of Law and Society 30*(1), 127-146. doi:10.1017/cls.2014.28.

Myers, N. M. (2017). Eroding the presumption of innocence: Pre-trial detention and the use of conditional release on bail. *The British Journal of Criminology 57*(3), 664-683. doi:10.1093/bjc/azw002.

Nowell, L. S., Norris, J. M., White, D. E., and Moules, N. J. (2017). Thematic analysis: striving to meet the trustworthiness criteria. *International Journal of Qualitative Methods 16*(1), 1-13. doi:10.1177/1609406917733847.

O'Malley, P. (2010). *Crime and risk*. London: SAGE Publications Ltd.

Power, M. (2004). *The risk management of everything: Rethinking the politics of uncertainty*. London: Demos.

Reitano, J. (2017). *Adult correctional statistics in Canada, 2015/2016*. (No. 85-002-X). Ottawa, Ontario: Reitano.

*R. v. Antic*, [2017] 1 S.C.R 509.

*R. v. Hall*, [2002] 3 S.C.R. 309.

*R. v. Morales*, [1992] 3 S.C.R. 711.

*R. v. Oakes*, [1986] 1 S.C.R. 103.

*R. v. Pearson*, [1992] 3 S.C.R. 665.

Schumann, R. (2013). *Gendered bail?: Analyzing bail outcomes from an Ontario courthouse* (Master's thesis). Retrieved from The Atrium.

Sprott, J. B., and Doob, A. N. (2010). Gendered treatment: Girls and treamtent orders in bail court. *Canadian Journal of Criminology and Criminal Justice 52*(4), 427-441.

Sprott, J. B., and Myers, N. M. (2011). Set up to fail: the unintended consequences of multiple bail conditions. *Canadian Journal of Criminology and Criminal Justice 53*(4), 404-423.

Sprott, J. B. (2015). How court officials "create" youth crime: The use and consequences of bail conditions. *Canadian Criminal Law Review 19*(1), 27-39.

Sprott, J. B., and Manson, A. (2017). YCJA bail conditions: "Treating" girls and boys differently. *Canadian Criminal Law Review 22*(1), 77-94.

Walklate, S. (2007). Risk and criminal victimization: exploring the fear of crime. In K. Hannah-Moffat and P. O'Malley (Ed.), *Gendered Risks*, 165-182. New York: Routledge-Cavendish.

Webster, C. M., and Doob, A. N. (2015). US punitiveness 'Canadian style'? Cultural values and Canadian punishment policy. *Punishment & Society 17*(3), 299-321. doi:10.1177/1462474515590893

Williams, M. R. (2003). The effect of pretrial detention on imprisonment decisions. *Criminal Justice Review 28*(2), 299-316. doi:10.1177/073401680302800206.

Wiseman, S. E. (2016). Fixing bail. *The George Washington Law Review 84*(2), 417-479.

Wyant, R. E. (2016). *Bail and Remand in Ontario*. Ontario, Canada: Ontario Ministry of the Attorney General.

# 8. Appendix

## Bail Court Checklist

Location:

Date: _____
Start time: _____ End time: _____
Court type: Regular Contested

**JUSTICE OF THE PEACE (JP) CHARACTERISTICS**
JP Name: _____
JP Gender: Male Female
JP Race/Ethnicity: _____

**ACCUSED CHARACTERISTICS**
Accused Name: _____
Accused Gender: Male Female
Accused Age (record DOB if possible): _____
Race/Ethnicity: _____

**LEGAL FACTORS**
Charge (s): _____
Severity of offense: High Medium Low
Criminal Record?: Yes No
If yes, state/describe criminal background:
_____
_____
_____
_____
_____
Has the accused been granted bail previously?: Yes No
If yes, what were the conditions/ any violations?:
_____
_____
_____
_____
_____
_____
Employment status: Employed (full time) Employed (part time) Unemployed Other:
_____
_____
_____
_____

Residence: Fixed address (Owned/Rented) Shelter Live with friends/family Other:

_____

_____

_____

Type of legal representation: _____

Drug/alcohol dependency?: Yes No

If yes, explain:

_____

_____

_____

_____

_____

Mental health issues?: Yes No

If yes, what?:

_____

_____

_____

Describe physical appearance:

_____

_____

_____

_____

Relationship status: Single Married Common Law Divorced Other:

_____

_____

_____

Children?: Yes No Pregnant

If yes, how many:_____

If yes, do they have custody of their children?:

_____

_____

_____

_____

_____

What is the bail set at (monetary amount)?: _____

Surety available?: Yes No

If yes, who is the surety?:

_____

_____

_____

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_____

_____

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_____

If no, why not?:

_____
_____
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**CROWN'S POSITION**

Consent to release? Yes No
Contested? Yes No
Reverse Onus?: Yes No
Crown Submission:

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Defense submission:

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**BAIL DECISION**

Granted bail?: Yes No

If yes, what are the conditions?: (how closely does the decision follow the Crown's position?)

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If no, what are the reasons given:

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**ADJOURNMENTS AND SUBSEQUENT HEARINGS**

Adjournment requested?: Yes No

Who requested adjournment? _____

Why was adjournment requested?

_____
_____

Please comment on any signs of efficiency/inefficiency in this bail hearing (if applicable):

**ADDITIONAL NOTES:**