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**Remanding Women: A Qualitative Study Of  
Magistrates' Decisions in Contested Remand Hearings  
In Three Metropolitan Boroughs**

**A thesis submitted to the University of London for the Degree of  
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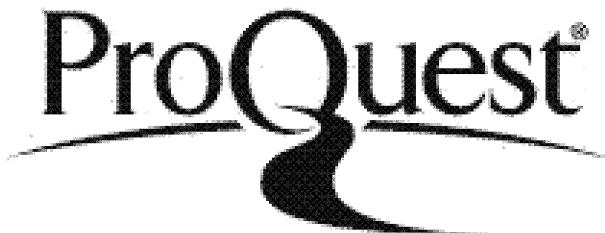
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# Abstract

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## **Remanding Women: A Qualitative Study Of Magistrates' Decisions In Contested Remand Hearings In Three Metropolitan Boroughs**

This thesis examines magistrates' decision-making in contested remand hearings in three boroughs of a large English city. The remand hearings for sixty four women (103 separate court appearances) who were 'at risk' of a custodial remand were observed.

The first section describes how the wide scope for discretionary practice and the weak regulatory structures in the remand system allowed the legal framework to be interpreted in different ways. It is argued that remand decision making was influenced by the socio-political and organisational contexts within which it took place. These contexts contributed to actors' understandings of what custodial remands were 'for', thus affecting remand outcomes.

In the second section it is argued that actors employed different models of remand to reach decisions, depending on which of the contradictory goals (legal and extra-legal) of the remand system they were attempting to satisfy. Information was filtered and bail law was selectively applied depending on how magistrates' defined individual cases. Gender considerations were found to significantly feature in magistrates' decisions when cases were on the 'cusp' between conditional bail and custodial remand.

The final section examines how the remand models were translated into practice in the social world of the magistrates' court. The goals of the three models were observed to fit into, and compete with, the variety of roles and responsibilities that court actors had; the application of bail law was found to be a social process as well as a legal one. Lastly, structural influences, such as 'court culture' and patterns of deference, on courts' social processes are explored.

The thesis concludes that the majority of remand decisions are based on the seriousness of the offence but magistrates are influenced by personal characteristics, such as gender, in 'cusp' cases. It suggests a model of remand decision making for women in which different types of cases and defendants are processed according to different rationales.

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## Acronyms

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BIS	Bail Information Scheme
CPS	Crown Prosecution Service
CRO	Community Rehabilitation Order
DTTO	Drug Treatment and Testing Order
HRA	Human Rights Act
PSR	Presentence Report

# Chapter One

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## Introduction

We saw that the numbers of women remanded in custody have been increasing, that they made up a quarter of the female prison population, and yet only 30 per cent eventually receive a custodial sentence. Considering the distress and disruption caused by imprisonment for the women and the difficulties which this creates for the management of prison regimes, this would appear to be an obvious first place to seek a reduction in the female prison population. *Yet we know all too little about how and why courts use remand.* (Wedderburn 2000:51 emphasis added)

The remand decision throws into relief one of the most fundamental conflicts in the criminal process: balancing the rights of the individual not to be imprisoned prior to conviction and/or sentence against the requirement to protect the public from crime. It appears that this balance may be shifting for some defendants as Prison Service data show marked increases in the frequency with which women are being remanded in custody, often for relatively minor offences. This research is intended to develop our understanding of women's treatment by, and experience of, the criminal justice system by addressing our current lack of knowledge on how and why remand decisions are taken.

Whilst there has been some analysis of the remand system<sup>1</sup>, there are a number of gaps in research to date. These are briefly outlined here as they are explored more fully in Chapter Two. Firstly, where women's custodial remands are mentioned in the research, the discussion is typically cursory. As 92.6 per cent of the custodial remand population in England and Wales<sup>2</sup> is male, this focus is understandable. However, as will be discussed later, there are different trends in female and male custodial remand populations so we need to have separate analyses of these two groups. Secondly, although most previous studies do acknowledge the large degree of discretion that operates in the remand system, legal categories are often accepted unproblematically.

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<sup>1</sup> See Chapter Two for references and a full discussion of this work.

<sup>2</sup> All figures in this chapter relate to England and Wales. Unless otherwise stated, all figures in this chapter are from Home Office (2003a) 'Statistics on Women and the Criminal Justice System' and Home Office (2002) 'Prison Statistics England and Wales 2002'.

Thus there are few questions asked about whether the formal exceptions to the right to bail (see below) are the only reasons why people are actually remanded in custody. This research characterises remand decision making as a social process as well as a legal process. Consequently, it moves analysis beyond a focus solely on the legal framework and develops the work that has already been done on the social dynamics of remand courts, commonly conceptualised as 'court culture'. Thirdly, few studies have tried to incorporate defendants' choices into their analyses and have, instead, focused entirely on the working practices and decision making of professional criminal justice agents. Although defendants' choices may be constrained choices, they still affect remand hearings and should be included in analysis<sup>3</sup>. This thesis aims to address these and other issues, building on knowledge from previous research projects to construct a fuller understanding of decision making in the remand system.

There is a fairly substantial body of work on the exercise of discretion and discrimination in sentencing, but remand decision making has not received much attention. Evidence that women are treated more harshly or more leniently at the sentencing stage of the criminal process is inconclusive (these issues are discussed more fully in Chapters Two and Six), pointing to the need for more sensitive offence categorisation and the inclusion of other variables (e.g. race and social class) which bisect the simple binary gender division (Carlen 1988; Hedderman and Hough 1994). The evidence that does exist indicates that women are not discriminated against in magistrates' remand decisions and may, in fact, be treated more leniently.

Females are less likely than males to be remanded in custody during proceedings at magistrates' courts (24% of females compared with 42% of males). However, research has shown that taking into account offending history and type of offence, the defendant's sex seems to have only a marginal effect on remand decisions. (Home Office 2003a:15).

One piece of research on contested bail applications by Brown and Hullin (1993) has raised important questions about how the system operates as a whole. It has shown that even if there is no bias in the remand decisions made by magistrates, disparities may arise from decision making elsewhere in the remand process. Whilst their research found no differences in the proportion of male white and Afro-Caribbean defendants

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<sup>3</sup> Disappointingly, it proved difficult to secure interviews with defendants in this analysis of the remand system. However, wherever possible, the role and perspective of the defendant is included. These problems are discussed in Chapter Three.

remanded in custody in cases where the CPS opposed bail, it did find evidence that black defendants were more likely to have their bail applications opposed than were white defendants (Brown and Hullin 1993). Moreover, the acquittal rate for Afro-Caribbeans remanded in custody was 7.5 per cent, nearly twice the rate for white defendants. Despite the fact that magistrates' decision making was not discriminatory, a greater proportion of ethnic minorities were actually remanded in custody because of CPS decisions to disproportionately contest their bail applications, and, judging by the acquittal rate, a greater proportion were being remanded in custody unnecessarily. These data suggest that male Afro-Caribbean defendants may be making different choices and/or being treated differently to male white defendants and demonstrate the value of examining the processes, and not just the outcomes, of remand decisions.

It is possible that other minority groups, such as women, are also treated, and behave, differently in the remand system compared to the majority group: white male defendants. As will be discussed below, there is evidence of differences in the male and female custodial remand populations. There is a difference in the rate at which these two groups are increasing in size, and the male and female populations differ both in terms of their charged offence profiles and the characteristics of the individuals incarcerated. This thesis aims to identify and explain these trends in the female custodial remand population through a focused examination of how and why remand decisions are made in magistrates' courts.

This chapter presents ways of understanding the process and details the importance of the remand decision in order to introduce the debate in subsequent chapters. It commences with a summary of the remand system in order to identify the different types of remand and to clarify the terminology used in this thesis. Following this is a description of relevant remand legislation which frames decisions and provides the formal rationale for custodial remands. The legal framework is an essential component in understanding how and why custodial remands are used. Trends in the use of custodial remands, particularly for women, are examined in the next section. Of particular note is the increasing frequency with which custodial remands are used for women, more than half of whom do not go on to receive a custodial sentence. These figures raise a number of questions about the purpose of custodial remands which are explored in subsequent chapters. In light of the trends outlined in the preceding section, this chapter goes on to explore concerns about the damaging effects custodial remands

are having on an increasing number of female defendants and their families. There is clear evidence that the custodial remand population consists of particularly vulnerable and socially excluded people. The chapter then presents a statement of the aims and objectives of the research which emerged from the material outlined in this chapter. In conclusion, an overview of the structure of the thesis is provided.

## **The Legal Framework**

This section explains remand terminology, outlines the processes involved in the remand process, and summarises the main points of the legal framework to familiarise the reader with the basic structures of the decision making process.

## **The Remand Process**

A magistrate's remand decision is not an isolated event but is one stage in an on-going and cumulative process of deciding whether a defendant should be held in custody or bailed and released into the community (with or without conditions attached to their bail) pending the next stage in the criminal process. The process begins with the police when custody officers decide whether or not to release a suspect on police bail to appear at a magistrates' court on a given date, or to hold them in overnight custody to be taken to appear at a magistrates' court the next morning. The power to attach conditions to bail used to be limited to magistrates and Crown Court judges when they granted court bail, but the Criminal Justice and Public Order Act 1994 extended this and now the police have powers to impose conditions on defendants released on police bail. When defendants appear at a magistrates' court, the Crown Prosecution Service (CPS) can oppose a defendant's release on bail and/or request certain conditions be attached to any grant of bail. Recommendations are usually informed, at least in part, by police comments and information. In some areas, bail information schemes (BISs), usually organised by the local probation area, are available in courts and/or in local prisons. These are intended to supply the court with more, independently verified, information about the defendant and their application. BISs do not operate in all areas.

There are thus a number of different points within the criminal justice process when remand decisions can be made. There are variations between the remand decisions made at these different stages, including in the personnel involved, the reasons a remand decision is required, the legal status of the person being remanded, and the law governing the decision making process. The sites in which remand decisions may be made are: police stations, magistrates' courts, Crown Courts and higher courts e.g. the Court of Appeal. Although important decisions are obviously made in the other sites, this thesis focuses on remand decision making in magistrates' courts (the reasons for this are more fully discussed in Chapter Three).

At the first hearing in a magistrates' court, the defendant elects whether or not to apply for bail through her defence representative. A bench<sup>4</sup> of at least two, but usually three, lay magistrates or a district judge (salaried and legally qualified members of the professional judiciary, previously known as stipendiary magistrates), after hearing CPS recommendations and the defence bail application, make a remand decision. A court has three options in a remand decision: release on unconditional bail, release on conditional bail, or remand in custody. The defendant can make a second bail application based on the same factual or legal information under the principles laid down by the Nottingham Justices (Cavadino and Gibson 1993) (later enacted and inserted into the Bail Act 1976 by s.154 of the Criminal Justice Act 1988), but any subsequent applications must be based on new information or a change in circumstances. This procedure is intended to recognise the fact that defendants held on overnight custody may not have had time to verify information, organise a surety or security (the deposit of monies or pledging a sum to be forfeited if the defendant breaches the terms of her bail), or deal with other matters which could have undermined the success of their first bail application. Equally, the system is intended to prevent defendants from wasting court time making repeat applications based on the same information.

If bail is refused, magistrates must state their reasons in open court and the defendant should be given a written copy of this information so they are in full possession of the facts for any possible future application for bail. Magistrates can remand 'untried' (see below) defendants in custody for up to eight days initially and thereafter can remand for up to 28 days at a time. They can remand 'convicted unsentenced' (see below)

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<sup>4</sup> Throughout this thesis, 'bench' refers to a panel of two or three lay magistrates, whereas 'Bench' denotes the cohort of all magistrates who sit at a particular court.

defendants in custody for a pre-sentence report (PSR) to be completed, a process that usually took three weeks in the courts in this study.

‘Remand’ is often used to denote custodial remands e.g. ‘the remand population’ is used elsewhere as a shorthand for ‘the custodial remand population’. However, this thesis does not adopt this usage as it confuses the act with the outcome. Thus, where the terms ‘the remand system/hearing/ decision/etc.’ are used, they are general terms for the processes or act of decision making in which a defendant can, specifically, be remanded on bail (conditional or unconditional) or remanded in custody. Although a remand on bail is sometimes reduced to ‘bail’, for the sake of clarity a custodial remand is never referred to as a ‘remand’.

Magistrates are called upon to make remand decisions for different categories of defendants:

(a) *Untried defendants*: If a defendant is not sentenced immediately, magistrates (or Crown Court judges if the case is sent to the Crown Court by a magistrates’ court) must remand the defendant in custody or on bail (conditional or unconditional). As discussed above, the defendant can make two bail applications based on the same factual or legal information. Additional applications will only be heard if it can be established that there has been a change in circumstance.

(b) *Convicted unsentenced defendants*: Magistrates may be required to make a remand decision on an offender who has been convicted but not yet sentenced:

i – to allow time for inquiries to be made and pre-sentence reports (PSRs) or psychiatric reports to be written if further information about the most appropriate sentence is required.

ii – if magistrates’ sentencing powers are insufficient, they can commit an offender either on bail or in custody to the Crown Court for sentencing.

(c) *Post-sentence appeals by defendants*: A convicted offender may be remanded by a magistrates’ court if they are appealing conviction, sentence, or on a question of law.

This thesis focuses on remand decisions made in magistrates’ courts about untried defendants and those convicted unsentenced defendants remanded for reports, the two largest groups of custodial remandees.

## Remand Law

The Bail Act 1976 is the primary piece of remand law. It frames the central issue of remand in terms of balance: do defendants present a substantial enough risk to the community to over-rule their rights not to be imprisoned before they have been tried and/or sentenced? The formal purpose of a remand hearing is to make a decision about the degree of risk a defendant presents to the community and subsequently to decide on the appropriate level of containment: unconditional bail, conditional bail, or a remand in custody.

Section 4 of the Bail Act establishes the “General right to bail”. Although the Bail Act 1976 asserts a right to bail, this is somewhat misleading. A right to bail is guaranteed unless certain criteria apply. Thus, the ‘right’ to bail is not an absolute right but is a presumptive right, and one that rests upon criteria that can be very widely interpreted (see below). The Bail Act 1976 adopted many of the recommendations of the 1974 Working Party on Bail Procedures in Magistrates’ Courts which set out the reasons for the presumption in favour of bail.

One of the foundations of our criminal justice system is the presumption of innocence. We regard it as important that a similar presumption should be created in relation to bail in favour of the defendant. There is at present no obligation on the court to consider the question of bail in the absence of an application from the defendant. We can see no reason why the onus should be on the defendant to make the application. In our view the court should of its own volition consider, on each occasion when it remands an accused, whether the remand should be on bail or in custody... We see the presumption in favour of bail not so much as a means of defining in detail in what circumstances people should and should not be bailed, but rather as an indication to courts of the attitude they should adopt – that they should not look to the defendant to show cause why he should be granted bail, but should rather consider whether there are good reasons why he should not. (Home Office 1974:27).

Section 4 of the Bail Act 1976 details to whom the ‘right to bail’ applies. For the purposes of this thesis, the two most important groups who have the right to bail are untried defendants, and convicted unsentenced defendants remanded for reports.

Section 4(1) of the Bail Act 1976 states that “a person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act”. Part I<sup>5</sup> of Schedule 1 details the “exceptions to the right to bail” i.e. the reasons why the right to bail can be overturned and the defendant remanded in custody. The key reasons<sup>6</sup> for refusing bail are contained in paragraph 2: that there are “substantial grounds” for believing a defendant would (a) fail to surrender to custody; (b) commit an offence while on bail; or (c) interfere with witnesses or otherwise obstruct the course of justice. When considering a custodial remand, a court “shall have regard to” one or more of the grounds contained in Schedule 1, Part I, paragraph 9. These grounds include the nature and seriousness of the offence, the character and community ties of the defendant, and “any others which appear to be relevant.”<sup>7</sup>

In sum, under the Bail Act 1976, untried defendants, and convicted unsentenced defendants being remanded for reports to be written, have a right to bail unless one of the exceptions to the right applies: that there are substantial grounds for believing they will abscond, offend on bail, or interfere with the course of justice. In assessing whether an exception applies, the magistrates can consider a wide range of grounds covering both the offence and the circumstances of the person charged with the offence. There is a dualism in the approach to bail decisions in this legislation as it contains a mixture of classical or just deserts and individualistic decision making. This thesis attempts to explore the tensions between these conflicting approaches and how they are resolved in the routine practices of actors in magistrates’ courts.

There are some additional amendments and specific elements of bail law that will be discussed more fully where relevant in later chapters. For example, the Criminal Justice and Public Order Act 1994 (sections 25-26) reversed the presumption in favour of bail with certain serious offences, and the Bail (Amendment) Act 1993 established the prosecution’s right to appeal against an award of bail where previously only the defence could appeal a remand decision.

There are two further issues which need to be raised in this overview of the legal framework. Firstly, the Human Rights Act 1998 and, secondly, government proposals on bail in the Criminal Justice Bill 2003.

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<sup>5</sup> Part II refers to non-imprisonable offences which are not discussed here.

<sup>6</sup> For the full list of exceptions to the right to bail, see Appendix One.

<sup>7</sup> See Appendix One for the full list.

As domestic law has to be read and given effect in ways that are compatible with the Human Rights Act 1998 (HRA), there was much speculation as to how the HRA would impact on the application of the Bail Act 1976.

UK courts, therefore, considering bail applications under the HRA, will have to adopt a new approach. It will not just be a matter of considering whether there are “substantial grounds” for believing one of the exceptions to bail is made out. Courts will have to consider and give weight to the principle of the presumption of innocence. They will have to consider whether there really is relevant and sufficient objective evidence which justifies a departure from the right to liberty. There must be no judicial speculation. And judges and magistrates will have to show a greater willingness to keep the situation under review by allowing applications at regular intervals covering all aspects of the case throughout the period of remand, accepting that the passage of time is a relevant consideration. Fully argued decisions will have to be given, which must incorporate the defendants own arguments and these decisions will have to be fully recorded. (Burrow 2000a:679).

The HRA has resulted in some minor amendments to existing law but, despite these early predictions, the impact of the HRA on the application of bail law has, in fact, been minimal. These issues are explored further in later chapters.

Turning to the Criminal Justice Act 2003, one of its main proposals on bail introduces a clause relating to withholding bail because of drug misuse.

The Bill creates a presumption that bail will not be granted for a person aged 18 or over who is charged with an imprisonable offence, and tests positive for a specified Class A drug, if he refuses to undergo an assessment as to his dependency or propensity to misuse such drugs, or following an assessment, refuses any relevant follow-up action recommended unless the court is satisfied that there is no significant risk of his reoffending on bail. (House of Lords 2003).

At the time of writing, this proposal has not yet been implemented. However, it is included here as it illustrates the direction of developments in bail law which have steadily undermined the principle of the right to bail by introducing supplementary exceptions<sup>8</sup>.

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<sup>8</sup> Section 153 of the Criminal Justice Act 1988 required the court to justify bail granted to defendants accused of murder (and attempted murder), manslaughter and rape (including attempted rape). Section 25 of the Criminal Justice and Public Order Act (CJPO) 1994 removed the right to bail for defendants charged with the serious offences listed above who had previously been convicted of such offences. Section 54 of the Crime and Disorder Act 1998 restored discretion to the court in such cases but required the defence to establish there were exceptional reasons for the grant of bail. Section 26 of the CJPO 1994

Moreover, it raises many of the issues of interest in this thesis, such as how the presumption in favour of bail is used in practice, the multiple rationales for custodial remand contained within bail law, and the discretion accorded to courts when assessing bail risk. It will be discussed in Chapter Nine in light of findings from this research.

## Trends in the Use of Custodial Remands for Women

This section explores changing patterns in the application of remand law. It presents data on trends in the use of custodial remands which raise questions about how and why custodial remand is used, particularly for women. Of note are the rapid expansion of the female custodial remand populations and the fact that over half the women on custodial remand do not go on to receive a custodial sentence.

Although there are many more men in custody, there are particular concerns about the female prison population because it is increasing much more rapidly than the male prison population. The average number of women in custody increased by 15 per cent to 3,740 between 2001 and 2002, compared to an increase of 6 per cent for males in custody. Longer term comparisons reveal even more striking differences.

In 1992, women comprised 3.5 per cent of the prison population in England and Wales. By 2000 they were 5.2 per cent. This may sound like a small change but it reflects a 115 per cent increase in the female prison population. During the same period, the male population went up by 42 per cent. The number of women received into prison rose even more sharply than the population, more than tripling from 2200 in 1992 to 7000 in 2000. Over the same period male receptions rose by only 58 per cent. (Hedderman 2004:82).

The custodial remand population shows similar trends. Both the male and female custodial remand populations are increasing. Between 2001 and 2002, the average custodial remand population increased by 14 per cent compared to an increase of 6 per cent in the average sentenced population. Within this rise, the rates of increase in the

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removed defendants' right to bail in cases where they had been accused or convicted of an offence on bail. Section 14 of the Criminal Justice Act 2003 states that if a defendant was on bail at the time of the offence, he may not be granted bail unless the court is satisfied that there is no significant risk of his committing an offence while on bail. Section 15 states that where a defendant has failed to attend court, he may not be granted bail unless the court is satisfied that there is no significant risk that, if released on bail (whether subject to conditions or not), he would fail to surrender to custody.

female custodial remand population and receptions outstrip the rates of increase in the male population and receptions, with interesting variations between the untried and convicted unsentenced populations (see below and Table 1.1).

We see different trends for men and women, with the female custodial remand population increasing in numbers and as a proportion of the total custodial remand population (see Table 1.2).

**Table 1.1: Untried and convicted unsentenced prisoners in prison: average population, receptions(1) and estimated time spent in custody**

England and Wales Males and Females	Number of persons/days					
Type of prisoner	1992	1994	1996	1998	2000	2002
Untried prisoners						
Males						
Average population	7,122	8,696	8,004	7,730	6,701	7,189
Receptions	47,501	54,157	55,545	60,157	50,866	53,754
Estimated average number of days in custody (2)	55	59	53	47	49	49
Females						
Average population	264	350	371	426	396	496
Receptions	2,368	2,922	3,343	4,540	4,026	4,954
Estimated average number of days in custody (2)(4)	41	44	41	34	36	37
Convicted unsentenced prisoners						
Males						
Average population	1,885	3,042	3,071	4,133	3,873	4,600
Receptions	20,051	32,751	32,993	39,945	40,116	47,851
Estimated average number of days in custody (3)	34	34	34	38	35	35
Females						
Average population	104	139	167	278	304	449
Receptions	1,199	1,812	1,994	3,442	3,773	5,450
Estimated average number of days in custody (3)(4)	32	28	31	30	30	32

(1) Total receptions cannot be calculated by adding together receptions in each category, because there is double counting.

(2) Time spent in Prison Service establishments before conviction, acquittal, etc.

(3) Time spent in Prison Service establishments after conviction before being sentenced.

(4) Averages are subject to wide variation because of the small population on which they are based.

Source: (Home Office 2003a:17).

**Table 1.2: Female remand prisoners as a proportion of all remand prisoners 1998 to 2002**

Annual population averages	Female custodial remand population (Thousands)	Total custodial remand population	Females as a percentage of total custodial remand population
1998	0.70	12.57	5.6%
1999	0.75	12.52	5.9%
2000	0.70	11.28	6.2%
2001	0.78	11.24	6.9%
2002	0.95	12.79	7.4%

Source: adapted from (Home Office 2002:14).

Before examining these figures more closely, it is important to establish how to measure the remand populations. The average custodial remand population is a somewhat misleading measure of trends as it is subject to distortion from other factors, primarily the average duration of custodial remands. While the number of *receptions* has continued to rise, this rate of increase is not so apparent when looking at the average population figures because of the decrease in the average length of custodial remands during the same period. For example, Table 1.1 shows that although the number of men received into custodial remand rose by 6000 between 1994 and 1998, the average population figures for the same period actually show a fall in the population. While the average population is an important measure for issues such as overcrowding and regime conditions, it does not provide an accurate indication of trends in the use of custodial remand or how many individuals experience custodial remand each year. Using reception figures, it is evident that women are a growing proportion of all prison remand receptions, both untried and convicted unsentenced.

Although the custodial remand population is only 18 per cent of the average custodial population, custodial remand receptions account for 62 per cent of all receptions into prison (see Table 1.3). Of course the majority of individuals sentenced to custody will be serving sentences far longer than the average of 38 days that custodial remand prisoners spend in prison (see Table 1.1). However, although shorter, a custodial remand can still cause many of the same problems as a custodial sentence, especially given the particularly vulnerable nature of the custodial remand populations (see below).

**Table 1.3: Remand prisoners as a proportion of receptions into prison and average population in custody, by sex**

	Receptions into Prison Service establishments 2002			Average population in custody 2002		
	Males	Females	All males and females	Males	Females	All males and females
All persons in custody	134,484	13,380	147,864	66,562	4,299	70,861
Prisoners on remand	82,835	8,690	91,525	11,847	945	12,792
Remand prisoners as a percentage of total prisoners	62%	65%	62%	18%	22%	18%

Source: adapted from (Home Office 2002:14).

Comparisons of the untried and the convicted unsentenced custodial remand figures show that for both groups female receptions are rising more rapidly than male receptions. They also show that for both men and women, receptions of convicted unsentenced custodial remand prisoners are increasing more quickly than receptions of untried prisoners.

Receptions of all untried prisoners rose by 10 per cent between 2001 and 2002 to 58,708. However, Table 1.1 shows that whilst receptions of male untried prisoners rose to 53,754, an increase of 9 per cent, receptions of female untried prisoners rose by 20 per cent to 4,954. A similar pattern is evident in the receptions of convicted unsentenced prisoners. The total population rose between 2001 to 2002 by 14 per cent to 53,301 but whilst receptions of males rose by 13 per cent to 47,851, female receptions rose to 5,450, an increase of 25 per cent. These figures indicate there are differences in the expansion of the male and female remand populations which need to be explored.

A further difference between the custodial remands of men and women can be seen in Table 1.1. For both untried and convicted unsentenced custodial remand prisoners, women are held for shorter periods of time than men. In 2002, 4,950 female untried prisoners entered Prison Service establishments. They spent an estimated 37 days on average in custody before conviction, compared with an average of 49 days for males. In the same year, 5,450 female convicted unsentenced prisoners entered Prison Service establishments and they spent an estimated 32 days on average in custody, compared with an average 35 days for males.

These figures raise a number of questions which will be returned to in Chapter Nine in light of the findings. Why is the reception of females into custodial remand rising so rapidly compared to the male population? Why is a greater proportion of the female prison estate accounted for by custodial remand prisoners compared to the male prison estate? Moreover, why are receptions of convicted unsentenced custodial remand prisoners (female and, to a lesser extent, male) increasing more quickly than receptions of untried custodial remand prisoners.

Questions about the necessity of custodial remands, for men and women, are raised by the evidence contained in Tables 1.4 and 1.5. It is clear from the breakdown of offences for which individuals are remanded in custody (Table 1.4) that many women are held on custodial remand for relatively minor matters. Most notably, 41 per cent of remand receptions of females in 2002 were for theft and handling compared to 24 per cent for males. The figures in Table 1.4 illustrate that receptions for the most serious offences (i.e. violence against the person, sexual offences, burglary and robbery) account for 41 per cent of males received into custodial remand; for women these offences accounted for only 22 per cent of receptions in 2002.

**Table 1.4: Receptions(1) Of Remand Prisoners Into Prison Service Establishments By Offence And Sex In 2002**

Offence	Number of persons remanded in custody	Percentage of persons remanded in custody
<b>Males</b>		
All offences	82,835	100.0
Violence against the person	12,990	15.7
Sexual offences	2,711	3.3
Burglary	12,768	15.4
Robbery	5,560	6.7
Theft and handling	20,258	24.5
Fraud and forgery	1,787	2.2
Drugs offences	6,693	8.0
Other offences	18,661	22.5
Offence not on record	1,407	1.7
<b>Females</b>		
All offences	8,690	100.0
Violence against the person	860	9.9
Sexual offences	16	0.2
Burglary	584	6.7
Robbery	469	5.4
Theft and handling	3,601	41.4
Fraud and forgery	363	4.2
Drugs offences	978	11.3
Other offences	1,510	17.4
Offence not on record	309	3.5

(1) Total receptions cannot be calculated by adding together receptions in each category, because there is double counting.

Source: Adapted from (Home Office 2003a:19).

Figures on sentencing outcome (Table 1.5) illustrate that fifty per cent of males held on custodial remand subsequently received a custodial sentence in 2002; the rate for females was 41 per cent. This means that 50 per cent of men and 59 per cent of women remanded in custody do not receive a custodial sentence. Twenty one per cent of males and 20% of females remanded in custody were acquitted or had proceedings against them terminated early. Sixteen per cent of males and 22 per cent of females held on custodial remand eventually received a community sentence.

**Table 1.5: Final court outcome for persons remanded in custody at some stage in magistrates' court proceedings (1)**

Final court outcome (2)	England and Wales			Estimated percentages		
	Males			Females		
	2000	2001	2002	2000	2001	2002
Acquitted, etc.	23	21	21	22	21	20
Convicted (3):	77	78	79	78	78	80
Discharge	3	3	3	6	5	5
Fine	6	4	4	6	5	5
Community Sentence (4)	15	13	16	23	19	22
Fully suspended sentence	-	-	-	-	-	-
Immediate custody (5)	48	51	50	36	42	41
<b>Total</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>	<b>100</b>

(1) Includes persons remanded in custody by magistrates during proceedings or on committal.

(2) Includes estimated outcome at the Crown Court for those committed for trial or sentence.

(3) Includes offences otherwise dealt with.

(4) Includes community rehabilitation orders, supervision orders, community sentence orders, attendance centre orders, community punishment and rehabilitation orders, curfew orders, reparation orders (from June 2000), action plan orders (from June 2000) and drug treatment and testing orders (from October 2000).

(5) Includes detention in a young offender institution, detention and training order and unsuspended imprisonment.

Source: (Home Office 2002:49)

If these offences and offenders are not considered serious enough to warrant a custodial sentence, why is it necessary to hold them on custodial remand prior to trial and/or sentence? Why do magistrates' courts remand so many individuals in custody when the offences charged are relatively minor? As there are different reasons for remanding in custody and for sentencing, we should be cautious about using sentencing criteria to make judgements on the use of custodial remand. These reasons will be more fully explored in this thesis. However, the number of women held on custodial remand for minor offences, and who later receive non-custodial sentences, does raise the question why magistrates consider custodial remands necessary in such cases.

## The Effect of Custodial Remands

As has been seen, there are a growing number of women being held on custodial remand, raising questions of whether this should cause concern, and why; what problems does the expanding custodial remand population present? There are practical problems for Prison Service staff (HMI Prisons 2000) in managing the custodial remand population as, by definition, it is a transient population. Although female remand

prisoners only constituted 22 per cent of the prison population in 2002, they made up 65 per cent of receptions into already crowded prisons.

For the prisoners themselves, the consequences of a custodial remand can be very damaging as they are a particularly vulnerable group. Their characteristics, such as drug misuse, mental health problems, self-harm and suicide risk, as well as social and educational needs, also make them a potentially difficult group for prison staff to manage.

The general picture for adults on remand is of isolated, anxious, sad, disturbed and often desperate men and women, many with children. Before coming into prison they were likely to be living in impoverished circumstances and dependent on the State for survival. Most were without work, living alone and a significant number were misusing drugs and/or alcohol. Their precarious position and mental state is further jeopardised by the experience of imprisonment which threatens housing, work and, particularly for women, contact with their children. (HMI Prisons 2000:24).

The Prison Reform Trust 'Innocent Until Proven Guilty' campaign identifies the often poor regimes remand prisoners have to cope with (see also (Casale 1989) on the specific experiences of women) and lists the complex needs of remand prisoners. In most of these areas, remand prisoners have more severe problems than sentenced prisoners.

Many of those held on remand will have a complicated set of needs – drug and alcohol misuse, poor educational attainment, mental illness and unstable accommodation are particularly prevalent amongst remand prisoners. (Prison Reform Trust 2004).

There is evidence that the female custodial remand population consists of an even more vulnerable group of women than the female sentenced population. Time spent on custodial remand can be as damaging to women as a custodial sentence, threatening accommodation and employment opportunities and straining community, familial and friendship ties. These difficulties often compound existing dimensions of social exclusion from which many women involved in the criminal justice system suffer. Research documents the adverse life experiences of this group which include parental separation, histories of sexual and physical abuse, time in local authority care, disrupted education, low household income, poor employment histories and homelessness (for example, see (Eaton 1993; Loucks 2004; Wedderburn 2000)).

[T]he differences between women and men in prison stood out much more starkly than I had ever imagined. Throughout the research on women, a consistent picture of poverty, deprivation, victimisation and marginalisation

made up the basis of every female population in every jurisdiction. The 'career' criminals and thrill-seekers common amongst male prisoners were virtually absent in women's prisons, replaced instead by people in custody often through desperate circumstances or lives so chaotic that they failed to comply with community penalties or bail. (Loucks 2004:142).

The Wedderburn Report (2000) explored whether women on custodial remand (untried and convicted unsentenced) possessed different characteristics to the sentenced female prison population. In terms of offending profiles, the two groups were comparable, the only difference being that drug offences were more common in the sentenced population (Wedderburn 2000:4). However, the 'personal characteristics' of women on remand were found to differ from the sentenced population in three ways. Firstly, whilst both groups had histories of deprivation, there was some evidence that this was more prevalent in the remand population. Secondly,

[I]t is in relation to mental health problems that the biggest differences are to be found. Although the same percentage of both groups, 40 per cent, had received help or treatment for a mental health problem before entering prison, more remand prisoners had been admitted to a mental hospital and they were twice as likely to have been admitted to a locked ward or secure unit. While the prevalence of 'personality disorder' was high in both groups, the probability of psychosis and of neurotic disorders was greater among the remand population. Furthermore, women on remand appear to be at a high risk of suicide. Over a quarter had attempted to kill themselves in the last year and nearly a quarter had had suicidal thoughts in the previous week. (Wedderburn 2000:4).

Mental health problems are also evident in the male remand population but women were found to present more acute mental health problems, and female remandees were twice as likely to have attempted suicide (25 per cent of women and 12 per cent of men) in the previous year (HMI Prisons 2000:22).

The third difference the Wedderburn Report identified between remanded and sentenced prison populations was the level of drug use. Opiate dependence in particular and intravenous drug use was found to be more common in the remand population (Wedderburn 2000:4). Comparisons with the male prison population show that dependence on opiates was proportionately higher in the female prison population. Significantly, opiate use was reported to be more common in both the male and the female remand prison populations than in the sentenced populations (Home Office 1999b:31).

Social exclusion, mental health problems, and drug dependence are significant issues for the male and female prison populations alike, and particularly so for the custodial remand populations. Clearly the experience of a custodial remand can be very damaging to such vulnerable individuals. However, at present we do not know enough about how these problems affect working practices and remand decision making in magistrates' courts.

In addition to causing difficulties in their own lives, the imprisonment of mothers can be severely disruptive to their children, many of whom are cared for solely or primarily by their mothers. Women in prison often have to rely on grandparents and other female relatives to provide temporary care for their children. It is reported that some women may not reveal that they have children because they fear they will be taken into care (Wedderburn 2000:9). The children of imprisoned mothers reportedly demonstrate a variety of behavioural problems resulting from this separation (Caddle and Crisp 1996).

The separation of mothers from children can also affect offending rates; there is evidence to suggest that maintaining family ties may help to reduce further offending (Ditchfield 1994). There are also concerns about the long term effects on the life course of the children of imprisoned mothers. There is growing evidence of the intergenerational transmission of social exclusion (Wedderburn 2000), suggesting that the children of imprisoned mothers may later become involved in the criminal justice system themselves.

The results do show a remarkable (and perhaps worrying) degree of continuity across the generations and the life-course. There is fairly general evidence of the transmission of social exclusion and disadvantage from parents to their children and from childhood to adulthood. (Hobcraft 1998:86).

The problems that emanate from the separation of female defendants from their families are compounded by the fact that women are often housed far from home: in a Prison Service document from 2000, it was reported that only seven of the, then existing, 13 Prison Service areas held unsentenced women.

This represents enormous social dislocation for women (most of whom [77 per cent] are parents of young children) who are held in establishments significantly distant from their home areas. (HMI Prisons 2000:21).

In addition to the harm done by custodial remands to the individual and her family, there is also some evidence that custodial remands have adverse effects on subsequent sentencing decisions. A study on racial bias in remand decisions found that

Some of the factors affecting the remand decision, particularly the seriousness of the offence will, of course, similarly affect the sentencing decision itself. However, there is some evidence that even where gravity of offence is matched (using the Cambridge Risk of Custody Scale, Version 2), there is a much greater likelihood of a defendant who has been remanded in custody receiving a custodial sentence than one who has been remanded on bail. (Brown and Hullin 1993:108).

Part of the explanation of this may well be that defendants remanded in custody have less access to their solicitors and are therefore disadvantaged when it comes to preparing their case.

It is clear that those men and women remanded in custody are a very vulnerable group with myriad social, economic and personal difficulties. The evidence suggests that there is an association between remands in custody and custodial sentences. Moreover, as many female custodial remandees are primary carers for their children, custodial remands can also be very detrimental to their dependants. Given the characteristics of this group of women and the harm done to them (and their children) by custodial remands, it is evident that wherever possible bail should be granted. However, as discussed above, the frequency with which women are being remanded in custody is increasing and this group is one of the fastest growing groups in the prison system. This raises the question whether custodial remands really are only being used as a last resort.

## Aims and Objectives

The primary aim of this research is to further understand how and why custodial remand decisions about women are actually reached in magistrates' courts. It originated from a concern about the increasing frequency with which custodial remands were being used for women, and from the potential harm done by imprisoning this particularly vulnerable group. This aim is approached by a detailed examination of decision making in cases where females are at risk of being remanded in custody. This exploration of the

remand process is undertaken in magistrate's courts in three districts of a large city. The more precise research questions that informed the focus of this study are:

- What is the relationship between the legal framework and remand practice? How closely do magistrates adhere to the principles and criteria for withholding bail contained in the Bail Act 1976 and in subsequent remand legislation?
- What are the characteristics of remand courts' cultures and how do these social dynamics influence decision making processes and remand outcomes?
- For what reasons are women remanded in custody? What issues do criminal justice personnel identify as being important in remand hearings? Given the low rate of women remanded in custody who are subsequently given custodial sentences, and given the availability of female-only bail hostel places, why are women being remanded in custody?
- How can we explain the increase in the number of women remanded in custody and the increased frequency with which custodial remands are used for women? What is the relationship between increases in the remand and in the sentenced prison populations?

## Thesis Overview

After outlining key findings from previous work on the remand system, Chapter Two presents a critique of the approach that most research to date has taken. A range of literature is then discussed to locate the research within the conceptual framework that is adopted in this thesis to explore the processes of decision making, the conceptualisation of women, and the social production of remand decisions in magistrates' courts.

Chapter Three presents the methodological approach which was selected in light of the theoretical and practical issues raised in Chapters One and Two. Qualitative methodologies are used to allow themes to develop from the emerging data and for subsequent stages of data collection and analysis to be informed by earlier findings.

Chapter Four explores the nature and impact of the regulatory influences in the remand decision making environment. In this chapter, remand hearings are located within a

number of structural constraints: socio-political influences; organisational context; regulatory systems; and the legal framework. Each is discussed in turn with illustrations of how they affect remand processing and outcomes.

Chapter Five presents evidence that the wide scope for discretionary practice in the remand system allows remand law to be differentially applied. Legal criteria are selectively used depending on the nature of the offence and, to a lesser extent, the characteristics of the defendant. Three ideal-typical models of remand are presented which illustrate the varying priorities and concerns magistrates, and other court actors, depending on the characteristics of the offence, the defendant, and the case.

Chapter Six focuses on the characterisation of female defendants in contested remand hearings. The chapter explores the gendered nature of both magistrates' moral assessments of female defendants' characters and of defence representatives' mitigation speeches. Debates on the treatment of women in the criminal justice system (e.g. the 'chivalry' hypothesis) are discussed in light of the data from this thesis.

Chapter Seven looks at the ways in which the models of remand identified in Chapter Five are translated into practice in the social world of a magistrates' court. It provides illustrations of the competing range of roles and responsibilities evident within and between groups of participants in the remand process. The ways in which individuals choose to prioritise their own roles, and how to respond to other actors' choices, are shown to directly affect case outcomes, at times overriding legal criteria.

Chapter Eight further develops the analysis of remand as a social process, and not simply a legal process. In remand hearings, representatives of different professional groups compete and negotiate with each other to try and assert their view of how to resolve a case. The underlying social organisation of magistrates' courts, that structures this interaction, is identified and used to explain persistent patterns in how decisions are collectively produced.

Chapter Nine summarises the key empirical findings from the research and relates them to wider theoretical debates about criminal justice processing and decision making systems. Also included in this chapter is a discussion of the policy implications of this research, particularly in light of government proposals about future developments in the

remand system. Finally, the chapter identifies issues from this analysis of the remand system which could be further explored in future research.

# Chapter Two

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## Literature Review

This chapter draws on a range of literature to locate this research in the context of what is already known about remand and to provide a theoretical framework for analysis of the remand system. It begins by outlining the key empirical findings from studies of the remand system. Following this is a critique of previous remand research. The last section outlines the conceptual literature which has informed this study.

### Remand Research

With the exception of Dhami (2001) the majority of published work on remand decision making has adopted a socio-legal approach using methods including observing hearings, analysis of court documents, analysis of official statistics, questionnaires and interviews. The results of these studies will be summarised before considering some of the weaknesses of the research.

There are a series of factors which are consistently reported as being related to remand outcomes which are presented here under three main themes: firstly, the offence and defendant characteristics that inform decision makers' resolution of remand hearings; secondly, the social and organisational processes which characterise the decision making environment; and thirdly, the variation in remand outcomes between courts and areas.

### Offence And Defendant Characteristics

Summarising an analysis of official statistics on 222,000 remand decisions, Jones (1985) concluded that

The results strongly suggest that the most significant factors in the court remand decision are the police remand decision, the offence group and court policy. Other factors such as the age and sex of the defendant and the type of proceedings (charge or summons), though associated with the remand

decision, tend to be of marginal significance in the overall explanation of individual court remand decisions. (Jones 1985:116).

Examining the impact of offence seriousness, Jones concluded that the risk of a remand in custody varied both across and within offence categories depending on their seriousness. King (1971) found “a close correlation existed between the granting of bail and the seriousness of the offence” (King 1971:17). Doherty and East (1985) also found offence-specific remand patterns e.g. custodial remands were more likely for domestic burglaries than other offences, and as the value of the goods stolen increased, so did the likelihood of a remand in custody. Hucklesby (1994b) also found variations in remand in custody rates according to offence seriousness.

Looking at previous convictions, Hucklesby (1994b) found that defendants with previous convictions had a significantly higher custodial remand rate than those with no antecedents. A poor bail record was also a factor in increased risk of being remanded in custody.

A defendant's community ties have been linked to remand outcomes. Defendants with no fixed abode, or unsuitable bail accommodation, have been found to be at a higher risk of custodial remand (Doherty and East 1985; Hucklesby 1994b; Kellough and Wortley 2002). Doherty and East (1985) did, however, find that of the 24 defendants with no fixed abode, six were still granted bail. Hucklesby (1994b) found that defendants who did not reside in the local area were significantly more likely to be refused bail than those who lived in the area.

No clear link has been found between age and remand outcome (Brown and Hullin 1993; Doherty and East 1985; Kellough and Wortley 2002), although Jones (1985) reported the rate of custodial remand for juvenile males was significantly lower than for adult males. Dhami (2001) found that age was a factor considered by some magistrates, with the use of custodial remands increasing with the age of the defendant.

Women have been consistently found to be at a significantly lower risk of custodial remand than men (Brown, et al. 2004; Doherty and East 1985; Hucklesby 1994b; Jones 1985; Kellough and Wortley 2002). Most have explained this apparent difference in terms of the less serious offences charged and bail records of females compared to males but Hucklesby (1996) argued that the effect remained even after allowing for

these factors. Kellough (2002) also found that, allowing for other variables, women were still significantly less likely to be remanded in custody than men. Eaton (1987) argued that simple comparisons between males and females could not be made. Instead, she explored the nature of gender expectations exhibited by magistrates in relation to men and women and how these related to remand outcomes. These issues are explored further below and in Chapter Six.

The evidence on the relationship between race and remand decisions is contradictory. Brown and Hullin (1993) found no difference between remand rates for Afro-Caribbean and white defendants but Walker (1989) found that blacks faced a greater risk of custodial remand at every stage of the remand process. Asians were consistently found to be remanded in custody less frequently than whites or blacks. Walker suggested that these figures may be related to the fact that a greater proportion of black defendants pleaded not guilty and this may have affected magistrates' bail assessments. Kellough (2002) also found evidence that black defendants were remanded in custody more often than other racial groups in her study of Canadian remand decision making.

Taking factors like criminal record, type of charge and number of current charges into statistical account, the odds of being detained are approximately 1.5 times greater for black accused than for accused from other racial backgrounds. (Kellough and Wortley 2002:196).

In contrast, Dhami (2001) found that race was rarely used in magistrates' decision making and "they mostly used it in the opposite direction to that reported by criminologists" (Dhami 2001:177), although he does acknowledge this result could be a product of magistrates' heightened awareness of the issue in the research.

These studies show a generally stronger association between remand decisions and factors related to offence seriousness and risk of further offending than to the personal factors that are permitted within the Bail Act (e.g. community ties) or personal characteristics such as gender or age. This suggests that some types of information are more influential in determining remand outcomes than others.

However, some findings indicate that certain groups of defendants may be treated differently in the remand process, with outcomes varying according to the gender and/or race of a defendant. This suggests that the relevance of extra-legal factors to remand decision making needs to be further explored. It also alerts us to the possibility that

groups of defendants might make different choices about how, whether and when to apply for bail.

## Social And Organisational Processes

Highlighting many of the themes of this section, Doherty and East (1985) stated,

The police and the defendant's representatives are the main source of information. Whilst...they suggest reasons for the granting or refusing of bail these assertions are rarely scrutinised. The result is that decision-makers, often amateurs with limited training who are working under a time-pressure, have to make subjective decisions on the basis of limited unsubstantiated information. The quality of decision-making must thus be regarded as suspect. (Doherty and East 1985:263).

The rapidity of most remand hearings has been commented in remand research (Doherty and East 1985; Hucklesby 1994b; King 1971; Zander 1979). Doherty and East (1985) reported that 62 per cent of hearings were completed within two minutes and 96 per cent within 10 minutes. More time was found to be spent on cases where bail was refused than where it was granted but even with these cases, 38 per cent took less than two minutes and 87 per cent took less than 10 minutes. Doherty and East observed that the informal behavioural norms in remand proceedings favoured the swift resolution of cases, for example the clerks spoke rapidly when dealing with procedural issues. Others have commented on the 'camaraderie' between court actors which may encourage non-adversarial, and consequently faster, hearings (Brink and Stone 1988; Doherty and East 1985; Hucklesby 1994b).

Previous research has also identified the lack of information presented in remand hearings (Bottomley 1970; Burrows, et al. 1994a; Doherty and East 1985; East and Doherty 1984; Hucklesby 1994b; King 1971; Zander 1971; Zander 1979). Zander (1979) recorded that none of the information in 56 per cent of the cases observed in his study referred to Bail Act criteria such as offence seriousness. However, it is possible that this information was available to the magistrates in written form. Zander (1971) found that information on community ties, relevant information under the Bail Act, was rarely given in remand hearings. However, more information on Bail Act criteria was given in contested cases, a finding reported by Hucklesby (1994b) too. Research has also found that lay magistrates do not ask for additional information in remand hearings (Burrows, et al. 1994a; East and Doherty 1984; Hucklesby 1994b; Zander 1979). In

contrast, Dhami (2001) found lay magistrates did seek additional information and ask questions of court personnel in over half of the cases. The question whether magistrates ask for additional information is particularly important given the findings that police or prosecution staff do not always provide reasons for opposing bail (East and Doherty 1984; Hucklesby 1994b). East and Doherty (1984) found police did not provide reasons for requests in 12 per cent of cases, whilst Hucklesby (1994b) recorded that reasons for remand recommendations were only given 12 per cent of the time.

The question who are the key decision makers is frequently discussed in research. Whilst magistrates formally take the bail decision, it is argued that they are variously influenced by police and prosecution decisions and recommendations, and by defence representations.

Although there is variation in the degree to which magistrates have been found to bail according to police recommendations, studies prior to the establishment of the Crown Prosecution Service (which introduced independent prosecutors) typically found police recommendations to be influential on magistrates' decisions. (Bottomley 1970; Doherty and East 1985; Jones 1985; King 1971; Zander 1971). Jones (1985) recorded that police bail decisions were the most important single factor in remand decisions in magistrates' courts: 89 per cent of those bailed by police are bailed by magistrates; 90 per cent of those held on overnight custody by police are remanded in custody in magistrates' courts. Importantly, however, Jones notes that this pattern is not universal.

[W]hile the influence of the type of offence on the court remand decision appears to be independent of area the same is not the case for police remand decisions. It is clear that despite an overall close association between police and court decisions the degree to which the court decision agrees with the police decision varies from area to area. (Jones 1985:117).

The issue of variation between areas is further discussed below. Remaining with the issue of influential participants in the bail decision, Hucklesby (1996, 1997b) argued that the CPS were the most important people in the remand process, with magistrates following their recommendations in 95 per cent of cases. Whilst the CPS assumed the police's former responsibility for making a remand request, Hucklesby noted that the CPS were still dependant on police for information and therefore the police still exercised influence over remand hearings.

There is evidence that defence representations make a difference to magistrates' ultimate decisions. Zander (1971) found that where the police opposed bail, those with a defence representative had almost twice the chance of being bailed than those without representation. Doherty and East (1985) reported that even where police objected to bail, magistrates bailed defendants in approximately one third of the cases where defence representations were made. Brink and Stone (1988) examined another facet of defence representatives' influence on remand decisions: the decision not to apply for bail. They found that between one-half and three-quarters of the defendants in the various courts they surveyed, who were remanded in custody at their first appearance, had not made a bail application because their representatives advised against it.

[R]emand prisoners are failing to ask for bail, not because they want to go to prison, but because they are advised that the best way to obtain bail is not to ask for it – at least not yet. (Brink and Stone 1988:154).

Doherty and East (1985) identified 47 cases where no bail application was made. In 33 of these cases no application was made as no new circumstances were evident so a bail application was not possible. In nine cases no application was made as the defence representative was seeking protective custody, most commonly this meant hospital treatment for defendants requiring psychiatric treatment. In one case the defence felt a more favourable pre-sentence report would be made if the defendant was in custody rather than in the community. Another defendant's record was so substantial that a bail application was not made as it would obviously not be granted. Although the numbers are not large, the data suggest that defence recommendations to their clients are an important factor to consider when examining remand outcomes.

Magistrates themselves obviously impact on remand decisions too. Studies have found different custodial remand rates between lay and stipendiary magistrates (now called district judges) with lay magistrates deferring to police or prosecution recommendations more often (Hucklesby 1994b; Zander 1971). Dhami (2001) however, found little difference between the decisions of lay and stipendiary magistrates, and between more and less experienced lay magistrates, in a remand decision making exercise. He did, however, find that more experienced magistrates tended to use more complex approaches to decision making, for example they used a greater number of cues. Doherty and East (1985) found no significant differences between lay and stipendiary magistrates but previous court decisions were seen to be influential: 71 per cent of

defendants previously remanded in custody were remanded in custody at later hearings, and 96 per cent who were previously bailed were re-bailed. This could, of course, be explained not by later benches deferring to earlier benches' decisions, but by benches concurring due to the fact that they are using the same information to make the decision.

Most studies demonstrate that remand decisions are not solely made by magistrates in isolation. Research has highlighted the relative importance of the various criminal justice personnel involved in the remand process, and the influence they can exert over decision processing and outcomes, both prior to and during the remand hearing itself. This indicates that remand outcomes may be related not just to the nature of the offence and/or defendant, but also to the nature of interaction between participants. Equally it has been argued that organisational factors, such as the pressure of time, affect remand processing and case resolution.

### **Variation In Remand Outcomes Between Courts And Areas**

A number of studies have recorded variation in remand outcomes between different courts (Brown, et al. 2004; Cutts 1982; Dhami 2001; Hucklesby 1997a; Jones 1985; King 1971). For example, King (1971) observed that Liverpool courts bailed up to 80 per cent of cases compared to Bristol and Brighton courts where the bail rate was under 55 per cent. 'Court culture' has been offered as an explanation of differences between courts. Identifying variation between courts in their study, Brown et al (2004) recorded

There is wide variation in the remand rates across the Sheriff Courts with no obvious explanation other than that of differing 'court cultures' (Brown, et al. 2004:i).

Hucklesby (1994b) analysed decisions in three courts and found two of them had custodial remand rates of 9 per cent whilst the third had a rate of 25 per cent. These variations could not be explained by differences in the cases (e.g. type of offence, offender characteristics, etc). heard at the three courts. Observations revealed a greater propensity by the prosecution to ask for a custodial remand in the court with the highest rate, leading Hucklesby to assert that prosecution requests were highly influential on magistrates' decisions. Thus, it is in the practices of the prosecution that variations between courts are said to lie.

However, Jones (1985) argued that courts varied in the extent to which they were influenced by prosecution recommendations (in this study, the police were the prosecutors as the research took place prior to the establishment of the CPS) and thus prosecution practices alone are not a sufficient explanation of variation. He found the remand in custody rate to vary from less than 10 per cent in some areas to over 30 per cent in others. Although evidence was found that police recommendations were important in explaining some of this variation, it was not the whole answer as courts varied in the degree to which they followed police recommendations (see above). Instead, he concluded that

[O]ver and above the important influence of the police remand decision and the offence mix, courts do have different policies and practices when deciding whether to remand defendants in custody or on bail. (Jones 1985:111).

Bottomley (1970) found variation between urban and rural courts and more recent research (Dhami 2001) has also reported differences between metropolitan and provincial courts in decision making policies. Metropolitan magistrates tended to be 'fast and frugal', perhaps reflecting variations in decision making strategies due to the greater time pressure in the busier urban courts.

Research has identified variations between courts' remand rates that cannot be explained by legal or offence based factors. The 'court culture' explanation of this focuses attention on how social processes can shape how legal decisions are resolved. It has also been suggested that variation between courts may also be explained by practical and organisational influences, such as a shortage of time. As such, the social and organisational environments in which remand decision making takes place are further important elements in an explanation of how remand decisions are reached.

## A Critique Of Previous Research

Before moving on to a discussion of the conceptual literature that informs this thesis, a general critique of previous remand studies is presented. Many were conducted prior to the Bail Act and/or before the establishment of the CPS, making many of their findings potentially obsolete. Consequently, as will be seen, this thesis relies on a small number of more recent studies when discussing findings in relation to previous research.

Whilst not all the studies discussed above employ the same methods (most notably, Jones (1985) who conducted a large-scale statistical analysis rather than small-scale court observations), they share some common shortcomings which are discussed below.

Many of the studies acknowledge, either implicitly or explicitly, that the remand system is one characterised by a large degree of discretion.

The nature of the system inhibits rather than guarantees informed and consistent decisions; as is clear from the Bail Act criteria for refusing bail, it is expected to be multi-purpose...The necessity of having regard to several matters makes for complexity in bail decision-making, which is increased by the fact that in relation to each and all of them numerous factors may have to be taken into account. (Doherty and East 1985:262).

The correct judicial approach to bail in criminal proceedings is confused by the absence of statutory rules of procedure specifically dealing with bail whenever it falls to be determined in a magistrates' court...In these circumstances, magistrates' courts have inevitably found it necessary to develop and adopt their own procedural approaches to bail in criminal proceedings, not all of which are consistent with each other. (Lydiate 1987:164).

The overwhelming majority of bail decisions are made either by the police or by the magistrates' court, in the exercise of a discretion that is only partially circumscribed by precise legal rules and criteria. (Zander 1967:100).

However, despite this awareness, these studies have not, on the whole, sought to explore whether or not the Bail Act reasons for withholding bail are, in fact, the only criteria that decision makers actually use when reaching remand decisions, or are simply the ones they use to *account* for their decision making in line with Bail Act requirements. Doherty and East (1985) did comment on the observed cases where no bail application was made. However, there was no discussion of how these decisions to remand in custody were officially recorded, or whether the official reasons reflected the information provided in hearings. Thus an opportunity to raise questions about whether formal Bail Act reasons for withholding bail concealed other, extra-legal, reasons was missed.

Furthermore, even where the Bail Act (and its subsequent amendments) was seen to be disregarded, this is not discussed. Although the possibility of non-Bail Act criteria was

not explicitly explored, Hucklesby (1994b) found strong evidence that the magistrates in her study innovated beyond what is defined by the Bail Act as acceptable criteria for withholding bail, and, moreover, they were not challenged by other participants in the remand process when they behaved in this way. Magistrates were observed to use offence seriousness as a reason in and of itself for remanding in custody; this is not a valid reason for withholding bail under the Bail Act. Despite this finding, Hucklesby did not go on to question why other court personnel, particularly clerks and defence representatives, did not dispute the validity of 'offence seriousness' as a reason for withholding bail, or whether other extra-legal reasons formed the foundations for the refusal of bail. In general, previous research on remand has been too uncritical of the implementation of legislation and put too much emphasis on remand decisions *per se*.

As discussed above, there is interest in whether magistrates 'rubber stamp' CPS and/or police recommendations but there is little subsequent questioning of how the CPS and the police reach their decisions and make the recommendations that they do. If, as is argued by many (Bottomley 1970; Doherty and East 1985; Jones 1985; King 1971; Zander 1971), CPS and police recommendations are highly influential, why is there no exploration of the criteria that they use to make their decisions and reach their recommendations?

Kellough (2002) did attempt to explore whether or not Canadian criminal justice personnel had extralegal reasons for remanding in custody. Kellough reported that custodial remands were used as bargaining tools to secure plea bargains. Moreover, she explored the factors that influenced remand decision making and found that the police's moral assessments of defendants was a significant indicator of risk of custodial remand. With the exception of Eaton (1987), no other studies have looked at the ways in which magistrates categorise the defendants that appear before them according to non-offence/offending-based criteria.

Some studies have commented on the fact that reasons are often not given to support remand requests (East and Doherty 1984; Hucklesby 1994b) but they do not discuss this any further than to suggest it indicates the extent to which magistrates defer unquestioningly to police and CPS recommendations. Whilst this may be the case, it is also possible that there are other reasons why no reasons are required. What, if anything, do cases where no reasons are given have in common?

A further problem with these studies is that they discuss the reasons for refusing bail (such as offence and defendant related issues, police and prosecution recommendations, etc) but they do not discuss reasons for *granting* bail in either uncontested or contested cases. As offence seriousness is closely related to the risk of custodial remands, it is, perhaps, regarded as self-evident that non-serious offences will be uncontested and granted bail. There is, however, no discussion of the decision-making processes except for comments on the dearth of information in these cases.

Moreover, as this thesis found, some individuals are remanded in custody for relatively minor offences; a fact which is not fully discussed by research to date. It may be that the numbers of contested, non-serious cases are too small to be significant in many of the studies and this accounts for their neglect. However, the figures for contested bail applications do need to be addressed. Although the majority of cases where the prosecution or police object to bail do result in custodial remands, some studies show a substantial minority of such cases which result in a grant of bail. Zander (1971) found 25 percent of cases where police requested a custodial remand resulted in bail being granted; King (1971) found 22 per cent; Zander (1979) found 42 per cent; and Doherty and East (1985) found 31 per cent. Although these figures are minorities, they still represent a reasonably substantial number of defendants who are being granted bail despite objections. Discussions of why magistrates disagree with police and prosecution recommendations in these cases are limited. Although there are comments that defence representations can make a difference to magistrates' decisions (Doherty and East 1985; Zander 1971), there is no discussion of what makes a successful bail application or how it affects magistrates' reasoning in contested cases.

A related point is that, with the exception of Doherty and East (1985) and Brink and Stone (1988), there is little comment on why defendants do *not* request bail. Moreover, even in Brink and Stone's (1988) article entitled "*Defendants* who do not ask for bail" (emphasis added), there is little discussion of defendants themselves. Defendants' choice not to apply for bail is credited to the advice they receive from their representative. Defendants themselves are absent from most research. Whilst the advice given by defence representatives is no doubt influential, questions remain about why defendants endure "weeks or even months" (Brink and Stone 1988:154) on custodial remand without seeking bail, particularly, as Brink and Stone (1988) themselves point

out, given that remand prisoners often have to endure worse conditions than sentenced prisoners.

[R]emand prisoners face many conditions that are far worse than those faced by sentenced prisoners, such as confinement in their cells for 23 hours each day and detention in the most overcrowded and antiquated establishments. (Brink and Stone 1988:153).

The choices that defendants make need to be explored if we are to develop a full understanding of remand processing and outcomes.

[The] natural focus [of analyses of criminal justice decision making] is upon the exercise of choice and the use of reasoning of those officials who are legally empowered to exercise discretion. But decision subjects are rarely, if ever, totally passive participants in the decision-making process, even if their 'participation' is often unwitting or inadvertent. (Hawkins 2003:202).

A further criticism of previous remand research is the limited attempts made to examine court-based social interaction and to incorporate it into explanations of remand decisions. As noted above, previous research on the remand system has taken some account of the impact social processes have on remand outcomes through discussions of 'court culture'. This concept, however, has been under-researched and, it is argued here, is insufficiently defined in remand research. 'Court culture' does usefully sensitise researchers to the ways in which the particular configurations of social interaction and court procedures can vary between courts, and that these variations can affect remand outcomes. However, remand research has failed to ask many important questions such as what the patterns of interaction are; where do they originate; and how, exactly, do they impact on decision making? For example, it is not sufficient to observe a concordance between magistrates' decisions and CPS recommendations and conclude that magistrates 'rubber stamp' CPS decisions. It has been shown that CPS and defence solicitors anticipate magistrates' decisions and adjust their own actions accordingly (Hucklesby 1997a; McConville, et al. 1994). Thus, a close correlation between CPS recommendations and magistrates' decisions may be due to deferential magistrates *or* deferential CPS officers, or other, as yet unidentified, working norms and social processes.

Despite evidence that processes and decisions are influenced by a range of criminal justice actors (see (Darbyshire 1984; Darbyshire 1999) on court clerks and

(McConville, et al. 1994) on defence representatives, as well as the previously cited remand research on the police, magistrates, and CPS officers), remand research still appears to be typically concerned with identifying the single most influential group in the remand process. Given this, coupled with evidence that the role of participants, such as the police, varies in significance from court to court (Jones 1985), it is argued here that other questions may be more instructive. For example: why does the influence of professional groups vary; which groups are deferential under what circumstances; is court-based interaction more complex than the previous unidirectional description e.g. CPS influence magistrates *or* CPS anticipate magistrates' decisions; and what the underlying forces are that shape courtroom dynamics?

Similarly, studies that seek to uncover what types of information are most influential in remand decisions need to consider more fully the social dynamics of remand processing. For example, Zander (1979) and Hucklesby (1994b) recorded whether, and how much, information about issues such as family responsibilities were mentioned in a hearing. Predetermined categories were used instead of recording proceedings verbatim. Moreover, there was no attempt to record the impact of pieces of information and how other court users responded to it. This method of recording data prevents analysis of the quality and tone of the information supplied, or the significance accorded to this information by other participants. The use of a pro forma imposes a conceptual structure on the remand hearing and inhibits the possibility of unanticipated themes emerging from the data.

Previous research has emphasised the complexity of remand decision making, a process with wide scope for discretionary practice which involves a series of stages, a range of personnel and the use of multiple decision making criteria. These findings, adapted and developed in light of their shortcomings, outlined above, have contributed to the framing of this study, highlighting issues to be explored further in the research. Firstly, the formal categories and rationale for decisions are not sufficient explanations of actual practice because the potential for discretionary practice is marked in the remand system. Legal and extra-legal criteria are both used for decision making so analysis must incorporate both. The nature of the organisational environment can affect how cases are processed. Equally, the social environment in which remand decisions are made is crucially important as decisions are the product of interaction between a range of participants.

## Conceptualising The Remand System

The conceptual literature which informed this thesis' analysis of the remand decision making process will be summarised here. The theoretical paradigm outlined in this section provided the foundation for the construction of the research questions and shaped the approach to the data collection. This section places the study in a wider conceptual framework thus both developing understanding of remand and, more widely, contributing to debates about the nature of decision making within a complex organisation such as the criminal justice system. This thesis aims to explore the nature of, and influences on, courts' social dynamics and working practices to understand how remand decisions are produced. Literature from a number of areas is discussed in relation to the examination of remand decision making in this thesis: firstly, models of the criminal justice system; secondly, approaches to the analysis of discretion and regulation; thirdly, the symbolic interactionist tradition; and, lastly, gender and criminology. The literature presented here is further discussed in subsequent chapters, where relevant, in light of findings from the data.

## Modelling The Criminal Justice System

Some previous work on remand (Dhami 2001; Hucklesby 1994b) has framed the process within the literature on models of the criminal justice system. The most well known of these are Packer's (1969) 'crime control' and 'due process' models. In the crime control model, the criminal justice system's priorities are to ensure a high rate of detection and conviction. Fast, efficient decision making is the goal in the "assembly-line conveyor belt" (Packer 1969:159) of criminal justice processing. Defendants who are not screened out by the police are presumed to be guilty and, in the remand process, custodial remands are regarded as a way of preventing further offending or absconding. Pre-trial detention encourages defendants to enter a guilty plea (something Kellough (2002) found evidence of in the Canadian remand system) and, it is argued, deters people from offending. Where defendants are bailed, their release is less to do with a 'right' to bail and more to do with promoting efficiency in the process.

At the other end of the continuum is the due process model where conveyor belt processing is replaced with a concern for quality control in decision making. Speed and efficiency in processing the presumed guilty makes way for

[F]ormal, adjudicative, adversary fact-finding processes in which the factual case against the accused is publicly heard by an impartial tribunal and is evaluated only after the accused has had a full opportunity to discredit the case against him. (Packer 1969:163-164).

In the due process model, it is not presumed that the defendant will be found guilty and custodial remands are seen to inhibit their right to access legal advice and the preparation of their case. The presumption is in favour of bailing the defendant and conditions, rather than custodial remand, should be used to allay fears of offending or absconding.

There are a number of critiques of these models (King 1981; McBarnet 1981) which will not be extensively explored as it is argued here that models are not an adequate theoretical framework for analysis of the remand system. One of the main problems with this framework is that the relationship between the models is not explored (Ashworth 1998). If they are at opposite ends of a continuum, then how do they relate to each other? In what circumstances is one used and not the other? What elements of the case, the immediate environment, the socio-political situation, etc. promote the use of one over the other? The models are not descriptions of existing systems but are ideal types to which the practice in actual systems can be compared, and degrees of deviation and variation illustrated. Models may be useful at the level of analysing abstract complex processes, but are less useful in the study of the detailed micro-processes of individual cases.

Further, following King (1981), it is also believed that multiple models may co-exist in the justice system, both at different stages in the system and between different groups of criminal justice agents. Previous analyses, which have focused on whether the remand system is typified by crime control *or* due process models, have failed to explore the extent to which a range of models co-exist and compete in the remand process.

Models do, however, usefully highlight certain issues, such as how practitioners' aims and intentions (e.g. crime control) impact on the ways cases are processed and resolved.

They also serve as reminders that there are links between the stages of the criminalisation process, for example

[T]he principles of sentencing are strongly related both to the criteria for diversion from the criminal process and to the system of plea negotiation. (Ashworth 1998:25).

They also illustrate the different ways in which one of the central dilemmas of the criminal justice system can be played out in practice: the tension between securing the proper pursuit of justice for the state and preventing defendants from being treated any more punitively than can be helped. These opposing principles are particularly evident in pre-trial processes, such as remand, as defendants' guilt or innocence has yet to be established.

These, and subsequent models (Bottoms and McClean 1976; King 1981), also sensitise analysis to the various possible functions of the criminal justice system and the tensions between them. Models illustrate how purposes are related to the goals and the roles of the professional groups working within the system. As conceptual frameworks, they foster an understanding of patterns in decision making in terms of the organisational and social prioritisation of particular goals. Moreover, they illustrate that apposite processes and practices are selected and adopted by criminal justice agents in order to achieve those goals. An examination of working practices can thus be used to illuminate the actual function(s) of the remand process and the rationale(s) behind remand decisions.

## Discretion, Regulation And Legal Rules

As discussed above, the legal framework and the decision making environment contain a great deal of scope for the operation of discretion. There are two broad approaches to the analysis of discretion in the criminal justice system: the legal and the social science perspectives.

In the legal approach, the concern is with discretion and its regulation through the use of legal rules. For example, Davis (1969), whilst accepting some discretion was necessary and desirable, was concerned about the excessive use of discretionary powers. He argued that more legal rules could be the answer to the problem of too much discretion

if they were coupled with greater accountability in the operation of discretion. Increased regulation through legal rules would prevent the unnecessary use of discretion. Galligan (1986) also approached discretion from a legal perspective. He accepted that some discretion was inevitable but argued that its extent should and could be limited by the adoption of clear legal rules with less room for interpretation and discretionary practice. Other authors writing from the legal perspective have also been concerned with how to frame legal rules in order to minimise the potential for discretion (Schneider 1992).

The regulatory impact of legal rules is important to this research as they do help to frame the structure of the process and affect social processes (see below). There is a relationship between legal rules and criminal justice action. Discussing the work of Nonet and Selznick, Galligan (1987) explains that discretion can be regulated through clearer expressions of purpose in the criminal justice system.

According to their account, the purposes of any sub-system of authority can be made objective enough to provide guidance in designing the institutions and procedures for decision-making, and in settling the substantive ends to which decisions are to be directed. ((Galligan 1987) reproduced in (Lacey 1994:154)).

It is true that the purposes of the remand system are not clearly defined by its legal framework.

[T]he discretionary bail decision is structured in terms of statutory criteria which embody a presumption in favour of bail...However, the statutory criteria themselves point in a number of directions, and it is widely recognized that the apparent presumption in favour of bail translates in practice into just the opposite, at least in cases regarded as relatively serious. (Lacey 1994:15).

Clearly, the way in which the law is framed is important. If the legal framework in bail hearings included explicit recognition of these purposes that are evident in working practice, they would be more susceptible to regulation and thus discretion would be limited.

However, the use of the legal perspective is limited because this study focuses more widely on decision making practices rather than simply the nature and operation of discretion. Thus, instead of concentrating on defining discretion and exploring what types of discretion operate at what points in the remand system (Galligan 1986;

Schneider 1992), the focus is on decision making and the ends to which discretion is employed.

In contrast to the legal approach, the social science approach tends to focus less on the relationship between legal rules and the operation of discretion, and instead examines decision making processes.

[C]riminal statutes are written without social relationships and context in mind, but they can only be interpreted and applied with reference to social relationships and context. ((Daly 1989) reproduced in (Lacey 1994:236)).

The legal framework is not the focus of this perspective and the analytic emphasis is on the influence of rules other than legal rules. Discussing the differences between legal and social science approaches to discretion and decision making, Hawkins (1992b) comments that

[D]iscretionary decisions are rarely as unconstrained as they might appear. It is precisely those social constraints that lead to highly patterned outcomes of discretionary decisions in the aggregate and may prompt some to conclude that little or no effective discretion really exists...Patterns in discretionary outcomes provide a marked contrast to the characteristic legal view of the use of discretion as individualized decision-making that is potentially capricious. While lawyers may conceive of a part of a legal system without rules as one of 'absolute discretion'..., it does not make sense from a social scientific point of view to speak of 'absolute' or 'unfettered' discretion, since to do so is to imply that discretion in the real world may be constrained only by legal rules, and to overlook the fact that it is also shaped by political, economic, social and organizational forces outside the legal structure. (Hawkins 1992b:38).

The legal framework must be incorporated in any analysis of criminal justice decision making as both legal rules and social rules in combination influence the production of decisions.

The contrasting approaches of law and social science have both, however, tended to underplay various important sources of influence. Where lawyers have usually shown little concern for the actual behaviour of those who exercise legal discretion, social scientists have frequently been guilty of discounting the part played by legal rules in shaping discretion. (Hawkins 1992b:19).

[W]e should reject any dichotomy between legal and social science approaches. Rather, we should recognize the importance of a pluralistic approach to the issues raised by the existence of discretionary power in legal

contexts, seen as a pervasive form of social and political power. (Lacey 1992:363).

The formation and impact of various types of social rules on decision making have been explored by other authors (e.g. see (Skolnick 1967) on working practices, (Lipsky 1980) on organisational culture and (Carlen 1976; Carlen 1983) on the role of extra-legal variable such as gender). These ideas are more fully developed in the next section on symbolic interactionism and the contribution this perspective makes to an understanding of criminal justice decision making. Literature on decision making in the criminal justice system highlights the importance of exploring the extent of discretionary practices and the legal and social rules which constrain such discretion. Models of criminal justice processing usefully combine with discretion literature as they can help to illuminate why discretion is exercised to particular ends. Equally, the insights from discretion literature enables an understanding of how and why different models can (co)exist in the criminal justice system.

## Symbolic Interactionism

The interactionist perspective is adopted in this thesis because it locates decision making and variation in criminal justice outcomes in the ways that cases are processed. Early studies of 'law in action' (e.g. see (Cicourel 1968; Skolnick 1967; Sudnow 1965)) examined social processes taking place outside courtrooms themselves. Indeed, Goffman's (1959) position was that what went on 'back stage' could be more revealing and significant than what took place in a central and public arena. Subsequent works began to explore the social interaction and decision making processes of courtrooms themselves (Baldwin and McConville 1977; Carlen 1976; Eaton 1984; McConville, et al. 1994; Parker, et al. 1981; Parker, et al. 1989; Rumgay 1998). Whilst acknowledging the importance of the 'back stage', this thesis draws on these later studies and explores how decisions are collectively produced in the unique environment of the courtroom itself. The court is an arena where representatives from numerous professions, as well as those involved in and affected by the alleged offence, gather to process the case collectively and produce an outcome.

Symbolic interactionism places process rather than legal rules at the centre of the field of enquiry. Instead of accepting formal rules and categories, this approach regards them

as problematical and seeks to explore the meanings that actions and decisions have for participants. Thus the official criteria for refusing bail, that are contained in the Bail Act, are not accepted as the focus of enquiry. This research explores the various purposes that custodial remands may be used to satisfy. These purposes may have little or no relation to the Bail Act criteria and, moreover, may actually be concealed by the requirement to frame accounts of decisions in terms of the formal Bail Act categories.

Where the question is explicitly addressed by criminal justice studies in the interactionist tradition, variation in outcome is explained by differences in how cases are processed. For example, Cicourel (1968) identified the central importance of different working practices in explaining patterns in outcomes for juveniles involved in the justice system in two areas that could be expected to have similar inputs and, therefore, outputs. Criminal justice outcomes are socially produced rather than determined by a legal framework. A number of previous studies have analysed courtrooms' social dynamics to explain patterns of decision making (Baldwin and McConville 1977; Carlen 1976; Eaton 1984; Eaton 1987; Parker, et al. 1989; Rumgay 1998). Cases are not regarded as being processed by rational legal actors, carefully balancing the issues of the case within a legal framework to reach predictable, rational decisions. Focusing on 'law in action', the ways in which formal rules and sanctions are applied are understood to be the product of a process of social interaction.

The limited regulatory impact of formal legal rules does not, however, mean that criminal justice outputs are the unpredictable results of individualised decision making. Social action is patterned and structured by social rules.

[S]ocial activity is not random. It is patterned and structured, and part of the sociological enterprise is devoted to identifying and explaining the patterns of social interaction. (Hutter and Lloyd-Bostock 1997:36).

Two particular aspects of the interactionist approach are useful for the analysis of patterns of decision making in the remand system: courtroom (sub)culture, and labelling and typification of defendants.

The general culture of magistrates' courts has been understood as a reflection of the social composition of the magistracy and of dominant social norms and attitudes. For example, Carlen (1976) and Eaton (1984) illustrate how traditional class and gender

roles are reproduced in, and reinforced by, interaction and decision making in magistrates' courts. Other work has accounted for more specific differences between various courts' outcomes in terms of patterns of social interaction (Brown, et al. 2004; Hucklesby 1997a; Jones 1985).

The term 'court culture' is often used to describe enduring variation in working practices in individual courts. Rock's (1993) ethnography of a Crown Court clearly describes the resilience of the court's social organisation despite the challenge of a relocation to a new building. Rumgay (1995) describes how, in contrast to findings from some other studies, City's court held probation officers in high regard and their recommendations were afforded an unusual degree of influence. As discussed above, Jones (1985) identified persistent variations in the extent to which courts were influenced by police recommendations and explained this in terms of the courts' working practices. Whether described as court culture or persistent working practices, the literature indicates the importance of courtroom dynamics in explaining particular practices and variations between courts' outcomes. Rumgay (1995) notes that situational factors can additionally affect courtroom dynamics.

Labelling and typification theories explore how defendants are constructed by participants in the remand process, and the consequences this has for case resolution. Berger and Luckmann (1966) illustrated how identities are socially constructed, and thus related to the social structure. Participants in social interaction employ 'typificatory schemes' which provide the framework for understanding what the situation 'means' and thus how that interaction should proceed.

The reality of everyday life contains typificatory schemes in terms of which others are apprehended and 'dealt with' in face-to-face encounters. Thus I apprehend the other as 'a man', 'a European', 'a buyer', 'a jovial type', and so on. All these typifications ongoingly affect my interaction with him... Our face-to-face interaction will be patterned by these typifications as long as they do not become problematic through interference on his part. Thus he may come up with evidence that, although a 'man', 'a European', 'a buyer', he is also a self-righteous moralist, and that what appeared first as joviality is actually an expression of contempt for Americans in general and American salesmen in particular. At this point, of course, my typificatory scheme will have to be modified... Unless thus challenged, though, the typifications will hold until further notice and will determine my actions in the situation. (Berger and Luckmann 1966:45).

Identity is formed by social processes. Once crystallized, it is maintained, modified, or even reshaped by social relations. The social processes

involved in both the formation and the maintenance of identity are determined by the social structure. (Berger and Luckmann 1966:194).

Typification, with its origins in the 'labelling school', is employed in this thesis to explore social construction in remand hearings, and how female defendants<sup>9</sup> are understood, characterised and responded to by other participants in the process. What are the typifications of women that pattern remand hearings, and to what extent are defendants able to challenge these typifications? Previous work has illustrated how the justice system is organised to render defendants powerless (Carlen 1976; Ericson and Baranek 1982; Rock 1993), and are thus unable to 'interfere' with the typifications applied to them. Consequently, defendants are reliant on their defence representatives' responses to the typifications being employed in their case.

The typifications used in magistrates' courts will be organised around both the broad categories employed in wider society (e.g. on gender and social class see Eaton (1984) and Carlen (1976)) as well the specific categories that emerge from the organisational concerns and the functions of the courts. For example, Reiner (1992) documents how police officers categorised members of the public, around which the exercise of discretion was organised. Rungay (1998) records the routinisation of responses to 'drinking offenders'. Lipsky (1980) showed how typifications about deservingness were constructed as a way of managing the distribution of scarce resources. Sudnow (1965) illustrated how the concept of a 'normal crime' was used to routinise, and thus speed up, case processing.

The symbolic interactionist approach raises certain types of questions for this thesis, for example, how does social interaction in courts influence the operation of discretion and decision making; what are the respective roles and goals of agencies and individuals in the system; and, how is interaction between them organised?

However, whilst the approach illuminates the importance of the rules of face-to-face interaction, within a coercive environment such as the criminal justice system an exploration of power dynamics must also be included in the analytic framework. Consequently, the other literatures discussed here are used to supplement this

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<sup>9</sup> There are, of course, manifold typifications employed in the justice system around cues such as race, class, age, nationality, etc. This thesis, however, primarily focuses on the experience and treatment of women in the remand system.

perspective. Models and discretion illustrate that there are decision making rules which are not created, though may be influenced by, the social dynamics of a particular court. For example, the outcomes of every courtroom, no matter what its culture, are affected by the structure of legal rules.

## Gender

As discussed above, analysis of remand decisions must take account of the nature of interaction in individual courts, but must also locate decision outcomes in broader social and organisational structures. This study explores how the wider social dynamics and structures of gender are manifested in court and, consequently, how they affect decision outcomes.

It is important to first note that any analysis which prioritises one element of social identity is in danger of overlooking or obscuring other important elements e.g. race, class, nationality. Moreover, it is problematic to talk about 'women' in the remand system as if they constituted a cohesive group. The social inequalities that arise from gender are bisected, compounded, and ameliorated by other aspects of individuals' social identities and the social and economic resources that they can draw upon. Research on sentencing has recorded variations between and within different women's experiences and treatment (Hedderman and Gelsthorpe 1997). It is fully acknowledged that this thesis is, to a degree, limited by its failure to explore many of these complexities in relation to decision making in the remand system.

Whilst the research focuses on women, the wider concern is with decision making; the findings on, for example, the decision making environment (power dynamics, constraints, regulatory mechanisms, resource shortages, etc). may have relevance to any individual or social group being processed by the system. Many of the same issues, structural constraints, working practices, etc. will arise whether the defendant is male or female. Although many of the findings in this thesis on the remand system may be generalisable, caution should still be exercised before applying conclusions reached from studying female defendants to other social groups. For example, although there are shortages of information with both male and female defendants, magistrates may respond to this problem differentially. It is possible that, because women are

comparatively scarce in the remand system, magistrates would be inclined to make individualised rather than routinised decisions and so seek more information about female defendants and/or use different cues to reach decisions.

Although there are debates about the role feminism has to play in criminology (Heidensohn 1997) and tensions between the different ‘feminist criminologies’ (Gelsthorpe 1997), it is still possible to identify certain questions that recur in feminist perspectives on crime, criminal justice and criminology. These are briefly discussed below in relation to their relevance to this thesis; far more comprehensive summaries are available elsewhere (e.g. see (Gelsthorpe 1997; Heidensohn 1997; Heidensohn and Silvestri 1995)).

### **The Invisibility Of Women**

One of the main feminist critiques of mainstream criminology has been the invisibility of women. This relates both to the absence of a consideration of gender in criminological theories until the late twentieth century (Heidensohn 1968), and to the

[E]pistemological and methodological project which has focused on the need to recognize forms of knowledge based on experience, and the need to use research methods sensitive to the task of eliciting an understanding of *women's experiences*. (Gelsthorpe 1997:511, original emphasis).

Much has been done to remedy the first of these concerns. There is a great deal more research into women and crime and it is now accepted that general criminological theories must account for women's historically and cross-culturally lower rate of offending (e.g. see (Braithwaite 1989)). There is, however, little research on women in the remand system. The gender-specific work that has been done has been very small scale (Eaton 1987), or has focused on women's experiences of being held on custodial remand (Casale 1989). This thesis attempts to address that gap in our knowledge and provide information about women's treatment in a system which can define their treatment in later stages of the criminal justice process. It was also intended that this thesis would be an opportunity for us to understand women's perspectives on, and experiences of, the remand system through hearing their own voices and exploring the choices that they make. However, as will be discussed in Chapter Three, it was difficult to secure access to women at risk of custodial remand and thus, regrettably, there are limitations on the extent to which their views inform this analysis.

## **Are Women Treated Differently By The Criminal Justice System?**

This is a much discussed question that is usually framed in terms of whether women are treated more ‘leniently’ than men. The question is rephrased here because the evidence to date demonstrates the leniency debate is dated. The apparently more lenient treatment of women by the criminal justice system has been explained by the ‘chivalry thesis’. In a review of the research data on this, Heidensohn (1995) summarised the evidence,

Ten years ago it was not possible to give a firm and unequivocal answer to queries about ‘chivalry’: about how fair to women the criminal justice system was. The answers, a decade later, must remain equivocal and qualified. Now, this is not because of a lack of evidence – there are numerous studies – but because there has been increased recognition of the complexities involved in making comparisons and also since the results of all the studies rarely give firm clear answers. (Heidensohn and Silvestri 1995:207).

Daly (1994) found little evidence of chivalry or, in her terms, “paternalism”. Neither

was there much support for the evil woman thesis that officials will react more punitively when women not only deviate from expectable female conformity by committing a crime but when they commit a male-typed offense... My research in this court and two others... leads me to suggest that the paternalism and evil woman concepts should be laid to rest. These concepts first appeared as claims without empirical support... No one has yet shown their explanatory merit. (Daly 1994:196-197).

Comparative work illustrates that we cannot meaningfully compare women’s treatment in the criminal justice system *en masse* to men’s; different groups of men *and* women are treated differently depending on a range of other variables such as race, class, offence type, etc. (Hedderman and Hough 1994; Kellough and Wortley 2002). This is not to say that gender is unimportant to an understanding of criminal justice processing, but that a more productive approach is to adopt more subtle and discerning analyses of the way that it influences decision making. This approach will be elaborated in the section ‘Conceptualising and constructing women in the justice system’.

A further point to note is the difficulty of comparing women’s treatment to men’s because of the differences in patterns of offending. Research on this issue has often centred on comparative analyses of large data sets which attempt to control for the fundamental differences between men and women’s typical offending patterns: women commit less crime, and less serious offences, than men; women’s criminal careers are shorter; and women have different pathways in and out of crime (e.g. see (Daly 1994; Gelsthorpe 2004; Gelsthorpe and Morris 2002; Hedderman and Gelsthorpe 1997;

Hedderman and Hough 1994)). This research is not comparative but the nature, prevalence and persistence of female offending are relevant to the remand decisions to the degree that magistrates and others may consider them when deciding whether or not to withhold bail.

### **Why Do Women Commit Less Crime?**

Given that this thesis is about the women who have already entered the criminal justice system, discussions of why women are consistently reported to commit fewer crimes than men are largely tangential. The more pertinent questions address the processing of those women who have entered the remand system (see below). There remain some questions about gender dynamics in the criminalisation of certain behaviours but these are not discussed here as the primary and obvious example of this, prostitution, is excluded from this study as no women are remanded in custody for this offence – although it is still possible for them to be imprisoned for secondary offences such as breaching an anti-social behaviour order (ASBO) prohibiting the defendant from loitering for the purposes of prostitution in certain areas.

Theories about why women commit less crime do have some relevance given that they may inform how magistrates, and other key decision makers, conceptualise women and how they choose to respond to women in remand hearings. These issues are discussed below.

### **Conceptualising And Constructing Women In The Justice System**

As discussed above, one of the central concerns of this thesis is the ways in which women are conceptualised and constructed in the remand system. Women have been observed to be understood and responded to by criminal justice personnel according to dominant social narratives of female domesticity and sexuality (Allen 1987a; Allen 1987b; Daly 1994; Eaton 1984; Eaton 1987; Worrall 1990). Whilst many of the issues relating to this question overlap with discussions of ‘leniency’ in criminal justice processing, they should not be conflated. Most obviously, although demonstrations of domesticity may encourage ‘chivalrous’ responses, they may also result in women being ‘uptariffed’ because magistrates are unwilling to fine a woman in case her children suffer economic privations (Hedderman and Gelthorpe 1997). Therefore, this thesis addresses both the issues of a) how women are conceptualised in the remand system, and b) the consequences of the ways in which women are conceptualised.

This summary of women and crime, criminology and criminal justice has just touched the surface of a rich body of literature. It has illustrated that gender should be one of the central organising principles in criminal justice research as women's entry into, treatment by, and experience of the criminal justice system are all influenced by gender. There is, however, a danger of polarising the experience of men and women too much. The focus on women may highlight certain issues,

It is possible that when gender disparities in sentencing are a research focus, family is suddenly more visible. ((Daly 1989) reproduced in (Lacey 1994:238)).

but

[S]tudies with a presumptive male as the defendant also reveal a family-based logic...court officials... confront a dilemma of justice when men and women who have responsibilities for the care or economic welfare of others are convicted of crime. ((Daly 1989) reproduced in (Lacey 1994:238)).

Whilst this research is organised around the treatment and experience of women in the remand system, it is possible that some results may also contribute to debates about men's experiences of, and treatment by, the remand system.

## Conclusion

The findings from previous research studies indicate the issues to be explored in this exploration of the remand system. One of the most important themes is the extent to which remand decisions are based on offence- and offending-related factors, such as offence seriousness and previous convictions, and/or on defendants' personal characteristics, such as age, race and gender. Whilst this research focuses on exploring gender considerations in remand decisions, it also addresses the broader question of the balance between offence and personal characteristics in reaching remand decisions.

The second broad theme in remand research to date highlights the importance of the environment in which decisions are made. Consequently, this research aims to explore the ways in which the social and the organisational contexts influence remand processing and outcomes.

In order to explore these issues and the relationship between them, the theoretical framework discussed above has been constructed from a range of perspectives on the criminal justice system, court dynamics and the operation of discretion in decision making. This thesis seeks to locate remand decision making in a network of individual, organisational, and societal influences. Although the organisation of material and the terminology employed vary, the principles of this framework are drawn from Hawkins' (2002; 2003) 'naturalistic' analysis of decision making.

[I]denifying the formal locus of discretion is best seen as a preliminary, if the task is to understand actual decision practices, and what shapes them. One way of thinking about legal decision making seeks to get away from approaches which focus on 'criteria' or 'factors' said to have been taken into account in making a particular choice. The argument, instead, is that decisions can only be understood by reference to their broad environment, particular context, and interpretive practices: their surrounds, fields and frames ... On this view, criminal justice decisions are made in the broader setting of a surround and within a context, or field, defined by legal and organizational mandates. Such decisions are made in a rich and complex environment, which acts as the setting for the play of shifting currents of broad political and economic values and forces. Decision frames, the interpretative and classificatory devices operating in particular instances, are shaped by both surround and field. To understand the nature of criminal justice decision making better, a connection needs to be forged between forces in the decision-making environment, and the interpretive processes that individuals engage in when deciding a particular case. (Hawkins 2003:188-189).

The range of perspectives explored is necessary as they each contribute to an integrated understanding of how remand decisions are produced. Whilst symbolic interactionism is an appropriate approach to explore the nature, organisation and experience of social interaction in the courtroom, it is less appropriate to an understanding of power dynamics and wider social and organisational forces. Discretion literature also illustrates the value of interpretive sociology to an understanding of how and why legal powers are used as they are, but, additionally, it focuses attention on the legal framework and how this can shape the exercise of discretion. Models of the justice system are used to explore relationship between legal, organisational and socio-political aims and ideologies, and courts' working practices. Finally, remand decision making is located within the wider societal dynamics of gender, aiming to explore how they are manifested, and acted upon, in the remand system.

In combination, these various perspectives inform the practical and analytic frameworks of this thesis. In accepting the inevitability of discretionary practices, and in exploring the interaction between a variety of influences on remand decision making (including the legal and regulatory environment, socio-political and systemic constraints, and professional and organisational cultures), the thesis does, indeed, aim to “understand actual decision-making practices, and what shapes them” (Hawkins 2003:189).

# Chapter Three

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## Methodology

This chapter describes the research process. It begins with an explanation of why the methodological approach was selected and locates this within the theoretical issues raised in the previous chapter. Following this is an outline of such practical considerations as access problems and selection of the research sites. Details of the individual research methods used are then described along with relevant issues that arose during the fieldwork. Finally, matters concerning analysis of the data are briefly outlined.

### Introduction

The choice of methods reflects the theoretical concerns of the thesis outlined in the previous chapter. In sum, this thesis understands remand outcomes to be the product of interaction between a range of actors, only partially described and constrained by the legal framework of the Bail Act and its amendments.

[L]aw is treated, not as a formal structure of more or less unproblematic rules, but as a constantly shifting, negotiated, emergent matter, a system of meanings, constantly evolving, and constantly dependent on social context. (Hawkins 2002:viii).

In order to understand how remand decisions are produced, we need first to understand the frames within which the actors operate i.e. to ask the question “what is going on here?” (Goffman 1975). What are the meanings of remand and the classifications through which bail hearings are interpreted and decisions made?

There are important and interesting research issues including the use of bail conditions or rates of offending and absconding whilst on bail, but this thesis focuses on decision making concerning women who were defined as being ‘at risk’ of receiving a custodial remand. Thus, this study was not concerned with routine remand hearings, the vast majority of which result in bail. The research explores the decision-making process and

outcomes in remand hearings where the defendant was at risk of a custodial remand. Of the 63 cases<sup>10</sup> studied, 47 were disputed hearings where the CPS objected to bail and the defence representative made a bail application. In the remaining 16 cases, the defence representative did not make a bail application and the woman was remanded in custody. It is argued in this thesis that there is significant variation in the processing of different types of cases. Consequently the results presented in this thesis should not be applied to the bulk of remand cases without caution.

Police decisions to hold a woman on overnight custody were used as a proxy indicator that a woman was at risk of a custodial remand; this was how cases were selected for court observation. It was reasoned that the police would not release a woman if they wanted the court to remand her in custody. However, it was not a foolproof indicator as holding a woman on overnight custody did not necessarily mean the police wanted the courts to remand her in custody. For example, many women on loitering charges were held overnight by the police to ensure that they attended court and paid their fines, but there was no likelihood that they would be remanded in custody for loitering charges. Of the women who were genuinely at risk of custodial remand, of particular interest were the 'contested' and the 'cusp' cases. Contested cases are those where the CPS oppose bail and defence representatives make a bail application in response. Not all of the 'at risk' cases were contested as some women chose not to make bail applications for a variety of reasons explored in later chapters. Cusp cases are those specific contested cases where a defendant is on the borderline between bail and a remand in custody. Not all contested cases are cusp cases, for example if the offence is serious then, although bail may be applied for, in all probability the defendant will be remanded in custody regardless of factors raised in the bail application (see Chapter Five).

There were two reasons for focusing on women at risk of a custodial remand. Firstly, the research originated in my curiosity as to why the number and proportions of women remanded in custody (both before and after trial) was increasing relative to the sentenced population. In order to explore possible court-based reasons for this trend, it was necessary to look at cases where the use of custody was considered.

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<sup>10</sup> The number of *cases* differs from the number of *hearings* (103) as some women made more than one bail application. This distinction is maintained throughout the text.

Secondly, by selecting ‘at risk’ cases, I would, by default, be observing all contested cases and cusp cases. As Patton (1990:169-81) argues, one strategy for choosing a sample of cases that will illuminate the field of study is through purposively selecting extreme or deviant cases rather than using random sampling. The overwhelming majority of remand hearings result in bail being granted. Although there are questions on the appropriateness of bail conditions (Hucklesby 1994a), there is no dispute that bail will be granted. Studies on remand have consistently found that more information is advanced in contested cases than in cases where there is a consensual view on how to proceed (Bottomley 1970; East and Doherty 1984; Hucklesby 1994b; King 1971). Previous work has tended to focus on all remand decisions, not just contested cases. Dhami (2003) claims a model with 95 per cent predictive accuracy. However, Dhami acknowledges that this “fast and frugal” model of decision making can not predict whether bail will be conditional or unconditional. As bail conditions become more onerous (e.g. the proposed use of electronic monitoring for bailees), it becomes even more important to understand how and why conditions are applied. Although, as Chapter Five argues, most bail decisions *are* made on a limited number of criteria, supporting Dhami’s (2003) model, it is clear that ‘cusp cases’ (those on the borderline between bail and custodial remand) cannot be predicted using such a mechanistic approach. Through observing and analysing cases where difficult decisions have to be made, the logic and functioning of the remand system is disclosed.

It is not possible to understand the complexities of the remand decision through the use of quantitative methodologies. Quantitative and qualitative methods can usefully be combined (Robson 1993) to build understandings of the remand system. However, without first establishing the meanings that decisions have for actors, such an approach fails to illuminate the field. Hucklesby (1994b) uses some qualitative analysis to supplement her quantitative findings. When looking at the statistical evidence of differential remand rates between courts, she acknowledges that “these findings provide very little insight into the remand process” (Hucklesby 1994b:191).

Decision making must first be located in, and understood with reference to, the contexts within which it takes place. For example, custodial remands can only be accounted for in terms of the official criteria for withholding bail contained in the Bail Act. Regardless of the actual purpose of a custodial remand, actors are procedurally obliged to classify their decisions in terms of a few pre-defined options. As will be explored in later

chapters, the reasons magistrates remand defendants in custody are not limited to those contained in the Bail Act. Analysis of statistical data on the use of the various exceptions to the right to bail tells us not about why women are remanded in custody but about the official *ex post facto* accounts of why they are in prison.

## Research Sites

Data collection was reasonably unproblematic. Fieldwork was completed in a little over one year. Approximately six months was spent doing court observations in each District. A police contact in the boroughs would phone me each morning to tell me if any stations had held any women on overnight custody and give me the name, charge and where relevant which of the borough's courts she was appearing at that morning. I would then cycle to the appropriate court where I observed the hearings, taking full notes on everything that was said and done. Depending on the outcome, I would attend any subsequent court appearances. I had intended to trace women through to sentence but that proved impossible in most cases. The majority of women were either sentenced after I had left the borough, failed to attend court, or were sent to the crown court which I could not cover in addition to the magistrates courts.

Court observations were undertaken in three City districts, hereafter referred to as Central District (courts: Castleford Road and Connerton Road), Inner District (court: Inswick Corner), and Outer District (courts: Old Market Street and Orrington Street). The names indicate the location of the Districts within the city. The selection of Districts was partly influenced by the practical consideration of their proximity to my base as I would often have only half an hour between receiving a phone call from the police, alerting me to a case, and the courts opening. Districts were also selected because their various populations reflected a number of issues that may have impacted on remand decision making and are evident in major cities in England and Wales e.g. race, nationality, age, social class, transitory populations, local policing priorities etc. However, given the small number of hearings that were observed, it proved impossible to explore many of these issues in a systematic and comparative way due to the absence of enough matched pairs of cases. (Daly 1994).

After the first three months at Central District, I began observations in Inner District. After six months I withdrew from Central District and started in Outer District. In the final three months, when I was only observing in Outer District, I conducted the majority of the interviews. When cases in different courts and/or boroughs clashed, I prioritised which case to attend based on a) whether it was a first appearance or was a second or subsequent hearing (every effort was made to follow each stage of cases in order to see how information flowed); and on b) the nature of the offence (e.g. some Districts held women on loitering charges overnight and I did not follow these cases as they never resulted in a custodial remand). Ideally I would have only been in one at a time but that would simply have taken too long.

It is important to note that these courts are all located within a large city. Not only is there evidence that rural and urban magistrates' courts have different patterns of sentencing (Bottomley 1970), but City courts, being busier, were often presided over by district judges and had to contend with some specific problems as well as the generic issues which face most magistrates' courts. For example, all the courts studied had to cope with very busy remand court lists, routinely required translator services, and other issues, such as the movement of staff between courts – the importance of which become evident in later chapters.

So, there are questions as to the extent to which findings from this research have generalisability (Flick 1998) and can be applied to remand processing in other courts and with other groups of defendants. Undoubtedly, the research was embedded within the environments in which it took place and this does caution against wider application of its findings. Most obviously, the focus was on female defendants and, in terms of understanding the female custodial remand population, there is one major shortcoming with this research: the absence of observations of cases involving foreign national females on custodial remand for drugs importation. As a precursor to the fieldwork, I visited a prison that held female remand prisoners. I met a number of foreign nationals on custodial remand and would have liked to include their issues in this research but practicalities prevented it. The exclusion of such cases was partly a practical consideration given the courts through which the majority of these defendants are processed (i.e. those near the major airports) were too far away to travel to at short notice. Additionally, foreign national women on drug charges present some very specific issues which would not be found in the 'typical' custodial remands that were

the focus of this study. It may be useful to explore the processing of foreign nationals in light of the findings from this research.

The generalisability of this research may be limited to some degree by its grounding in three City districts and its focus on female defendants. It is important to be cognisant of the boundaries of the research and not apply its results indiscriminately to all magistrates' courts or to all defendants.

Although much of the book is an exploration of routine activity directed by the insider's recipe knowledge of how to conduct trials in *any* court, it does not pretend to generalize or compare far beyond what happened in a single court in a little under one year. (Rock 1993:6) (original emphasis).

However, this research was not intended to be an ethnographic study of the type Rock undertook; indeed, it would be difficult to do justice to such an approach in five separate courts within one year. The comparative element was a foundation of the research design and, although the limited numbers of cases prevented meaningful comparisons on many issues, themes in the processing and outcomes in all courts were sought and identified. The inclusion of five courts in three districts ensures that whilst the idiosyncrasies of courts were identifiable, the commonalities of the remand process demonstrated in each court was also evident; multiple courts were included in the research design for this very reason.

## Access And Consent

Initially, it was also hoped that observations could take place in police custody suites to explore every stage of the remand process from police decision-making onwards. Although City Police were very helpful on other matters, they were unwilling to facilitate this element of the fieldwork because of the problems of disclosure of evidence. There were fears that if I was observing and questioning custody sergeants and arresting officers on bail decisions in "live" cases, I could potentially be called as a witness in those cases. Senior officers presented this in terms of protecting both myself and their officers. Although previous observational research has been successfully undertaken in police stations before (Reiner 2000b), it was evident that senior officers would not easily relent on this issue and so it was not pursued for fear of disrupting

discussions on the essential police role of alerting me when relevant women appeared in court.

Notwithstanding the regrettable absence of data on police decision-making in the research<sup>11</sup>, officers in the City Police Service were essential to efficient use of researcher time and targeted data collection. It was agreed centrally that an officer in each district in turn would notify me each morning if an adult female had been held on overnight custody at any station in the district and was due to appear at court. The defendant's name, age, ethnic origin, offence and the court they were appearing at (where the district contained more than one court) were supplied. This intelligence proved invaluable as it enabled me to follow (almost) all cases of women at risk of custodial remand in a district during the observation period. It also prevented me from having to spend wasted days sitting in courts as female defendants were rare and those at risk of a custodial remand proved rarer still.

This system worked well, on the whole, in the three districts. The primary problem with access was not that City Police were unwilling to cooperate<sup>12</sup> but that the need to engage each level of police hierarchy, and the necessity of allowing time for orders to filter through the layers of bureaucracy, proved more time consuming than had been anticipated. Once secured, though, police cooperation could only be faulted by the gaps in provision of documents (see below) which were consequent on trying to fit my requests for information into the sheer volume of work my contacts were already undertaking.

The morning telephone call from officers in the three boroughs, informing me whether or not any women had been held on overnight custody, was the foundation of this research. It allowed me to attend the relevant court and follow the progress of the case. Without this cooperation, the fieldwork would have been far more time consuming and

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<sup>11</sup> As was argued earlier, remand outcomes must be conceived of as the product of a series of decision-making stages. The police decision has crucial significance as, it has been argued, it frames the progress of the case (e.g. see Hucklesby, 1994b). It was intended that police decision-making would be studied in-depth; indeed, the absence of such close analysis was argued as a weakness of all previous remand research in the initial ESRC proposal. However, as discussed, access was problematic and, it became evident at later stages, the practicalities of undertaking fieldwork in a series of courts was ambitious enough for a single researcher without trying to include police observations too.

<sup>12</sup> Thanks to Dr Janet Foster's contacts and personal recommendation, securing initial access to senior members of City Police research team was unproblematic. Following a number of meetings with the team and their senior officers they agreed to support the research. Their cooperation guaranteed that authorised access would be granted by senior officers in the individual districts.

fewer courts and cases would have been covered as it would not have been possible to monitor two courts, let alone two districts, at the same time.

The names of the courts and the districts in which the research was conducted have been changed to protect the individuals who agreed to be interviewed; some would be easily identifiable if the court were known. A letter describing the research was circulated to magistrates and court staff by the Chief Clerks of the courts, and individuals subsequently volunteered for interview (discussed below). All interviewees' anonymity was guaranteed and a record of their informed consent was secured by the consent slip I requested they sign and return to me. No interviewee objected to the interview being tape recorded.

The consent of the women whose cases I observed was not sought. Firstly, the women would have been difficult to trace as I rarely had knowledge of their home addresses or they were in custody. Secondly, the information on them which features in this study was all collected from observing their public appearances in court. As will be seen below, the supply of the remand forms (the 'MGs') from the police was erratic and they rarely contained any information which was not disclosed in open court. It was felt that as the information on the defendants was in the public domain, it was not necessary to secure individual women's consent.

## Research Methods

A combination of different sources of data was necessitated in this thesis by the nature of the issues being explored. Case vignettes were constructed to elicit information about magistrates' decision-making processes. Magistrates were asked to verbalise their decision-making, allowing the author to compare the relative importance of issues in different types of cases. Such analysis of observation data would be impossible as magistrates never gave detailed public accounts of how and why they reached their decisions. As Hucklesby notes, observations do not necessarily allow the researcher to reach an understanding of the relative importance of pieces of information to magistrates,

[M]agistrates themselves only had the same information available to them as the researcher had. However, simply because the information is available to

the court does not necessarily mean that it played a part in the magistrates' decision. (Hucklesby 1994b:196).

Conversely, when exploring the purposes of remand and defence representatives' techniques, court observations were the most appropriate source of data. The observations allowed me to identify and analyse issues that occurred in real cases, and include the roles played by other court actors (not least, the defendant herself). Vignettes or interview data could obviously not supply such information as they are accounts of what individuals think they do, rather than records of what individuals in a group setting actually do. As McBarnet (1981) argues, decisions are actually made on different criteria to those evident in the rhetoric of legal judgements and accounts: "The rhetoric lives on in the statute but is routinely negated in the courts by judicial reasoning" (McBarnet 1981:160). Moreover, with vignettes and in interview, magistrates responded to an artificial situation, unlike the genuine situations that occurred in courts. The combination of observation, interview and case vignettes was considered to be the approach to data collection which would most comprehensively capture the issues of interest in this thesis. This methodological triangulation (Robson 1993:66-72) also maximised the data's validity; although each stage of data collection was designed to target specific issues, they all explored overlapping themes and the findings from the various approaches did all resonate with each other.

## Documentary Sources

The police alerted me when women had been held on overnight custody which enabled me to attend and observe their court hearing. The police were also supposed to give me copies of the paperwork prepared on these women. The two most relevant forms were known as the MG5 and the MG7. The MG5 was the police summary of the offence. The MG7 was meant to be filled out when defendants were held on overnight custody and it contained a record of police reasons for withholding bail and their objections, if any<sup>13</sup>, to court bail being granted. This form was for CPS reference only and was not available to the defence representatives. Most of the form was a series of tick-boxes but one section was anticipated to be of particular interest: the section where the police could

<sup>13</sup> In many cases police refused bail but were content for court bail to be granted. This happened, for example, when the defendant could not safely be released late at night because they were incapacitated through alcohol or drugs. In Inner District, the police had a policy of holding prostitutes overnight to ensure their attendance at court but, as they were invariably released on "time served" or with a fine by the magistrates, this overnight remand was clearly not an indicator of being at risk of a longer term custodial remand.

write comments substantiating their recommendation that court bail should be refused. Although some of these forms did contain useful information, they were erratically supplied to me because of the pressure of work my contacts were under. Unfortunately, as they were not routinely available to me, I was unable to incorporate them into the research in a systematic way and instead used them as a supplementary data source to check information such as a defendant's date of birth or the precise wording of the charge. A study of the content and impact of the MG7 form would be a very interesting project as this is the primary form of communication between the police and the CPS on bail issues and it may elucidate decision making rationale at the first stage of the remand process.

## Court Observations

The number and outcome of observed cases are listed in Table 3.1. Table 3.2 contains the remand outcomes in pre- and post-conviction hearings. In agreement with Hucklesby's (1994b) analysis, pre- and post-conviction remands are discussed together throughout this thesis. The legislative framework is the same for both groups (where convicted unsentenced offenders were remanded for reports) and magistrates expressed a strong reluctance to use custody prior to sentence regardless of the stage in proceedings. Where relevant, the data from the two groups are discussed separately.

**Table 3.1: Outcomes In Observed Cases**

Hearing Outcome	Number Of Hearings
Remand in custody	55
Conditional bail	36
Sentenced	7
Failed to attend	3
Unconditional bail	1
Case discontinued	1
<b>TOTAL</b>	<b>103</b>

**Table 3.2: Remand Outcomes In Pre- And Post-Conviction Hearings**

Hearing Outcome	Pre-conviction	Post-conviction
Remand in custody	37	18
Conditional bail	21	15
Unconditional bail	-	1
Total hearings (where a remand decision was given)	58	34

Table 3.3 contains the offence types of all the observed cases. As can be seen from Table 3.3, the offences the women at risk of a custodial remand were charged with ranged from very serious offences (e.g. arson) through to shoplifting. Although it broadly reflects the general pattern of female offending (i.e. largely non-violent property offences, (e.g. see (Burman 2004; Daly 1994; Hedderman 2004; Hedderman and Gelsthorpe 1997; Home Office 2003a))), there were a number of serious offences (e.g. robbery, domestic burglary, arson). This is unsurprising given that the women were selected because they were at risk of custodial remand. What is more notable is that nearly half the women at risk of a custodial remand in this research were charged with offences that were not serious: either comparatively low-value thefts (22 women) or low-value deception (seven women). The rationale behind remand decisions for offences of varying seriousness are explored in Chapter Five.

**Table 3.3: Offence Types In Observed Cases**

Primary Charge	Number Of Women Charged
Theft from a shop	12
Deception (credit/debit cards)	7
Robbery	7
Burglary	6
Theft of a handbag	4
ABH	2
Arson	2
Handling stolen goods	2
Living off immoral earnings	2
Possession of an offensive weapon	2
Possession with intent to supply Class A drug	2
Theft (unspecified)	2
Wanted on warrant	2
Allowing self to be carried in a stolen vehicle	1
Assault on police	1
Breach of an anti-social behaviour order	1
Criminal damage	1
Going equipped to steal	1
Possession of a firearm	1
Racial harassment	1
Theft by distraction	1
Theft from employer	1
Theft by finding	1
Theft from person	1
Unknown	1
<b>TOTAL</b>	<b>64</b>

Cases were observed and verbatim notes were taken on everything that was said and done during the course of remand hearings, along with observations on actors' demeanour and other events that were taking place on the periphery of the actual hearing. Previous studies (Hucklesby 1994b; King 1971) have collected and organised data given verbally in court proceedings under a series of categories e.g. offence type, employment status, residence status, etc. and recorded the amount of information provided about each. However, the view was taken that proceedings should be recorded verbatim and categorised later as part of the analysis. By recording information in pre-defined categories, the 'script' of the proceedings is lost. For example, cases were observed where magistrates interrupted defence representatives, telling them that bail would not be granted. If the hearing had been recorded under categories, the hearing record would show 'no additional information provided' without this being contextualised by the crucial point that the magistrates circumvented procedure and prevented information being supplied. Additionally, without a verbatim record, the

moral tone of the hearing is lost. For example, child care responsibilities were mentioned in numerous cases but occasionally they would be afforded greater significance (e.g. in one case it was argued the defendant needed to be granted bail so she could attend a custody hearing for her children). Observations were not limited to the specific cases I followed: notes were also made on the general nature of the court and its staff, and on activities and conversations both inside and outside courtrooms.

As I wanted to observe the systemic nature of the remand process, a decision was taken not to try and form a prior affiliation with any particular participating group but to observe decision making from a 'peripheral membership role' (Adler and Adler 1987:36-49) separate from all participants. Adopting this role meant that I did not participate in any activities that defined groups' membership and this, inevitably, impacted on the nature of information available to me. For example, although I did not risk alienating any one group through a strong affiliation with other groups, I was not a privileged member of any group and this would have limited their degree of trust in me and levels of disclosure. Despite this, I did acquire a degree of insider status and was accepted by almost all court actors. For example, although the majority did not know who I was or why I was there, I was allowed to enter restricted, semi-private courtroom space and sit in the 'home territory' reserved for the courts' 'miscellaneous users' (Rock 1993) without challenge.

[R]eserved spaces [were] marked by visible and invisible frontiers and stringently policed by ushers and clerks...Court staff were concerned always about people out of place, and the ushers and court clerks, whose territory the courtroom was, would eye and question all those who seemed to be acting improperly or whose identity was infirm. (Rock 1993:234-235).

I had no agreed access to the semi-private spaces in courtrooms and initial access to this part of the courtroom was secured early in the fieldwork stage when a list-caller at Connorton Road mistook me for a lawyer doing articles. He beckoned me from the public gallery and told me he would let me sit in the courtroom itself if I was interested in a particular case. I did not try to explain I was a researcher as the court was sitting and I did not want to risk disrupting the hearing. When he was replaced by another list caller some minutes later, the second official did not question my presence. I remained there without being questioned all afternoon. Following this, I decided it might be possible to go unchallenged in other courts too so I entered the restricted part of the courtroom in Castleford Road when I next had a hearing there. The list caller there

looked puzzled when I sat down but I just smiled confidently and nodded at him. He did not have a chance to challenge me because the district judge entered the court at that moment. The list caller did not question me later and, the next time I entered the courtroom, he acknowledged me with a nod then continued with his responsibilities.

I observed the public obediently filtering into the public galleries rather than cross the real and symbolic boundaries that segregated the courtroom. Other court users were witnessed being removed from these seats and asked to sit in the appropriate position in court. My assumption is that my acceptance as an insider was consequent on the way that I managed my behaviour in the field and on the particular nature of magistrates' courtrooms as a research site.

The confident way that I located myself physically in areas of the courtrooms that were reserved for 'insiders' signalled my acceptability to the court. Few knew my actual role even though I made no effort to conceal my researcher status. I had written to all the Chief Clerks about the research and happily discussed it when asked, but I was rarely asked. If they did ever wonder about my role, most court actors filled in the gaps themselves rather than asking me for information. On one of my last days at Inswick Corner, the security staff told me that they had been taking bets on what my actual role was. The options included policewoman, probation officer, trainee magistrate, reporter and trainee lawyer. In the year that I spent in courts I was only challenged once about my right to sit in restricted areas – it appears that I did not look "out of place".

Perhaps one reason why I was not challenged and clusters (see below) formed regardless of my presence was the acceptability that was afforded by the identity card the police had issued me. Initially I displayed it prominently, hanging it around my neck and holding it up whenever I asked for information or I came through the security checks. After a while, I became self-conscious of it as I felt it marked me as an outsider, albeit an officially sanctioned one. I experimented with having the chain visible but concealing the card under my clothes. Knowing that I could produce the card if challenged afforded me a confidence which was probably reflected in my manner; I had a purpose to fulfil and a right to be there. Court actors responded to that and treated me accordingly. However, there was still always an ambiguity about my role. When in public areas of courthouses, I repeatedly experienced defendants looking at me, taking steps towards me then veering off and asking someone else for information. They

seemed to identify me as someone official but could not quite place my role. Security guards, with whom I quickly began to exchange morning pleasantries, waved me through security checks; my bag, like those of permanent staff and the more familiar peripatetic defence representatives, was routinely left unsearched. Occasionally new staff would begin to check my bag but older staff would intervene and usher me through.

The fact that court actors voluntarily and spontaneously legitimised me and my presence without explanation from me was evident by this absence of challenge or suspicion. This was exemplified by the actions of one security guard at Inswick Corner. On one occasion when he was allowing me to jump the queue and bypass the security check, he commented on the ID card which was, as usual, obscured by my clothing, saying “What is that card, anyway? It could be your bus pass for all I know.” I took this as a challenge for me to establish my identity but, before I could display the card, he turned away to deal with the next person in the queue. Despite the ambiguity about my role and identity, I was, nonetheless, accepted.

When magistrates or district judges retired, the court was brought together in the common purpose of waiting. During such periods, the court would subtly re-orientate itself away from a focus on the magistrate to a more inclusive formation. CPS officers would typically move to one side to form a “cluster” that included the clerk in front of them and the defence representatives sitting immediately behind them. Defence representatives sitting further back would often move to the front of the court to define themselves as part of this group. A cluster is formed by people with a common purpose or identity; it is

a set of persons physically close together and facially orientated to one another, their backs towards those who are not participants (Goffman 1963:100).

Within these clusters, participants sometimes engaged in indiscreet exchanges of information. With the magistrate and defendant removed (defendants in custody were taken back to the cells when magistrates retired), it was possible for them to become the topic of conversation. Often these conversations were innocuous but, at times, I overheard personal and professional criticisms of magistrates and privileged details of defendants’ cases and lives. I learned which magistrates were respected and which were

the subject of mockery, which magistrates liked a “liquid lunch” and which retired unnecessarily because they wanted a cigarette. I learned defendants’ offending records, their histories of abuse, their domestic situations, and their alleged guilt despite their professed innocence. I was repeatedly surprised that actors engaged in these conversations when I was, in plain view, listening and making notes. They appeared to regard me as an unthreatening satellite to their clusters – I was of the group but not in it.

Participants may have been less wary than many who have been the subject of observation by an ambiguous other in previous research projects because they were not themselves the law breakers and their work was not low-visibility (Hunt 1984). Magistrates’ courts have a high throughput of people, especially in remand hearings, so solid in-groups and out-groups are less likely to be formed. This may promote tolerance of strangers who can signal their acceptability through dress and behavioural cues etc. It may also be that the actors considered the courtroom their “home territory” (Rock 1993) once the magistrates had left.

A home territory was a piece of ‘defensible space’ marked off from the rest by physical or token boundaries... To be in a home territory was to be away from strangers and with one’s own. (Rock 1993:210).

The adequacy of a private space turned on its privacy, freedom and safety. A good home territory was sealed against unwelcome intrusion. It was not incursions from other professionals which were feared: they posed little threat to freedom or confidentiality. It was insiders, not the public, who came to the CPS room, for instance, and they were defined as innocuous. (Rock 1993:211).

Although the courtroom (in the absence of the magistrates and defendant) did not constitute a “good” home territory because members of the public were still present in the public gallery, it did operate as a home territory nonetheless because the public were, in most of the courts, in a physically separate gallery that was screened off. The public could see what was happening in court and could hear anything said in a commanding tone of voice (e.g. when defendants were called to the dock), but conversational tones could rarely be heard in the public galleries. It was unquestionably a professionals’ territory.

My insider (if ambiguous) status enabled me to sit unchallenged in an area of the court where I could hear all routine court interactions without difficulty and was privy to the

indiscrete conversations which actors felt able to have in clusters in their home territory when magistrates and defendants had left the arena.

## Semi-structured Interviews

The range of personnel interviewed is listed in Table 3.4. Although I was somewhat limited by who chose to respond, an attempt was made to incorporate some basic socio-demographic factors into the magistrates I selected for interview from those who responded to my request for interview. I tried to get a balance of male and female magistrates, a range of experience, and, with limited success, respondents from all the courts.

**Table 3.4: Interviewees**

	FEMALE	MALE	TOTAL
Lay magistrates	12	12	24
Clerks	1	3	4
CPS officers	2	3	5
Defence representatives	1	3	4
Women on bail	4	-	4
Total	20	21	41

The Chief Clerk in Central District refused to circulate my letter requesting an interview to magistrates. I was told that the District's courts were busy and could not accommodate all those interested in researching them. Although I knew individual Central District magistrates, who had expressed an willingness to participate in the research, they felt unable to do so without the sanction of their Chief Clerk. This was unfortunate as it meant Central District magistrates were not among those interviewed.

The Chief Clerks in Inner and Outer District were supportive of the research and distributed my letter requesting interviews to their benches. The Clerk in Outer District actively promoted the research by twice circulating the letter in magistrates' mail. All respondents were self-selected as they had to volunteer to participate. This is clearly a weakness of the research but it is believed that the range of magistrates that did participate was not as narrow as it could have been; a number of magistrates declared they were "not the type" (male magistrate) to normally volunteer for interviews but had done so because of their Clerk's encouragement. One magistrate told me that she would

not have cooperated with the research if the Clerk had not lent it his seal of approval and made it “sort of official, sanctioned” (female magistrate).

In fact, the response rate was so good from Inner and Outer Districts that I was able to select an equal number of men and women and, towards the end, turned down a number of magistrates because I did not have time to undertake and transcribe any more interviews. As with all research, providence played its part in the number of interviews I secured: eight of the interviewees said they were encouraged to participate because they had either been to the university I attend themselves or their children had been or were students there. I had a series of encounters where I first had to respond to names, dates and photographs that interviewees offered me, seeking to find further common ground before the interviews could actually begin.

It is very regrettable that no district judges were prepared to be interviewed; the bulk of the observed cases were presided over by district judges but there was no opportunity to explore remand processing with them in interview. The other professionals were either approached directly or via letter from the court Chief Clerks. Again, the range of interviewees was entirely dependent on who volunteered.

Contact was made with a female only Home Office bail and probation hostel in the city with the intention of recruiting some women on bail for interview. These women were approached as substitutes for the women who appeared in the observed remand hearings. As the women in all the observed cases had been held on overnight custody, they were always returned to the courts' cells after a hearing for processing, whether or not they had been remanded in custody. This meant it was very difficult to access the women in observed cases to see if they were willing to participate in an interview. It was reasoned that women who had been bailed to a hostel were likely to have been at risk of a custodial remand, the target group for this research, because of insecure housing, support needs, substance misuse, etc.

The women in the female only bail hostel were all offered £5 to participate in an interview on their experiences of the bail system. It was made clear, at the request of the hostel management, that the money would be given to their keyworker and not directly to the women. Unfortunately (and significantly, see Chapter Four), the bail and probation hostel had very few bail residents and the majority of the beds were taken by

women on CROs or on licence. Despite repeated visits to the hostel over a period of some weeks, only four women on bail took part in the research.

Interview schedules (see Appendix Two) were constructed for all interviewees except the women in the bail hostel (I felt a less formal, conversational approach would be more appropriate) and, in the main, were followed although not always in sequence. In most cases all the set questions were asked but other topics were pursued if respondents raised them. Questions were formulated after time had been spent in all three Districts so the emerging data could inform further data collection (see below, Data Analysis). With the exception of the women on bail, many of the same themes, and some of the same questions, were explored with all the professionals interviewed although the phrasing and content of questions were adapted to reflect their professional responsibilities and perspectives. The questions were organised thematically using the 'natural conversation' technique (Gillham 2000) to encourage interviewees to engage.

A number of options were given to respondents and most chose to be interviewed in their own homes. This maximised confidentiality as it eliminated the possibility of colleagues overhearing or interrupting the interview, and it minimised inconvenience to the interviewees, many of whom were very busy. Where interviews were conducted in courthouses, I requested that they booked a room so we would not be disturbed. Interviews typically lasted for one and a half hours; with magistrates, the first half hour, approximately, was taken up with the case vignettes.

For magistrates, the case vignette exercise preceded the interview questions. This order was followed for two reasons. Firstly, I did not want magistrates to be sensitised to the issues explored in the interview when they took part in the case vignette decision-making exercise. Secondly, the vignettes allowed me to establish my own level of expertise and experience without being threatening. I appeared knowledgeable about the practicalities of court-based decision making and the range of issues that magistrates had to take into account, but also communicated that I was unaware of the details of their decision-making processes. Magistrates repeatedly made such comments as "well, you know how it is in court" and "you obviously know that...."

I also engaged in a number of informal discussions, or 'ethnographic interviews' (Flick 1998), with some court actors and the police contacts in each District. Casual

conversations in the field took place with some CPS officers, defence representatives, list callers, and clerks. Defendants and magistrates were the only groups that I could not engage with in this way because they occupied territories to which I had no access. It was not possible to talk to magistrates about specific cases in court as they retired to private areas to which I had no access and most of the defendants were either taken back into custody or returned to the cells in order to be processed for release. With separate entrances and territories, our paths did not cross.

## Case Vignettes<sup>14</sup>

Case vignettes usually consist of a short story about hypothetical characters in particular situations and respondents are questioned, typically on what they think should happen next. Case vignettes can be employed in decision-making research in a number of ways. A great deal of work has been done using case vignettes as the basis of, or as adjuncts to, statistical analysis (Alexander and Becker 1978; Finch 1987; Martin, et al. 1991). This approach tends to use an experimental design where individual variables are manipulated to test their significance. Contextualised case vignettes are an under-used methodology and can contribute significantly to real-world understanding of decision-making. These vignettes supply supplementary information rather than simply a few 'key' facts. In this study, for example, the vignettes indicated whether the information source was a defence representatives or the CPS. Previous users of case vignettes in remand decision-making studies have argued that one or two key variables can account for remand decision outcomes (Dhami 2001). It is argued here that such methodologies are flawed because the vignettes focused on legal variables (such as offence seriousness and offending history) alone. Consequently they failed to incorporate contextual and extra-legal factors which, the thesis found, were central to the ways in which actors' understood and subsequently resolved contested cases. The use of contextualised case vignettes to supplement court observations can provide invaluable insights into the understandings and intentions of decision makers: elements of decision-making that are impossible to capture through observations or interviews alone.

In this research, case vignettes were not used to test the relative importance of specific pieces of information as measured by decision outcomes i.e. they were not designed to measure how/if risk of a custodial remand varies proportionately with housing status,

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<sup>14</sup> Copies of the full case vignettes are contained in Appendix Three.

employment status, offence type, number of antecedents, etc. Magistrates' decision making is situationally dependent (e.g. time pressure will alter the number of cues magistrates use to make decisions (Dhami 2003) ) and the information that magistrates receive in court is inevitably subject to dispute in contested cases. Asking respondents to make judgements based on a summary of the agreed 'facts' of the case can only produce artificial outcomes that do not reflect the reality of court-based decisions. Moreover, a distinction has been drawn between substantive and procedural consensus. Finch and Mason (1991) found whilst there was a consensus about the factors that were selected by respondents to be important, this did not necessarily result in agreement about what should be done i.e. decision making on kinship obligations was considered to be based on a general set of principles rather than specific and concrete rules.

The vignettes were used to explore the general principles of decision making rather than any specific rules which might be attached to key pieces of information. The construction of the vignettes was not random but was informed by issues that arose from earlier stages in the research: they were designed to explore the specific hypothesis that magistrates' approaches to decision making varied with the characteristics of the case and, accordingly, the same pieces or types of information would be used or weighted differently. Case vignettes were designed to elicit responses which would elucidate an observed relationship between the nature and seriousness of the offence and magistrates' approach to bail hearings. The categories and the text of the vignettes themselves emerged from observation data and their validity is confirmed by the fact that the themes apparent in the case vignettes were all evident in the observed cases. Nothing arose from vignette decision-making which did not tally with observed courtroom decision making. Each vignette was conducted with 24 lay magistrates from Inner District and Outer District. Magistrates were asked to verbalise their decision-making, allowing the author to compare the relative importance of issues in different types of cases. Such analysis of observation data would be impossible as magistrates never gave detailed public accounts of how and why they reached their decisions.

As it is argued that decision making must be understood in context, the vignettes were constructed to be as 'real' as possible. Firstly, they were composite cases made up of various cases which had been observed over a period of some months. Secondly, the information was presented to the magistrates in the same format as they would receive it in court. I read out the information, informing magistrates what role I was playing at

any one time, and the magistrates were given pen and paper to make notes on the case if they desired. Vignettes began with the details which would appear on the court list or would be announced by the clerk at the beginning of the hearing (e.g. age, gender, offence type, stage in the remand process). Next, as the CPS officer, I would read out why bail was objected to. Lastly, as the defence representative, I would read out the defence response to the CPS and make a case for bail. Magistrates would then be asked to make a bail decision based on what they had heard and explain their reasoning to me.

The one criticism of the vignettes that magistrates repeated was that it was hard to make a decision without seeing a defendant.

[The] crucial difference between an artificial exercise and what actually happens is that you see the defendant and that can be critical (male magistrate).

What's interesting is that when you think about what we're doing in court, how influenced are we by the, of course we shouldn't be, by the demeanour and manner of the people in the court (male magistrate).

Notwithstanding this problem (the importance of demeanour is discussed in Chapter Six), the 'realness' of the vignettes was evidenced by the responses of magistrates who found the vignettes convincing and appeared to genuinely engage with the cases and the women because they 'recognised' them.

They're very believable, I sort of recognised one of them, I think, are they from actual cases? (male magistrate).

Oh, they feel real, yes! That BHS one, I feel I've heard it a dozen times (female magistrate).

I've tried to be honest with you about how I feel with these women. I've tried to respond just how I would when I see these kinds of cases in court (male magistrate).

I'm worried about her, very worried about what will happen if she doesn't get help soon. It's a sad, familiar story (female magistrate).

The vignettes' construction and delivery was made as real as possible in order to try and promote responses that were close to court-based decision making. As Alexander and Becker (1978) argued, people often are not very insightful about the issues involved in the decision-making process. Consequently, asking direct questions about the relative

importance of key pieces of data would not access the rich decision-making processes that responses to more complex and grounded vignettes deliver.

## **Data Analysis**

Observation, interview and vignette data were all analysed using the qualitative analysis package 'QSR N6'. In keeping with the nature of qualitative research, data analysis was undertaken as an on-going process in order for subsequent data collection methods to be informed by earlier findings. Court observations were carried out for approximately nine months before interviewing began (a period which allowed me to experience remand hearings in all three courts). During this time the observation data was periodically organised into broad themes. These themes, and the particular issues that arose from observations which were in need of clarification, were then used to construct the case vignettes and interview schedules for the second stage of data collection. This data, in turn, was transcribed, entered into QSR N6, and coded thematically. In the final stage, further and more abstract links between the data sources emerged from analysis of the material.

## **Conclusion**

This chapter has detailed the choice and application of the research methods employed in this research. The selection of qualitative methods was embedded in the theoretical framework of the thesis. Using a number of qualitative techniques in combination ensured results from each individual source were confirmed (triangulation) and also enabled me to augment data that could not be fully captured by using one method alone. Allowing one stage of data collection to inform later stages, and using the different methods sequentially, facilitated more in-depth analysis of specific themes which emerged from the data.

# Chapter Four

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## Structural Constraints on the Remand Decision

This chapter explores how remand decision making is structured by the socio-political, organisational and formal regulatory contexts in which it takes place. It argues that these influences contribute to the ideas in the decision-making environment about what is possible and what is desirable in remand decisions. It draws on data from court observations, interviews, and on the work of other authors to document how these three contexts affect day-to-day decision making. The three contexts are distinct and are presented separately for the purposes of analysis but, in reality, they are highly interrelated. Thus, the categories are somewhat artificial and I support Hucklesby's argument that "levels...interact and often become blurred when issues of practice are tackled" (Hucklesby 1994b:108).

### Introduction

Remand decision making takes place within a number of different environments or contexts. As Hucklesby (Hucklesby 1994b:108), for example, argues, analysis of the remand system must be located in an appreciation of the influences of the criminal justice process specifically, and in the wider political and economic environment more generally. This chapter presents some of the contextual influences on remand; some are recurring issues in the criminal justice system, but others are peculiar to the remand system. Firstly, selected socio-political influences are presented and their impact explored. Secondly, some of the particular characteristics of the remand system are described along with illustrations of how they affect the decision making process and remand outcomes. Lastly, the formal regulatory procedures are described (interpersonal interaction also served to regulate decision making and this is explored in detail in Chapters Seven and Eight). It is argued that, taken in conjunction, these three contexts all contribute to participants' ideas of what is possible and what is desirable in the remand system. These ideas, in turn, filter how individual cases are processed and resolved.

Following Hawkins' model, what is understood here as the socio-political context can be described as the "surround", and the organisational and regulatory contexts as "fields" (Hawkins 2002). Although the terminology may differ, the importance of locating decision making in its wider contexts is a common theme in interpretive analyses of decision making. As Hawkins argues,

Legal decisions, like other kinds of decision, are made not in a vacuum, but in a broader context of demands and expectations arising from the environment in which the decision-maker lives and works. An explanation of decision-making behaviour therefore requires attention to the social, political, and organizational context in which decisions are taken. All of these create pressure for action or inaction or conspire to make a particular decision outcome seem more or less rational in a particular matter....In other words, the variety of outcomes possible need to be located in the context of the social forces at play in the decision process. (Hawkins 2002:31).

The discussion of all three different influences in this chapter is necessitated by the shortage of space. Each could be a topic of study in its own right and the combination of the three here may seem somewhat arbitrary. However, in order to understand how and why individual remand decisions are produced, the central concern of this thesis, it is necessary to first establish the ways in which the system's actors, processes, and outcomes are constrained, or otherwise, by the environments within which they are located.

## Socio-Political Context

This discussion is necessarily limited to how the socio-political context influences the remand system but many of these issues are played out in similar ways at other stages of the criminal justice process. The following is not intended to represent the complete range of socio-political influences on remand, and on criminal justice decision making more widely, as such a project was beyond the scope and focus of this research. However, as interviewees themselves repeatedly referred to socio-political influences on decision making, the following section has been included to provide a brief indication of their concerns about the nature and impact of some elements of the socio-political context.

## Central Government Policy

In this research, the most obvious and immediate influence central government had over remand decision making was seen in legislative changes and recommendations. Simon and Weatheritt (1974) argue that legislative changes may not have as significant an impact on remand decisions as they may appear. They looked at decision making in magistrates' court before and after the introduction of the Criminal Justice Act 1967: one aspect of this Act was intended to discourage custodial remands. They argued that the reduction in the use of custodial remand following the implementation of the Act was due not to the legislative changes but was a consequence of the more general pattern in the reduced use of custody that was evident in sentencing. Hucklesby (1994) argues there is a closer relationship between central government policy and remand outcomes. She detailed the relationship between changes in remand law and practice, and the central government imperative to reduce spending:

[T]he impetus behind many of the legal changes to the remand system has been to reduce the prison population which culminated in the presumption of bail which was introduced by the Bail Act 1976. Although some of this impetus for reducing the prison population was for humanitarian reasons, these were coupled with a need to reduce public expenditure. This is a goal which has become increasingly important since 1979 and has arguably become the major vehicle for change, not only in the remand process but in the criminal justice process as a whole. (Hucklesby 1994b:99).

During the course of this research, the Lord Chief Justice Woolf issued advice to magistrates and judges that custody should not be used for first time burglars. This directive was spontaneously raised by interviewees as an example of how specific recommendations from central government had a direct impact on decision making practice. Court observations also revealed it to have a direct and immediate impact on remand proceedings.

### *Example 4.1*

A man in his early twenties appeared before a mixed<sup>15</sup> lay bench in Orrington Street charged with domestic burglary. The Lord Chief Justice had issued his advice to not use custody for first time burglars the previous week. The defence representative rested his bail application primarily on this advice and repeatedly pointed out that the defendant should be released "according to the Lord Chief Justice's advice." The magistrates

<sup>15</sup> Throughout this thesis, a 'mixed bench' refers to one made up of male and female lay magistrates, and 'male' and 'female' benches indicate single sex lay panels. Although magistrates' visible ethnicity was recorded in observations, it has not been reported in examples as this thesis is not able to discuss questions of race and ethnicity (see Chapter Three). All district judges observed were white, as were the large majority of lay magistrates.

appeared reluctant to release the man on bail as he had a substantial record of offending – though not for domestic burglary. Unsure of whether he fitted the Lord Chief Justice's criteria due to his previous record, they asked the clerk for his advice. The clerk admitted he did not know how to interpret the recommendation and asked the magistrates to rise whilst he phoned a senior colleague for advice. Whilst the magistrates were out of the courtroom, the defence representative told the court that he did not think they should release his client on bail but felt that the Lord Chief Justice had provided him with a very strong basis for a bail application. He then related the details of a similar case when he had represented a first time burglar at Inner District a few days earlier. The defence representative said "if he'd appeared the week before [the Lord Chief Justice's advice], he would have been in custody, no question. But he bailed him. Bad decision, I thought." The clerk, CPS officer and other defence representatives in the court all discussed the recommendation and all who expressed an opinion felt it was poor advice. "But, they [lay magistrates] will take it on board. I'm going to have a hard time arguing against it, for a while at least" (male CPS officer). The defendant was released.

Thus, it appears that very specific recommendations from the centre did resonate in courtroom decisions as magistrates sought to respond to them and integrate them into everyday practice. The present study found that magistrates and others struggled with how to react to the contradictory messages that emanated from the centre. Following the Lord Chief Justice's recommendation, the Home Secretary, David Blunkett, pointedly distanced himself from the advice to give bail to first time burglars and sought to reaffirm the government's 'tough' credentials on criminal justice matters. One magistrate succinctly expressed his reaction.

I think in lots of ways contradictory messages are being sent out. I don't think anyone understands what's going on as far as burglary is concerned  
(male magistrate).

Magistrates' frustration with inconsistencies in public pronouncements, and their struggle to find ways to respond to the conflicting messages, have also been found in relation to sentencing (Hough, et al. 2003:53-57).

This political discourse and others, such as the moral panic (Cohen 2002) in the 1990s on "bail bandits" offending on bail, illustrate the increasingly tough stance on the use of bail that has emanated from central government. Since the Bail Act, there has been a gradual shift in the main purpose of bail from ensuring attendance to prevention of offences on bail (Corre and Wolchover 1999). The clear principles of decarceration that were contained in the Bail Act have been diluted, resulting in the current confused picture of what the aims of the remand system are.

I'm not sure what bail is for any longer. I would have said x years ago that what it was about was decarceration and it was about the rights of individuals not to be locked away if they were charged with an offence. Now I'm not so sure I could say what it's about, but it's not about that any longer. I don't think you'd find many people arguing that viewpoint now. (Stephen Stanley, Intelligence Officer in the former Inner London Probation Service. Personal communication 26.04.01)

Central government could also influence proceedings in other, less specific, ways. Some of those professionals who regularly sat in court referred to the long-term effects of government targets. Two clerks commented in interview on the pressure of time felt in remand courts and attributed this, in part, to the pervasive target-driven atmosphere fostered by government intervention in the management of courts.

I think we've all been conscious in the last four or five years of an attempt to speed up the process. The Narey courts, clearly an attempt to get people in the system, get a plea taken quickly, and indeed sentenced if we can do it that quickly as well (male clerk).

## The Media And Public Opinion

The relationship between the media and/or public opinion and decision making in remand decisions has been explored in previous studies (Hucklesby 1994b; Prison Reform Trust 2004). This research also found that an awareness of media and public opinion impacted on remand processing and outcomes. Three CPS lawyers expressed concerns about the personal and professional implications of making remand recommendations. One CPS officer had coined the phrase “the Evening [Paper] test” to sum up his fears about what the press would say if he recommended bail for a serious offender who then reoffended whilst on bail. Many remand decisions were fairly clear-cut (see Chapter Five) but most criminal justice personnel agreed that there were occasional cases where “brave” decisions should rightfully be made. A CPS officer admitted that she was sometimes over-cautious when making recommendations because she feared what would happen to her if the papers published the story. She preferred to leave these “difficult decisions” up to the magistrates and protect herself by recommending a custodial remand. Evidently, in some cases, anxiety about possible media reactions to remand decisions directly impacted on the recommendations that CPS officers made.

Magistrates commented on the media much less than the CPS officers but were aware that they operated in a public arena, commenting on 'public opinion' instead. Hucklesby (1994b) also found that public opinion was an important factor in magistrates' decision making. When she asked her respondents whether they believed magistrates' decisions were affected by public feeling about an offence, 38 per cent said they thought magistrates' decisions were substantially affected, 43 per cent thought decisions were sometimes affected, and only 19 per cent said public opinion had little, if any, affect on magistrates' decisions. All magistrates in this study said they would not let possible public reactions affect remand decisions as they felt the public was not necessarily sufficiently informed to understand the issues. The view that the public were uninformed reflects recent findings on sentencing (Hough, et al. 2003:54).

We're there to balance the defendant's rights with the public interest. The thing is sometimes it might be hard for people to see why we made a decision, in serious cases, say. They read it in [local paper] and must wonder what we're up to! But we've got a responsibility to the facts that we hear in the court. They aren't always fully reported. (male magistrate)

Although the majority of magistrates in this study said they would not let public opinion affect their remand decisions, three did admit that with one particular offence, domestic burglary, they found it difficult not to take public opinion into account. Domestic burglary was perceived to be most people's "number one priority" (female magistrate) and was a very emotive offence.

Domestic burglary, that's the one people really worry about, are really afraid of. That's in my mind, I suppose I feel a particular responsibility for that one. There's nothing worse than having someone break into your home, is there? (female magistrate)

It is interesting that these magistrates did not cite sexual or violent offences as being difficult. Perhaps this reflects the fact that few defendants charged with such offences made bail applications in magistrates' courts and instead saved their first application for the crown court (see Chapter Seven). Consequently, magistrates very rarely had to struggle with possible public reaction with these types of offences. The singling out of domestic burglary might also have reflected the fact that decisions in burglary cases had a raised public profile at the time of the research resulting from the Lord Chief Justice's guidance on not using custody for first-time burglars.

## Summary

Participants in the system reported feeling that central government messages were sometimes contradictory but it appeared that they did attempt to respond to them in routine court proceedings. Over a period of time, legislative changes altered views on what the remand system was for and should aim to achieve. Participants' concern about public and media reactions could have an immediate impact on their remand decisions.

## Organisational Context

The particular characteristics of the remand system affected how cases were processed. The defining feature of the key organisational influences on remand was that of shortage: shortage of time, information, and resources. Although this section focuses on the specifics of the remand system, these issues may have some relevance to analysis of the criminal justice system more generally. However, it is argued that they are manifested in particular ways in the remand system and the same pressures may not have an impact in the same way in different parts of the system. For example, whilst the pressure to prevent delay and use court time efficiently is evident throughout the criminal justice process, it is most immediately, and therefore most acutely, felt at the remand stage because, for example, there are often a large number of cases to process within a very limited time frame: 10.00am to 1.00pm. Clock watching and frustration with time wasting were evident in all the courts as participants worked towards the collective goal of completing court business by lunchtime to prevent them having to return to the court in the afternoon.

## Time/Delays

The lack of time spent on each remand hearing has been commented on in previous remand research. For example, Zander (1979) found that 47 per cent of remand hearings were dealt with in under two minutes, and Doherty and East (1985) found that 62 per cent of hearings were dealt with in less than two minutes and 90 per cent in less than ten minutes. In contrast, the present study found only 54% of cases were resolved in less than ten minutes and 46% took ten minutes or longer (up to 25 minutes in one case) to complete (see Table 4.1). This is unsurprising as the majority of the cases included in the present study were contested cases.

**Table 4.1: Duration Of All Hearings<sup>16</sup>**

(excluding those with co-defendants and/or where interpreters were required)

	No application made and defendant remanded in custody (n=19)	Application made and defendant remanded in custody (n=23)	Application made and defendant conditionally bailed (n=27)
Mean duration of hearing	6 minutes	11 minutes	10 minutes
Hearings taking 0-4 minutes	26%	0%	3%
Hearings taking 5-9 minutes	58%	31%	49%
Hearings taking 10-14 minutes	16%	43%	33%
Hearings taking 15+ minutes	0%	26%	15%

It has been argued that the rapidity of remand decision making originates in a cooperative court culture which promotes a camaraderie resulting in non-adversarial remand hearings (Brink and Stone 1988; Doherty and East 1985; Hucklesby 1996). However, this research found little evidence to support the claim that hearings were truncated because of a cooperative camaraderie ('court culture' is discussed in Chapter Eight). The brevity of remand hearings is instead explained firstly in terms of organisational pressures on court actors.

[T]he implicit feeling of time pressure and the subsequent speed with which magistrates make the remand decisions may affect their decision making strategies (Dhami 2001:38).

Secondly, short hearings indicate minimal information was presented to the court. It has been argued the short duration of most remand hearings reflected the limited information which was provided (Brown, et al. 2004; Burrows, et al. 1994a; Doherty and East 1985; Hucklesby 1994b; Morgan and Henderson 1998; Zander 1979). A short remand hearing may indicate that limited information was *presented* but it does not mean, however, that limited information was *available*. This is most clearly seen by the fact that around one quarter of the uncontested cases which resulted in a remand in

<sup>16</sup> Cases were timed from the moment a defendant entered the courtroom to the moment she left. In some cases defendants appeared on several occasions in one sitting as cases were put back for a variety of reasons. In these cases, the duration of each appearance has been added to give a total for time spent in the courtroom. This does not include the time magistrates took in deliberations when they retired. All cases where there was a co-defendant or an interpreter was required have been excluded as these factors resulted in substantial but misleading increases in the duration of the remand hearing.

custody took less than four minutes to resolve. Clearly these very short hearings are a product of the fact that the remand in custody was not opposed by defence representatives. If the defendant had asked to make a bail application, more information would have been necessary and the mean duration would increase. This can be seen in contested cases that resulted in a remand in custody (the second column of Table 4.1): none of these cases took less than four minutes to resolve and one quarter took fifteen minutes or more to complete.

That the duration reflects, in part, the amount of information requested, rather than the amount available, is supported by a further interesting variation within the contested cases. Sixty nine per cent of the contested cases that resulted in the defendant being remanded in custody took ten minutes or more to resolve. In those contested cases where the defendant was released on conditional bail, only 48% took ten minutes or more to complete. Using observation data to interpret these figures, it is argued that court actors signal (using verbal and non-verbal cues) their remand intentions to each other and the amount of information supplied is adjusted accordingly. Thus, district judges were observed interrupting defence representatives in contested cases to tell them that bail would be granted and they should stop making their application and address themselves to the question of appropriate bail conditions.

It has been argued that time pressure can impact on the task of processing information in courtrooms (Shapland 1987) and that the brevity of remand hearings is a cause for concern (Bottomley 1970). In contested cases, there may be some unease that decisions are being made on inappropriate or ill-judged criteria if the duration of a hearing is short. However, in most cases, the brevity of a remand hearing should not be advanced as sole evidence of poor decision making. The present study suggests that the duration of a remand hearing is consequent on how much information is seen to be required for a decision to be reached; where more information or discussion is required, more time is available. This is clearly seen in the majority of cases where the CPS do not object to bail. Little time is required as there is no need for the court to hear detailed information when the right to bail is not being challenged.

Whilst the findings of this study caution against using the brevity of many hearings as evidence of hasty or hurried decision making, the pressure of time in the remand system was a recurring theme in court observations and in interviews. Whenever there was a

lull in court proceedings, the district judge, lay magistrate or a clerk (only if sitting with a lay bench) would routinely ask the list caller to run through the morning's list and update the court as to the readiness of each case. Given that all five courthouses were located in metropolitan districts which generated busy court lists, any lull in proceedings was not received as a welcome break but was endured with frustration as it meant delay rather than an absence of work. Particularly at Inner District, district judges would call defence representatives into the court, even if they were occupied taking instructions from their clients, to account for why they were not ready to appear. One district judge in particular was observed to say on more than one occasion "put out a tannoy, I will not wait all day" for the defence representatives to appear in court.

The time at which those defendants held on overnight custody (the group most likely to be the subject of a contested bail hearing at first appearance) arrived at court was determined by when they were collected from police stations' cells and delivered to court by the security company. During the observation period, there were particular problems with this service which were the cause of much frustration to all court actors. For a period of some months it was unusual for overnight custody cases to arrive at court before 11.30am – courts typically sat at 10.00am. This meant they did not appear in court until at least 12.00pm as their representatives first needed time to take instructions on how to proceed with the case. As this left only a relatively short period until the morning list was supposed to be completed, it did cause delays - especially if there were a large number of overnight custody cases. This caused particular problems for courts' duty solicitors who provided legal advice to all those who did not have their own representative. Duty solicitors sometimes had to take instructions from and appear on behalf of multiple clients in a very limited period. Of course, if necessary, they could overrun and continue the case after lunch but all court professionals worked to the common goal of finishing the morning remand list by lunchtime if they could.

Of course we can ask for extra time if we need it. I actually had to do it the other day, asked the DJ to rise, and he did. But it's not something you, it's something you avoid if you can. Best to keep things moving, if it's at all possible, unless you're in real trouble. (male CPS)

When lay magistrates retired to make a remand decision, it was not uncommon for the remaining court actors to complain about the slow pace of a remand court with a lay bench and to regale each other with (possibly apocryphal) stories of lay benches taking

inordinate amounts of time to reach ‘obvious’ decisions. On three occasions in two difference court houses, two CPS officers and one clerk were observed telling the rest of the court, after the bench had risen, that if the government was serious about reducing delays in court proceedings they should introduce legislation to ban the purchase of chocolate biscuits by courts to prevent lay magistrates rising just because they wanted a cup of tea and a nice biscuit.

District judges were preferred, by all legal professionals interviewed, for a variety of reasons, including their consistency and predictability, but most commonly because court business was conducted more quickly in remand courts with district judges<sup>17</sup> as they did not have to rise to discuss decisions with colleagues.

Lay magistrates were aware of the pressure to conclude cases succinctly. Five magistrates, who admitted that they did not follow structured decision making<sup>18</sup>, accounted for this failure to engage strictly with the prescribed procedure by reference to time pressures.

[Structured decision making] means you’ve got to go out, it’s holding up everything to go out so we do sometimes decide in court (female magistrate).

This could have been the real reason they did not use structured decision making or they may simply have cited time pressure to justify their failure to follow correct procedure. Either way, it is illustrative of the fact that the pressure to conclude hearings quickly was of significance to court actors, particularly magistrates on whom the pace of the court business largely rested.

Time pressure did not appear to affect decisions directly; without privileged information it is impossible to say for certain, but it is believed that magistrates were never observed making hasty judgements or concluding cases prematurely for reasons of time constraints alone. On the contrary, there were occasions when magistrates asked that complicated cases be put back to ensure they were fully heard and not rushed. Six lay

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<sup>17</sup> All the clerks entered the caveat that whilst on balance they preferred district judges, working with a lay bench was more interesting for them as their duties then included the role of legal advisor.

<sup>18</sup> Structured decision (further discussed below) making is an approach employed in magistrates’ courts. It encourages magistrates to break decisions down into a series of constituent and sequential parts, each stage determining the options for the next decision. It is intended to encourage consistency in the use of discretionary powers and to counter stereotyped assumptions affecting judgements.

magistrates admitted in interview to being self-conscious at the amount of time they took to reach decisions but defended this on the grounds that they were taking their responsibilities seriously.

It is contended that whilst the pressure to resolve cases quickly was not sufficient to foster injudicious decisions, it did contribute to a common expectation that cases should be processed without delay and this may have fostered working practices which discouraged all options, in some cases on busy days, being explored as fully as they could have been. The fact that the pressure of time was keenly felt by at least some magistrates was evident in observed court interaction.

#### *Example 4.2*

In Connorton Road, a male district judge was sitting in a remand court and business appeared to be proceeding as normal. Without warning, mid-way through a hearing, the district judge announced to the court that he was not going to rush decisions any more and he would return to his normal pace of work. He said, “I know some amongst you will feel I work a little too slowly, but I am concerned not to rush these decisions.” It was very unusual for a district judge to address the court in such a manner but in the overheard conversations in the court’s canteen (where defence, defendants and miscellaneous people were separated from prosecutors and witnesses by an obviously post hoc partition [on design of courts and the separation of space, see (Rock 1993) ] at lunchtime there appeared to be more comment on the fact that it was a district judge (i.e. not ‘just’ a lay panel) who found the pace of work untenable.

#### *Example 4.3*

A mixed lay panel was sitting at Inswick Corner. The morning list was busy but not unusually so. At 12.40pm the chairman announced to the court that the panel was going to rise for lunch early because they were feeling “pressurised” by the court’s proceedings and needed to retire to collect their thoughts. When they had left, the CPS officer and the defence representatives in the court expressed their bemusement that the panel were not “up to the job.”

## Perceptions of Available Information

The link between available time and available information was strong in the remand system. For example, given that defence representatives on overnight custody cases were restricted in the time they had to prepare bail applications, and there was limited court time available to hear and respond to issues in applications, it was anticipated that a lack of verified information would be a feature of the remand system. The absence of information in the remand system has been commented on in previous research (Brown,

et al. 2004; Burrows 1994b; Doherty and East 1985; Hucklesby 1994b; Morgan and Henderson 1998; Zander 1979). Indeed, the perceived absence of sufficient information in remand hearings was one of the factors behind the Manhattan Bail Project in the USA and the emergence of bail information schemes in the UK. Citing the numbers of defendants who either offend on bail or are remanded in custody but receive non-custodial sentences or are acquitted, Sanders (1997) asserts,

Clearly magistrates have inadequate information on which to make confident decisions. (Sanders 1997:1077).

It is argued here that possible difficulties with the supply and flow of information in the remand system must actually be established in research. It is unsatisfactory to simply examine figures on the numbers of people remanded in custody who are not given custodial sentences, then conclude that the disjuncture between the two must have been caused by a lack of information. The processes involved and other possible reasons must be identified and explored before a conclusion about the relative role of information in these two separate decisions can be drawn. It will be established in an analysis of the vignettes in Chapter Five that magistrates will remand in custody even where there is a low risk of offending on bail, and will bail where there is a high risk, depending on offence seriousness. That a shoplifter offends on bail or an alleged murderer is remanded in custody but later acquitted should not be advanced as proof of inadequate information being available. The vignettes show magistrates will sometimes make decisions *despite* the evidence of bail risk, not because of it. It is a mistake to attribute cause (inadequate information) to outcome (acquittal, offence on bail, etc) when the magistrates' purpose has not first been established.

It is not being suggested that access to reliable information was unproblematic. Bail information schemes did not operate in the courts studied and there were some cases observed where defendants were remanded in custody under the Bail Act exception that insufficient information was available to reach a decision or because key pieces of data were missing from files.

#### *Example 4.4*

A 29 year old woman appeared at Inswick Corner charged with theft of a handbag. The CPS objected to bail on the grounds that she lived in a squat and she had failed to surrender in the past. The defence countered that she only had one fail to appear conviction on her record, was suffering from depression and deep vein thrombosis, and

in fact lived in a housing association flat, not a squat. The female district judge interrupted the bail application being made for her male co-defendant to ask if the woman's address could be verified. The defence began to suggest contacting the housing association but the magistrate again interrupted and said

She will be remanded in custody as I have insufficient information to make a remand decision. I suggest you [the defence representative] check with probation to check on your client's address as I see from her record that she is currently on a CRO.

#### *Example 4.5*

A 38 year old woman appeared at Old Market Street on a charge of breaching an anti-social behaviour order (ASBO). The defence requested a week's adjournment to appear against the length of the original order, which was eight years. The CPS stated

I don't have the full file. I don't have any details of previous history so I can't make comments on bail except to point out that the order would have been made with her previous convictions in mind. The length of the order suggests an extensive history.

The defence representative said that the ASBO had been made because of loitering matters and it served to exclude her from the northern half of the city. He acknowledged the bench's probable concerns but again pointed out that the original matter was loitering and the breach was entering a section of the city, there was no accusation that she had been loitering when arrested. The mixed lay bench remanded the defendant in custody for a week.

#### *Example 4.6*

A 24 year old woman appeared at Inswick Corner having been arrested on a warrant for failing to appear at court. She had been charged with theft of packages from the Royal Mail and the failure to appear dated back three years. The CPS stated that he had very few papers in court and did not know if she had antecedents but he believed she was unemployed and was of no fixed abode. The defence representative offered information on the failure to appear and details of a medical condition i.e. she was on a methadone script and had a blood clot. The male district judge stated that he did not have sufficient information to make a decision and remanded her in custody.

Evidently, on occasion the absence of information did cause problems for decision makers. However, it was generally felt by most of the professionals interviewed that between the CPS records, the court records and defence representations, there was sufficient information to make a bail decision. Hucklesby (1994b) also found that most of her respondents felt there was sufficient information available in most remand decisions for the court to make a reasoned judgement, especially by the time of the second or subsequent hearing.

More commonly, it was not the lack of information *per se* that caused difficulties but whether or not it had been verified. Sometimes magistrates were observed to accept

defence representatives' word on, for example, the suitability of a bail address, whilst at other times magistrates would challenge them to substantiate their assertions. The reasons for this are explored more fully in Chapter Eight. On those occasions when defence representatives were unable to provide the verification a magistrate asked for, defendants were at risk of being remanded in custody. This risk was heightened if time was short and magistrates wanted to resolve the case quickly. In the following example, the district judge could have remanded the defendant in custody on the grounds of insufficient information for her to reappear at court the next day. He decided, however, to remand in custody for one week.

#### *Example 4.7*

A 25 year old woman was appeared at Castleford Road charged with shoplifting. She had a very extensive record, had repeatedly offended on bail and appeared to be known by the district judge. Her defence representative told the court that her client was now attending a substance misuse programme and asked the district judge not to jeopardise the place by remanding her client in custody. The male district judge asked for details about her progress at the centre, commenting that he was sceptical about her commitment to rehabilitation. The defence representative was unable to answer the questions, so the case was put back for further enquiries to be made. When the case was recalled, the defence representative told the court that she had been unable to contact her client's keyworker. Another staff member had confirmed the defendant was attending but could offer no further information. The defendant was remanded in custody because of a risk of offending on bail.

Magistrates' decisions are based on the information that is presented in court. Thus, as Shapland (1987) has pointed out, their decisions are a product of what information other court actors choose to impart. Bail information schemes are intended to supply courts with information about defendants to facilitate remand decision making. Some studies have shown that supplying magistrates with additional information results in some defendants being diverted from custody (Lloyd 1992) but others have argued this is not the case (Dhami 2002). It has been argued that the success of bail information schemes lies in the fact that they present verified and *independent* data to the court. There is evidence from this (see Chapter Eight) and other studies (Hucklesby 1994b; Rumgay 1998; Shapland 1981; Shapland 1987) to show that magistrates do not trust all sources of information equally: as it is the responsibility of defence representatives to secure bail for their clients, some magistrates observed that their mitigation should be taken with "a pinch of salt" (male magistrate).

No bail information schemes were in operation for adults in the three Districts studied but analysis of the impact of verified information on decisions was attempted by comparing first and second bail applications where the defendant had initially been remanded in custody. It was presumed that during the week-long remand, defence representatives would have time to verify information, secure places at bail hostels, raise sureties, etc. which would improve the chances of the defendant being released on conditional bail. Contrary to expectations, few defendants appeared to be released because additional information was supplied and/or verified (see Chapter Six). It may be significant that the source of information was still defence representatives and not independent bail information schemes. However, the bail applications of those women who were released at second hearings were not distinguishable from their initial bail applications in terms of the amount of (verified) information they contained. The noticeable difference was in how the defendants were characterised and presented to the court (see Chapter Six for a discussion of how defence representatives constructed women as being 'worthy' of conditional bail).

It may be that attempts to furnish the court with additional information at second bail applications were less effective in observed cases than data from bail information schemes would have predicted because all the defendants were women. As Dhami (2001) shows, accommodation is one of the key issues that bail schemes seek to provide the court with verified information on. However, as is explored below, housing was not typically a problem for women appearing in the courts studied. It is suggested here that bail information schemes might prove to be more effective in securing the release of male defendants because schemes are able to address the kinds of problems that more commonly affect men, thus overcoming court objections to bail. It would be useful to explore gender differentials in bail information schemes' effectiveness.

The rushed and sometimes chaotic nature of the remand system suggests that it may be difficult to secure and/or circulate all the relevant information. Although multiple examples were observed during the course of the research where there were problems with information, if the information was considered important the case would typically be put back for facts to be gathered and/or checked. At times this was not possible because of the pressure of time and a decision would be made with inadequate information or the woman was remanded in custody whilst information was gathered. When asked, all interviewees considered sufficient information was usually available in

court. Whilst, some magistrates and CPS officers did report cases where insufficient information was available to make confident decisions, they all argued that this was not usually caused by problems with the system itself (e.g. being too rushed or files being lost, though this certainly did happen) but was the unavoidable result of the remand hearing taking place early on in the criminal justice process: one female magistrate commented that “we’d like more info, it just isn’t there at that stage in many cases.”

It had been assumed that the observed conversations that defence representatives and CPS officers fitted in around court proceedings consisted of defence representatives requesting further information about CPS bail objections and/or bargaining with bail conditions. However, in interview all the CPS officers and defence representatives said the conversations were usually about how to progress the case and bail was rarely discussed. The universal view was that a lack of information was something that became more problematic as cases progressed.

The bail stage is relatively simple, it’s pretty much all there. There’s not much, if anything, that exists which isn’t in court, I find. It’s when the case progresses, or doesn’t progress, that we have trouble. You’ll ask for full disclosure, be told you’ll have it by whatever date. You’ll get to the date and the CPS are there in court promising me, the bench, that we’ll have it by a new date (male defence representative).

There are potential improvements in information systems which could be usefully made. For example, bail information schemes may reduce the numbers held on custodial remand, and clerks and magistrates alike said up-to-date electronic information on previous convictions would be invaluable in court both for remand and sentencing. There clearly were some difficulties with securing and verifying information in the remand system but they should not be exaggerated. “The majority of remand decisions are no-brainers” (male clerk); outcomes were obvious and undisputed so only a cursory amount of information was necessary to proceedings. In contested cases, more information was required but it was usually made available. Problems occurred more commonly when magistrates did not accept defence representatives’ assertions without proof but there was too little time to get information verified. Very occasionally there was simply too little information available to make a reasoned decision, though this could be a result of magistrates being unable or unwilling to wait for information to be gathered and verified. The fact that initial remand decisions need

to be made so early in the criminal justice process meant in some cases more information was desirable but simply was not yet available.

## Perceptions of Available Resources

Previous research has shown that general criminal justice resourcing, both actual and perceived, may affect remand decision making. Hucklesby (1994b) found 23 per cent of respondents felt prison overcrowding substantially affected remand decisions and 29 per cent felt it affected the decision sometimes (Hucklesby 1994b:51). However, the still rising numbers of women in prison suggest that overcrowding does not significantly reduce the number of women remanded in custody.

The problem of securing access to bail hostels was the main example of how resource shortages affected remand decision making. In the area which covered Central, Inner, and Outer Districts, requests for a bail hostel place all had to go through a centralised referral system operated by probation. The referral would then be sent on to any relevant bail hostels for assessment. Referrals to the central system could only be made by probation officers or probation service officers who acted as gatekeepers to the resource. Probation officers were never observed to ration access to bail hostels (Lipsky 1980) but their involvement was essential if a referral was to be made. In Central and Inner District, a probation service officer was usually, though not always, available in the courthouses even if a delay of 30 minutes or more was incurred when she was engaged in another courtroom. Whilst this did not usually matter, when a district judge or a bench was impatient to resolve a hearing, they were sometimes not prepared to suffer the delay.

### *Example 4.8*

At Inswick Corner, a female district judge had put a case back on the defence representative's request for the possibility of a bail hostel to be investigated. The representative was twice called to address the magistrate on the progress of the application during the course of the morning, and he explained that he could not find a probation officer to make the application for him. On the second occasions, the district judge replied

What do you mean you can't find probation? They've got offices here.  
[Addressing the list caller] Get me a probation officer in here now.

On investigation, the list caller reported that the probation officers were busy in other courts and could not make themselves available. The district judge replied that she had waited all day for probation and now doubted there was time for an application. She

asked the list caller to inform probation that they had responsibilities to all the courtrooms in the building. The defendant was remanded in custody for one week.

In Outer District, which contained busy but smaller courthouses, probation staff were sometimes absent and this affected referrals to an even greater extent.

#### *Example 4.9*

In conversation with a defence representative outside Old Market Street, I explained the nature of this research. The defence representative replied,

I wish I'd known about you before. I've been in court all morning trying to get my client bail but he's homeless. I wanted to try for a bail hostel but this isn't a probation day today, apparently. Meanwhile, my guy is inside for seven days until he's back here. Let's hope probation decide to work that day, or I might be asking you for details of local hostels!

He began to walk away then returned and said,

Actually, seriously, can you give me some details of local ones? For future reference, you know.

The central referral system was introduced to improve access to bail hostels by removing the need to make multiple referrals to different bail hostels and providing more immediate information on availability of places. These were all creditable ambitions but their intentions were frustrated because, at times, there were no probation staff available in magistrates' courts. Without probation staff, referrals could not be made and defendants could be remanded in custody.

Although difficulties securing bail hostel places were observed, there was an additional problem with *expectations* of availability of bail hostel bed spaces. Removing all pressures of time, magistrates and defence representatives may possibly have explored the option of a bail hostel place for more defendants, but magistrates and defence representatives alike reported operating on the assumption that bail hostels were always full. When the issue was discussed in interview, and I reported that the local Home Office female-only bail and probation hostel routinely had empty beds, all interviewees (except the women on bail) expressed surprise. Defence representatives uniformly thanked me for informing them of the resource and five of the 24 magistrates said they would bear it in mind when they were next in court. It should be noted that this bail hostel did do an annual mail-shot to magistrates' courts in the City to try and raise its profile. Observations suggested that district judges had a greater awareness of this bail hostel than lay magistrates, probably because they sat more frequently. When defence representatives said they had applied for a place in a local bail hostel, district judges in

Inner District particularly – geographically the closest to the hostel – would ask “is that [name] hostel?”, whereas lay magistrates did not have the same level of familiarity. Some lay magistrates thought that they probably had received information about the local female-only hostel but had forgotten it.

We do get an awful lot to read through. I’m afraid to confess that sometimes, if you’re not using the information immediately or regularly, it slips one’s mind (female magistrate).

In addition to assumptions about a lack of bed spaces, it is likely that few incidents of females being referred to bail hostels were observed because magistrates believed that, in general, bail hostels did not address the problems that result in women being remanded in custody. Of the 24 magistrates interviewed, 19 expressed the view that bail hostels’ primary purpose was to provide a secure bail address and female defendants tended to have problems with accommodation much less frequently than male defendants.

I think bail hostels are useful for the accommodation issue primarily. They do offer support, I know, but that’s secondary to the issue of providing a bed. I just don’t recall a female defendant needing a bail bed. That could be my faulty memory, but I do feel the issue comes up more commonly for men. Women don’t seem to have, in my experience I haven’t seen many, if any, women with that, I feel it’s more of a male issue. (male magistrate)

Even where a bail hostel bed would address a concern about accommodation or enforcing a curfew, magistrates and other legal professionals (most crucially, defence representatives) sometimes dismissed the option. All but two magistrates and all the defence representatives believed that bail hostels would not accept defendants with substance misuse problems. Some expressed great frustration at this.

It’s ridiculous, the people who need bail hostels the most, the users who need a safe secure place with support, are exactly the ones the bail hostels refuse to take. It seems like the criteria for acceptance actually probably mean you don’t really need a bail bed anyway. Users and people with alcohol problems are excluded yet users and people with alcohol problems are exactly the kind of people bail hostels should be there to help. (female magistrate)

In fact, the nearby female-only bail and probation hostel *was* prepared to accept women with substance misuse problems. Referrals would be decided on a case-by-case basis

depending on how many other women with similar problems were already resident in the hostel. Although hostel staff were careful not to have too many active substance misusers resident at any one time for reasons of safety and control, they actively promoted their preparedness to consider women with drug and alcohol problems. Despite this being prominently featured in the promotional material the hostel sent to all magistrates' courts in the area, the overwhelming majority of legal professionals were unaware of this (or had forgotten it) and may not have made full use of the bail hostel as a result.

The shortage of probation resources had other impacts on remand. During the course of the research the local Probation Board sent a letter to all magistrates' courts in the Districts informing them that a pressure on resources meant requests for PSRs should be limited if possible. The scale of the research makes it impossible to quantify the impact of the Probation Board's request but, based on observation data, a drop in the convicted unsentenced custodial remand population would be expected as more defendants were sentenced instead of remanded for reports.

We're very aware not to ask for PSRs at the drop of a hat. Probation have reminded us a few times recently that they're short staffed so, and also I think it's very wrong when defendants have to wait a long time for a report to be completed. We're seeing that a bit more often now, delays in getting reports done, and so on. (female magistrate)

Magistrates were also cognisant of resourcing issues elsewhere in the criminal justice system, for example some magistrates reported being particularly loath to use custody for women. They explained this not only with reference to differences in gender roles (see Chapter Six) but also in terms of conditions in the female prison estate. Two main issues were raised by six magistrates. Firstly, the women's prison which served the courts in all three Districts had been severely criticised by Her Majesty's Inspectorate of Prisons, amongst others, on a number of occasions. This resulted in a reluctance to use custodial remands as it meant sending women to this particular prison.

What I find most difficult is that we've been told so many times by people who should know that [Local] Prison is an horrific place to go, that it really is very very under standard. So that makes custody even more of a major decision (female magistrate).

Having been a prison visitor in [Local] Prison, I don't think I want to put any woman in [Local] Prison (male magistrate).

In the back of one's mind, if we're talking about City for example, we're talking about [Local] Prison. There's no where else to go... It's something you do rather reluctantly (male magistrate).

I suppose the issue of [Local] Prison hanging over us, that's a big issue about where they'll go and we all, we have always been told that our decision is independent and is has to be seen to be that but nevertheless there is at the back of your mind where a female who goes in actually goes to (male magistrate).

The second issue which three of the magistrates also raised was the fact that young offenders would be housed at the local prison. This was not explored in interview as the research focused on the adult remand system but the same reluctance to use custodial remand because of the prison's reputation, along with an absence of dedicated facilities for young offenders, was raised.

That's the real problem, sending them to ... [Local] Prison which has an appalling reputation and our problem is especially with young women and first timers who are more vulnerable...We actually don't have the facilities for female young offenders in this area and it is a nightmare (female magistrate).

Although this has greater relevance to sentencing practice than to remand, seven magistrates spontaneously bemoaned in interview the lack of rehabilitation services in the community and a further five also commented on the poor service provided in [Local] Prison for substance misusers. Magistrates voiced their frustration that they were sending women to prison instead of offering them support when it was clear that the local prison would do little more than "warehouse" (female magistrate) them until their release.

That is an area that is really frustrating because there aren't enough places, there isn't enough help...It's frustrating really. There are two levels. Obviously there's a job to be done and I'm happy to do the job to the best of my ability and I recognise that what we're there to do is to apply the law, not make it. But on a personal level it is frustrating that there aren't more resources available. You look at what the government is doing and banging more and more people into prison is not good and when you go and look at the prisons and see the amount of overcrowding, that's depressing (male magistrate).

There clearly is the will to try and help defendants with problems and, if greater provision of substance misuse services were available, it seems probable that

magistrates would willingly divert defendants from custody and into rehabilitation programmes.

## Summary

The organisational context in which decisions were made did influence remand processing and outcomes. As Rumgay (1998) argues when discussing time pressures and the poor quality of information available in court,

In these circumstances, the notion that the sentencing decision is reached through a logical, mathematical weighing up of discrete items of mitigating and aggravating information, as advice to sentencers suggests it should be, is highly suspect. (Rumgay 1998:104).

The constraints on time were found to affect how magistrates and others approached decisions but the limited duration of hearings cannot necessarily be advanced as evidence of poor decision making. Some examples of restricted availability of information were found but it was not typically believed to be a routine difficulty in remand decision making. That a limited amount of information was presented was usually a reflection of a consensual view on how to resolve the case rather than on the availability of information. More problematic was the issue of whether or not information had been verified and was accepted by magistrates. The difficulties defence representatives had in verifying information was compounded by the pressure on time which meant they were sometimes unable to confirm information before the court rose. Shortages of various resources and perceptions of how appropriate the available resources were did limit the options magistrates had when dealing with remand cases but did not necessarily weight decisions in one direction. Resourcing also impacted on others, for example the delays in moving defendants between police stations and courts sometimes meant defence representatives had limited time to take instructions from their clients and to verify information.

## Formal Regulatory Context

This section examines the regulatory context which framed remand decisions. The legal framework, the Bail Act and subsequent amendments etc. discussed in Chapter One,

obviously contains regulatory elements as it sets limits on the circumstances in which custodial remand can be used. In practice these legal powers are necessarily subject to a process of interpretation by participants in the remand system, illustrating the classic distinction between law in books and law in action. The ways in which the actors involved in the remand process interpreted and implemented their legal powers is explored in more detail in the next chapter. The regulatory context is understood and presented here as the formal procedures which are intended to guarantee the fair and reasoned application of the powers contained in the legal framework. Galligan (1987) argued that the protections afforded by such due process ideals are a method for regulating pre-trial decision making. However, it is argued that these formal regulatory procedures have limited impact on remand decision making as they are easily evaded or subverted. McBarnet (1981) usefully demonstrates how due process rhetoric can obscure actual working practice rationale.

Following Rumgay (1998), it is not contended that magistrates commonly and wilfully misinterpret or misapply the law and engage in conscious strategies to subvert the intentions of regulatory mechanisms. The majority of magistrates interviewed expressed an apparently genuine commitment to the principles of regulation. All those who argued against strict adherence to regulatory practices did not disagree with the aims of regulation (e.g. considered and unbiased decision making) but rather felt that they were so experienced they did not need to follow the exact procedures in order to reach the 'right' conclusion. This belief was reiterated when magistrates talked about younger (i.e. less experienced) members of the bench whose close observance of regulatory practices was felt to be a method of ensuring 'good' decisions until they had gained sufficient experience to enable them to short-circuit them.

The various actors involved in the remand process all had their own professional responsibilities (more fully explored in Chapter Seven). For example, defence representatives had a duty to follow their clients' instructions and represent them to the best of their ability. CPS officers had a duty to make well reasoned bail recommendations to magistrates. Clerks had a duty to ensure the legality of the proceedings. Broadly, these actors were observed to adhere to their professional codes of conduct – although some exceptions were witnessed (see Chapter Seven). Where they did breach these norms, it was interesting to note that they were sometimes corrected by other actors through comments and actions (see Chapters Seven and

Eight). However, they were not subject to any formal regulatory court-based procedures. Formal regulatory mechanisms were aimed at magistrates' actions and decision making; as magistrates were the ultimate arbiters in the remand process this is unsurprising. However, as will be seen in later chapters, magistrates were significantly influenced by other participants in the process – participants whose actions and decisions were not addressed by the regulatory framework.

Before examining the impact of specific regulatory mechanisms, it should be noted that observation evidence showed the overwhelming majority of lay magistrates and district judges did not remand many people in custody and did not use the power carelessly. All of the magistrates and clerks interviewed commented that custodial remands were only used rarely. Many of the interviewees employed the same phrase: custodial remands were used as the “last resort”. Interestingly, use of the same phrase was recorded in research on the use of custodial sentences (Hough, et al. 2003).

## The Triumvirate

The triumvirate, the three lay magistrates sitting together to make up a bench<sup>19</sup>, was argued by ten magistrates to produce balanced and fair outcomes. It was assumed that lay magistrates would “balance each other out” (female magistrate) and this was one of the strengths of the lay system<sup>20</sup>.

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<sup>19</sup> A bench of lay magistrates usually consists of three individuals: a more experienced chairman and two “wingers”. The chairman takes the senior role and directs proceedings e.g. all questions and decisions are voiced by the chairman. Chairmen also sit as wingers on occasion; it is possible, but not common, for wingers to be more experienced than the chairman of a particular bench. District judges sit alone.

<sup>20</sup> There was some unease that district judges could act as “judge, jury and executioner” (male clerk) as they operate alone. It was noticeable that magistrates and clerks always exempted the district judges at their own courts, for whom there was universal respect, from such concerns. Their ‘own’ district judges were ‘balanced’, ‘fair’, ‘reasonable’, ‘professional’, etc.

I’m a great fan of our district judge. I think he’s fair, he sees it for what it is and I feel reassured when the court is in front of him. (male clerk)

Clerks regularly observed the district judges in court and were prepared to criticise general style and specific decisions but generally viewed district judges’ decisions favourably (lay magistrates were considerably and more comprehensively criticised). In contrast, lay magistrates’ criticisms of district judges were restricted to comments on personality (e.g. commonly at Outer District, “he’s not as approachable as our last DJ” (female magistrate)) rather than professional conduct for which there was universal approval. As magistrates were never observed to sit in on district judges’ courts (the one exception to this was a female magistrate at Old Market Street who observed cases as part of the field work for her own PhD), it was unclear what evidence the lay magistrates used as the basis for the positive assessments of ‘their’ district judges in comparison to others. Some district judges were observed in the course of this research to make some questionable decisions which bordered, and occasionally crossed, the boundaries of correct legal procedure (e.g. see Example 7.4). Whether magistrates were unaware of such behaviour, or were aware but excused it, it appeared that the esteem in which district judges were

The discretion is not just one person. It is three people making that decision so, the one thing about magistrates is they are all very, I was going to say opinionated, but no-one is afraid of saying their bit and if they disagree with the others, you put your argument...So I think everybody does get a chance to say their bit and it's like a debate, you say your bit, they say theirs. (female magistrate)

The good thing is that it's [decision making] safeguarded by three of them sitting that at least there are discussions and also you can't have the chair dominating the decision. (female CPS)

Baldwin (1976) argued that the reason for the triumvirate system was that individual idiosyncrasies and prejudices would be balanced out and their impact negated by sitting with two colleagues with differing views. Kapardis (1987) found that more extreme views were tempered somewhat but there was no consistency in how they were evened out: some benches' decisions were harsher than the average of the three members' views and some were more lenient than the average.

In this research, the perceived benefits of the lay bench system were not limited to the balancing out of extreme or unreasonable views, although magistrates did comment on this in interview. The collective nature of the decision also served to reassure individual magistrates when they lacked confidence in their own assessment of a case. In the cusp vignette, which explored a particularly problematic remand case, nine out of 24 magistrates volunteered the information that they "could be persuaded" if their colleagues felt strongly about a case. This could have been a defence adopted by magistrates who wanted to qualify their decision in case they were being tested in some way by the vignette exercise. However, the sentiment was expressed even by experienced magistrates who judged the other vignettes confidently and assertively. This is illustrative of the difficulties magistrates have in resolving cusp cases (see Chapter Five for a discussion of the findings from the case vignettes exercise). The vignette evidence suggests that assertive magistrates and those with strong views can be more influential in determining outcomes in cusp cases as there is greater uncertainty among their colleagues as to the right course of action and greater preparedness to allow themselves to "be persuaded".

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held by lay magistrates was based in large part on the authority of the position rather than on knowledge of individuals' actual conduct (see Chapter Eight for a fuller discussion of district judges' authority).

The degree to which the triumvirate was effective at securing a genuine debate between its members or was heavily influenced by decisions taken by its principal member (usually the chair) was discussed by Kapardis.

It was found that 48 per cent of 504 decisions about sentence were majority decisions. Three-quarters of these embodied the chairperson's decision (by chance we would expect two-thirds). When the bench chairperson had his or her way, there was a tendency towards severity in relation to the bench average. (Kapardis 1987:200).

This thesis found the effectiveness of the triumvirate system in balancing out idiosyncrasies and tempering the influence of more senior magistrates was fundamentally affected by the way in which decision making was organised. There was convincing evidence that the Outer District Bench took the responsibility of chairmen (or more experienced magistrates) not to influence the views of less experienced members very seriously. In interview, magistrates from this district reported a policy of asking the least experienced member of the bench for their views first and affirming that their views were as important as those of longer-serving magistrates.

The thing is that is slightly worrying sometimes is they always ask the most junior person there to say their bit first so they are not swayed by the others and that sometimes when you first start is difficult to, you know, you think 'do I dare, do I know anything?' (female magistrate)

Organising deliberations in such a manner did not preclude the possibility that the more experienced members of benches used their seniority to influence decisions. However, the policy did contribute to a climate where the less experienced magistrates reported feeling confident that their views mattered and were taken seriously. Without observing discussions in retiring rooms, it is not possible to know the extent to which junior magistrates actually did challenge chairs or simply believed they did or they could.

Given that the scope of magistrates' decisions is limited by previous decision making stages in the criminal justice system (Hawkins 2002; Shapland 1987), inconsistency in the remand system cannot wholly be magistrates' responsibility. Unfortunately, this research was of insufficient scale to allow the matching of cases which would have supported a more meaningful discussion of consistency in various stages of remand

decision making. The question of magistrates' consistency was, instead, explored through the experience of the legal professionals who worked with lay benches.

The clerks, the defence lawyers and the CPS officers were asked how often they could predict lay magistrates' decisions. Whilst they all expressed a fairly high degree of confidence in predicting decisions, this fell markedly when they were subsequently asked how often they could predict outcomes in *contested* cases. Of the 13 legal professionals interviewed, the majority felt unable to predict magistrates' decisions and expressed bemusement as to how and why magistrates reached their decisions. Only one individual, a clerk of many years' experience in the Outer District courts, reported being able to predict outcomes with any certainty when a lay bench was hearing a contested bail application. She explicitly stated that this was not because the triumvirate generated consistency in decision outcomes, but was because she knew the magistrates as individuals and so could predict how they would respond to cases.

## Structured Decision Making

Structured decision making is used in magistrates' courts to encourage consistency in the use of discretionary powers and to minimise the potential for stereotyped assumptions to affect legal judgements. The approach requires magistrates to address and resolve each stage of a decision sequentially before moving on to the next part. For example, decision making cues prompt magistrates to consider whether any bail risk exists before deciding how this might be addressed. How each stage is resolved determines the issues and options to be considered at the next stage. Structured decision making is intended to prevent irrelevant information or extra-legal factors influencing decision outcomes. In the majority of remand hearings the outcome was agreed by all parties so, in effect, no structured decision was required. Structured decision making was employed when cases were contested. By requiring magistrates to examine evidence of bail risk sequentially, structured decision making was intended to prevent magistrates prematurely reaching conclusions based on conscious and/or unconscious bias.

Typically, structured decision making was regarded positively. All the clerks interviewed maintained that magistrates' decision making was improved by use of this method as it helped magistrates focus on their thought processes and thus prevented

cursory decisions. Magistrates also supported the approach: 20 of the 24 magistrates interviewed said they used structured decision making and expressed a strong commitment to its principles. Even those 11 magistrates, all with a number of years' experience, who then admitted to circumventing structured decision making did not argue that the process or its intentions were wrong. They simply felt that they were experienced enough to achieve the same outcomes without having to adhere to such a laborious process.

We're constantly being reminded of [structured decision making], going to training on it. I suppose because I'm long in the tooth as a magistrate, I think it probably fair to say that I don't feel I need to use it quite as conscientiously as maybe I should...And I do use it and I suppose I use it, when I do use it it's as part of an on the job training for new magistrates (female magistrate).

Despite this overwhelming commitment to the technique, its utility in regulating decision-making was uncertain. Paradoxically, even the clerks, who all supported its use, and those magistrates who said they used structured decision making assiduously all admitted it may not actually affect outcomes. When asked in interview, all but 12 of the 24 magistrates, four clerks, and five CPS officers said they believed it affected the decision making *process* but not necessarily the *outcomes* of decisions. It was argued that the procedure did not alter the criteria on which magistrates judged cases, but rather changed the way that they accounted for their decisions.

I suspect our practice hasn't changed very much in terms of outcome. I think it's a useful exercise in articulating for the benefit of your colleagues what you're actually thinking. But it's unclear to me as to whether people are picking reasons that fit in their instinct or gut reaction or whether they really are looking at the reasons objectively and choosing an outcome that's appropriate in the context (female magistrate).

We've all had to look harder as to if the court was going to say that they had substantial grounds to say that someone was going to fail to surrender, they would have to think long and hard about why they've come to that conclusion and then give reasons in open court. But effectively the decision remained the same, it just focused magistrates' minds as to what they were doing. I don't think that as a result of structured decision making and the European legislation, I don't think any less people are being remanded in custody (male CPS).

I do recall a, and this is whether someone is guilty or not [and not a remand decision], I recall a magistrates saying "Oh, he must be guilty, he's got green hair." And they do come out with comments like that. Obviously they

know they're not going to come out and say he must be guilty because he's black or he's Muslim or some racist thing. They wouldn't say that because they know that's not acceptable. But it's just as bad to find someone guilty because he's got green hair but they're more likely to *say* something like that. And you don't know if they're thinking the racist things but they're not going to actually say it so we're not ever going to know (male clerk).

The limitations of attempting to use process to affect outcome were also found, for example, in research on the use of structured national gravity scores for issuing final warnings to young offenders. Some police officers were shown to use the gravity scores not as the foundation of decisions but as *ex post facto* justifications. Decisions were actually reached on the basis of their previous cautioning practice (Evans and Peuch 2001).

Whilst the efficacy of structured decision making in producing more consistent decisions was clearly debatable, it did provide some junior magistrates with the leverage to ensure their opinions were listened to by some of the more intractable senior magistrates. Although chairmen may not have been swayed by, or even considered, opposing views, junior magistrates did feel that structured decision making provided them with a means of challenging other members of a bench and this, they said, bolstered their preparedness to do so

I think we do feel that our views are listened to, and it's all done in a structured way. If it's not, we can, there was one case where a Chair, and this is very unusual, but this Chair didn't ask me my views. He just said 'custody, I think'. And I said, 'I thought we used structured decision making, shouldn't we consider the facts?' And he was a bit shamefaced! (female magistrate)

I think remand decision making is much more structured than it was before.... There's having to give reasons. When I first started in court, the one thing you never did was open your mouth...When I started there were a number, particularly of men, who there was no decision making, it was just 'that's it'. There was no discussion... and I think for me, certainly in Outer District, that's the thing that's changed enormously in the last ten years. Now, we really encourage Chairs to make sure they consult the junior members of the bench (female magistrate)

Given the widespread acknowledgment that structured decision making had not changed outcomes very much, why was there a majority commitment to using it? It appears that the benefit of the approach may lie more in the ethos of decision making

that it fostered rather than in any real control it exercised over how individual cases were resolved.

Certainly there's a change in culture, they are much more encouraged now to apply structured decision making to every decision. I don't feel it makes any difference to the outcomes. I could be wrong. Often it's simply, the structure justifies their first decision, they'll think 'oh I don't think we should give him bail' and then they'll go through it and they might just find more reasons to support their first view, but equally there are situations where they might actually conclude they should give bail. It's hard to say. But it has been a cultural change over the years. That's not how it was when I first started. The older ones were just, they didn't think they had to justify any decision, they just did it. That's just not the case now, they all, well nearly all, put time and thought into their decisions. (female clerk)

Its procedures were reported to be easily circumvented (consciously or unconsciously) but the general principle that decisions should be based on acceptable criteria, sequentially considered, did resonate strongly with all those involved in the remand decision.

## **Giving Individualised Reasons For Decisions In Open Court**

Since the integration of the Human Rights Act 1998 into UK law, magistrates have been required to give individualised reasons for applying conditions to bail or withholding bail in open court. Prior to this time, the Bail Act 1976 (s.5(3) and s.5 (4)) required reasons to be given but a pro forma was used and the grounds for applying an exception to the right to bail were selected from a list. Magistrates expressed a strong commitment to the practice of giving reasons for refusing bail or applying conditions to bail in interview and commented on how much emphasis their Chief Clerks placed on the importance of giving sound reasons. However, there was evidence that this principle was not necessarily adhered to in practice.

The exception under which bail is refused, and the related grounds, should be announced in open court and recorded on a bail information sheet that is given to the defendant. Although the reasons for all custodial remands are supposed to be recorded, the only available criteria for formally accounting for a refusal of bail are the grounds under the Bail Act i.e. risk of failing to attend, offending, and interfering with justice. So, whatever the real reason for a remand, it would necessarily be recorded in terms of these categories. As one male CPS officer observed,

[The exceptions] are pegs really, you just pick one and hang your hat on it. Most things can be fitted in to them somehow. Reoffending is always a good one, it can cover pretty much anything.

It can be seen from Table 4.2 that antecedents, bail history, and the nature and gravity of the offence were the most commonly cited grounds in cases where the defendant was remanded in custody and these had all been options on the old bail forms. It is possible that these grounds were the most appropriate and relevant ones in these individual cases. Alternatively, this continuity may show that standardised reasons have persisted despite the emphasis on individualised decision making. The reasons given in court may simply be *ex post facto* accounts of decisions rather than accurate records of magistrates' reasoning. All the clerks commented that this change had not substantially affected magistrates' decision making. Magistrates also admitted that although the requirement had superficially altered the process, previous practices still remained.

The bail form has actually altered where previously we had prescribed reasons for applying exceptions and we actually now construct those as appropriate to each individual case, although I have to say that we tend to use the old clichés anyway (female magistrate).

The reasons for the exceptions to bail, there's probably only four or five that we ever use...and those are really the ones we used to use as well. Now it just makes us think about them a little more, I suppose, but that's all. But I'm not convinced there's been much of a change quite honestly. I don't think there has (male clerk).

We used to have pre-printed bail forms with reasons for the magistrates' decisions and we just used to virtually tick off the reason but now we, in theory anyway, tailor reasons specifically to that individual case although often, actually, the reasons given are much the same as the standard ones used to be. (male clerk)

**Table 4.2: Grounds Cited In Support Of Custodial Remands**

Grounds Given In Open Court In Support Of The Exceptions To The Right To Bail	Number Of Times Cited (in the 55 cases that resulted in a remand in custody)
None given	26
Antecedents	13
History of breach of bail (failing to appear and offending on bail)	13
Nature and gravity of the offence	11
Likely sentence	4
Mental health concerns	4
Wanted at another court	3
Lack of community ties	3
No fixed abode	2
Drug habit	2
Foreign national	1
Vulnerable witnesses	1

Even more striking is the fact that in nearly half the cases that resulted in a remand in custody, magistrates ignored the legal requirement and no grounds were given at all. This finding echoes Hucklesby (1994b) who found reasons for a remand in custody were only given in 47 per cent of cases. This deficiency indicates that the requirement to give reasons (individualised or otherwise) is not an effective mechanism for regulating magistrates' behaviour. This is reinforced by the data in Table 4.3 which shows that in 11 of the 55 cases which resulted in a remand in custody, magistrates did not even state which exception to the right to bail they were applying.

**Table 4.3: Exceptions To The Right To Bail Given In Court**

Exceptions To The Right To Bail Given In Open Court	Number Of Times Cited (in the 55 cases that resulted in a RIC)
Risk of further offending*	36
Risk of failure to appear*	30
None given	11
Risk of interfering with justice	5
For the defendant's own welfare	4
Insufficient information	2
Unknown	1

\*fail to appear and/or further offences were cited in 40 of the 44 cases where a reason was known to be given in open court

As some magistrates evidently did not feel constrained by the requirement to give individualised reasons or the specific grounds for remanding in custody, there must be some doubt as to how thoughtful these reasons and grounds for custodial remands were. All the clerks were doubtful about the rigour of some magistrates' reasoning at times and argued the requirement to give reasons did not necessarily constrain them.

We would insist that we would have the reasons, because we have to have the reasons to write them down. At the end of the day there must be a reason within the Bail Act otherwise they're not going to get remanded in custody. Now it may be that the magistrates have a different agenda and don't tell us the real reasons but as long as they tell us reasons which we can fill in on the form as being reasons under the Bail Act then we can't stop them (male clerk).

Hucklesby (1994b) also found that defence representatives and clerks believed magistrates used incorrect grounds or poorly reasoned grounds.

He [a magistrate] went on that the reasons for keeping a defendant in custody sometimes do not relate to the Bail Act 1976. However, he could always find reasons under the Bail Act 1976 to keep someone in. If this is the case, it suggests that the real reasons why defendants are remanded in custody do not relate to the grounds under the Bail Act 1976 (Hucklesby 1994b:282).

Following the introduction of this requirement to give individualised reasons, it became more common for clerks to retire with magistrates to help them draft their reasons for withholding bail. Unsurprisingly, all the clerks argued that this resulted in better decision making. The clerks insisted that they would never unduly influence magistrates' decisions (a claim explored further in Chapters Seven and Eight) but they did acknowledge that their role in the remand process had increased as a result of the Human Rights Act and there was a "fine line" between providing advice on the legality of a decision and actually influencing outcomes. As the quote below illustrates, clerks were aware of their power to influence magistrates' decisions.

Thus, an unintended consequence of the move towards more transparent decision making (i.e. through requiring individualised reasons) was to afford clerks with more opportunities to influence magistrates' decision making, unobserved by any other parties. The requirement to give individualised reasons resulted in magistrates' reasoning being scrutinised by clerks to ensure they were fair and appropriate. However, although clerks did feel strongly bound by the codes of their professional conduct, there were no formal regulatory controls governing clerks' greater levels of involvement in remand decision making. One clerk expressed his surprise that this had not resulted in decisions being appealed.

We all thought that [The Human Rights Act] was going to have an enormous impact. We've all done reasons since the Human Rights Act and

we were all very cautious about retiring with the magistrates. The Chair would say “we’re asking the legal advisor to retire with us to assist in the drafting of reasons” when in fact we would go out and talk to them about the case and if we thought they were going wild we’d try and bring it back and get them to focus on what the issues are. And for some strange reasons we were never challenged. No challenges came from defence lawyers at all....and I think it’s because we are trusted. We’re not seen as being part of the magistrates, part of the decision making process. Although we probably have quite a considerable input, we’re not a fourth member, but it’s not difficult to shape what’s going on if we think they are going a little wild. But it’s not really become an issue, strangely enough (male clerk).

## Appeals

The Bail Act allows the defence to appeal remand decisions and, since the Bail (Amendment) Act 1993, the CPS has also been able to appeal against magistrates' decisions in cases which attract a custodial sentence of five years or more<sup>21</sup>. Hucklesby (1994b) raised concerns that the introduction of this power would further encourage magistrates to concur with CPS remand recommendations because they feared appeal. The present research did not find magistrates to be concerned about the risk of having a decision appealed by the CPS. This may in part be because magistrates' decisions were rarely appealed; an appeal was never observed during the course of this study.

There was a revealing disparity between magistrates' and clerks' perceptions of the lack of appeals and the CPS's views on this. The five magistrates who commented on prosecution appeal and all four clerks in interview believed that the lack of appeals indicated magistrates were getting remand decisions right most of the time.

You can judge that by the number of appeals can't you, Bail Amendment Act appeals. We get the odd one, not loads, but that seems to me to be an indication that by and large they get it right. (female clerk)

However, the CPS officers interviewed all said they felt that magistrates made some very poor decisions but they would only appeal those decisions involving a significant risk of the defendant committing another violent offence. CPS officers appeared to regard it appropriate to use their power to appeal only in the most serious cases even if

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<sup>21</sup> Or an offence under section 12 (taking a conveyance without authority) or 12A (aggravated vehicle taking) of the Theft Act 1968.

they felt the decision was outside what was 'reasonable'; the power was a safeguard not to be used routinely.

If I've got a serious case, it's much less of a worry to have the DJ there because I felt that you are going to get a decision within the reasonable range of bail decisions whereas with lay benches you will get a number of decisions that, in my opinion, are outside that. And then you've got the agonising thing of do I appeal it or not? (male CPS).

I wouldn't normally appeal a case like that because it wasn't the most exciting case and there was no violence, but the sums of money involved were enormous, and an officer appeared in court and he reckoned he'd probably stashed away 400 to 450 grand somewhere. (male CPS)

[Bail appeal] is an option that we just don't use very often unless we believe it's a very, very bad decision (female CPS).

On the evidence of this study, the prosecution's power to appeal does act as a safeguard against poor decisions in the most serious cases but it has not significantly impacted on magistrates' decision making. They did not incorporate the risk of appeal into their decision making because it was such a rare event. Additionally, they did not have an opportunity to learn from their poor decisions as information about what happened to appealed cases in the Crown Court was not routinely fed back to the magistrates' court.

## Summary

Analysis of the impact of formal regulatory structures on remand decision making suggests that they are largely ineffective at regulating behaviour or standardising decisions. Some magistrates' unsustainable decisions and failures to adhere to correct legal procedure were observed to go unchallenged and legal professionals reported significant inconsistency in how magistrates resolved contested cases. However, although regulatory structures were ineffective in individual cases, their existence did serve as an on-going reminder to magistrates to approach remand decisions fairly and with caution. Although the procedures were at times dismissed as unnecessary and time consuming, all magistrates did report great hesitance to use custodial remand and believed that it should only be used as a last resort.

## Conclusion

Whilst not intended to provide an exhaustive description of all the structural influences on remand decision making, this chapter has sought to contextualise the processing and resolution of individual remand hearings – the subject of the remaining chapters. There were multiple pressures on the remand system from different sources. It has been suggested that magistrates received confused and conflicting messages from central government about the aims of the remand system and the general tenor of what they should be trying to achieve. Participants in the remand system were acutely aware that some of their decisions may be subjected to public/media scrutiny and they struggled to resolve the tensions between what was ‘right’, protecting themselves, and ensuring that justice was seen to be done.

Pervasive and sometimes chronic shortages of time, information and resources characterised the remand system. Decision making within such an environment was inevitably constrained and/or compromised at times; outcomes were sometimes reached under less than ideal conditions, restricted by the nature and availability of resources. However, as will be seen, many outcomes are not affected by these shortages as they rely on decision making cues, such as offence seriousness, which were available even when time and information are restricted.

It was established that the regulatory mechanisms did not effectively constrain decision making processes and outcomes as they were easily subverted. Moreover, they were all aimed primarily at regulating magistrates’ decisions but they did little to regulate the other participants in the remand process who have been shown by this and previous research (Bottomley 1970; Derbyshire 1984; King 1971; Shapland 1981; Shapland 1987) to affect remand outcomes substantially. Some of the formal regulatory practices were seen to have greater significance in affecting decision making in the longer term as they contributed to the formation of normative ideas on what was desirable in the remand system. Whilst they could not prevent individual poor decisions, they did encourage magistrates to strive to achieve the principles of methodical, unbiased and reasoned decision making.

It is also evident that these three environments were connected and impacted on each other. For example, government targets on reducing delay enhanced the already existing

organisational pressures on time felt in the courtroom. In turn, this pressure on time either encouraged or excused magistrates' failure to adhere to regulatory procedures such as structured decision making. This is just one example of how measures intended to effect certain changes may have unintended consequences in other parts of the system. Despite the emphasis in the regulatory structures to ensure that custody was only used as a last resort, it appears that socio-political pressures and agendas may have reduced tolerance in the remand system and the 'last resort' has become a point more quickly reached by magistrates. This last point is suggested but not substantiated by this study and needs to be explored in further research. Finally, it is not argued that the influence of these three contexts was always direct, obvious or unavoidable; they were loosely coupled to the processing and outcomes of individual remand decisions. Their analytic significance lies in the fact that they contributed to the formation of operating practices by helping to frame ideas of what was possible and what was desirable in the remand system.

The next chapter illustrates how some of these structural influences filtered into remand decision making, affecting how the law was interpreted and decisions reached.

# Chapter Five

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## Models of Remand Decision Making

This chapter presents evidence that remand law was differentially applied depending on the characteristics of the case. Actors were identified employing three different models of remand which emerged from the data, each with its own decision making criteria: offence seriousness; cusp cases; and case processing. The way a case was processed, and its likely outcome, varied according to how it fitted into this typology. In these models, remand decisions have different functions and this structures the information that actors select as relevant from the hearing and how they apply that data to the resolution of the case. Each model is presented in turn and the way in which the legal framework was adapted to suit the rationale of each model is explored.

### Introduction

The previous chapter demonstrated that there were conflicting aims in the remand system, and that the regulatory mechanisms permitted discretion to be exercised in remand decision making. This chapter explores the ways in which discretion was employed in the remand system. It argues that actors in the criminal justice system had a great deal of discretion in how they chose between different approaches to remand hearings. Remand cases were seen to be categorised by participants, and whether and how legal powers were used was consequent on this categorisation.

Thus, as will be seen, the legal framework provided some structure to remand hearings but it was not rigidly applied to all cases alike. For example, although the rhetoric of the 'right to bail' was the dominant narrative in the legal framework, it was not necessarily adhered to in practice. The formal language of remand law concealed a series of different considerations that were evident in working practices.

The rhetoric and the law operate at two different levels, the abstract and the concrete, and the contradiction is operationally negated and a clear clash prevented by each being pigeon-holed out of the other's realm of discourse. The rhetoric is rarely actually denied, it is simply whittled away by exceptions, provisos, qualifications. Law in this form is rather like a Russian

doll. You begin with the rhetoric and a single, apparently definite, condition which on closer inspection turns out to contain another less clear condition which in turn opens up to the unpredictability of ‘it all depends on the circumstances’ – *which criteria we use in your case depends on your case.* (McBarnet 1981:161) (emphasis added).

That the legal framework could be manipulated, and that there was scope for such discretionary working practices in the remand system, was established in the previous chapter. Firstly, bail law itself does not tightly constrain actions as it contains a range of reasons for refusing bail (from risk of absconding to insufficient information) and allows magistrates to draw supporting evidence from multiple grounds (including any information “which appear[s] to be relevant”). Secondly, it was also demonstrated that the formal regulatory framework was, in fact, easily circumvented and so it had only a limited ability to constrain magistrates’ decision making, for example, the use of extra-legal criteria in decision making.

From court observations, it was noted that, notwithstanding the flexibility of the legal framework, cases with certain characteristics were, in fact, approached in a consistent manner. There was an underlying structure to remand decisions which was related to, but not wholly constrained by, the legal framework. Three models of remand were constructed from the regularised ways in which cases were seen to be processed and resolved, each defined by a separate remand rationale that was evident in the criteria used for case resolution. These models are used to explain the structure and nature of the different types of remand decision making that were observed. The models of remand can be equated with theories of punishment in that they delineate the priorities and the rationale of decisions: what are we trying to achieve, why, and how?

A number of authors have constructed and employed models in attempts to understand and explain the workings of the criminal justice system and the decisions made by its participants (King 1981; McBarnet 1981; Packer 1969). Models help us to understand apparent contradictions and discrepancies in decision making by elucidating how participants understand and chose their roles in decision making and how they orientate their actions and decisions to the fulfilment of particular goals. Dhami (2001) discussed Packer’s (1968) models in relation to the remand system.

Although the Bail Act 1976 contains due process and crime control principles, it also affords magistrates much discretion in which of these principles is enforced, and how they are enforced (Dhami 2001:41).

The consensus in remand research in the last 30 years is that the remand process is characterised by the crime control model. Both crime control and due process models (see Chapter Two for an explanation of these models) were evident in this research to varying degrees but they could not account for many of the observed remand decisions as case outcomes were observed which did not fit their rationales. Instead, as with King (1981), it is argued that a number of models co-existed in the system. Magistrates used what has been described as “eclecticism” (Walker 1991) in relation to sentencing: the selection of which approach to apply in the resolution of a case depended on the characteristics of that case and the defendant.

Criminal justice models are best understood as ideal types, or ‘normative’ models (Packer 1969) i.e. they are reified accounts of what exists in reality in more diluted and confused forms. The three models presented here are ideal types which were extrapolated from the issues that emerged from court observations and were corroborated in the case vignette exercise. Thus, their identification and presentation here should not be understood as a portrayal of a ‘tidy’ system operating on wholly discrete categories of remand. Although they were observed in ‘pure’ form in many remand hearings, cases were also observed to be located in a combination of categories and also moved between them, depending on the circumstances of the case and in the court at each subsequent hearing. The ways in which the social dynamics of courtrooms affected the application of models will be discussed in Chapters Seven and Eight. This chapter focuses on the rationale of remand decision making contained within each of the three models, and how they resulted in the law being differentially applied.

It is not possible to indicate with certainty how many observed cases fell into each of the three models for three reasons. Firstly, as explained above, these models are not all necessarily mutually exclusive and it was possible for a case to move between models at different stages, or to be a combination of two. For example, a cusp case could also have elements which encouraged participants to see it in case processing terms too (these terms are explained fully below). Secondly, magistrates had access to information about a case which was not available to me. Although comprehensive field notes were taken, data in some of the observation cases were incomplete, for example magistrates

referred to information on defendants' antecedents which was not always commented on in court (and thus could not be recorded in the observation notes) but which may have been significant in decision making. For example, magistrates may have had information on other cases involving a defendant being processed by the same court. Such information could result in a case being framed in terms of the organisational needs of the system but it would not necessarily be evident to me as an observer. Thirdly, as will be explored in Chapters Seven and Eight, the processing and resolution of cases was also affected by courts' social dynamics and the choices participants made. For example, on occasion defendants chose not to apply for bail for reasons unconnected to these models. Thus, in some hearings, the ways in which cases were processed and resolved depended more on interpersonal and inter-professional dynamics than on the characteristics of the case.

Magistrates rarely explained their motivations for decisions and never gave a public account of the thought processes whereby they reached their decisions. Given this, and the other shortcomings of the observation data discussed above, case vignettes were used to explore remand decision making rationale in detail. The vignettes were constructed after months of observations and were composites of cases typically found within a model (see Chapter Three for a full discussion of the case vignette methodology). Each section begins with a real example of the type of case being discussed to introduce the nature of each model but, unless otherwise stated, all quotes are from comments made during the case vignette exercise.

Before exploring the nature of each model, the question of how and why cases were allocated to the models is discussed. In the majority of remand hearings, the offence itself determined which model was used. As will be seen in Model One, offence seriousness was the primary cue for decision making and made the resolution of a case "self-evident" (female CPS). There were some cases that could not be easily categorised in terms of offence seriousness. Those on the 'cusp', were allocated to Model Two and processed using different criteria. As will be evident from the discussion below, there were certain factors which led to a case being defined as a cusp case. Unlike the other two models, Model Three approach was used not because of the characteristics of the offence, but because it was warranted by the criminal justice system's administrative needs. Thus, when case processing problems were identified, the remand decision was framed not by the nature of the offence, but by a concern for overcoming that problem.

As will be seen, organisational pressures in the remand system, such as poor administrative support, that were explored in the previous chapter contributed to the cases processing problems that Model Three was employed to solve. Thus it can be seen that models are applied in light of contextual pressures.

So, the majority of cases were allocated to models on the basis of key pieces of information which were recognised by all participants in a remand hearing. This common understanding allowed cases to be processed quickly (see below). Where an actor tried to introduce a piece of information that was 'spurious' in relation to the model being employed, other actors were observed to reassert the dominant narrative in order to negate the relevance of the comments. For example, occasionally CPS officers would raise bail concerns in routine trivial offences (as opposed to those which had crossed over into the cusp category – see below). In response, defence representatives rarely even acknowledged their comments, but simply restated that it was not a serious offence. The subtext of this was that a discussion of bail risk was irrelevant as the court knew the offence was not serious enough to attract a custodial remand. However, as will be discussed in Chapter Seven, case processing was also a social process and so it was possible for a case to be misclassified, or the rationale of the models to be bypassed, because of courtroom dynamics. So, although the approach to be taken in majority of cases was 'self evident' to participants, some cases were processed not on the basis of their characteristics, or the needs of the justice system, but because of interpersonal dynamics in the courtroom. These cases will be returned to in Chapter Seven and Eight.

## Model One: Offence Seriousness

This research found offence seriousness to be the primary cue influencing how participants organised their response to a defendant and allocated a case to a particular model. It was seen in Chapter Two that previous research on remand also found offence seriousness to be strongly correlated to remand outcomes. For example, in an analysis of official statistics on remand decisions at first appearances, Jones (1985) found that defendants charged with indictable offences were at a greater risk of receiving a custodial remand than defendants charged with triable-either-way offences. This finding is echoed in all remand research to date. This section uses case vignettes to explain why

the nature of the offence was so strongly associated to remand outcome, and explore the subsequent ways in which remand law was selectively interpreted and applied.

It could be argued that this model adheres to the risk-based “new penology” (Simon and Feeley 1995) in that its criteria for judging a case are explicitly rule bound rather than based on individual defendants’ personal characteristics. Even where defendants were perceived to invite moral censure, character assessments did not affect remand outcomes. It was found that the majority of remand decisions were resolved using this model’s rationale in which decisions were founded on offence-related criteria alone.

However, it is argued that bail risk assessments are far cruder than the actuarial decision making of the new penology. The findings from Model One suggest that offence seriousness was not used as a proxy signifier of risk but was the primary reason for remand outcomes regardless of actual levels of risk. As will be seen, magistrates themselves admitted that the working conception of risk in the remand system was defined by offence seriousness and assessments of ‘risk’ in many remand cases were, in fact, simply accounts of how serious the offence was. For example, where offences were serious, it was highly probable that the defendant would be remanded in custody even if there was no objective evidence of risk. Conversely, where an offence was not serious, the defendant would invariably be released on bail even where it was acknowledged that she would almost certainly reoffend.

Moreover, as will be seen, in cases where decisions could not be based on offence seriousness, decision makers turned to defendants’ personal characteristics in order to reach decisions. As Model Two illustrates, even where an individual’s record established there was a high risk of reoffending or failing to attend court, it was still possible for her to be bailed if magistrates’ perceived her to be a ‘deserving’ individual. These findings demonstrate that the new penology and risk assessment have not replaced individualised moral reasoning and they echo those of Kellough (2002) in her analysis of the Canadian remand system. Further, Model Three shows that some remand decisions were made for practical, case processing reasons and not because of risk assessments. These findings suggest that there has not been a decisive break with the previous focus on the individual defendant (Garland 1995) and that whilst ‘risk’ is inevitably referred to in remand decision making, the term actually conceals a range of

decision making rationales rather than signifies a single coherent approach to remand reasoning. It is these different approaches which are explored in this chapter.

The formal reasons for withholding bail are presented in terms of the level of risk that the defendant will fail to appear, offend on bail, or interfere with justice. Observation and vignette data alike revealed that when such issues were considered, the concern was not *whether* a breach of bail would take place but instead focused on the potential *harm* that would be done if one occurred. In cases where risk assessment was the primary narrative or purpose, risk (of reoffending etc). was overwhelmingly defined in terms of potential 'harm'. What constituted harm and who needed to be protected from it, the defendant or the public (including victims and witnesses), was determined by offence seriousness. If the offence was serious, public protection was paramount. If the offence was not serious, the defendant should be protected from the harm of a custodial remand. However, not all cases could be easily categorised and processed according to their offence seriousness. 'Cusp cases' are those on the borderline between a custodial remand and bail. Magistrates approached and resolved cusp cases in a significantly different way and, as will be seen, the reasons for granting bail in cusp cases are constructed around moral assessments, not risk assessments. Cusp cases are discussed below.

The Working Party on Bail Procedures in Magistrates' Courts, the forerunner of the Bail Act, said there may

exceptionally be occasions when all the circumstances of the case make the offence so grave and so shocking to public opinion that bail can properly be refused...even though the danger of absconding or of offences being committed if bail is granted is slight. (Home Office 1974:18).

and, conversely,

the comparative triviality of the offence may of itself indicate that a remand in custody is not justified, whatever the other considerations. (Home Office 1974:19).

The impossibility of simultaneously minimising harm done to the defendant and to the public was identified by the Working Party. It is argued here that in order to understand remand decisions, it is first essential to appreciate that with serious offences, the balance

of this zero-sum calculation shifts away from the defendants' rights towards the rights of the public, prompting a risk prevention approach (Hudson 2003:25) because of the potential for harm. Thus the rationale of remand decisions in non-serious offences (to minimise harm done to the defendant) differs from the rationale of decisions on serious offences (to minimise harm done to the public) and consequently different tests of risk or "substantial grounds" are applied. It is argued below that magistrates employed a 'bifurcated' approach to remand decision making when offence seriousness was the primary criterion for reaching a decision. There was significant differentiation in the ways magistrates approached and applied bail law to serious and non-serious offences. This dual approach was witnessed in observations and explored in the vignettes.

### i - Permissible Bail Risk: Non-Serious Offences

The reasoning magistrates employed when the offence was not serious was explored in Vignette One. The following example is a case that was observed at Orrington Street and is a typical example of a non-serious offence.

#### *Example 5.1*

A 38 year old woman appeared at Orrington Street charged with shoplifting. The CPS officer told the court,

The shoplifting matter was at BHS where she stole £51 of clothes. Nothing unusual about the theft and full admissions were made. The defendant was charged and bailed to appear on the 20th August when she failed to appear. There are previous convictions, 38 matters in total mostly for dishonesty matters and all types of punishment have been used in the past.

#### *Vignette One - Case Summary:*

A 30 year old woman appearing on overnight custody charged with shoplifting to the value of £120. She has a very poor bail record and extensive convictions for similar offences.

Despite strong contrary indications to granting bail (i.e. previous failures to appear and offending on bail) none of the magistrates remanded this woman into custody. The universal reason for this was that the offence was not serious enough to warrant a remand in custody. In this context, 'non-serious' offences are defined as nuisance offences (such as criminal damage, allowing yourself to be carried in a stolen car, etc) and lesser property offences (such as handling stolen goods and shoplifting). A female

magistrate summed up the views of the 12 magistrates who simply cited triviality as a reason in itself not to remand in custody when she said “it just doesn’t seem a serious enough offence to deprive her of her liberty.” However, defendants charged with non-serious offences could occasionally be at risk of a custodial remand depending on their bail and/or offending history (see ‘cusp cases’ below).

Anticipating sentencing, nine magistrates said they would not consider a custodial remand in light of a probable non-custodial disposal: “at the end of the day if she’s convicted then it’s very unlikely that she’ll go to prison and therefore remanding her in custody is not equitable” (male magistrate). The anticipated length of a remand compared to the probable sentence length was a very important consideration for some magistrates who felt they had a responsibility not to punish defendants excessively.

Benches, although they don’t like to say that they do this, they have an eye on how long the remand would be. If it was only for one week they tend to think ‘well maybe we’d better be safe’ and keep her in but if it was going to be for say four weeks they’d think ‘well I’m not keen to keep her in for four weeks.’ (female magistrate)

The injustice of a custodial remand longer than anticipated sentence length was frequently used by defence representatives either to prevent a remand in custody or to secure release from custodial remand, particularly if there had been delays, for example, in getting a PSR done. The comments of one defence representative in court illustrate how proportionality between the nature of the offence and the remand decision was used to try and secure bail. The defendant was granted conditional bail for a delayed PSR to be completed.

She has been in custody for the equivalent of a six week custodial sentence so she has been fairly well punished already (female defence representative).

Remands in custody were seen to be inappropriate and unfair for non-serious offences and this extended to the use of overnight custody. One possible consequence of a night in the cells was receiving undemanding bail conditions - five of the magistrates commented that the night the woman in Vignette One had spent in the cells was punishment enough; it was a sharp reminder to her of what would happen if she breached her bail and lenient bail conditions could be given in consequence.

The trivial nature of the offence meant that magistrates chose to ignore bail risks when making decisions. Magistrates judged that the woman would probably breach her bail but were prepared to accept this because the offences were not serious. Twelve magistrates made comments such as “I mean it’s worrying I have to say and one would be running a risk by giving her bail but I am willing to risk another shop losing another couple of jackets” (female magistrate). The way in which magistrates resolved the conflict between the rights of the defendant and protection of the public altered depending on the nature of the offending.

Bail conditions were given by all but one female magistrate who felt that as no bail conditions could prevent the defendant from offending, she would grant unconditional bail. This action was unusual as it implied a practical approach to the use of bail conditions with a non-serious offence. It was implicit in most magistrates’ comments on the usefulness of bail conditions that they often considered conditions ineffective, particularly at preventing offending. Two magistrates explicitly stated that applying bail conditions could “often be more for our sake, feeling like we’re doing something more than actually altering their [defendants’] actions” (male magistrate). When asked how a residence condition would address his stated concern about further offending, a male magistrate replied, “Well it doesn’t really, but at least the police will know where to find her.” Similarly, five of the 24 magistrates asked for the defendant to be excluded from the shopping centre in which she had offended. Whilst this may have prevented the commission of offences in that area, it would not have prevented her from shoplifting elsewhere. In interview, two clerks said exclusion zones could be useful for some types of offences (particularly offences against the person) but expressed their bemusement that magistrates used the condition for shoplifting as they regarded it as pointless. The vignettes demonstrated magistrates’ use of ineffective and unnecessary bail conditions for non-serious offences. In contrast to bail conditions given for other offences, conditions for non-serious offences appeared to be selected somewhat perfunctorily. Observations also confirmed that magistrates ‘delivered’ bail conditions for different types of offence differently (see below).

A further theme was that when the offending was non-serious, the defendant’s character was not considered relevant. Disapproval of the defendant’s behaviour and disbelief of her story was commented on in the vignette but bail was always granted. This contrasts with the more serious offending in cusp cases where remand outcomes were crucially

influenced by the credibility of the defendant and whether they were perceived to be a sympathetic character. This is discussed below and also more extensively in relation to women in Chapter Six.

From the responses to Vignette One it was evident that if an offence was not serious, magistrates were loath to remand in custody and would consequently dismiss evidence of bail risks.

With that sort of record but with crimes against the person, he [sic] would be a definite remand in custody but for this one, it's extremely unlikely (female magistrate).

and

There's a good chance she'll offend on bail, in fact I know near as damn it that she will. But I'm not going to remand someone like her in custody (male magistrate).

In such cases, the harm done to the defendant by a remand in custody superseded the potential harm to the public and defendants are bailed. Bail law was employed to suit the outcome of the case that was predetermined by the nature of the offence.

Although the overwhelming majority of non-serious offences were bailed, it was possible for such offending to move into the “cusp” category and thus be at risk of a custodial remand if the offending was exceptionally prolific or if the defendant was considered to be blatantly defying the court (see below). As will be seen in the next section, magistrates employed a very different approach to making remand decisions on serious offences.

## ii – Insubstantial Grounds: Serious Offences

The reasoning magistrates employed when the offence was serious was explored in Vignette Two. The following example is a case that was observed at Inswick Corner and illustrates the issues that were regarded as relevant in serious offences.

### *Example 5.2*

A 31 year-old woman appeared on overnight custody charged with ‘entering enclosed premises’ and ‘burglary’. The defendant had entered two premises, trying to find somewhere to smoke drugs. She left each of the premises almost immediately, saying that she decided they were unsuitable. She did not actually enter any dwellings, but did enter communal hallways. Her actions were caught on a surveillance camera. Given that

the behaviour in each incident was identical, her defence representative repeatedly stated that she could not understand why different charges had been laid.

“It appears to be a serious charge but it is not in this case. She accepts that she did enter both premises. Why are the Crown putting the two incidents as different types of charges? The evidence of burglary is not strong.”

The mixed bench remanded her in custody on the grounds of failing to appear and committing further offences. They said they based that assessment on the nature and seriousness of the offence and the likely penalty.

The defence representative’s repeated questioning of the charge, her bald statement that the offence was not as serious as it seemed, and the magistrates’ specific (and unusual) reference to the likely penalty indicates that the seriousness of the charge (and not the nature of the actual offence) was the key factor in this remand decision.

In this context, ‘serious offences’ are defined as: any offences where violence or the threat of violence is used; domestic burglary; and offences involving large sums of money. Defendants charged with serious offences were only very rarely bailed by magistrates; the seriousness of the offence overrode other considerations. In court observations, the relationship between offence seriousness and custodial remands was evident:

- Seven charges of robbery: all were remanded in custody
- six charges of domestic burglary: four were remanded in custody and in the remaining two there were queries about whether ‘burglary’ was an inappropriate charge which should be reduced to, for example, ‘unlawful entry’.
- Two charges of arson: both were remanded in custody.
- Two charges of living off immoral earnings: both were remanded in custody. They involved allegations of human trafficking for the purposes of prostitution, violent intimidation of victims/witnesses, and very large sums of money.

Although the nature and gravity of the offence is not one of the exceptions to the right to bail under the Bail Act 1976, Hucklesby (1994b) observed that the seriousness of the offence<sup>22</sup> had, in fact, become a *de facto* exception to the right to bail. This reason for refusing bail was also observed to be accepted unchallenged in courts in this research. This provides further evidence that remand decisions were not founded on assessments of risk, as described in the Bail Act, but were statements on the seriousness of the offence charged, almost regardless of the actual risks involved (see below). Again, the inadequacy of procedural requirements in effectively regulating magistrates’ behaviour was evident.

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<sup>22</sup> It is possible that the adoption of this rationale in remand decision making was an unintended consequence of the ‘just deserts’ principles of the Criminal Justice Act 1991. The link between sentencing principles and remand practice is discussed in Chapter Nine.

Also of note, is the frequent use of the nature of an offence as a reason for withholding bail. The nature and seriousness of an offence does not in itself provide an exception to the presumption of bail under the Bail Act 1976 although it does constitute one of the considerations that may be taken into account. Nevertheless, the findings of this study seem to suggest that it is the third most commonly used reason for objecting to bail. (Hucklesby 1994b:312)

In an attempt to understand further the importance of offence seriousness in magistrates' decision making, and to explore the extent to which it overrode other considerations, particularly assessments of the risk of reoffending, Vignette Two explored the impact of a serious offence on the conduct and resolution of bail hearings, and on any subsequent consideration of the presumption in favour of bail. This presumption was particularly tested by Vignette Two which presented a serious offence (domestic burglary) but the case rested on weak evidence, the defendant had no record of burglaries and a good record for attending court i.e. although the offence was serious, the grounds for refusing bail were not substantial.

*Vignette Two - Case Summary:*

A 28 year old woman appearing on overnight custody charged with domestic burglary. The evidence against her is very weak, she has no record for burglary, and she has a good bail record.

Of the 24 magistrates, 15 remanded this woman into custody and nine gave her conditional bail. All magistrates commented that domestic burglary was a serious offence. This was the primary consideration of all those who remanded her in custody. Although two who remanded her in custody actually thought she was innocent, they refused her bail because of the seriousness of the charge; they felt duty-bound to accept the facts of the case as presented by the CPS (see below). Of the nine who bailed her, six said they believed there was no charge to answer as the case was too weak to proceed and/or convict her so a remand in custody would be unfair and unnecessary. It is important to note that these six were not arguing for bail *despite* the nature of the offence: they were not disputing that offence seriousness should be the key issue in such cases. They also commented on the 'nasty' nature of domestic burglary and would probably have responded to the remand decision in the same way as the majority of their colleagues had and remanded her in custody *if* the CPS's case had not been (designed to be) so conspicuously weak. The remaining three who granted bail did not

question the strength of the case. They all commented on the nature of the offence (“domestic burglary is a very nasty crime” - female magistrate) and stated that if the mitigation had not been so strong, they would have remanded her in custody. So, of the 16 who accepted there was a case to answer, 13 remanded her in custody and two of the eight who believed her probably innocent also remanded her in custody.

In Vignettes One and Two it was clearly simply the seriousness of the offence, rather than any assessments of the risk of failing to attend, reoffending or interfering with justice, that was the primary determinant of the outcome. In explaining their decisions on Vignette Two, magistrates referred to many of the same considerations they applied to Vignette One.

The likely custodial sentence was referred to by six of the 15 who remanded her in custody. They did not advance this as grounds to withhold bail because of risk of absconding<sup>23</sup> but argued that the time she spent on custodial remand would come off her sentence anyway so it benefited her to be in custody: “in a sense you’re giving her an inverted sort of hand in this really” (male magistrate); “any custodial sentence she got in the outcome would be reduced by the amount of time that she’s been on remand and in slightly nicer conditions” (male magistrate).

In contrast to the outcomes of bail risk assessments for non-serious offences, with serious offences magistrates were not prepared to take any chances with reoffending. Even those magistrates who were not convinced that the woman in Vignette Two would offend on bail were unwilling to bail her because of the seriousness of the offence: “This is a marginal one but I think my reaction is more that it would be better to keep her in custody because of the seriousness of the offence” (female magistrate).

With serious offences, bail was refused because of a fear of the consequences *if* the defendant offended and not because of a probability, or even possibility that she *would* offend. It was rare that bail conditions could be found which were ‘strong’ enough to override this fear about granting bail for serious offences. In interview, magistrates commented on the difficulty of finding bail conditions that prevented any type of

<sup>23</sup> If the offence is serious magistrates sometimes advanced the argument that defendants may abscond because a long term in prison is likely. However, failure to attend based only on the likely sentence was not regarded as sufficient reason to withhold bail. “The case law says that it shouldn’t be the only ground for refusing bail on the fear that there would be a fail to surrender. Just because somebody is likely to be facing five years imprisonment, that shouldn’t be the only ground.” (male clerk).

offending. Those magistrates who granted bail because of mitigation, rather than because they believed she was innocent, wanted extensive and onerous bail conditions that specifically addressed their fears of her offending. The first required residence, a surety, daily reporting to a police station, and a curfew. The second remanded her to a bail hostel and wanted to extend the hours of the hostel's own curfew. The third gave conditions of residence, a curfew and an electronic tag.<sup>24</sup> It is important to note that these magistrates were not using the generalised and token conditions of Vignette One. They all volunteered a bail condition, the curfew, which they believed directly addressed the risk of her offending by restricting her movements. Other magistrates, who did not accept the premise that she would only offend at night, did not bail her because a curfew did not allay their fears: "I could keep her indoors at night but what's to stop her burgling for drugs during the day when everyone's at work?" (male magistrate).

Only four magistrates made any kind of comment about the defendant's character. Of these, two magistrates dismissed the impact of a custodial remand on her based on their judgement that she was already "corrupt". That defendants with antecedents appear to be afforded less sympathy and remanded in custody more easily is discussed in a later section.

So, if we deny her bail she's going to be in prison for six or seven weeks. That in itself is not necessarily the most appalling thing for her because she's already been in custody many times so she's not going to be further corrupted by it because she is already corrupted or corrupt..... We have so little information at this stage that we can't tell if she's guilty or innocent but she's not exactly like Caesar's wife, beyond reproach. (male magistrate)

The other two magistrates commented that it would be useful to "see a body" in this case. They felt her demeanour in court would provide useful information. Interestingly, unlike assessments of defendants in cusp cases (see below), they did not frame this in terms of how sympathetic or genuine she appeared, but were simply interested to know whether she appeared to be withdrawing from drugs. This would indicate that she might be 'desperate' to satisfy her addiction and would offend on release to raise money to

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<sup>24</sup> Three magistrates requested a bail condition of electronic tagging in Vignette Two, mistakenly believing this to be a power available to them. It may be that they were drawing on their experience of working in the Youth Courts where tagging is more widely used. When asked what changes they would like to see in the remand system, ten magistrates and one clerk volunteered the idea of using electronic tagging for bail.

buy drugs. As with non-serious offences, character did not seem to be considered as an important element in remand decisions for serious offences.

Eight of the 24 magistrates stated erroneously that they were required to take the prosecution's case at its highest i.e. they had to assume the defendant was guilty and would be convicted regardless of their own views on the strength of the evidence. Two magistrates even remanded the woman in custody despite their belief that she was not guilty because they felt obliged to incorporate her alleged guilt into their decisions. Those six magistrates who granted her bail because they did not believe her to be guilty were all chairmen and/or had many years experience. They either had sufficient confidence in their own expertise (see Chapter Seven) to ignore this apparent requirement to accept the prosecution's case at its highest or they knew that there was no such requirement.

It's a pretty weak case but our training tells us in a magistrates' court on a bail application that we have to accept the facts of the case given by the prosecution as true. But, and this is important, even if they are true they don't necessarily prove the case. (female magistrate)

The obligation to take the prosecution case at its highest was asserted so often that a question on it was included on the interviews for all legally qualified respondents. All but one of the five CPS officers, four clerks and four defence lawyers interviewed believed that magistrates were indeed required to take the prosecution case at its highest. When asked where this requirement was enacted, none of them knew. One CPS officer made contact some weeks after the interview with the following statement

Further to our interview, I've now checked the position: there is no statutory provision to support that the Court has to take the prosecution case at the highest during bail application. Perhaps it is just a phrase commonly used by advocates (prosecutors and defence lawyers, at times the Magistrates!). (female CPS officer)

Bail hearings are supposed to be based around bail concerns and not on the strength of the case. At such an early stage in the process it would be impossible and inappropriate, particularly with complex cases, to make meaningful judgements about guilt. However, it was worrying that this general principle of practice was considered to be a statutory requirement by the majority of respondents.

Vignette Two is based on a real case: despite disjointed and sparse objections to bail by the CPS, the bench remanded her in custody. The CPS withdrew the case the following week citing lack of evidence. It would be an overstatement to say that defendants charged with serious offences were never bailed. However, court observations and the responses to Vignette Two demonstrated that magistrates were very reluctant to grant bail on serious offences because they feared the consequences. This was true even when the objections to bail were not substantial. Moreover, magistrates were less willing to consider personal mitigation when assessing the defendant and the risk they presented when the alleged offence was serious. Custody appeared almost inescapable for serious offences, regardless of mitigating factors. Referring to Vignette Two, a female magistrate explained how simple the decision rationale was,

the fact that the people were upstairs means it is a serious offence. That is probably over-weighing everything else you've told me. (female magistrate)

Both the Working Party and previous Lord Chancellors expressed the view that the dual approach to remand according to offence seriousness was acceptable:

I would be slow to grant bail in cases where the charge was murder, attempted murder, rape or attempted rape, or wounding, or other grave crimes. This list is not exhaustive...if the exceptions and restrictions provided by the Schedule to the [Bail] Act were properly applied, only in exceptional cases would one expect to see bail granted to a person charged with murder, rape, wounding, or other grave crimes. (Lord Hailsham addressing the Magistrates' Association in 1984 cited in (Corre and Wolchover 1999:29)

It is clear from the language used that offence seriousness should not be the only matter considered, and 'seriousness' specifically relates to very "grave" crimes. More research is needed on the boundaries of what magistrates consider constitutes a 'serious' offence in practice. Observations in the current study suggest that the benchmark of 'seriousness' has moved since Lord Hailsham's statement and now encompasses many more offences. This may reflect a shift from the original primary purpose of custodial remand, to ensure attendance<sup>25</sup>, towards a prioritisation of preventing offending on bail (Corre and Wolchover 1999). Offence seriousness and the harm to potential future

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<sup>25</sup> "The principal matter which the court has to consider in deciding a bail application is whether, if granted bail, the defendant is likely to attend at the time and place required." (Home Office 1974:18). Chapter Four explored how the socio-political context has altered the main purpose of remand from ensuring attendance to preventing offending on bail.

victims are valid considerations in remand decisions. However, it is suggested here that flexible guidelines (i.e. ones which allow for variations in seriousness *within* categories of offences) should be issued on what constitutes a serious enough offence to alter the assessment and consideration of the grounds for withholding bail. One observed case in particular, Example 5.2 demonstrated magistrates' sometimes arbitrary response to offence seriousness and illustrated the need for guidance on the appropriate use of 'offence seriousness' as a ground for withholding bail.

The responsibility to take account of the strength of the evidence had particular salience in cases where the seriousness of the offence predisposed magistrates to remand in custody regardless of mitigating factors and, sometimes, in the absence of any 'substantial grounds' for remanding in custody.

Evidently, in the majority of cases the seriousness of the offence charged was the most significant consideration in remand hearings. It framed how magistrates approached cases and was the primary determinant of case resolution, often irrespective of other issues. Hucklesby was struck by the fact that magistrates still often granted bail even when defendants had breached their bail,

72 per cent of defendants who were charged with a bail offence were still granted bail which is surprising considering the historical and legal significance of failing to appear and suggests that the majority of defendants charged with a bail offence are trusted to appear at a later date (Hucklesby 1994b:210).

In the context of the models outlined above, these figures are not surprising. It is posited that the majority of the 72 per cent were not actually trusted to reappear but were re-granted bail because their original offence was not serious enough to warrant a remand in custody despite the evident bail risk. However, some defendants fail to appear with such regularity that, even though their offences are not serious, their contempt for court proceedings eventually results in their re-categorisation as cusp cases which exposes them to the risk of being remanded in custody. It is to cusp cases that the discussion now turns.

## Model Two: Cusp Cases and Individualised Decision Making

Before the responses to Vignette Three are presented, a fuller explanation and definition of 'cusp cases' is required. Vignette Three explored cusp cases: those cases that did not fall easily into the bifurcated pattern of decision making outlined above. Cusp cases are those on the borderline between conditional bail and custodial remand. The overriding determinant of magistrates' resolution of Vignettes One and Two was the seriousness of the offence. The offences in the cusp category can be understood as being of 'mid-range' seriousness. However, unlike both non-serious and serious offences, in the cusp category 'seriousness' is not simply defined by the offence type but by the characteristics of the defendant, the pattern of offending, and the specific nature of the offence which may be concealed by broad offence categories. Echoing Hough et al's (2003) findings on borderline sentencing decisions, observations of cusp cases revealed no patterns either in the types of offences that fell into the cusp category, or in the remand outcomes of offence types in the cusp category.

The cusp category probably does contain some offence types which are regarded by magistrates as being of mid-range seriousness and are thus not approached in the manner that non-serious or serious offences are. For example, although Hough et al (2003) found that borderline cases were not defined by offence type, they noted that certain types of violent offences were more commonly defined as 'borderline' than others (Hough, et al. 2003:39).

Replicating previous evidence on female offending (Burman 2004; Daly 1994; Hedderman 2004; Hedderman and Gelsthorpe 1997; Home Office 2003a), the women tracked through the remand system were typically either non-serious but prolific offenders (e.g. shoplifting or handling stolen goods) or had committed one very serious offence (e.g. arson or burglary). Because of the nature of the observed females' offending patterns, the present study is unable to conclude whether or not particular offence types have intrinsic mid-range seriousness and are, therefore, categorised as cusp cases. It would be interesting to conduct similar research on males in the remand system to see what, if any, the differences in the cusp category for the two groups were. During the interviews and vignettes, magistrates did comment that making bail decisions for females was much harder than for men because of the nature of their offending.

It's predominantly men that we see and the question of bail is usually much more straightforward than with women because of the offences they've committed. (male magistrate).

If the cases in the cusp category were not determined by seriousness as defined simply by offence type, how should the category be understood? Three different types of cusp cases were observed. The first concerned offences that initially appeared serious but when the details were presented in court there was reason not to remand in custody because the nature of the offence did not automatically warrant it. This finding reflects more general comparisons between male and female offending: the broad offence categories mask variations in seriousness between male and female offending (Daly 1994). In the present study some of the most serious charges fell into this category: two charges of possession of offensive weapons, one charge of possessing a firearm, and two charges of burglary fitted this pattern. The following example illustrates how the same offence categorisation can conceal very different offending behaviour.

*Example 5.3*

One burglary case related to a woman who had broken into her ex-husband's flat during the day whilst he was known to be away on holiday. She removed goods she claimed were hers and left the building. This contrasts with another case of burglary, this time a male, whose case also happened to be observed during the same week at the same court. The female occupant of a flat had woken up at approximately 3.00am to find a man in her bedroom. Having broken into her flat, he had disturbed her whilst going through her bedroom chest of drawers. Although both were defined as domestic burglaries, the female's offence is far less serious with none of the aggravating features evident in the male's offence.

The second type of offences which populated the cusp category were those which were not serious in their character but were aggravated by the prolific nature of the offending. Commonly observed examples were shoplifting and attempted deception using stolen credit or debit cards. The level and frequency of offending had to be very significant for magistrates to debate whether to use custodial remand for a non-serious offence.

*Example 5.4*

A 20 year old woman appeared before a male lay bench at Orrington Street charged with shoplifting (two leather jackets valued at £60 each) and going equipped for theft (possession of a multi-tool used for removing the jackets' security tags). She had pleaded not guilty to all charges six weeks previously and had been released on bail

pending the trial. She had failed to attend the trial and was charged with this too. When the charge of failing to attend court was put, her defence representative said:

She has no explanation really and will plead guilty to it. She has been a heroin user for some time. She was released from court in November and fell back into use and simply failed to attend.

The CPS officer added that the police had informed him that she had failed to report for police bail. The defendant disputed this and pleaded not guilty to these charges. The CPS officer opposed bail:

Bail is opposed as she has failed to appear in the past. She has also failed to appear three times on the November matter. The defendant will fail to attend and she may commit further offences to feed her drug habit.

The clerk added that she has “a lot of other matters, thefts, that she has pleaded guilty on that are awaiting a PSR.” Her defence representative made a bail application stating that her child had recently been taken into care and she was suffering from depression and was now “desperate to get off drugs” as a result. This defendant had a very extensive record for shoplifting and failing to attend court and the magistrates retired to consider bail. They bailed her with multiple conditions: residence, daily reporting to a police station, and a 7am to 7pm curfew (to prevent her stealing from shops).

Another type of offence in this group was non-serious offences which did not warrant a remand in custody because of their prolific nature but defendants were still at risk of custodial remand because they conspicuously defied the court. Magistrates struggled with the conclusion that they had “no other choice” but to use custodial remand for a non-serious offence.

#### *Example 5.5*

A woman was charged with criminal damage in Central District. She had been arrested for breaking windows in a high-profile, and heavily policed, public building. The defendant was of no fixed abode and appeared in court on overnight custody. She did not have a significant record of antecedents and the CPS did not object to bail. The defence bail application stated that she was homeless and had broken the windows in an attempt to draw attention to her situation. The male district judge began to explain that she would be released on conditional bail when she interrupted him and stated her intention to commit the same offence as soon as she was released unless housing was found for her. The district judge appeared annoyed and told her that she could not “blackmail” the court. He bailed her. She reappeared the following day before the same district judge for the same offence. Again she said she would reoffend. The district judge remanded her in custody, telling her that he had “no other option as I cannot allow you to flout the authority of the court again.” It is possible that the woman might have been bailed again if her chosen target was not such a high-profile public building.

As cusp cases were not primarily organised around the seriousness of the offence or system imperatives (see Model Three below), decision making was much more individualised and the particular characteristics and needs of the defendants were paramount. This model is in the tradition of the positivist approach to criminal justice decision making which is concerned with the reasons why individuals offend, and what

interventions, if any, could and should be employed in particular cases. In this research, cusp case remand decisions were seen to be highly individualised and ‘evidence’ was selected and interpreted depending on the moral assessment of a defendant. The specific ways in which moral assessments were made about women are discussed in detail in Chapter Six. A favourable impression meant

other potentially condemning data can now be re-assembled so that it becomes more difficult to ascribe unfavourable meanings to them. (Hawkins 1983:110).

The concerns here were welfare and rehabilitation. Many magistrates were deeply committed to the idea of ‘doing something to help’ and were prepared to take chances and release ‘risky’ defendants because of their perceived needs. There was, however, a sharp moral distinction made between those women who magistrates felt were genuine and would benefit from help, and those who were seen to be ‘playing the system’, cynically making pleas for help or pretending to be candidates for rehabilitation in order to secure bail. This moral division between the “troubled” and the “troublesome” (Hedderman and Gelsthorpe 1997) women is discussed more fully in the next chapter.

#### *Vignette Three - Case Summary:*

A 25 year old woman appeared on overnight custody charged with theft of a handbag. She failed to attend in the current proceedings and has a substantial record for similar offences but personal mitigation is presented in her bail application.

Of the 24 magistrates, eight remanded the defendant in Vignette Three in custody, 15 gave her conditional bail and one gave her unconditional bail. These contradictory responses to Vignette Three illustrate magistrates’ inconsistent approach to and resolution of this case which contrasts with the greater uniformity evident in Vignettes One and Two<sup>26</sup>. Such variation was expected as Vignette Three was designed to explore decision-making in cases that were on the borderline between a remand in custody and conditional bail.

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<sup>26</sup> In Vignette Two, the figures are similar: 15 remanded in custody and nine gave conditional bail. It is argued, however, that the response to Vignette Two was more consistent than the response to Vignette Three: in Vignette Two, of the 16 who accepted there was a case to answer, 13 remanded in custody and two who believed her to be innocent still remanded the defendant in custody because of the seriousness of the offence. If Vignette Two had not been designed to explore also the secondary issue of the strength of the evidence, it is believed that the majority of the magistrates who granted bail would have remanded the defendant in custody too.

Vignette Three was based on a real case which magistrates demonstrably struggled to resolve. The vignette allowed analysis of the type of issues that magistrates selected to focus on in a typical cusp case and an exploration of how these issues differed from the considerations that typified approaches to non-serious and to serious cases. It did elicit contradictory responses from the magistrates but, just as with Vignettes One and Two, there was significant consistency in the issues that individual magistrates were concerned with: i.e., whilst outcomes varied, magistrates all approached decision making in the cusp case in the same way. Information was processed in a substantially different way from the other two vignettes. For example, much greater attention was paid to issues illuminating the 'character' of the defendant in the cusp case. This was not simply a product of the ways the vignettes were constructed as comparable mitigating data was available in the non-serious and serious offence vignettes but magistrates did not focus on it.

The ways in which cusp cases should be processed and resolved are, by definition, open to debate. Cases are not easily defined by their seriousness and so encourage more individualised decision-making; a fact reflected in the issues that magistrates focussed on when explaining their decisions.

In contrast to Vignettes One and Two, only two magistrates commented on likely sentence for Vignette Three. One explanation of this is that the cases on the cusp for remand are also on the cusp for sentencing and so magistrates are not confident in anticipating later decisions. They cannot justify a custodial remand on the basis of a probable custodial sentence if that sentence is not, in fact, probable. Another possible explanation is that, as will be seen below, in cusp cases the ultimate sentence is often informed by behaviour during the period of bail. The bail period is used to test the defendant's commitment to rehabilitation programmes etc. and, at the end of the bail period, sentencing outcomes will reflect her conduct on bail. So, in some cusp cases magistrates were not bailing in anticipation of the likely sentence, as they were with serious and non-serious offences, but were granting bail as a way of facilitating a subsequent bench's sentencing decision.

Interestingly, only six magistrates gave any kind of assessment of the bail risk that this defendant presented and these were contradictory; some regarded her as likely to

reoffend whilst others were confident that she would not. In Vignettes One and Two ‘risk’ was primarily defined by magistrates as the amount of harm done if an offence took place (i.e. based on seriousness). The magistrates were more confident in their assertions about the nature and significance of the risk in Vignettes One and Two.

As more magistrates bailed the woman in Vignette Three than in Vignette Two and as the offence was more serious than in Vignette One, more comment on bail conditions was expected. The nature of the particular bail conditions given are not discussed in detail here as they were, in large part, the same as the conditions offered by the defence representative in the vignette (see Appendix Three). Magistrates did not innovate and suggest new conditions in Vignette Three as they did in Vignette Two where they used conditions in an attempt to control that defendant. The apparent role of conditions was different in the three vignettes and reflected what was observed taking place in courtrooms. Magistrates bailed defendants in Vignette One regardless of perceived risk and conditions were recognised to have limited utility in preventing breaches of bail. They were admitted to be applied more for magistrates’ sake than with any real expectation that they would change defendants’ behaviour whilst on bail. Most magistrates who bailed in Vignette Two doubted there was a case to answer but those who did have concerns suggested stringent bail conditions which, they felt, successfully controlled the specific risk of offending in that case. Bail conditions were tailored to the specific circumstances and were used to regulate defendants’ behaviour. In Vignette Three, seven of the 16 magistrates who gave bail spontaneously said they would address the defendant directly to “give them a little homily” (female magistrate) or “read her the riot act” (male magistrate) i.e. to encourage her to take the matter seriously, to appreciate that she was being given a chance to prove herself and that the consequences of any breach of the conditions would be custody. This personalised appeal to defendants was totally absent from the discussion (and observations) of non-serious and serious offences but was evident in both Vignette Three and the observed cusp cases. It may indicate that magistrates were “prepared to take a risk” (male magistrate) in such cases, making a ‘personal contract’ (Hough, et al. 2003) with defendants and responding to them in a more individualised way.

The most striking difference in the manner of magistrates’ comments on the three vignettes was the relevance of ‘character’. Character was commonly equated with demeanour. In Vignettes One and Two character was barely commented on despite

information being provided but in Vignette Three, 12 of the 24 magistrates expressed a desire to see the defendant in order to assess her demeanour. A further three said that they found cases where the defendant was an addict particularly difficult as they were unsure whether or not they could trust what she said and seeing her might help them make that judgement. The ways in which actors made moral assessments about defendants and the impact these had on hearing outcomes are explored below in depth in the next chapter.

## Model Three: System Imperatives

The reasoning magistrates employed when the offence was defined by case processing needs was not explored using a case vignette. This was partly for practical reasons: it was felt that a fourth vignette would limit the time available for discussion of important issues in the semi-structured interviews. It was also because this model was explicitly acknowledged in remand hearings by participants and so it was not necessary to construct a case vignette to encourage magistrates to talk about their reasoning. The data in this section are from court observations.

In this third group of cases, the purpose of the remand decision was not to minimise harm or to address the needs of a defendant but was instead tailored to the organisational and information needs of the criminal justice process itself. Clear links can be seen between the rationale of this model and the political and organisational pressures outlined in Chapter Four, such as the need to reduce delay in court proceedings and the problems faced by the CPS because of insufficient administrative support. The legal framework was manipulated to suit case processing needs. It was only in those cases where there was a procedural problem that this model was required, and it was often, though not always, evident in the remand rationale of the second or subsequent hearing i.e. the initial remand decision was more likely to fit the rationale of Models One and Two.

Some authors (Hucklesby 1994b) have argued that bail bargaining takes place in the remand system. The defence and the prosecution cooperate to produce remand decisions which have less to do with grounded assessments of risk and more to do with speeding up the hearing by reaching agreement prior to the hearing. Little evidence of this was

found in the present study, a finding supported elsewhere (Dhami 2001). CPS officers and defence representatives were observed in discussion prior to hearings but, when these groups were interviewed, all respondents said these snatched conversations were rarely about the bail position. Rather, they were about the progress of the case: securing disclosure of evidence, establishing convenient dates for hearings, raising potential problems, etc. The nature of the relationship between the CPS and defence representatives is discussed in Chapter Eight.

However, in other jurisdictions, there appears to be strong evidence that bail is used in plea bargaining. This illustrates how the bail stage of criminal proceedings can be employed to serve purposes related to later stages of the criminal justice process. What structures the remand decision may, for example, have more to do with securing a case for the prosecution than with bail risk *per se*. Kellough (2002) reported in her study on the Canadian remand system that

rather than ‘managing risk’, our findings reveal that the detention of accused person is a rather important resource that the prosecution uses to encourage (or coerce) guilty pleas from accused persons. (Kellough and Wortley 2002:186).

The examples found in the present study did not raise the same degree of concern as Kellough’s findings, perhaps reflecting differences in the English and Canadian systems, but the principle remains: some remand decisions are reached not because of assessment of risk, but in order to overcome obstacles (for example, a defendant who was not pleading guilty or a prison which failed to produce defendants at court) and promote speed and efficiency in the remand process and in later stages of the criminal justice system. The following case processing reasons for making a remand decision were observed being employed in the courts in this study.

### i – Securing Attendance

Ensuring a defendant attends court is, of course, a primary purpose of the Bail Act. However, there was evidence that courts resorted to using their powers to remand in custody to ensure attendance in an attempt to compensate for problems elsewhere in the criminal justice system, often attempting to overcome shortages of resources which might prevent defendants from appearing. In discussing the difficulties magistrates’

courts had in securing defendants' appearance in court from prison, Hucklesby (1994b) noted that defendants were remanded

in custody rather than on technical bail (those on bail for the present proceedings but who were either in custody to another court or serving a sentence) meaning under the eight clear days rule, the defendant must be produced (Hucklesby 1994b).

These defendants would be in custody regardless of the remand outcome. However, the salient point is that they would appear in remand statistics as custodial remands even though a custodial remand was technically unnecessary. Magistrates sought to use the legal status of a custodial remand as a tool to force prisons to produce defendants at court.

Similarly, the present study found magistrates issued warrants not backed for bail<sup>27</sup> when defendants failed to attend court. As warrants not backed for bail were more likely to be prioritised by police than warrants backed for bail, magistrates were inclined to use them even where there was little or no risk of a subsequent remand in custody. Again, magistrates used remand decisions to overcome problems elsewhere in the criminal justice system. As a result, defendants would be held in police cells on overnight custody waiting to be taken to the magistrates' court the next morning. As Hucklesby argues,

The problems with the execution of warrants, therefore, seem to create a situation where the decisions of the court are taken more for pragmatic and practical reasons than in the interests of the defendant, the court, or justice. (Hucklesby 1994b:56).

It is also possible to remand a person in custody for reports (typically a convicted defendant) if releasing the defendant would make it impracticable to secure the report because, for example, the defendant would not attend the probation appointment. Whilst the necessity of this power is not questioned, the research raised some serious concerns about the disproportionate length of time that some defendants were kept in custody awaiting reports because of pressure on probation resources. Four women were observed to receive additional remands in custody because the probation service had failed to complete the reports by the court's stated deadline. This illustrates how the contextual factors identified in the previous chapter, such as a shortage of resources, in

<sup>27</sup> A warrant for the defendant's arrest was issued and it instructed the police not to bail the defendant but to hold her overnight to appear at court the next morning. A warrant backed for bail allows the police to re-arrest a person but to bail them with a new court date.

this case probation officers, affected remand decision making. Each of these defendants remained in custody for an additional minimum of three weeks. Evidently women were serving extra time on custodial remand because of a shortage of resources (see Chapter Four).

One case was observed where the CPS sought to use a remand hearing in one case to resolve a problem in another unconnected case.

*Example 5.6*

A young woman appeared on overnight custody at Old Market Street on a charge of 'allowing herself to be carried' (i.e. she had been a passenger in a car, knowing it to be stolen). The CPS officer told the mixed lay bench that the defendant had numerous other cases proceeding through the court. He said that although the current charge would not normally attract a custodial remand, he was requesting one because he wanted to make sure that she attended court to answer the other charges that were in the system already. The clerk intervened and said that was not an acceptable reason for a custodial remand. The CPS officer re-stated his request for custodial remand but said the grounds were the risk of failing to appear. The magistrates released her on conditional bail.

Although unsuccessful in this case, the request for a custodial remand may have been supported by magistrates if the CPS officer had phrased his argument differently and thus avoided the objection by the clerk. It is impossible to know in how many other remand hearings similar considerations are the basis of the request but they are never voiced in open court.

## ii - Bringing Together Disparate Charges

Another example of remand decisions whose purpose lay in procedural needs rather than risk assessment was the practice of delaying sentencing in order to tie the case in with other cases and/or PSRs that were being processed by a court. If sentence was postponed, the question of remand arose.

There are two sets of matters. The old matters at Connerton Road, which led to the breach, and the new matters before this court. I request that we take a consolidated overview to be taken in sentencing her so I would like to keep all matters together, so I will not be making a bail application (male defence representative).

On four occasions defence representatives requested sentencing be delayed so charges could be brought together and a remand in custody resulted. Obviously there were pre-

existing grounds for the custodial remands but, if custodial remand statistics are to be meaningfully interpreted, it is important to understand that some remands are required because defendants choose to delay the resolution of their case. Ironically, in the following example, the defence representative declined to apply for bail to try and speed up the process of sentencing but, as a result, the defendant actually had to spend even longer in custody.

*Example 5.7*

A 22 year old woman appeared at Inswick Corner on a charge of deception using a stolen credit card and a breach of bail (it was argued that she was not resident at the address she had been bailed to). Her defence solicitor explained that she disputed the breach.

The failure to reside is contested because the address the court had was wrong and she has been residing at her home.

Despite the fact that this could have formed the basis of a bail application, her defence solicitor did not apply for bail. He said,

There is a PSR on another matter and that's due on 6<sup>th</sup> December. It is for a similar matter of handling a stolen credit card and, therefore, if it assists, I will not make a bail application and the two charges can be brought together for that PSR.

The male district judge agreed that it made sense but the probation officer in court said,  
Because the court had the wrong address, the PSR appointment letter will have gone to the wrong address so we cannot meet the 6<sup>th</sup> December date.

The defence representative replied

But I was told the letter hadn't gone out yet so the wrong address cannot be the reason for not meeting the 6<sup>th</sup> December date.

The probation officer said

But that date could only be met if she were not in custody.

The magistrate said

Are you content for her to be remanded in custody until 16<sup>th</sup> December? [The defendant looked at her representative and then shrugged her assent]. Then I'm afraid it's remand in custody until 16<sup>th</sup> December for the preparation of a PSR with all sentencing options.

When the defendant reappeared in court on the 16<sup>th</sup> December, the probation officer said the report still had not been completed. The defendant was remanded in custody until after Christmas.

### iii – Anticipating Sentence

In contrast to Hucklesby (1994b), the present study found that some magistrates did report considering possible sentencing outcomes when making remand decisions. This was seen in the previous section (Model One) where magistrates would only exceptionally remand in custody if a custodial sentence was unlikely. Although it was never explicitly commented on in court, if a custodial sentence was considered likely,

magistrates said in interview they would be inclined to remand in custody for any requested reports to be completed. In this way, “she can start her sentence early; there’s not much point bailing her if she’s going to be locked up again really” (female magistrate). Some magistrates even persuaded themselves that they were doing the defendant a favour.

Any custodial sentence she got in the outcome would be reduced by the amount of time that she’s been on remand in slightly nicer conditions. (female magistrate)

Defendants themselves also saw the advantage of getting a custodial sentence underway as soon as possible and chose not to make a bail application for that reason (see Chapter Seven for a discussion of how defendants’ choices affected remand hearings and outcomes). However, 59% of women remanded in custody do not receive custodial sentences (see Table 1.5). In interview, clerks commented on magistrates’ inconsistent sentencing, indicating that magistrates may have different views on whether an offence would be likely to attract a custodial sentence. One bench might justify a remand in custody to themselves based on an expectation of a probable custodial sentence but the sentencing panel may take a different view and issue a community penalty. Moreover, magistrates at the sentencing stage have access to information which is unavailable at the remand stage e.g. PSRs that may mitigate against a custodial sentence. Justifying a remand in terms of an anticipated sentence is fraught with problems, particularly when the charge has not yet been proved, and may result in unjust custodial remands.

#### iv – Remand As A Sentencing Tool

In most cases this rationale applied to the grant of bail and to convicted women awaiting sentencing. The duration of the bail period was used as an informal assessment period, an opportunity for her to prove that she would refrain from taking drugs, attend all appointments, cooperate with the PSR, etc. on bail.

I would ask for a four week remand at [hostel] to show that she will comply with the rules of the hostel. If she succeeds, the court may feel she would be capable of a full CRO (male defence representative at Inswick Corner).

The purpose was explicitly stated in court: proof of good behaviour on bail makes a community sentence more likely.

### *Example 5.8*

A 25 year old woman appeared at Old Market Street charged with attempted deception. The CPS had opposed bail on the grounds of the risk of further offending as she had committed a number of offences on bail. Her defence representative urged the mixed lay bench to

consider her for bail and give her an opportunity to show that she can cooperate with probation and that may help the court in sentencing in a few weeks time (male defence representative).

Although this rationale was usually used when granting women bail, there was one case where the defendant was told that if she remained drug-free on custodial remand for two weeks, she would be allowed into a bail hostel and, in turn, that would affect her likely sentence as she could then be assessed for a drug treatment and testing order (DTTO). Only rarely could defendants receive a DTTO from custody as they need to be assessed in the community.

More commonly, the police decision to hold a defendant on overnight custody for a non-serious offence was reported by magistrates in interview to be useful for the processing of some defendants (particularly loiterers and beggars) as the option of sentencing them to 'time served' allowed them to dispose of the case immediately.

In all these cusp cases, the remand decisions cannot be understood simply in terms of offence seriousness or moral assessment. Even though it would not be evident from official records, it is apparent in court that the specific purpose of such remands were the system imperatives of the criminal justice process and these worked both in tandem with and over-rode other considerations.

## Conclusion

Remands in custody can only be accounted for in terms of the risk criteria of the Bail Act, regardless of the real rationale of a remand decision. Consequently, the language of risk was almost always present in remand hearings, in both defence applications and in the formal reasons cited for a remand decision. However, it has been shown in this chapter that although the system required actors to address the narrative of bail risk, it was not the only, or even the primary, rationale for most remand decisions. As McBarnet (1981) argues, a system's rhetoric does not necessarily reflect the reality of its decisions making practices. This chapter identified and explained the other rationales

for decision making that were evident in the working practices and norms of the remand system.

This chapter has shown that the flexibility of the law, and the inability of regulatory mechanisms to constrain magistrates' decision rationales, allowed magistrates to adapt the legal framework according to concerns relating to the nature of the offence, the character of the defendant, and the procedural needs of the justice system. The remand system was found to operate using a set of different rationales for decision making, illustrated in the three models of remand, each of which prioritised different concerns and adapted the remand process and remand law accordingly.

In Model One, offence seriousness was used as a proxy measure of bail 'risk'. Moreover, offence seriousness was so fundamental to remand outcomes that petty offences were always bailed regardless of strong evidence that the defendant would breach their bail, and serious offences always resulted in custodial remands even where there was little evidence of actual risk. As was seen in the previous chapter, actors incorporated anticipation of public opinion and media reporting into their actions. In serious cases, CPS officers were seen to be reluctant to recommend, and magistrates reluctant to grant, conditional bail for fear of the possible public/media reaction. The socio-political context can evidently affect the ways in which magistrates and others choose to categorise particular offences. It is suggested that heightened social and/or media anxiety about particular offences could result in them being defined and processed as 'serious' offences, and thus determine remand outcomes.

In Model Two, difficulties with categorising the seriousness of the offences resulted in magistrates adopting a more individualised approach to decision making that rested on assessments of defendants' needs and deservingness. In this model, decision making was based on moral assessment, not risk assessment. The next chapter explores in more detail how this model was used in cusp cases involving female defendants.

In Model Three, it was the needs of the criminal process itself that structured why remand decisions were made. This chapter illustrated how the organisational and political pressures on the remand system, identified in the previous chapter, were translated into practice in remand courts.

This chapter has laid out the various ways in which the legal framework was interpreted by magistrates and others. The application of these models in practice, however, was not always unproblematic and straightforward. Chapters Seven and Eight illustrate that the ways in which the models were translated into practice in the remand court was partly structured by the complex social framework of the magistrates' court. Before moving on to consider the social organisation of magistrates' courts and the effect it had on decision making, the next chapter will discuss in more detail the degree to which remand decisions about female defendants were influenced by considerations of gender.

# Chapter Six

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## The Role Of Gender In Remand Decisions

The previous chapter identified that where remand outcomes were not determined by the nature of the offence, magistrates used more individualised decision making that focused on the needs of the defendant. Central to outcomes in this model were judgements about the 'deservingness' of defendants which were based on moral assessments of individuals. It is argued that where individualised decisions were required, magistrates were more likely to be influenced by extralegal factors such as class and gender. This chapter illustrates that extralegal considerations did affect remand outcomes in cusp cases, and that the moral assessments of female defendants in this study were, in large part, structured by magistrates' perceptions of women's conformity to traditional gender roles. It is also demonstrated that defence representatives successfully used evidence of gender role conformity to construct mitigation in remand hearings.

### Introduction

The previous chapter explored the degree to which the legal framework was adhered to in remand decisions. It was established that offence seriousness was magistrates' primary consideration when reaching decisions on the appropriate outcome in remand cases, and remand law was differentially applied in light of this assessment of offence seriousness. It was further established that where the offence was not easily categorised in terms of seriousness, i.e. the cusp cases, magistrates adopted a more individualised approach to the resolution of remand hearings which included assessment of the individual defendant's character.

This chapter considers the extent to which extralegal factors such as gender influenced the moral characterisation of women. The chapter begins with a consideration of why extralegal factors are used in decision making. It goes on to demonstrate the importance of extralegal factors in remand decision making by briefly illustrating how defendants' class and demeanour affected magistrates' decisions. The chapter then focuses in more

depth on the extent to which decisions made about female defendants were framed in terms of their gender in cusp cases.

Under the Bail Act 1976, it is permissible to consider a defendant's 'character' when deciding whether or not one of the exceptions to the right to bail apply. It is argued in this chapter that, for women, 'character' was constructed primarily around gender role fulfilment: a woman who could demonstrate conventionality and conformity was more likely to secure bail than a woman who could not. Again, although the language of 'risk' was necessarily employed, decisions were, in fact, based on assessments of need and deservingness which provided the real rationale for remand decisions in these cases.

It is also argued that magistrates' gender expectations meant they responded to women's mitigation because they were less inclined to perceive women as entrenched and culpable offenders. Whilst there is evidence that this perception is based in the reality of female offending patterns (e.g. see (Burman 2004; Daly 1994; Hedderman 2004; Hedderman and Gelsthorpe 1997; Home Office 2003a)), some magistrates admitted that it was gender roles, rather than gendered offending patterns, that shaped their bail decisions. For example, magistrates said that they were reluctant to remand women with dependants in custody, for the sake of the dependants, but that they viewed men who claimed to be carers with suspicion, as men who were 'trying it on' to secure bail. Gender role expectations shaped magistrates' perceptions of male and female defendants.

The discussion in this chapter is based on a combination of observation and interview data. Again, whilst certain patterns and themes in decision making were apparent in court observations, magistrates rarely explained the rationale of their decisions to the court. Thus it was necessary to supplement observation data with interview data where the issues could be explicitly discussed.

## The Relevance Of Extralegal Factors

As discussed in the previous chapter, in the majority of cases offence seriousness overrode consideration of all other factors, including extralegal issues such as gender. It was seen that magistrates did make moral judgements about the defendants in Model One, but these judgements were not considered relevant to the remand decision as the

nature of the offence, above all else, determined the outcome. However, in the cusp cases, offence seriousness could not determine remand outcome as the categorisation of offence seriousness was itself problematic. In cases where offence seriousness was debateable, remand decisions were found to be framed by magistrates' perceptions of individual female defendants' characters and needs. In cases where routine considerations could not resolve a case, magistrates resorted to using extralegal criteria, in this case gender, to resolve hearings.

It is suggested here that decision makers might use extralegal factors in order to make sense of confused or conflicting information. The complex way information is structured and presented in the justice system can cause confusion, and thus possibly encourage a greater reliance on extralegal cues even where there is sufficient information available. Shapland (1987) describes the problems magistrates encounter with sentencing procedures and how they rely on selected items of information. She criticises sentencing procedure as being

one of the most inefficient ways we could have devised of presenting a large amount of information on a great many different subjects to a decision maker... it is likely either that the sentencer will come to fasten upon only a few items of information (not necessarily the same ones for each sentencer) or that he will place considerable reliance on the judgement of those who have had the opportunity to consider everything in peace – the author of the social inquiry report (if there is one) or the defence solicitor or counsel. (Shapland 1987:80-81).

The role and influence of the various actors involved in the remand decision is discussed in Chapter Seven and Eight. It was established in Chapter Four that the nature of the remand system could cause problems for decision makers, with its pressures towards rapid case processing and the difficulties in securing verified information. It was argued that this did not present problems for decision making in the majority of 'self evident' cases. However, it may have compounded existing uncertainty about how to process cusp cases, and further encouraged magistrates to 'fasten upon only a few items of information' in attempts to make sense of cusp cases under pressure of time and with insufficient and/or confused sources of information.

It is often problematic to equate one stage of the criminal justice process with another, but legitimate and extralegal or 'extraneous' (Kapardis 1987) factors have both been identified as influences on magistrates' assessments of defendants in sentencing

decisions<sup>28</sup>. Moreover, there do appear to be some parallels between how and why extralegal factors are employed in remand decision making and in jurors' assessment of guilt. Reskin and Visher (1986) found evidence that jurors resorted to using extralegal factors, such as assessments of defendants' characters, in decision making when the evidence was weak.

The influence of extralegal factors were largely confined to weak cases in which the defendant's guilt was ambiguous because the prosecution did not present enough hard evidence. In these situations, jurors – forced to arrive at a decision – were apparently swayed by their own values and reactions to the defendants and victims. When the prosecution offered ample hard evidence, jurors were more likely to be convinced of the defendant's guilt without considering the extralegal factors we examined. (Reskin and Visher 1986:436-437).

Unlike jurors deciding on guilt, it appears that in remand hearings magistrates did not use extralegal factors, such as gender, when the case was weak, perhaps because this is commonplace at the remand stage. However, extralegal factors were found to be considered when the outcome was not "self-evident" because the offence was neither serious nor trivial enough to determine the outcome, i.e. in cusp cases where the outcome was open to dispute. That is, in remand as in sentencing, decision makers resort to using extralegal factors to inform their decision when the likely outcome is debateable. Other research on remand has also found that the relevance of legal and/or extralegal criteria varied depending on the nature of the case.

[T]he saliency of the role of statutorily prescribed factors varies across decisions. This finding underscores the importance of context in research of this kind. (Nagel 1983:511).

The remainder of the section explores the ways in which magistrates used extralegal factors in their decision making. It is argued that a defendant's personal characteristics may foster discriminatory outcomes as magistrates' assessments of individuals are mediated through the magistrates' own personal beliefs and stereotypes.

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<sup>28</sup> In a review of a series of research findings on courtroom decision making, Kapardis (1987) points out that extraneous factors' influence on sentencing is not limited to the characteristics of the defendant but also includes those of the sentencer and the victim. Lay magistrates' sentencing decisions were found to be influenced by legitimate factors as well as "their own characteristics and penal philosophies [which] are likely to effect how they perceive and decide on cases." (Kapardis 1987:193).

## 'Them And Us'

As the focus of this study was female defendants, it is unsurprising that the data collected through this analytic lens highlighted the issue of gender. However, this is not to say that gender was the only extralegal issue that magistrates might have considered. It was argued in Chapter Two that gender can be bisected by class, race, ethnicity, nationality, etc., all of which may affect decision making practices. Before moving on to a fuller discussion of the role that gender played in magistrates' decision making, this chapter will briefly explore how the social status<sup>29</sup> of the defendants and magistrates influenced remand decision making.

It is argued that the social and economic disparities between the majority of the magistracy and the individuals they were remanding meant that magistrates used stereotypes when processing defendants and/or misunderstood motivations for actions, which could affect how defendants were assessed and cases categorised.

Contradictory evidence has been found on the link between magistrates' class and leniency in sentencing (Hogarth 1971; Hood 1962). The 'them' and 'us' attitude that was identified in 'Yellowtown' (Parker, et al. 1989:22) was not evident in any of the interviews conducted in this study. In contrast, for some there was a liberal middle-class desire to limit the social distance between magistrates and defendants. Four of the magistrates made comments such as "there but for the grace of God". However, whilst all the clerks agreed that many magistrates had this "well meaning" attitude, they identified a wide social and economic gulf between the magistrates and the majority of defendants. One clerk went on to comment that this affected decision-making. He argued that magistrates simply could not relate to most defendants and failed to understand their motivations because magistrates applied their own motivations to defendants' actions. Consequently, "they miss the point" in some cases and made, in the clerk's view, harsh decisions.

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<sup>29</sup> The courts in this study were selected because they served particularly diverse areas, even in comparison to the rest of the City and it was hoped that data could be collected on possible variations in the treatment of different racial, ethnic, and national groups. However, although there were some observed differences, for example in the pace of hearings where translators were required, data on these issues was difficult to collect for two reasons. Firstly, particularly as women were the focus of study, too few matched pairs of cases were observed to generate data sets that could be meaningfully compared. Secondly, it was considered unlikely that magistrates would comment on race or nationality in the interviews. As three of the clerks observed, magistrates' training sensitised them to issues of racism which made them very unlikely to refer to such issues, even if they did enter magistrates' decision making rationale.

[Magistrates] don't get into the minds of what the defendant's actually thinking. Our biggest problem is no insurance. Magistrates think no insurance is the most heinous crime committed in this court and we [the clerks] often joke saying it was dangerous driving, he went through five red traffic lights and all that but it's alright because he had insurance. If he had no insurance they'd be sentencing him to prison straight away. They can't seem to see past it and the reason is, and you can hear it when you discuss it with them, is they think if they were to drive a car without insurance, they would be doing it completely deliberately with a mindset that insurance costs so much per year and I can avoid paying that by driving without insurance and if I get caught without tax I'll just pay the back duty on it and so it would be a really deliberate sort of action. But the mindset of the ones we get, they bought the car for fifty quid and they haven't bothered to tax and insure it and if it gets written off or stolen, they just don't care. The car costs less than the insurance. But the magistrates, they would never dream of driving their BMW without insurance but these defendants are driving their Ford Fiestas without insurance and there's a much different level of criminality between the two things, the consequences are the same if they hit someone and there's no third party...but it's very difficult to get magistrates to think like that because they think in terms of what they would do and again if you come in to bail decisions then they've got to consider, say, seriousness of the offence and would they abscond? These people who have lived in [economically deprived area] have lived there their entire lives in a bedsit or a one bedroom flat or whatever but they've lived there for 20 years. The magistrate might think 'well if I lived in a one bedroom flat I'd leave, I'd go to Barbados, I wouldn't stay around for my trial', but these people would, they do. They're not going to fail to surrender because they don't know anywhere else, they've lived in the area all their life and they're not going to go anywhere. And even if they didn't turn up they'd be arrested on a warrant straight away because they'll still be walking around [area]. But it's very difficult to get them to equate that. (male clerk)

This gap between offenders' motivations and magistrates' assessments was also observed to be evident in remand outcomes.

#### *Example 6.1*

A woman was refused bail at Inswick Corner on a charge of using a stolen credit card. The reason given was the likelihood of her failing to surrender. This was based on her previous record of failing to attend. The defence solicitor argued:

She has a large number of fail to appear for loitering offences but she hasn't taken prostitution offences too seriously before as she regards them as not very serious. She has never failed to appear for a more serious matter.

The male district judge remanded her in custody saying that he did not believe she would attend court based on her previous record. From the dock the defendant begged not to be remanded in custody:

Please don't send me to prison. I really would turn up to court. Please give me a chance. Please. Please don't send me to prison. Please give me a chance. I'd turn up cos it's serious, it's not like prostitution.

The defendant's logic was that a failure to appear on a loitering offence did not count as the offence was not serious. She distinguished between this and her attitude to the court

on more serious matters. The district judge, however, seemed not to agree and his response was based on a judgement that her failures to attend exemplified her disrespect for the court and she could not be trusted to attend.

Some magistrates themselves commented that the magistracy may not be able to understand the motivations of the people they are processing because of the social and economic gulf between them. Most interviews were conducted in magistrates' homes. The two magistrates who identified themselves (and whose homes - location, size and décor - confirmed this) as the least privileged of the magistrates interviewed, both spontaneously commented on the problem of whether the majority of their Bench could relate to defendants:

I wonder if you'll be able to pick up on what people's backgrounds are and if they influence things at all. I think they do. I wonder about the magistrates who only ever see the poorer and more struggling people in society when they're in court. I wonder how they view them. If I doubt that I can really relate, then how can those people who just don't have any exposure to it?  
(male magistrate)

The social distance between defendants and the magistracy has implications for the extent to which magistrates' concerns about bail are justified. Similar to Fitzmaurice and Pease's "false consensus bias" (1986), magistrates equated defendants' views with their own and 'understood' bail issues accordingly. Hedderman and Gelsthorpe found magistrates were "often flummoxed...[and]...clearly confused" (Hedderman and Gelsthorpe 1997:47) by family structures which did not reflect their own. Consequently, in those cases where it was considered relevant, magistrates perceived fewer reassuring structures of informal social controls in 'unconventional' family structures compared to magistrates' own. The greater the social distance between defendants and the magistracy, the less familiar, and therefore less accessible, the defendants' motivations and lifestyle were and the greater the chances of magistrates having unjustified bail concerns.

## Demeanour

Magistrates admitted that their assessments of defendants was affected by individuals' demeanour. In most cases, defendants choose not to involve themselves actively in proceedings (see Chapter Seven) but they may still have affected proceedings through their appearance and body language. Whilst some magistrates argued in interview that they tried to ignore defendants' demeanour as it could be misleading (a viewpoint also

found by Hedderman (Hedderman and Gelsthorpe 1997:30)), others admitted it did affect their views of the defendant.

Some people are unsympathetic, or one is not sympathetic towards them. Other people don't help themselves, some people walk in noisy, boisterous and aggressive, rude in court, it really doesn't help them but you do have to try and filter that down a bit. (male magistrate)

In interview, two wingers (the, usually less senior, magistrates on either side of the chair) said it was one of their duties to watch the defendant, see how she behaved and responded, and to share this information with the other winger and the chair when they retired to reach a decision. All the clerks felt that magistrates were influenced by a defendant appearing before them. Two clerks reported that in training exercises where magistrates were required to make bail decisions on cases, they typically made much harsher decisions than when they had a 'body' in front of them in court.

When we do training sessions and what have you, we give them [magistrates] case studies and they always come up with much harsher decisions that they actually would when faced with a person in the court. (female clerk)

Both clerks thought that magistrates were influenced by the presence of the defendant for two reasons: firstly that they were personally uncomfortable about having to look at an individual whilst they remanded them in custody; and secondly, that the defendant's personal characteristics and other cues could influence magistrates' decision making. On occasion, use of these cues might be appropriate: for example, evident physical symptoms of drug withdrawal would increase concern that the defendant would leave court and "go straight out and offend to get a fix" (female magistrate). However, magistrates also made subjective judgements, for example about how 'sympathetic' the defendant appeared. A study of the psychiatric remand process found that perceptions of defendants affected outcomes. It established that black defendants were more likely to be remanded in custody, and for a longer time, than white defendants. This was partly explained by differences in perceptions of dangerousness that were rooted in stereotypes of black men but not borne out by objective evidence (Browne 1990).

Although magistrates were hesitant in interview to say what specific conclusions they drew from body language, their comments reflected previous findings on how contrition, inexperience of the justice process, respect for the court, credibility, etc were

all inferred from demeanour and, in turn, impacted on decision-making (Hedderman and Gelsthorpe 1997:30-34). Sentencers in this study, and other studies (Hedderman and Gelsthorpe 1997; Parker, et al. 1989), often appeared to construct views on defendants' characters based on observations of their demeanour and admitted to using these impressions to inform their decision making. Magistrates were confident that observing demeanour was a useful tool.

I don't wish to sound too clever, but very often one can judge by the demeanour just how convincing the plea is...body language and tone of voice, again there's no single thing, you have to piece the various actions together. (male magistrate).

Hough et al (2003) comment on the importance of character assessments in understanding sentencing outcomes.

It is no wonder that sentencing patterns are so difficult to explain when at the heart of the process is the belief that sentencers, and they alone, are uniquely placed to understand not only the uniqueness of the events which constitute the offence, but also the character of the individual who has committed it (Hough, et al. 2003:42).

The importance of character assessments in explaining remand outcomes was evidenced by the responses to Vignette Three. Magistrates were divided as to whether the defendant was genuinely trying to help herself and was redeemable (and therefore deserving of a 'second chance' and bail) or whether she was trying to manipulate the court and had cynically arranged an appointment with the rehabilitation centre simply to help her secure bail (and therefore could not be trusted so a remand in custody was necessary). Over half the respondents to Vignette Three commented on the difficulty of making the decision without seeing the defendant, indicating the importance of extralegal cues and character assessment in the resolution of cusp cases.

## Characterisations Of Defendants

It has been argued that decision makers use characterisations of defendants to facilitate decision making. Characterisations have been found to be integral to the organisation of knowledge in courtroom decision making and to the selection of appropriate responses to defendants (Baldwin and McConville 1977; Carlen 1976; Carlen 1983; Eaton 1984; Rumgay 1998; Sudnow 1965).

Decision-makers like to create a picture of the kind of person they are facing, also to make the totality of their knowledge more manageable... In

doing so, board members rely heavily on characterisations of the prisoner... Processes of characterisation are central to human judgements about the world, and are at the heart of decisions made in the criminal process from the policeman on the street onwards. Characterisation is a means of endowing individuals with attributes to make sense of them and to place them; it creates and organises expectations since it embodies a description and a prediction. Embedded in the notion of "the kind of person" is another of "what that person is likely to do." (Hawkins 1983:119).

Characterisations develop with repeated encounters of defendants with similar cues which require a decision to be made (Hawkins 2002). Rumgay (1998) found that for the majority group of defendants, young adults, rich characterisations existed. This contrasted with an older and rarer group of defendants.

There is no need for well-articulated 'simplifying choice heuristics' for comparatively rare events, particularly when there is a serviceable alternative. (Rumgay 1998:134).

Female defendants at risk of custodial remands were found to be a very rare group in the magistrates' courts. The individualised approach that was observed to be taken with women who could not be easily categorised and processed on the basis of offence seriousness alone may partly be accounted for by the rarity of women in contested remand hearings. It is argued that decision makers had not had the opportunity to develop concepts of 'normal cases' (Sudnow 1965) with this group of female defendants. Perhaps women's greater chances of avoiding custodial remand compared to men, even controlling for offence related factors (Jones 1985; Kellough and Wortley 2002), is because their offences are not the 'normal crimes' of young men (the majority group in the criminal justice process) and therefore warranted closer attention. In turn, this closer attention resulted in more individualised decision making which encouraged more lenient treatment (at least for some groups of women, see below).

Routine decision-making stemming from repetitive behaviour is also more likely to be stable, consistent, and therefore predictable than the more individualistic decision-making behaviour reserved for those cases that seem unusual in some way. (Hawkins 2002:36).

Where 'perceptual shorthand' (Skolnick 1966) was used by decision makers to classify, and thus appropriately process, female defendants they were framed at least partly in terms of their gender role fulfilment rather than their criminality. Perhaps in the absence of a 'normal' female defendant in contested cases, magistrates relied more on whether a

defendant was a ‘normal’ woman (Shapland 1987). The gendered nature of magistrates’ characterisations is explored below.

## What Made A Woman ‘Worthy’ Of Help?

As we have seen, cusp cases attracted more individualised decision making, but not all defendants whose cases fell into this category actually received help. Magistrates differentiated between women who they wanted to try and help and women who were considered beyond or undeserving of help. A moral judgement was made about which women were ‘worth’ risking a grant of bail for, and which were judged to be not worth the risk. We have seen that class and demeanour could affect magistrates’ assessments of defendants, and that magistrates employed characterisations of defendants in decision making. This section of the chapter explores the specific nature of characterisations about women in the remand system.

### Caring Responsibilities

The welfare needs of women’s dependants could act as ‘insulators’ against custodial remands as decisions were influenced by a concern for ensuring the welfare of others, for example, sometimes women were bailed because of concerns about the care of their children or elderly relatives. Magistrates who were concerned about these issues said in interview that it would never be the deciding factor but they admitted to trying a little harder to keep women out of jail if they knew a child would be taken into care as a result.

[Women] have extra responsibilities in life over men, usually family and children, that sort of thing. Because in a sense you’re not dealing just with the offender. You’re actually dealing with the situation because she will have care and responsibility probably for other people...So I think in a sense that you have to look at the bigger picture with a woman I think in many ways...I think men are fairly simple to deal with. They do have their own problems, I mean, naturally, but generally speaking you can do for a man and it’s probably the end of it. If you do for a woman, you can, there can be knock-on effects far beyond just the case itself.” (male magistrate).

Observation data suggested that the welfare of others might have an even more direct affect on remand decisions than magistrates admitted in interview.

### *Example 6.2*

A woman appeared on charges of shoplifting and theft of a handbag at Castleford Road. She was seven and a half months pregnant and on a methadone maintenance programme. There were some problems with the pregnancy and she had been admitted to hospital from prison because she feared loss of the baby. The defence representative told the court that the defendant was “desperately concerned about the safety of her child.” The male district judge granted conditional bail and addressed the defendant, saying “I am making this decision more in concern for your child than for you.”

Magistrates were also observed remonstrating with women who they felt were not being good mothers and using the issue to try and secure cooperation.

If you cared for your child at all, you would not risk her care by committing these offences. Make sure you turn up or your child will be without her mother for some time (male district judge).

One female magistrate stated in interview that a bail hostel would be inappropriate for a mother with young children if it was some distance from her family. Her reasoning was that the defendant would be tempted to abscond from the hostel to see her children and this could have an adverse impact on her future remand status and on her sentence. She believed the defendant should be “protected from herself” and a short custodial remand in a prison close to her home would be preferable. Similarly, three magistrates spontaneously said that if a bail hostel was too far away from family and defence representatives they would have concerns that they were setting the offender up to fail as she would not be able to support, and be supported by, her family and may have difficulties accessing legal advice.

Unsurprisingly, the majority of magistrates interviewed said they would respond to the needs of a situation regardless of the gender of the defendant and would, for example, grant the same licence to a man with childcare responsibilities. However, two magistrates admitted that although they wanted to believe they would treat men and women equally, assessments of need were influenced by gender expectations

Of course men can have childcare responsibilities too and we should treat them the same as women’s. But to be honest, if a defence solicitor says his client has caring responsibilities, I think I tend not to believe them, to think it’s being tried on. Maybe I shouldn’t have admitted that! (female magistrate).

These magistrates admitted that ingrained gender role expectations probably influenced their decision making, and made them less inclined to accept that male defendants were carers. These gender expectations were also evident in the comments that magistrates occasionally made about men in interview. Two magistrates stated that they would try harder to bail a man if custody would mean he lost his job as they felt it unjust that his family should suffer the loss of income. It is interesting that magistrates volunteered such gendered assessments of defendants' responsibilities. These findings reflect Eaton's (1984) conclusions that socially dominant models of gender roles are reflected in and reproduced by courts.

### The 'Reformable' Woman?

Research on the Canadian remand system has demonstrated that remand judgements are influenced by moral assessments of the defendants, and that variations in remand outcomes can be partly explained by these subjective assessments. Kellough (2002) found that

individualized, moral assessments of accused persons have a strong influence on remand decisions. Accused persons who receive a negative personality assessment by the police are much more likely to be detained than those who receive neutral assessments. Our analysis also reveals that these subjective character evaluations help explain racial differences in the likelihood of pre-trial detention. (Kellough and Wortley 2002:186).

Moreover, these moral assessments operated independently of legal variables i.e. defendants were not simply being labelled negatively by the police because of their records of offending. Kellough found that the attribution of negative assessments was related to defendants' personal characteristics, such as their race.

[T]he data suggest that the police provide more negative character assessments of black accused than white accused or accused from other racial groups. These more negative assessments, it would appear, subsequently explain the higher rates of pre-trial detention experienced by black accused. (Kellough and Wortley 2002:196).

This finding supports earlier research which found that mentally vulnerable black male defendants were much more likely to be remanded in custody for psychiatric reports than mentally vulnerable white male defendants, even where offending and mental health histories were similar. The authors argued the key explanatory factor was magistrates' perceptions of black defendants' "dangerousness" (Browne 1990). Given

similar circumstances, black mentally vulnerable defendants were assessed more negatively by magistrates than comparable white defendants and this affected magistrates' remand decisions.

[T]he use of discretion which rests with key decision makers in the process and the element of subjectivity in making assessments. Decision makers seemed more likely to err on the side of caution with Black mentally vulnerable defendants and to be affected by a heightened *perception* of dangerousness with regard to this group. (Browne 1990:35) (emphasis added).

Similarly, part of the reason why black mental health patients are more likely to be defined as suffering from more severe mental illnesses was because of mental health professionals' stereotypical ideas about the prevalence of mental health problems in the black population (Boast and Chesterman 1995).

Comparative research by Daly (1994) also showed the importance of the moral characterisation of groups and identified a greater degree of variability between black and white men than between black and white women in sentencing. This difference was also evident in character judgements.

Black women did not register as "hardened street criminals" or beyond reform to the same degree as black men did. Nor did black women differ in reform potential from white women. The defendant subgroup most at risk to receive the harshest penalty in this court is not "black" *per se*, but black men. (Daly 1994:228).

Given the small number of observed cases in the present study, it was not possible to draw any conclusions about the representation and treatment of ethnic minorities in the remand system; there were too few cases to be able make meaningful comparisons (see Chapter Three). It is possible that, as in Daly's study, the characterisation of women was more constant across racial groups than it was for men. This would, however, require further research. Whilst aware of the importance of exploring whether or not different groups of women experience being processed by the criminal justice system differently, this limited study focused on the general representation of women in the remand system.

Clearly, the ways in which defendants were characterised could affect how they were processed and what decisions were reached. Most of the data in this section emerged from discussions in cusp cases – both in court and from Vignette Three. This is because,

as we have seen, although magistrates may reach moral judgements about women who commit serious and petty offences, the outcomes in these cases were determined by the nature of the offence. Defendants' personal characteristics were primarily of importance in cusp cases where, as we saw in Chapter Five, they formed the basis of remand decisions. The following section explores how were women characterised in the remand system, and what impact this had on decision making in cusp cases.

Data from previous studies suggests that moral characterisations of women do influence decision making and that these assessments were often structured around traditional gender role expectations. Allen (1987) found women to be at a 'moral advantage' because of stereotypical assumptions about women's 'passivity' and 'irresponsibility' in psychiatric reports.

In this calculation of the 'just deserts' of their male and female subjects, writers of medical reports appear to draw on sexual stereotypes which systematically place women at a moral advantage and men at a moral disadvantage. (Allen 1987a:106-107)

Research evidence consistently shows that women do indeed have some kind of advantage in the remand system as men are more likely to be remanded in custody than women, even controlling for offence related factors such as offence seriousness and offending history.

Though several legal variables emerged as significant predictors of pre-trial detention, these factors apparently do not entirely explain the effect of both race and gender...After controlling for legally relevant factors, the data indicate that black accused and male accused are still more likely to be held in pre-trial custody. Taking factors like criminal record, type of charge and number of current charges into account...the odds of being detained are 1.8 times greater for male than female accused (Kellough and Wortley 2002:196).

The relationship between remand outcomes and perceptions of women was confirmed by magistrates in this study who stated that they believed women were treated more leniently than men because of some magistrates' attitudes towards them. One male magistrate observed that his decisions probably reflected a greater propensity to see women as deserving help than men, and this originated in his wider views of men and women in society. Other male magistrates expressed similar sentiments about the moral advantage women possessed in remand hearings.

The system is skewed towards women receiving bail rather than custody. It's skewed partly because a lot of us old fashioned men, that's how we were brought up, so the mindset is that you will start off by looking at a female defendant as a person less likely to commit an offence. Particularly a violent offence which is a major, major determinant of keeping someone in custody....Females do tend to get, in inverted commas, more lenient decision making in their favour. (male magistrate).

I would say it probably does help being a woman, they probably get preferential treatment. I shouldn't say that but I would say that's probably the case. (male magistrate).

The representation of women in moral terms is apparent in a section of the 1974 Working Party on Bail Procedures in Magistrates' Courts which cites a female prison governor's experiences of women and remand. She believed that women, especially young women, were treated differently by the courts. She argued that a "protective" approach to females meant courts were reluctant to sentence women to custody but this same protective element

shows itself in another way [at the bail stage] and magistrates are particularly loath to see women, particularly young women left in 'at risk' situations...Thus, the protective element which eventually works to keep them out of custody has the opposite effect in the first place. (Home Office 1974:65).

Thirty years later, this protective attitude was seen used explicitly in one case and it was, indeed, a young woman of 18 years old.

#### *Example 6.3*

An 18 year old woman had been brought to Inswick Corner on overnight custody on charges of loitering. Although she did not have extensive previous convictions, and although no other woman was ever observed being remanded in custody on loitering charges, she was remanded in custody. The defendant waved and called hello to the policeman I was sitting next to in court. We had already spoken about my research and he commented that he knew the defendant well, she was a lovely girl and it was a shame to see her living the life she did. He said, "give her a couple more years and she'll be beyond help, if she's still alive." It was this policeman who told me that she did not have many previous convictions. The male district judge remanded the defendant in custody, citing the risk of her offending on bail and, unusually, for her own welfare. The district judge commented on her young age and stated that his concern was her lifestyle of drug use and prostitution was putting her at risk. It was noticeable that throughout the hearing, the defendant was referred to as a girl, not a woman. It was assumed that the very unusual steps of remanding in custody on loitering charges and of citing her own welfare as a reason were prompted by her age and a desire to remove her from the damaging lifestyle she had become involved in.

Research found sentencing patterns also contained characterisations of women which demonstrated magistrates' perceptions of female defendants as 'troubled' and male defendants as 'troublesome' (Hedderman and Gelsthorpe 1997). These categories illustrate the way that magistrates perceived and treated female defendants as sympathetic individuals who needed and deserved help.

Even allowing for the fact that women were more likely to be first offenders or less frequent offenders than men, and were more likely to behave respectfully in court, on the basis of these interviews it would seem that magistrates are less inclined to sympathise with men and to impose a sentence intended to address their underlying problems and needs. (Hedderman and Gelsthorpe 1997:44).

Similar themes were found in research on the use of gender characterisation in psychiatric reports. Allen (1987) found that reports on women were much more likely than those on men to recommend supportive interventions.

Reports on males are far less likely than those on females to include a sentencing recommendation, and such recommendations as they do include will much less often suggest a medical, therapeutic or even loosely rehabilitative approach. (Allen 1987a:104).

These differences could not be accounted for by differences in criminal history or mental disorder between the two groups as even some women who were not diagnosed as disordered were recommended medical treatment. Such recommendations were almost never made for men diagnosed as not disordered.

Daly (1994) noted that women were more often viewed as reformable or as being more victims than victimisers i.e. there were gender differences in the character judgements made about men and women, and "officials were far less optimistic that the men could change" (Daly 1994:199). The origins of this gender distinction about which defendants are reformable might be found in men and women's 'commitment' to offending. Heidensohn (1995) argues that offending behaviour is more peripheral to women's lives so it is easier for them to resist deviant labels (Heidensohn and Silvestri 1995). Perhaps, consequently, women are responded to more in terms of the wider reasons for their offending behaviour rather than judged in terms of the offence itself. Important here are perceptions of men and women's pathways into offending and the consequent

differences in assessments of their motivation and likely continuation of offending behaviour.

Daly (1994) found that in pre-sentence investigation reports, writers characterised female offenders as vulnerable, and their pathways into offending were explained in terms of their own victimisation. For men, the link between victimisation and criminal activities was less commonly and less strongly asserted.

the story line went this way: the women were abused or inadequately cared for, leading to “out of control” behavior, alcoholism, or drug addiction, which in turn led to street life or violence toward others. Another theme was that of being under the control of dominating men or being mentally unbalanced. These linkages between victimization, offending, and criminalization seemed “obvious” for women, though not most women, but for four in ten.

For the men, the link between victimization and criminalization was less obvious and was made less frequently. Such a link was evident for perhaps two of ten men. Fewer men were described as growing up in abusive households or having parents unable to care for them. One problem is that other sites of the men’s victimization (such as reformatory schools and jails while in their teens, or initiation requirements for adolescent male groups) are not discussed by the probation officers or the men. The costs of masculinity, such as “taking it like a man” and not showing weakness, render men less victimized than they might be and construct them as less victimized in comparison to women. Overall, then, a portion of men may be viewed as more blameworthy than women. (Daly 1994:84-85).

The evidence of the present study supports the idea that magistrates were more inclined to view women broadly as troubled or needy, rather than troublesome, and made criminal justice decisions based on this conceptualisation of female defendants. Generally, women were seen as reformable and magistrates sought to do what they could to help female defendants when, in cusp cases, they were given the opportunity to make individualised remand decisions.

It is not being argued magistrates were being manipulated into mistakenly thinking female defendants had problems that needed addressing. Their difficulties, although undoubtedly put forward to elicit sympathetic treatment in some cases, were not invented by defence representatives; the issues listed above reflect the problems with which many female offenders have to cope (Wedderburn 2000). There is a significant body of research that illustrates the welfare needs of female offenders and the fact that

women's pathways into offending are often related to these needs (Daly 1994; Gelsthorpe and Morris 2002).

Of course, being female did not provide universal protection for all women from custodial remands. Firstly, as was seen in Chapter Five, in those cases where the offence was serious, the moral perception of a defendant was all but irrelevant as the outcome, custodial remand, was determined by the nature of the offence. It was the cusp cases where moral assessments of a defendant could affect remand outcomes. Secondly, in those cusp cases, magistrates did not respond to all women as 'troubled' and deserving the benefits of help. Magistrates' accounts (in interview and in observations) of women's characters distinguished between women who were perceived as needy, as victims in their own right who could and should be helped, and those women who were beyond help. In interview, magistrates commented that they regarded some women with scepticism and dismissed their mitigating accounts as cynical attempts to manipulate the court.

It is to how and why magistrates distinguished between deserving and undeserving female defendants in cusp cases that this chapter now turns. The next section explores the ways in which defence representatives sought to use the perceptions of women discussed in this section to portray their clients as 'reformable' women in order to provoke a sympathetic reaction from magistrates and to secure bail.

## Mitigation Techniques: (Re)constructing Women's Characters

As discussed in the previous section, not all women were afforded the benefit of being perceived as troubled women deserving support. There was a distinction made, in fact, between women perceived as troubled and those who were perceived as troublesome.

This distinction was not simply made on the basis of previous records of offending, though that did represent an obstacle to be overcome. Although women could, indeed, have offending histories that indicated they were poor bail risks, this was not sufficient to explain the pattern of decision making. Cases were observed where women with long records of offending and failing to attend court were granted bail. Conversely, women with relatively minor offending histories were remanded in custody. In these cases it

appeared that the gendered moral assessments magistrates made about the individual defendants determined the remand outcome. Although the nature and frequency of a woman's offending was found to be one factor in whether or not she was perceived as genuine, it was not insurmountable if her defence representative was able to convince the court to make a positive moral assessment of her. In the following example a prolific offender who had repeatedly failed to attend court was bailed because her defence representative successfully labelled her as someone who now deserved the court's support. The court chose to accept the defence advocate's representation of the defendant and subsequently bailed her.

*Example 6.4*

A 29 year old woman had pleaded guilty to multiple counts of possession of a Class A drug. She failed to appear twice before she pleaded guilty. A PSR was requested and she failed to attend the appointment which was rearranged. She failed to attend the second appointment. On the third failure to attend an appointment for a PSR, a warrant without bail was issued. She was brought to Inswick Corner on overnight custody. Her defence representative asked for bail to be granted. He did not try to dispute her record and fully accepted her poor offending and bail records. He detailed her disturbing family history and then made a remand application based on an assertion that she was now ready to change and desperate for the magistrates to help her. He offered no tangible reason why she would attend the PSR appointment this time when she had failed to attend it just a matter of weeks earlier. Despite her offending history and her repeated failures to cooperate with the court and the probation service, the mixed lay bench released her on conditional bail. Notably, the Chair addressed the defendant directly and said,

We have heard your record on attending is, frankly, awful. We have also heard you're getting your life together and we're trying to help you. Help yourself now by making sure that you keep all your appointments.

Evidently a good bail application which effectively (re)defined a woman as a deserving character had the power to persuade magistrates to 'take a chance' and use the remand decision as an opportunity to help her, even when her offending and attendance record would be expected to attract a custodial remand. Example 6.4 demonstrates that even the most intransigent offender could be redefined as someone who (now) deserved the help of the court if the mitigation was convincing and if they could overcome magistrates' suspicion of repeat offenders' sincerity.

Repeat offenders, on the other hand, were viewed very differently. If they dressed up and behaved politely (addressing the magistrates and Clerk as 'Sir' or 'Ma'am'), it was seen to be a con. (Hedderman and Gelsthorpe 1997:31).

However, as will be illustrated below, a skilled defence representative could, in fact, incorporate apparently damaging information about previous offending or a chaotic lifestyle into mitigation and use it to the defendant's advantage.

Evidence is utterly malleable and can be bent to serve apparently contradictory purposes (Hawkins 1983:111).

In cusp cases where a woman was at risk of a custodial remand, there were often extensive records and poor bail records. The technique defence representatives usually adopted was to begin by accepting everything the CPS officer had said as accurate and justified – there was rarely any dispute about events to date. The defence representative would then proceed to say “however” and present an alternative account of the *defendant* herself, rather than facts of the case or the defendant's history, etc. This was done to encourage the magistrates to see her as someone who *now* deserved bail. It could be a dangerous strategy because it was most effective when it rested on the defendant admitting, without perceived pretence, that there were grounds for refusing bail. The defendant's public proclamation of '*mea culpa*' allowed a ceremony of transition enabling the defendant to become newly defined as trustworthy and “worth a chance” (male magistrate). If a disingenuous admission of culpability was (perceived to be) made, the defendant was viewed as trying to dupe the magistrates and bail was refused.

Typically, in such cases where trust was central to the grant of bail, the district judge or magistrates addressed these defendants with a direct appeal not to let the magistrate (or herself) down. This was evident both in observations and in the responses to Case Vignette Three. It was rare for magistrates to speak directly to defendants and was not observed in any cases that fitted in to Model One (offence seriousness) or Model Three (case processing). The acknowledgement of the defendant as a participant in the proceedings was very unusual (see Chapter Seven) and usually only occurred when magistrates related to them as sympathetic individuals and sought to strike this kind of bargain or pact.

By definition, all cusp cases contained some degree of evident bail risk. However, as explored in Chapter Five, what defined these cases was that they were argued not on the basis of offence seriousness or bail risk *per se*, but of character. Defence representatives sought to present the women as sympathetically as possible, defining them as individuals who deserved to be given bail. Given the importance of character, the

success or failure of such applications often rested on assessments of honesty: was the defendant trustworthy and her account genuine or was she trying to con the bench? As outcomes made on the basis of character may conflict with the factual evidence of risk, it was common to find phrases such as 'take a chance' recurring throughout these bail applications.

The central point about such applications was that magistrates were indeed encouraged by defence representatives to take a chance, to trust their assessments of defendants' characters and intentions over the evidence of bail risk and/or the inclination to remand on the basis of offence seriousness. As magistrates were asked to resolve cases based on the degree of trust they had in individual defendants (and, in some cases, their defence representative – see Chapters Seven and Eight), the potential for further extralegal cues (race, nationality, class, etc.) to influence decision-making was high. As discussed, this research was, unfortunately, unable to analyse the influence of multiple variables.

The observation data was used to identify the narratives defence representatives used to encourage magistrates to perceive their clients as a troubled and not a troublesome woman. Out of 24 women who spent no time on custodial remand and were given conditional bail at their first hearing, nine made bail applications which specifically sought to establish the woman as someone who 'deserved' bail. As all 24 of these women were released on bail at the first hearing, it is difficult to assess the relative effectiveness of this technique in these cases. More revealingly, out of the 23 women who were initially remanded in custody, 18 made subsequent bail applications which included information which would encourage a sympathetic assessment of the defendant's character. Of those 18, six were released on conditional bail following their second bail application. In all these six cases, the bail application which led to their release contained more references to a greater number of morally framed issues (e.g. how she had changed, would now be supported, etc.) than the initial application which had resulted in a custodial remand. Importantly, close reading of proceedings in these six cases revealed that five of the second bail applications did *not* contain any additional factual information which might have had a bearing on assessments of bail risk e.g. details of the offence, offending history, secure accommodation, offer of sureties, etc. The difference in the bail hearings lay in the way that the *woman herself* was presented.

### *Example 6.5*

A 32 year old woman appeared at Inswick Corner charged with shoplifting (value £41) and failing to appear at court following police bail. On her first appearance, she was remanded in custody. On her second, she was released on conditional bail.

#### **Application One:**

She has a long standing heroin addiction, ten years in fact. She realises now that she cannot continue in this manner. She is trying to take steps to change her life and, in fact, she attended a drugs centre but unfortunately she was turned away because she did not have an appointment with them and they couldn't help her.

#### **Application Two:**

She is an intelligent 32 year old woman. She is German, bilingual, a designer and mother. A drug addiction left her in a pitiful state. She is now detoxed and determined to remain so. I suggested that she may be released today so I challenged her to see if she really wanted a CRO. She is determined to get help with her addiction. She has a four year old son who is currently subject to a care order, and she wants to be a parent to him. She therefore needs to be drug free.

It should also be noted that this style of bail application was used twice as often with women who were initially remanded in custody than with women who were given conditional bail immediately. This may indicate that defence representatives used this technique when they anticipated difficulties in securing bail because of the nature of the offence. The technique was used more often in cusp cases where the remand outcome rested not only on offence seriousness and assessments of harm, but also on magistrates' perceptions of defendants' characters.

Defence representatives sought to use impression management strategies to influence magistrates' assessments of individual defendants. These impression management strategies operated in a similar way to Sykes and Matza's (1957) 'techniques of neutralization': they sought to undermine, replace or deny the master status of 'serious offender' and/or 'bad bail risk' so the defendant could resist or minimise her deviant status and encourage the court to choose to respond to her offending in a less punitive way. It is important to note that there were rarely total 'denials of responsibility' (Sykes and Matza 1957) as admissions of culpability were central to the success of these hearings. Defence representatives attempted to use gendered accounts of women's actions and/or lives not to deny offending, but to try and minimise the significance of the offending behaviour in magistrates' deliberations on bail. As will be seen from the following, it is argued that many of these neutralising narratives were grounded in gendered representations of women. For example, the 'she's free of him now' account

engages with perceptions of women's patterns of offending being related to their patterns of victimisation.

The following ways in which defendants were (re)constructed by defence representatives are based entirely on observed cases. Six different accounts were seen to be repeatedly used in all the courts in the study. Whilst they are presented separately here, they were frequently used in combination in bail applications. The cases in which such accounts were heard were all disputed cases. There was no need for such intricate argument in cases where bail was either not requested or was unopposed, or where magistrates offered the defence an early signal that bail would be granted.

The data presented here are illustrative of the highly gendered arguments that featured in such bail applications and the ways in which they were used. However, as the numbers are small, the results should be regarded as no more than suggestive. Whilst they are accurate accounts of the narratives defence representatives used, no conclusions can be drawn on their relative effectiveness in securing bail. A study large enough to generate data on which logistic regression analysis could be performed is necessary if the relative importance of each issue is to be understood.

#### **i - She's Ready To Change Now**

Of the 27 cases (18 women remanded in custody and 9 women conditionally bailed) where this technique was used, nine women were presented as having recently experienced a significant event which had prompted them to change old patterns of behaviour. The catalysts for this preparedness to change included the shock of a recent custodial sentence (particularly if it was their first experience of imprisonment); children being taken into care and the defendant realising she could not secure custody until she was drug-free; recent detoxification which the defendant wanted to maintain; and a health scare necessitating a drug-free life. These women were all presented as being at a turning point in their lives and the courts were encouraged to recognise and support their efforts to change. 'Change', if perceived to be genuine, has been identified as an important issue in successful parole applications too (Hawkins 1983). The examples below provide an illustration of how this technique could secure bail even in very difficult cases.

*Example 6.6*

This 37 year-old woman had previously been remanded in custody on two charges of shoplifting. She appeared in court from the cells and her male defence representative made the following application:

She has a long-term entrenched drug habit...My client has been very honest and says that she still wants drugs. She is not pretending to the court to be a reformed character and her honesty is to her credit. Whilst she is still addicted, she wants help to break her addiction. She is asking for a chance to do this.

He followed this with an account of how drugs had affected many members of her family. The district judge granted her conditional bail, saying

I will certainly give her the benefit of a chance but I just hope she takes advantage of it. It is a very sad case, I have heard that her whole family is affected by drugs. [Addressing the defendant] I am trusting you to be sensible about this. If you don't, you'll be flummoxed and blow your bail.

*Example 6.7*

A 22 year-old woman appeared on overnight custody on a charge of shoplifting. She had a very extensive history of offending and a poor bail record. It was acknowledged that she had been repeatedly remanded in custody and sentenced to custody before. Her defence representative said:

She pleads guilty at the earliest opportunity and accepts that her offending makes prison likely but she wants to ask for a remand for reports. She realises it is a risk as she may be remanded in custody but she is trying to make changes in her life...She wants the chance to get reports not so much to give you details of her life and conditions but to prove that she can keep appointments and show willing.

The male district judge granted conditional bail and addressed the defendant, saying

The time has come to make some effort to make some changes and if you're prepared to do so, we'll take that risk.

**ii - She's A Good Person, Really**

Of the 27 cases, 12 offered information on the general 'goodness' of the woman which served to challenge perceptions of her simply as an offender and prove she was not beyond redemption. In these cases, worth was signified most commonly by accounts of what a good mother she was (five cases) but was also evidenced by one or more of the following: the fact that her three children all had the same father; there was no social services involvement in her children's lives; she was an intelligent and educated woman; she had previously held down a good job; and she was a carer for the disabled/aged.

*Example 6.8*

A 23 year old woman appeared at Old Market Street charged with handling stolen goods and attempted deception. Bail was opposed on the grounds that at the time of committing the offence, she was on bail to another magistrates' court and Old Market Street for similar offences. There was also concern about failure to surrender and a risk of further offences being committed on bail. She had eight convictions for 13 offences

and 4 cautions all for similar offences. In her bail application, her defence representative said,

She has been a user and that has been the reason for most of her offending. She does have some successful parts to her life too though, most notably a six year old son with whom she has a very good relationship. Her mother informs me that she is a good mother and that she cares for her son well. She takes him to school every day. This is a lapse, she has slipped up.

The defendant was released on bail with a condition of reporting to the police station.

### **iii - She's More A Victim Than An Offender**

Of the 27 cases, 13 offered accounts of debilitating difficulties in women's lives. These included illness (six cases); advanced pregnancy; homelessness; and abuse as a child (see below for abuse from male partners). These defendants were presented as women struggling to cope with their problems, perhaps not fully culpable because of circumstance and certainly deserving of some protection and support.

#### *Example 6.9*

A 25 year old woman appeared at Old Market Street charged with criminal damage. She had damaged some internal walls of the hostel she was living in. She had become angered when the staff asked her to leave after finding a man in her room, against hostel rules. Her defence representative told the court,

She accepts that she caused the damage. You have heard that she was asked to leave the hostel. The man in her room had followed her in from the street and followed her to her room. She tried to get him to leave but couldn't make him. Staff wouldn't listen to her explanation and this frustrated and angered her...She was married with children aged seven and nine. Her husband physically abused her. A later boyfriend also abused her and this is why she is in a hostel. She has had five miscarriages in the last few years and is signed off on a pension because of this. She asks the court for help finding accommodation as she cannot return to this hostel.

### **iv - She's Free Of Him Now**

The removal of a corrupting man from the woman's life was cited in nine cases. This could be included in the 'ready to change' category but is separated out because 'change' is predicated on an acceptance of past guilt and an opportunity for redemption. In this category the woman was presented as not being fully culpable (particularly when the man was violent) and now the man had gone, she could be trusted to return to her natural law-abiding self. She was led astray and/or pressurised but now that influence has gone.

#### *Example 6.10*

A 22 year old woman appeared at Inswick Corner and pleaded not guilty to a charge of theft from a person. It was regarded as a serious offence as money had been snatched from a woman at a cash point, and the victim had been assaulted by the defendant's alleged co-defendant. In his bail application, the defence representative argued,

She has a boyfriend and a drug habit and the two are entwined. She buys her drugs from her boyfriend and owes him money. He is very possessive of her. He doesn't know her home address so if you grant her bail she therefore has an opportunity to break away from him, and thus hopefully from her habit... The reason for much of her offending is drugs. She has broken away from her boyfriend who is the root cause of her habit.

The defendant was bailed with conditions of residence at her family's home address, daily reporting at a police station, and an exclusion from the City.

#### **v - She's An Honest Offender**

In bail, unlike sentencing, extensive records of offending can actually be an advantage. In four cases, offending history was used to provide evidence that the defendant would not abscond or offend. A record without failures to appear could provide proof that the woman could be trusted to attend. Additionally, a prolific record with a recent hiatus could be cited as proof that the defendant had changed and is now law abiding and/or free of a drug habit. Past misdemeanours were offered as evidence that these women could be trusted to cooperate and behave.

#### *Example 6.11*

A 34 year old woman appeared before a male district judge at Connorton Road charged with a failure to appear in court proceedings, one charge of theft of credit cards and five charges of deception (using stolen credit cards to obtain goods), values ranging from £30 to £112. She pleaded guilty to all charges. Her defence representative said,

It is difficult to apply for bail given her record but these matters pre-date her last court appearance. She instructs me she has now turned a corner. She was in a violent relationship which is now over and clearly she has problems. Her last prison sentence got her clean and there have been no offences committed since she was released three weeks ago. She points out that she usually offends within two days of being released. She asks the court to appreciate that she has turned a corner now.

The defendant was bailed with conditions of residence, reporting to a police station three times a week and a night time curfew.

#### **vi - She's Got The Support Of Others**

In five of the remand in custody cases women were said to have support in the community. The argument was that the bench may not judge her to be trustworthy but there were others who would take responsibility for her. Importantly, 'support' was only successful in securing bail at the second application when it was allied to 'control' e.g. a

husband on whom, the court was told, she was financially dependant; a father who would offer residence and would make her work in his shop; a brother-in-law who was sitting in the back of the court ready to escort her out of the City to return home. The offers of support from mothers did not result in bail being granted at second bail applications. The number of cases is too small to make any meaningful generalisations from but they are suggestive of Eaton's (1984) findings that courts respond to traditional models of family structures: male relatives are seen to offer 'control', an essential adjunct to 'support' when bail is being considered. Carlen (1983) also found that courts were more likely to impose formal controls if the defendant was perceived to be beyond the informal controls of familial structures.

#### *Example 6.12*

A 20 year old woman appeared at Castleford Road on a charge of theft to the value of £153, the goods were recovered. She had been remanded in custody for one week previously. The defence representative said that his client could leave the City, to get away from her drug taking lifestyle, and return to live in her family home. He said the defendant's brother in law was in court to take her back and, "he's assured me he'll escort her through the front door." The defendant was bailed with conditions of residence and reporting to a police station.

Not all of the above 'scripts' that defence representatives used were conspicuously gendered. However, the themes of the women's needs, informal controls, familial responsibilities, and victimisation repeat through the majority of them.

To summarise, previous research shows that magistrates are predisposed to understand female defendants and their actions in terms of the women's needs. This research showed that if women and their defence representatives could also successfully persuade magistrates to give the defendant a positive character assessment, custodial remands could be avoided. Narratives that appealed to gender stereotypes were used by defence representatives to minimise perceptions of women as 'troublesome' and encourage perceptions of them as 'troubled'. Evidence of women's fulfilment of normative gender roles was presented defence representatives to demonstrate their good character, to define the woman as someone who was deserving of help.

I find that one common presupposition is the domestic division of labor and the vaunted "good family woman." (Daly 1994:197).

The findings reflect Eaton's (1986) and Carlen's (1983) findings that courts operate on, and perpetuate, gendered conceptions of men and women's roles in the criminal justice

system and in wider society. Whilst Daly (1994) agrees that images of “good family women” are used in courts to some women’s advantage, she disputes the contention that the existence of such attitudes and their use in mitigation is necessarily detrimental to those women who do not satisfy these criteria.

I am not persuaded that surrounding women with familial and maternal imagery restricts the range of possibilities for womanhood (excluding, for example, single women, those not in heterosexual couplings, and those without children). This argument may be right in the abstract, but it is less so in actual court practices – at least in United States courts, with which I am familiar. When there are good family women, their labor for others is affirmed. But women who are not considered to be good family women are not penalized for this status... We should expect to find gendered presuppositions in courtroom discourse and actions, but we should *explore* whether such presuppositions harm or adversely affect some women... We should not assume that they harm all (or even most) women in all courts. (Daly 1994:197).

The data from the present research broadly support Daly’s position. Of course magistrates and others may have brought unspoken prejudices to the remand court but whilst defence representatives did, at times, use gender role fulfilment in mitigation, the CPS were never observed referring to women’s gender role misdemeanours in their objections to bail. ‘Good family women’ were observed in the courts in this study to be characterised more positively, and thus were more likely to be bailed, but there was little evidence that women whose characters were more negatively perceived were treated any more harshly than men. There was little identifiable evidence that women in this study were being doubly damned for being doubly deviant (Carlen 1983; Carlen and Worral 1987), but there was evidence that successful mitigation was often framed in terms of gender roles, for both women and men; defence representatives were also occasionally observed to successfully use men’s gender roles to encourage magistrates to grant bail. For example, if a male defendant had a job, magistrates would try harder to keep him out of custody because of the strong links between steady employment and reduced offending, and to ensure his family did not suffer economic privations by losing the family’s income.

## Conclusion

This chapter explored the evidence that extralegal cues were used by magistrates when they were making remand decisions in cusp cases, i.e. those cases where neither offence

seriousness nor the processing needs of the remand system determined the outcome of the remand hearing. As the outcomes in these cases were not 'self evident', magistrates admitted to using extralegal factors, such as demeanour, in their decision making.

Evidence was explored that in cusp cases, where offence seriousness did not determine remand outcomes, remand decisions varied according to magistrates' assessments of individual defendant's character. Magistrates' perceptions of female defendants' characters were found to be significantly structured around normative gender roles. Women were typically perceived to be more 'troubled' than men which encouraged magistrates to use the remand decision in cusp cases as an opportunity to help and support defendants. Gender role fulfilment was found to, consequently, be a resource that defence representatives used to (re)construct their clients as women who (now) deserved bail. Although this was found to benefit those women who could demonstrate these favourable characteristics, those 'troublesome' women whose defence representatives failed to reconstruct their characters in the eyes of the magistrates were not afforded the same latitude.

Whilst there was little evidence that women who were defined as 'troublesome' were treated more harshly than men were, it is suggested that some women were less likely to be perceived as troubled because of their personal characteristics. So, although the skill of the defence representative was instrumental in defining magistrates' perceptions of women's characters, there are concerns that some women may be disadvantaged by their social distance from magistrates. For example, what evidence there was on 'class' indicated that magistrates attributed their own reasoning to defendants' behaviour, suggesting that the greater the social distance between the magistracy and defendants, the greater the chances of magistrates resting remand decisions on incorrect assessments of defendants' lifestyles and actions. Further, the potential for discrimination in moral assessments was exacerbated by the credence magistrates afforded to extralegal factors, such as their impressionistic assessments of defendants' demeanour in the dock. An obvious area for future research would be to explore how magistrates' moral assessments of women varied with personal characteristics such as race, nationality, class, age, etc.

# Chapter Seven

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## Negotiating Process And Outcome: Court Room Interaction

In Chapters Five and Six, the three models of remand illustrated that the processing and outcomes of remand decisions were shaped by the nature of the offence, the defendant, and the case. The next two chapters explore the practical application of these models in the complex social environment of the magistrates' court to further understand how remand decisions were produced. The models provided a structure for decision making but observations demonstrated that the process of applying these models could affect remand decisions, i.e. remand decision making was a social as well as a legal process. It is argued in this chapter that court actors had multiple competing roles and responsibilities and the ways in which professionals chose to prioritise them affected remand processing and outcomes. This chapter examines the range of roles that actors had, and provides examples to illustrate that the ways in which actors chose to prioritise their responsibilities could have profound effects on both individual remand decisions and, as we shall see in the next chapter, on courts' overall remand rates. The next chapter looks at the different ways in which these roles and relationships could be structured, depending on the nature of courts' social structures, and the effect this could have on remand outcomes.

### Introduction

It has long been argued that participants in organisations such as the criminal justice system have to resolve contradictions between their various roles and to organise their responsibilities. The contrary nature of criminal justice systems was noted by Rock (1993),

Practically, the court was a contradictory enterprise...People were adversarial, yet they had also to work together to engage in conflict, and there were widely ramifying conventions about how their relations should be conducted. (Rock 1993:131-132).

Street level bureaucrats characteristically work in jobs with conflicting and ambiguous goals. (Lipsky 1980:40).

These are apt descriptions of the experience of participants in the remand process. In addition to the self-evident conflict in remand law itself (for example in the requirement to protect both the public and the defendant from potential or actual harm), participants also had to assimilate a range of other, often contradictory, considerations into their remand decision making. It is argued that participants' goals in the remand process were not only framed by the formal task they were engaged in (i.e. reaching a remand decision about a defendant based on legal and/or extralegal information) but were also influenced by, for example, the socio-political and organisational pressures described in Chapter Four which helped to frame what was seen as desirable and possible in the remand system. These pressures could create further conflict, for example between the requirement to use custodial remand to protect the public and a reluctance to remand women in prison because of the notoriously poor conditions in the local prison. Further, court observations also revealed that the complex social environment of the court itself generated additional goals for participants to satisfy, for example magistrates felt a responsibility for maintaining order in the courtroom.

It was evident from observations that participants in the remand process had a range of roles and responsibilities which often conflicted with each other. Participants had to make choices about how they were going to prioritise their own roles and responsibilities, and how to engage in the on-going process of negotiation with other participants whose own choices would also impact on how remand cases would be resolved. So, for example, defence representatives occasionally had to adjust their priority away from securing their client bail and towards protecting their own professional reputation, depending on magistrates' responses to them and their bail applications. This chapter illustrates how the various contextual and situational, formal and informal, legal and social goals of participants in the remand process, that were evident in courtroom interaction, were selectively translated into 'practical work' (Rock 1993) by participants and remand decisions produced.

One particular example clearly illustrates that remand decision making was not only structured around considerations of the issues highlighted in the three models i.e. the offence, the defendant, and the case.

#### *Example 7.1*

A female district judge at Ipswich Corner remanded a woman in custody on a Friday then released her on conditional bail the following Monday. The same district judge,

CPS officer and defence representative appeared at both hearings. There was no change in circumstance which could account for this decision. If anything, the second bail application, which resulted in a conditional bail, was weaker than the first, which saw her remanded in custody, as there were more doubts over whether her accommodation was an appropriate bail address. When presented with almost the same information twice, this district judge made two different decisions.

Inconsistency in decision making is often accounted for by the operation of discretion (Gelsthorpe and Padfield 2003). Whilst the exercise of discretion makes it *possible* to make two different decisions based on the same information, it does not explain *why* the different conclusions are reached. Inconsistent remand outcomes are explained in this chapter as the consequence of actors defining and prioritising their own and others' roles and responsibilities in different ways. The roles and responsibilities that an individual assumes will affect the process and the outcome of remand decisions:

- a) the process: how s/he goes about making decisions, what questions are asked, what information is selected as being important, the nature of the interaction with others involved in the system, how much time is given to the decision etc, and
- b) the outcome: what is seen as a desirable, or at least as a justifiable, outcome will be a product of how the decision-making 'problem' is framed e.g. to help, to contain, or to process an offender, to finish the court list by lunchtime, to build a professional reputation, etc.

Process and outcome are interdependent: the process employed to make a decision will influence the outcome and what outcome is seen as desirable will frame how information is processed. Although process and outcome can profoundly affect each other, it will be seen that there is no automatic relationship between the two: it is not always possible to read directly across from one to the other.

In sum, the process and outcome of remand decisions were allied to participants' understanding of what the remand decision was 'for'. Magistrates did make the final decision about the purpose of a remand but the other court actors participated to varying degrees in a process of negotiation, seeking to influence how the magistrates decided to conceptualise a particular remand case. Each actor in the process had choices to make about what s/he wanted to achieve at any given hearing. The underlying structural reasons for the choices that actors made are explored in the next chapter. This chapter

concentrates on demonstrating the range of roles and responsibilities that participants had, and how they could affect remand decisions.

This chapter explores the range of court actors' roles and responsibilities which emerged from the interview and observation data. Examples are used to illustrate how the roles chosen by actors, and the success with which they were asserted, framed magistrates' decision-making process and/or the outcomes of decisions. Although this chapter is primarily based on observation data, interview data are used at times to support and elucidate observation findings. No section relies on interview data alone as this chapter explores what *actually* happened in courts rather than what was *supposed* to happen. As such, interview data proved inadequate as what people think they do can differ from what they actually do, as is evident in the following example.

#### *Example 7.2*

In interview a female magistrate, who had nearly 30 years' experience, said that she felt structured decision making was a positive development as it encouraged proper procedures. She stressed the importance of procedures and stated that she encouraged new magistrates to adhere to them. She brought out a folder and produced flow charts that illustrated the decision making process in bail applications. However, this concern for procedure was clearly not demonstrated when she was observed making a bail decision on a woman charged with burglary some weeks earlier. The magistrate, who was chair of the bench, and the two wingers retired after hearing her co-defendant's bail application. When they returned, they remanded him in custody and announced that "we have had a full discussion of both cases and we remand both the defendants in custody." The clerk responded by saying "you haven't actually heard from the female's lawyer on the matter of bail." The matter had to be re-heard in another court later that day. Procedure was not followed here: a bail application was not heard and clearly the magistrates could not have used structured decision making as the basis of an informed decision here as they had no information from the defence. This magistrate's belief in the value of procedure was, in this case, not translated into practice.

Not only do people conduct themselves in ways they would not imagine or admit to, there is evidence that suggests people's personal philosophies are not accurate predictors of their decision-making (Hogarth 1971). Thus observation data proved a superior source of information to interview data as they captured how people really behaved in the remand process rather than how they thought they behaved or what they believed should happen.

## Roles And Responsibilities In Courtroom Interaction

The present study found magistrates to be more involved in and engaged with the remand process and decision making than Hucklesby's "rubber stamping" magistrates who habitually deferred to the recommendations the CPS offered (Hucklesby 1996). Although the current data does also provide some examples of magistrates making unquestioning decisions on the basis of CPS recommendations, the observations reveal a much richer role for the magistrates who were seen to be actively engaged with the process and outcomes of remand decisions. In fact, the data show all court actors engaging with a process of resolving their own complex and conflicting choices about how to process individual defendants on a case-by-case basis and responding to the choices made by other court actors.

The following list of actors' roles and responsibilities was constructed from a combination of what emerged from the observation data and the interview data, supported by findings from previous court-based research.

### Magistrates

- a) ...to make a fair and reasoned decision
- b) ...to protect the public
- c) ...to protect the defendant
- d) ...to expedite the criminal justice process
- e) ...to verify information
- f) ...not to punish others
- g) ...to maintain authority

### CPS

- a) ...to provide the court with information
- b) ...to make recommendations on bail
- c) ...to challenge bad decisions
- d) ...to protect themselves

### Defence representatives

- a) ...to follow their client's instructions
- b) ...to advise their clients
- c) ...*not* to apply for bail
- d) ...to be truthful
- e) ...to protect their professional reputation

### Clerks

- a) ...to protect the defendant
- b) ...to ensure procedure is correctly carried out
- c) ...not to influence magistrates' decision-making

### Defendants

a) ...to be actively involved in the process

Although all personnel in the system had choices to make, some had a greater number of competing roles and responsibilities to juggle than others. Whereas clerks had few responsibilities which rarely conflicted with each other, magistrates had the greatest number of potential responsibilities - some of which were incompatible and required magistrates to elect which one(s) to prioritise. As will be seen, defendants had a very limited role in a remand process which was monopolised by professionals.

### **Magistrates' Roles And Responsibilities**

Whether magistrates are understood as being proactively involved in the remand process or as simply 'rubber stamping' CPS recommendations, they are central to proceedings as all decisions must ultimately be made formally by them. As the final arbiters, magistrates must find a resolution to the often conflicting aims in remand decisions. In their position as the group with the most formal authority (see Chapter Eight) in the courtroom, magistrates were unique in the degree of influence they could exercise over cases and over the choices made by other court personnel. However, as will be seen in this and the subsequent chapter, magistrates, and particularly lay magistrates, were greatly influenced in their actions and choices by the roles that other actors played.

a) ...To Make A Fair And Reasoned Decision

When asked, all criminal justice personnel said the primary decision makers in the remand system were magistrates and magistrates' principal responsibility was believed to be to act as the final arbiter between the CPS and the defence. When talking through their decision making on the case vignettes, magistrates almost universally referred to the need to "weigh up" and "balance" the conflicting pieces of information and the competing rights that were presented to them in remand hearings. Parker et al (1989) also found magistrates concerned with the balance between the defendant and the public. However, they noted that the need to support the defendant was mentioned much less often than the need to protect the public. In the current study, the rights of the defendant and the public were invariably mentioned in the same breath. Perhaps this reflects the difference between sentencing convicted individuals and bailing unconvicted or unsentenced defendants. This responsibility was generally taken very seriously. A magistrate of 23 years' experience summed up the widespread opinion

amongst magistrates that remand decisions were not to be taken with anything other than the utmost care. Even when a defendant was convicted, and therefore the presumption in favour of bail did not apply, the potential consequences of a remand in custody were considered to be so serious that magistrates felt wary of using their powers

Depriving someone of their liberty is an extremely audacious thing to do. And the law enables you to do that, requires you to do it but it's a very big decision...So I think that's the main issue that I always have in my mind actually when all this comes up. It's not a game. It may seem to be a game in a sense for the people who are prosecuting and defending. But for the people who actually have to make the decision, I think it's a very serious business indeed. (male magistrate)

In one case a district judge asserted the importance of correct procedure, even though it would not affect the outcome of the hearing.

*Example 7.3*

When a male district judge at Castleford Road was told that no bail application would be made by the defence he said “well I would still like to hear the Crown’s bail refusal reasons and something of the case.” This district judge requested information relevant to bail even though he was not required to make a decision in this case.

Recent research on sentencing found that magistrates believed they only used custody as a “last resort” (Hough, et al. 2003). The present study echoed those findings, with magistrates also frequently using this same phrase in interview. However, observations detailed how remands in custody were occasionally used where conditional bail would have satisfied any bail concerns. As was seen in Example 7.1, given the defendant was later released on conditional bail, her initial remand in custody (which was based on the same information as the conditional bail decision) could not have been the “last resort”. If it had been, she would not have been eligible for release on bail only three days later as her circumstances had not changed at all. Again, what magistrates believed they did was not always born out in the way they actually behaved.

Not all magistrates employed such a careful approach as the district judge in Example 7.3, resulting in unconsidered and perhaps rash decisions.

*Example 7.4*

A woman who pleaded guilty to two counts of shoplifting (value £89) was remanded in custody at Connorton Road. The CPS had not even offered a view on bail when the

male district judge asked the defence representative if there was to be a bail application. The defence representative said he would be asking for bail and began to make the application. The district judge interrupted him and said "I'm not going to grant bail." The defence went on to say that he was asking for a DTTO assessment and that could only be done in the community so bail was important. The district judge again interrupted him and said "I will not consider bail at this stage." The district judge did not fulfil his responsibility to hear both sides of the argument and make a reasoned decision. He did not wait to hear the CPS's views and he prevented the defence representative from even making an application. After three weeks in custody for a PSR, this defendant was released on conditional bail to a bail hostel in order for a DTTO assessment to be done.

Whether a bail hostel place could have been found and, if so, whether the defendant would have been released on conditional bail at the first hearing is unknowable. What is evident is that the district judge's refusal to follow correct bail procedure and listen to the bail application meant the possibility could not even be explored. He pre-empted the outcome by his arbitrary refusal to follow procedure. It is also interesting to note that in this case the clerk failed to challenge this breach of procedure and, further, did not prompt the magistrate to announce the formal reasons for refusing bail, something which is required by law. (Clerks' deference to district judges is explored in a later section and discussed in the next chapter).

#### b) ...To Protect The Public

The remand decision is at heart a question of balancing risk against rights: does a defendant present enough of a risk to the public (offending or re-offending against the general public or against specific victims or witnesses) and/or the process (failing to return to court) to justify incarcerating them? There is a responsibility not to expose the public to undue risk and this is achieved either through the use of bail conditions or by remanding in custody.

As explored in Chapter Five, with serious offences, a remand in custody was almost inevitable, even if the defendant presented a very low risk of reoffending. The rationale was that even though reoffending may be unlikely, the harm that would be done by another offence being committed was too great to release the defendant.

#### *Example 7.5*

A woman was remanded in custody at Orrington Street for domestic burglary. The defence made a strong bail application based on the fact that the defendant's offending pattern was almost entirely one of prostitution and deception and she had never been convicted of burglary before so reoffending was very unlikely. She had a good record of

surrendering to court so failure to attend was unlikely. The evidence in the case was so weak that the CPS admitted they would be reviewing the case and in fact the case was dismissed the following week because of lack of evidence. The mixed bench remanded the woman in custody citing the risk of reoffending but no grounds were given to support this. This case was used as the basis of one of the case vignettes. Most of the magistrates who concluded a remand in custody was necessary in the vignette exercise volunteered the information that they would have granted conditional bail if the offence was less serious. Even though she was not a bad bail risk, they were not prepared to bail her because of the nature of the offence.

In such cases, offence seriousness eclipsed consideration of any other factors, including the absence of any “substantial grounds” for refusing bail. It was exceptionally rare for a magistrates’ court to bail a defendant charged with a serious offence but it might be done under certain circumstances e.g. see Example 8.1 for a striking exception to this rule. Two clerks noted that they had previously had to correct magistrates on this issue, telling them that offence seriousness alone was not a valid reason for a remand in custody. In practice it was understood that offence seriousness would in fact determine remand status and this was acceptable to the clerks as long as the decision could be *accounted* for in terms of the Bail Act criteria.

they'll say because it's a serious offence and I'll tell them that's not enough.  
So then they'll say it's a serious offence and that means they are likely to abscond. That's acceptable. (male clerk)

In their pursuit of public protection, magistrates made decisions based on offence seriousness then framed their decisions in terms of Bail Act grounds which provided the *ex post facto* account of the decisions rather than the basis for them.

### c) ...To Protect The Defendant

Magistrates have a responsibility to protect defendants’ right to bail and there should be “substantial grounds” for refusing bail. As was seen in Vignette Two, wherever the offence was not serious, they applied the right to bail, even if there were evident concerns about bail risk.

Magistrates were also observed on occasion behaving as active guarantors of defendants’ rights. In Hucklesby’s (1994b) study, 34 per cent of magistrates said that defendants’ legal representation was of good quality, 22 per cent said it was variable quality and depended on the individual solicitor, and 28 per cent said defence representation was poor quality (16 per cent gave neutral answers) (Hucklesby

1994b:147-148). In interview magistrates in this research also bemoaned the poor quality of some defence representatives and went on to say they had to work hard to get enough information to make sure the defendant had a fair hearing. Clerks supported magistrates' comments on this,

you do get the occasional one where he'll get bail *despite* his rep not because of him. The magistrates will do all the work, ask all the questions. We had one the other day, the Chair said afterwards it was like pulling teeth. (male clerk)

A prioritisation of the defendant's rights may secure defendants bail but could also affect the process without impacting on the outcome of a remand decision.

#### *Example 7.6*

At Inswick Corner, a woman appeared before three district judges on separate occasions. At each hearing there was no question of bail being granted as the offence was arson and she was on custodial remand for psychiatric assessment. The three district judges, two male and one female, all remanded her in custody but responded to being told that she was refusing to come into the courtroom very differently. The first simply remanded her in custody without commenting on her absence. The second asked if the defence wanted him to see her in the cells. The third district judge stopped proceedings and told the court

I will go down and see her in the cells, I don't want to conduct this in her absence. (female district judge)

Whilst these different attitudes towards the defendant did not affect the outcome, they may have impacted on the defendant herself, as the defence representative commented

I think it may help if you did see her [in the cells] as it may help her acknowledge what's happening to her. (male defence representative)

Some magistrates also seemed to feel responsible for ensuring the defendants' welfare throughout the remand stage of the criminal justice process. Seven occasions were observed when magistrates expressed their concern at the length of custodial remands when problems with procedure had delayed their hearings.

#### *Example 7.7*

At Castleford Road a woman was remanded in custody for trial on a charge of possession of an offensive weapon. Because of a series of administrative problems the trial was repeatedly delayed. She had already been in custody for six weeks when the trial had to be put back again due to the police officers in the case being sent to the wrong court and probation officers mistakenly giving the magistrates a PSR concerning other matters which could prejudice the trial. It would be another two weeks before her trial could take place. The mixed bench expressed their anger that the defendant would have to spend even more time in prison and insisted that the file was marked to indicate to the next bench that if the Crown were not able to proceed on the next date, the trial should be abandoned. The Chair apologised to the defendant for the continued delay

and explained again, this time directly to her, that the case would be withdrawn if it could not proceed on the next occasion.

In addition, as discussed in Chapter Six, magistrates tried to help ‘sympathetic’ defendants when it was possible and they sought to minimise the harm done to the defendant. Concern for welfare was exhibited, for example, in magistrates’ preparedness to make “risky” remand decisions in explicitly-stated attempts to help offenders make changes in their lives instead of simply processing or containing them (see Chapter Five). However, a magistrate inadvertently revealed that well-meant displays of concern for defendants’ rights were sometimes empty gestures.

We often didn’t retire, the decision was made by the bench. The chairman would turn to me and say ‘remand in custody’ and I wasn’t going to start arguing with him in court. Now I mean I always take my bench out, or most times I do, because I think the defendant deserves it. Even if you’re just going out to have a cup of coffee, so to speak, I want the defendant to feel that he’s being properly considered. (male magistrate)

#### d) ...To Expedite The Criminal Justice Process

Magistrates appeared to feel they also had a responsibility to keep the pace of proceedings up and to drive cases along when, for example, adjournments were requested because further instructions needed to be taken or files had been mislaid. The district judges in particular, perhaps because of their legal training or their more frequent sittings, took responsibility for getting through the daily remand lists by lunchtime and for ensuring cases progressed. As discussed in Chapter Four, staff in magistrates’ courts felt pressures from central government to reduce delays in the criminal justice system.

At times the preoccupation with keeping court business moving had the potential to over-ride other duties. In the following example of a shoplifting case at Connerton Road, the rights and the dignity of the defendant had to be defended by her representative against a district judge keen to resolve the case.

#### *Example 7.8*

A defendant had been remanded in custody for psychiatric reports and was due in court for sentencing. The defence said,

The defendant is very heavily medicated and they cannot get her out of the van that has brought her from [prison]. She is very heavily sedated and in effect is fast asleep.

The male district judge replied,

Well, there must be some way they can get her into court. I'd like to deal with this today. It's a simple matter and it's only going to have to come back again next week. Is she a large person? If not, could they carry her in?

The defence responded,

Sir, the issue is that given she is so heavily medicated, whilst she could be physically present in court, I would not be able to take instructions from her and she wouldn't, she could not understand court proceedings.

The district judge then said,

Yes, I see. Remand back to custody for a week then.

Magistrates sometimes struggled with another facet of their responsibility to the criminal justice process: remanding in custody because of likelihood of failure to appear. The hardest cases were those where the offences themselves were not serious (commonly shoplifting in these observations) but the offender had an extensive history of simply ignoring all court orders to return for trial or sentencing. Whilst magistrates and district judges alike would bail and re-bail the majority of these cases, there would be the occasional time when a magistrate felt they had to remand a woman in custody because she was simply flouting the authority of the court. In these cases, the frustrated and exasperated magistrates almost invariably used the phrase "you leave me no other choice but to remand you in custody." Such 'cusp cases' were discussed in more detail in Chapter Five.

#### e) ...To Verify Information

As discussed in Chapter Four, it was sometimes difficult to get verified information in remand hearings. The reasons why magistrates sometimes reached the decision to challenge lawyers to verify their statements are explored in Chapter Eight. The focus here is on the consequences of their choice whether or not to request information was verified. Magistrates did question the CPS on occasions but more frequently they requested the defence state whether or not he himself had verified a defendant's address was suitable for bail, if she really was attending the rehabilitation centre as she claimed, if she was in fact the full-time carer of her children, etc. Magistrates who actively involved themselves in the process and asked for information to be verified had a significant impact on bail outcomes.

#### *Example 7.9*

The defence informed the court the defendant's mother was present to support her daughter and he offered residence with her mother along with a curfew and reporting conditions. Even though the defence had spoken directly to her mother and her mother's attendance indicated she supported her daughter, the male district judge, unusually, did

not accept the offer of residence without question. He asked for the mother to take the stand, "I want to hear how the mother feels about her staying at her home." The mother communicated her anxieties about having her daughter in her house to the court through the defence representative and said she was not prepared to offer her residence. The defendant was remanded in custody. In this case, it was only because the district judge insisted on hearing first hand verification of the information himself that the problems with the bail address were revealed. If he had accepted the word of the defence representative, the defendant may well have been released to an unsuitable bail address.

The presence of the mother in the court may have been the reason why the district judge asked to hear from her. Perhaps she communicated her anxiety through her expressions and body language. Perhaps the district judge asked to speak to her simply because she was in the court so he could. Would the district judge have accepted the defence representative's word for the offer of residence if the mother had not been in court? It is impossible to say what the outcome might have been in this case but, in general, the data illustrate that the extent to which magistrates choose to take court personnel at their word or enquire as to the veracity of information affects remand outcomes. The caprice with which such requests are made produces irregular and inconsistent remand decisions.

In contrast, where magistrates elected not to request verification of information some potentially unsafe bail decisions could be made.

#### *Example 7.10*

A case of theft from the person at Inswick Corner was considered serious enough for the CPS to decline jurisdiction. The defendant was remanded in custody by a male district judge because of a substantial likelihood of further offending and failure to surrender based on the nature and gravity of the offence and the fact it was committed on bail. At the next hearing little had changed but the defence argued for bail based on an uncorroborated offer of a residence condition:

Defence: She wants to go home now and live with her brother. I have not spoken to him but I have spoken to her father and he says her brother would be prepared to have her to stay.

District judge: Would anyone stand surety for her?

Defence: took instructions and said 'She says her father would be able to.'

The defendant was released on bail with conditions of residence with her brother, daily reporting, exclusion from the city and £500 surety. In this example it is striking that even though the defence representative states he has not verified with the brother that he has agreed she can reside with him, the court is satisfied that the condition of residence is acceptable. No attempt is made to establish whether the brother knows she will be bailed to his address and no attempt is made to check on the brother's character. Furthermore, the court accepts a surety based on the defendant's own word. This would be an unenforceable condition as the father has not given the court his consent to stand

surety. The male district judge released the defendant from custody, granting her conditional bail based on an unverified bail address and an unsecured security.

#### f) ...Not To Punish Others

At times magistrates demonstrated concern not for either the defendant's rights or the need to protect the public, but concern not to punish innocents. As was seen in Chapter Six, most commonly this related to considering giving a woman bail for the sake of her children. This was rarely observed to be explicitly stated in court but interview data suggested that magistrates "try a little bit harder not to remand a woman in custody if she's got young children" (male magistrate). All but one magistrate interviewed said this was one of the hardest things about remanding women in custody.

#### *Example 7.11*

In a case of shoplifting at Inswick Corner, a male district judge established that the defendant had a history of not co-operating with getting PSRs done and she had breached her last CRO. He asked how often the defendant saw her child. Because of the defendant's drug problem, the child actually lived with the defendant's mother-in-law but the defendant saw her daughter on a regular basis. The magistrate said:

I am inclined to think that custody is the only option. If she didn't co-operate with reports before, why should she now? But, on reflection I will give conditional bail to try and get a PSR done. [Turned to address the defendant] I make it clear that you will go to prison if you fail to co-operate. I want you to know that I have deliberately given you this final chance for your child's sake.

It was very rare for concern for others to be mentioned by magistrates in court so it is not possible to know the extent to which it influenced their remand decisions. Most magistrates said they would afford the same degree of consideration to a man's bail application if he was the primary carer of a child. Three magistrates disagreed with this and said that whilst they hoped they would treat men and women equally, in reality this was probably not true

your decision is made very hard because you know you're putting them into care and that's bound to affect the balance of your decision, isn't it? And that's unfair, it's actually unfair on young men because we really ought to always ask the same questions with men. Do they have parental responsibilities? But we don't. I suppose their defence would raise it but, to be honest, we don't think to ask. And I have a feeling that we'd be a bit dubious if some young man said he had sole care of a young child. You'd expect it with women more, don't you? (female magistrate)

### g) ...To Maintain Authority

Courtrooms in the different areas did vary to some extent in formality but for the majority of the time court personnel in all areas and courts were very deferential to the magistrates. However, when it was obvious that a lay bench were not very experienced and/or they were having to be guided by clerks because of inadequate control over the process and poor decision making, clerks became far more influential and proactive in determining case process and outcome.

#### *Example 7.12*

Defence representatives played a subtle game with a mixed lay bench at Inswick Corner. Defence representatives commented that the bench was “one of the worst I’ve seen”: they took an unusually long time to reach decisions in some cases, had to be repeatedly prompted by the clerk to give the reasons and grounds for remand decisions, rose half an hour early for lunch because “we’re feeling pressurised”, and had to apologise to the court when they remanded a woman in custody without first hearing her defence representative’s bail application. Defence representatives challenged each other to include certain words in their applications. The words became more and more difficult to insert into a speech subtly; the final challenge I heard was to use the word “elephant” in a bail application. When the defence representative managed to incorporate it (“my client, like an elephant, would never forget to attend court”), a few defence representatives and the list caller, who was aware of the game, stifled laughs. The bench were probably not aware of the rules of the game but could not have failed to sense the almost light-hearted atmosphere in the court room. This bench could do little to reassert its authority but the clerk began to direct proceedings to an unusual degree.

On other occasions magistrates, and particularly district judges, sought to re-assert their authority within the court when they believed it was being challenged. Three district judges in Connorton Road and Inswick Corner had a habit, when no-one was ready to appear, of calling all defence representatives into their courtroom, even if they were in the cells taking instructions or in other courtrooms waiting to appear, and telling them to explain to the court why they were not ready. Most simply proffered apologies and asked the court’s indulgence of a few more minutes. Few ventured explanations as this usually attracted the full force of the district judge’s irritation.

#### *Example 7.13*

A male district judge in Connorton Road chastised a defence representative for not being ready to appear, even though he had been busy in another courtroom, and was refusing to let the case be put back for him to take instructions because he should have been ready. The district judge said,

Court One takes precedence. You should have been ready at 10.30am. Your client has been in custody all week. This Court takes precedence and this case will proceed now.

It seemed unlikely that the district judge was motivated by a concern for the defendant's welfare as he insisted the case proceed immediately. Consequently, the defence representative was forced to take whispered instructions from his client under the impatient gaze of the district judge. The best interests of the defendant could not possibly have been served in this hearing.

## The CPS' Responsibilities:

The CPS receive files for overnight cases from the police on the morning of the hearing. They must make a bail judgement based on the information in the file, records of the defendant's offending history, and police recommendations on bail. Women held on overnight custody would typically begin to arrive at the court at 10.30am onwards and the CPS would need to be ready to start the overnight list. Any file they had not been able to look at would be read during natural breaks. CPS officers, then, had to juggle with attending to court proceedings and making judgements on files often, particularly when district judges were sitting, with no break all morning.

### a) ...To Provide The Court With Information

The CPS and the defence are the two main sources of information in a remand hearing, although clerks and probation officers also contributed at times. Magistrates cannot make reasoned decisions without information from the CPS and the defence. However, their information does not carry the same weight. There is an assumption that information presented by defence representatives is partial because it is their responsibility to do what they can to get their client bail (Hucklesby 1997b; Shapland 1987). In contrast, CPS information is generally considered to be verified and completed, though, as we shall see in the next chapter, personal experience of poor CPS officers does undermine this faith.

The CPS officers interviewed reported taking this responsibility seriously for two reasons. Firstly, all said they were aware that the magistrates rely on them and cannot make good decisions unless they are given accurate information. A magistrate said he felt it was the CPS's responsibility

to give us as much information that we can make the correct decision and that has to be in a structured way with as much concrete evidence as possible that they've checked such as a very real fear of reoffending or witness interference. To highlight all the areas that we have to consider because we are the lay bench and we don't always spot the obvious in some cases but we have to be told and their job is not to assume that we know all the pitfalls and all the bits and pieces, they have to give us the complete picture as best they can and why they are saying it backed up by some sort of sound concerns such as interfere with witnesses or further offences, that sort of thing. (male magistrate)

Where the information isn't available, it isn't up to the tribunal to find that out. It's up to the CPS to present it. We're not there to interrogate (female magistrate).

Secondly, all CPS interviewed commented on poor communication with the police and the difficulties presented by having inexperienced police filling out remand forms. They said that reasons for double checking information from the police was that,

the police decisions are not always 100% correct... You can tell whether it's an experienced officer from the information on the MG7....As I say, it would be nice if they put all the information there. For example the PNC print out will show pending matters and I've already spoken to the police about this, they do give you the bail conditions for the impending matter and also the date and the court but they never tell you the type of offence. ...we find the case summary prepared by the officer in the case sometimes not quite accurate. For example they say 'the victim was repeatedly kicked twenty times' but if you read the victim statement it actually happened one after another so it's not all whilst the victim was on the floor, it's not as if he was kicked twenty odd times, it could be spread over half an hour moving from one location to another. So if you give that information it's a little bit misleading. (female CPS)

This differs from Burrows et al (1994) who found evidence the CPS had a more unquestioning attitude to police information. It should be noted that the CPS interviewed all came from Outer District where there were long-standing difficulties in the Police-CPS relationship. In Central District, the police contact complained that the CPS regularly revised charges to less serious ones, to the great annoyance of the police. Hucklesby found that the CPS felt police information was useful but their recommendations were not unquestioningly followed (Hucklesby 1994b).

In addition, three CPS officers in this study commented on how uncomfortable they found it personally when they put information to the court only for it to be revealed as incorrect by the defence or by magistrates asking further questions about it. The CPS in

Outer District stated that they relied heavily on the police liaison officer to verify or find additional information. When he was not available, they would hesitate about putting information before the court if they were not certain about it or if they felt it was incomplete.

You do think twice. It's the most embarrassing thing if you put to the court 'oh he's got two outstanding matters at blah blah court' and the bench asks you for what type of offences, when was it? And you just say no! You can't answer their questions! So I'd like more information on the MG7 (female CPS).

CPS officers were observed to check police information and altered recommendations accordingly. For example, CPS officers stated in court that whilst the police had concerns about the bail address, the issues had been resolved to the CPS's satisfaction. A male CPS officer commented that "the way the police check out a bail address might be, shall we say, a little cursory."

So, the CPS stated that for a variety of reasons they took seriously their responsibility to present verified and complete information to the court. However, although CPS officers insisted in interview that they reached their own conclusions on files and did not rely on unverified police information, the pressure on time with overnight cases outlined above seemed at times to have prevented this. CPS officers were observed struggling with their grasp of the facts of a case and it was not unusual for defence representatives to offer clarification on, for example, previous convictions or current prosecutions. Evidently, in practice the CPS were not always able to proceed on the basis of personally verified and factually correct information.

On those occasions when they did not provide the court with full facts, poor bail decisions were made. One magistrate recalled a bail application for a man charged with domestic violence

the CPS came and said it was only, it was an argument but it's this that and the other. And I let him out on bail, because no one was opposing it. The warrant officer said to me afterwards, 'he gave that girl such terrible black eyes.' And nobody had told me that she's been damaged and I would have made much more stringent bail conditions if I'd known. I might not even have let him out on bail. And since then I have always asked very specifically and I think nothing wrong came of that particular bail decision but I am always very aware ever since then to actually ask much more

specific questions from the CPS. The CPS is often, doesn't know, gives you a load of old rubbish and hasn't got a clue. (female magistrate)

This example illustrates how the generalised trust magistrates had in the CPS's professionalism was tempered by personal experience of the organisation (e.g. the regular use of agency staff) and of individual officer's mismanagement of cases.

b) ... To Make Recommendations On Bail

Although magistrates were free to disagree, CPS bail recommendations did constitute the basis of the vast majority of bail hearings: they flagged up concerns magistrates should be aware of and defence representatives should respond to. On the few occasions I observed the CPS refuse to make bail recommendations (mainly because of a lack of information), the magistrates appeared to feel somewhat stranded. For example, at a Saturday court in Outer District, the CPS representative said he had no information on the defendant as the police file had not yet reached him or was incomplete so he could not offer a view on bail. The magistrate replied, "well surely you have *some* thoughts for us?".

Whilst all agreed the CPS had a responsibility to make recommendations to the bench, interview and observation data revealed that there was some disjuncture in terms of what the recommendations actually represented. Although all CPS representatives interviewed stated it was their responsibility to make a reasoned bail recommendation based on the evidence, the observation data showed some cases where recommendations were made more by rote than by reasoned judgement. As with magistrates, the CPS work within the Bail Act framework when making remand recommendations. So they too should safeguard the rights of the defendant to be given bail and balance this against their responsibility to protect the public and to ensure the process proceeds. The following example illustrates that not all CPS recommendations were reasoned judgements based on what the CPS representative believed really should happen. Talking to the CPS representative before the magistrates came in, the defence representative said that his client had already been given bail by another bench in the same court that morning on a more serious matter.

Defence: Are you prepared to grant bail seeing as next door have given bail already?

CPS: I'll have to oppose bail because she's offended on bail but I'm sure the bench will bail her.

It should be noted that magistrates are never in court when these kinds of discussions take place so they could not disabuse magistrates of the idea that the CPS recommendations are in fact reasoned judgements.

All but two of the magistrates interviewed felt that the CPS were responsible for presenting the facts fairly and accurately and making well-informed and professional judgements on bail. However, five of the more experienced magistrates and all the clerks did voice doubts about how considered CPS recommendations sometimes were.

I think they say what they say in an automatic fashion and they expect us to be listening to the defence side and weighing up factors. My impression is they more often say 'custody' when, they say it automatically and they ask for it when it seems clear to us that anyone with any sense would know they weren't going to remand in custody. (male magistrate)

I definitely get the impression with some prosecutors that they don't actually make their own judgement about whether to object or not, they just say she's got previous so I'm going to object but they don't bail appeal it so that means, I know they can only do that for the more serious cases but the fact that they don't say anything about 'that's an outrageous decision' shows they're quite happy once they've got bail but they just want the bench to make that decision. (male clerk)

Appealing a bail decision to the crown court is the only formal mechanism the CPS has to communicate its disagreement with a decision. Other cases need to be heard so there is little time for comment and few informal opportunities to express views and give feedback on decision making exist. Outside the courtroom, the CPS and the clerks and magistrates are located in different areas of the courthouse. As such, they are unlikely to have opportunities to discuss particular cases. As the quotation above illustrates, clerks and magistrates (five mentioned this spontaneously in interview) interpret the decision not to appeal and the absence of any negative comment as an indication of CPS satisfaction with decision-making when in fact this apparent concordance may simply reflect the lack of an immediate forum to communicate any concerns not serious enough to prompt a bail appeal.

The extent to which CPS or, prior to the creation of the CPS, police recommendations influence magistrates' decisions has been a subject of some debate. Previous studies have found CPS recommendations to be accepted without question by magistrates.

In cases where the CPS are satisfied that a defendant can safely be granted bail and, if appropriate, the defence agrees to the conditions proposed, the CPS do not offer, and the magistrates do not ask for, additional information, which tends to suggest that in these circumstances the magistrates take at face value the CPS assessment of the bail risk the defendant poses. (Hucklesby 1994b:305).

It is important to note the caveat in the above statement: CPS recommendations are accepted without question in *uncontested* cases. There may be concerns about the appropriateness of the bail conditions that are applied but challenges on this matter, surely, are the responsibility of defence representatives. Thus, if the defence representative does not dispute the bail recommendation, why would the magistrates challenge the CPS? There may be occasions where the defence representative was not performing her professional role adequately and here magistrates did have a role. Evidence from this study suggested that where magistrates saw a defence representative failing their client, they did intervene and ask additional questions (see above). Of course, there must be occasions when magistrates do not take responsibility and poor decisions are made. The broad point, however, is that magistrates should not be portrayed as having unquestioning acceptance of CPS recommendations in all cases simply because they do not intervene in uncontested cases. At one point Hucklesby does in fact acknowledge that magistrates behave with greater autonomy in contested cases,

Evidence suggests that magistrates do not always agree with the CPS assessment of the situation and in 28 cases where the CPS requested a remand in custody and also put forward reasons for that decision the magistrates granted conditional bail. Consequently, even a reasoned application for a remand in custody by the CPS can be overturned by the magistrates. (Hucklesby 1994b:309).

The relationship between CPS recommendations and magistrates' decisions is not straightforward. It seems that CPS views are very influential but magistrates do not follow them unquestioningly. In interview, all magistrates said they were prepared to disagree with CPS recommendations but four did explicitly acknowledge that CPS recommendations were highly influential on benches' decision making.

Yes, sometimes [I disagree with the CPS], but it comes less well from the Bench. And yes, if we do feel strongly then we won't grant bail of our own volition so to speak. But it's not a comfortable situation to be in because we are not there to take sides or that sort of thing. We are there to make up our own minds from what we hear from both sides and we want the case presented in a balanced way on both sides. So that is a concern, that the CPS

should in fact pay greater attention to whether or not they are objecting to bail. (male magistrate)

Hucklesby found similar sentiments expressed in her study (Hucklesby 1996) and also found that magistrates felt unable to question CPS recommendations, even when the offence was not serious (Hucklesby 1997b). So, when the CPS made recommendations the magistrates took them very seriously and this did lead to some surprising remands in custody.

*Example 7.14*

In one case at Old Market Street, a man was on overnight custody on a charge of rape. The CPS asked for a remand in custody. Although it was a serious charge, the defendant had no previous convictions and the defence made an exceptionally convincing bail application. He raised serious questions about the truth of the allegation and drew attention to the police notebooks which contained their concerns about the motivation of the complainant. He also pointed out that the complainant had a conviction for perjury. Despite this, the mixed lay bench chose not to release the defendant on conditional bail but to remand him in custody. When the bench gave their decision, the CPS's and the defence representative's facial expressions registered their surprise. The CPS representative turned to the defence representative and mouthed the words "I'm sorry about that" and later told the defence representative that he was surprised by the decision as he had expected the bench to bail the defendant. As this example shows, given the influence the CPS has over magistrates, particularly lay magistrates, recommendations should be made with caution.

Part of the explanation for this decision must be that it was a serious offence and magistrates were, as has already been seen, very reluctant to bail any defendant accused of a violent offence against a person. In the case vignette which was constructed to explore responses to a serious charge but very weak evidence, 15 out of 24 magistrates remanded her in custody with eight of them expressing regret but feeling they had no choice because they were required to take the prosecution's case at its highest. Only the most senior magistrates (i.e. the longest serving and the bench chairs) felt confident enough to reject the CPS recommendations and trust their own judgement. This illustrates that even where magistrates did not fear the possibility of a repeat (serious) offence being committed, they generally still remanded in custody if requested to do so by the CPS.

Others have found CPS and defence representatives settled many bail applications in informal discussions before the court sat (Hucklesby 1996, Baldwin, 1977). Defence representatives were frequently observed in discussion with the CPS officer but when questioned about this in interview, all five of the CPS officers said they never agreed

difficult cases with the defence. They reported that the conversations mainly concerned other issues such as the disclosure of evidence. However, there was evident agreement in this case so why did the CPS officer oppose bail i.e. why did the CPS officer make a remand request he evidently did not believe in? The CPS feared the consequences of having bad judgement and recommending the release of someone who will commit a serious offence (see below, the “Evening [Paper] test”). Unlike magistrates, CPS officers can reassure themselves that they are not the final arbiters in the remand system and it is up to the magistrates to make or fail to make “brave” decisions. In this case, the CPS officer failed to take responsibility for his recommendation and because the bench were predisposed to accept his recommendation a man was remanded in custody, possibly unnecessarily.

#### c) ...To Challenge Bad Decisions

The CPS have the power to appeal magistrates’ bail decisions and have them reviewed in the crown court. Defendants remain in custody until the appeal has been heard. The CPS are expected to use this tool to fulfil further their remit of protecting the public when, in their view, a defendant could not be safely released on bail. Whilst magistrates are still considered to be the final arbiters between the CPS and defence representatives, all interviewees with legal qualifications applauded this change in the law as a

safeguard against bad decisions. They don’t, it isn’t often that magistrates make really bad decisions but sometimes you wonder what on earth was going through their heads. (male clerk)

I had one dreadful decision the other week. It was the worst decision I have ever had on a bail. I have only ever appealed a bail decision once and that was it... It was a car-jacking at gun-point, victims were a female and her boyfriend... The defence and I, as we do, we sat there. He almost reluctantly asked for bail, made a fairly good fist of it but no better than an average fist of it and was totally shocked himself to get bail. The defence brief turned to me, and they don’t often say this, turned to me and said, what a dreadful decision. Privately. ...Of course, the crown court remanded him in custody. (male CPS)

As was seen in Chapter Four, magistrates and others used the absence of CPS appeals as ‘evidence’ that magistrates were making good remand decisions. However, in interview the CPS said that they did not appeal every bad decision, only the “truly awful ones” (male CPS). CPS officers did not routinely use this power but reserved it for the most extreme examples of poor decision making.

This example is also a useful illustration that magistrates did occasionally make maverick decisions where the principle of offence seriousness was disregarded and/or CPS recommendations were not followed. Such decisions demonstrate the scope of magistrates' discretion. Rumgay (1995) points to the importance of situational factors (such as the disposition of individual characters on the bench). Also, Hucklesby (1994) noted that clerks in one court purposively selected which magistrates should sit on the same bench in order to ensure a balance of views. Chapter Seven further explores the influences on the production of decisions and illustrates that these surprising decisions are often explicable in terms of the social dynamics of the court.

#### d) ...To Protect Themselves

Both Hucklesby (1994b) and the present study found that CPS remand recommendations were not made simply on the basis of the case. If the remand court list contained a large number of overnight custody cases where the police requested remands in custody, the CPS in both studies reported applying the Bail Act tests more stringently than when there was only one or two potential remand in custody cases. CPS officers commented on their desire to protect their credibility in the eyes of the court and appearing to ask for too many custodial remands could damage this. Hucklesby (1994b) also found CPS officers anticipating district judge's decisions and tailoring their recommendations accordingly. Similarly, as has been seen, CPS lawyers explained one incentive to verify the information they offered to the court was to protect their reputation. As previously noted, three CPS lawyers expressed wider concerns about the personal and professional implications of making bail recommendations. One officer had coined the phrase "the Evening [Paper] test" to sum up his fears about what the press would say if he recommended bail for a serious offender who reoffended whilst on bail. Many remand decisions were fairly clear-cut but most criminal justice personnel agreed that there were occasional cases where "brave" decisions should rightfully be made. A CPS officer admitted that she was sometimes over-cautious in her recommendations not simply because of the fear of the defendant reoffending but also for fear of what would happen to her if the papers published the story. She preferred to leave these difficult decisions up the magistrates and protect herself by recommending custodial remand. As was seen above in Example 7.13 where a man was remanded in custody on a charge of rape, expecting the bench to make the 'right' decision regardless

of the CPS's recommendations can backfire because of magistrates' respect for CPS advice.

## **Defence Representatives' Responsibilities:**

It is the responsibility of defence advocates to represent their clients in bail hearings. Whilst many defendants on overnight custody were represented by their own solicitor, it was also common for the "duty solicitor" to represent overnight cases. The duty solicitor would be responsible for all unrepresented defendants on the court list who requested her help. In large courthouses such as those in Central and Inner District, a number of 'duties' were usually present each day. The differences between duty solicitors and the more peripatetic individual solicitor or barrister must be born in mind when analysing defence representatives' role in remand hearings. The duty solicitor commonly had a large number of cases and so may have been under pressure to process them (take instruction and make the bail application in court) more quickly than a representative who only had one or two clients. However, many of the peripatetic advocates were required to appear at more than one courthouse in a morning and consequently needed to get their case heard as early as possible. The duty solicitor was likely to appear regularly at the court for so she would have a greater familiarity with the court and its personnel. The potential value of having an established relationship with the bench is illustrated in the next chapter. Duty solicitors were unlikely to have had much, if any, previous contact with the clients they represented. This contrasted with individual advocates whose familiarity with their clients' histories, situation and temperament may have provided them with information which enabled them to make a more informed and thus more effective bail application.

### **a) ...To Get Their Client Bailed**

Carrying out their clients' instructions is the primary responsibility of defence lawyers. In the vast majority of cases this means trying to get their client bail; very occasionally a defendant would elect not to apply for bail. As will be seen later on, defence representatives did follow instructions and make convincing bail applications even when they believed the defendant should be remanded in custody. This professional obligation was usually taken very seriously.

In Example 7.10 the defence representative tried very hard and even misrepresented the support the defendant's mother was prepared to give to try and secure bail. This same

defence representative was observed outside the court after the hearing talking to the defendant's mother saying

To be honest I think she's better off inside. She's too much for you to cope with, isn't she? I'll try and get all the cases sentenced at once to get a big custodial sentence rather than lots of short ones so that she can get some drug rehab help whilst she's inside. (female defence representative)

From what she said, it appeared that the defence representative felt that her client was in fact better off in prison because of her drug problem. If this was true, she suppressed her own views on what she felt was the best thing for her client and for her client's mother and made a very determined attempt to get her bail. Defence representatives did apply for bail even if they felt their client should not be bailed. On the other hand, it may be that she was simply saying this to her client's mother because she had failed to get her bailed or that she changed her approach to her client's situation as a consequence of the remand decision.

As defendants are almost wholly dependent on their defence to represent them, the lawyer's commitment to protecting a client's interests is of paramount importance. In some cases defence lawyers worked very hard and secured bail against the odds. In others, the defence representations were inadequate and women who should have expected conditional bail actually were remanded in custody. One case observed at Inswick Corner illustrates the importance of defence representatives fulfilling their duty fully.

#### *Example 7.15*

Despite the fact that the defendant was appearing in court on six charges of theft and dishonesty and one charge of fail to appear, a reasonably strong bail application could have been made based on the fact that she was only 21 years old, had no previous convictions and had spent a night in police custody for the first time. Her defence representative addressed the district judge and said

I am not sure that I am in a position to make a reasonable bail application but perhaps you would like to hear the facts of the case first, Sir. (male defence representative)

In effect, the defence representative left it up to the district judge whether or not he wanted to hear a bail application; the defence lawyer made no attempt to represent his client. The male district judge did not request further information and she was remanded in custody for three weeks.

### b) ...To Advise Their Clients

Although not all clients listen, defence representatives felt a responsibility to offer advice on how best to proceed with the bail application. Hucklesby found that defence representatives sometimes advised their clients not to apply for bail. She explained this as defence representatives seeking to protect their credibility by not asking for bail if it was unlikely to be granted (Hucklesby 1997b). In the present study, recommendations not to apply for bail were explained more as tactical decisions that would benefit the client. For example, with more serious offences where the case was going to the crown court defence representatives sometimes advised their clients to “keep their powder dry” and wait to apply for bail at the crown court. This was good advice for two reasons, firstly it gave the defence a week to organise sureties or securities, to find a bail hostel place, to get character references, etc which would all contribute to a stronger bail application; and secondly, the defence representatives interviewed all felt that judges in crown courts were more likely to give bail than magistrates were<sup>30</sup>. The explanations offered for this included that crown court judges are professionals and are thus more confident in making complex or borderline decisions. Secondly, what appears to be a very serious offence in magistrates courts will appear much less serious in a crown court relative to the other cases appearing there. Consequently, judges are believed to be less likely to remand in custody based simply on the nature of the offence. Without having witnessed defence representatives taking instructions from their clients, it is impossible to know in how many cases the absence of a bail application stems from defence representatives’ recommendations or was the defendants’ own initiative.

### c) ...*Not To Apply For Bail*

There are cases when defence representatives felt a responsibility to a broader concept of justice or public protection and did not make a bail application. In cases where clients had mental health problems, defence representatives may not apply for bail even if their clients instructed them to because being released was not in their client’s best interests.

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<sup>30</sup> Crown courts deal with much more serious offences than magistrates’ courts so there are difficulties in comparing remand in custody rates as the nature of their case loads would alter the necessity of custodial remands. Even comparing decisions on the same defendant is problematic as many defendants in effect remand themselves into custody at magistrates’ courts by not making a bail application. Again, although the decision will be recorded in terms of the Bail Act exceptions to the presumption in favour of bail, the issues will not have been aired in court. The official reason cited will have little meaning beyond its fulfilment of an administrative procedure.

One defence barrister told me that on rare occasions in his career he had deliberately made a poor bail application because he did not think his client should be released. He acknowledged that this action breached his professional code of practice but said

I live in this community too. There are some people you just don't want to meet in the proverbial dark alleyway aren't there? (male defence representative)

He felt that these clients would have been remanded in custody anyway but he didn't want to "risk being too convincing." It should be noted that whilst defence representatives did acknowledge that poor bail applications were deliberately made, these incidents were few and far between.

d) ...To Be Truthful

Magistrates, clerks and the CPS all believed defence representatives had a responsibility to be truthful in their applications and should verify the information they put before the court. Three interviewees expressed strong doubts about whether or not defence representatives took their responsibilities as officers of the court quite as seriously as they should.

What I think are their [defence representatives] responsibilities and what they think are their responsibilities are quite different. The defence lawyers have become more Americanised, that is it's my duty to my client and not my duty to the court. My duty to the client is to do everything legal to prevent my client suffering the consequences of his or her actions rather than it's my duty to the court to present the facts regarding my client in the best possible light. Therefore more and more I listen to unsubstantiated suggestions about how well this or that client has behaved (male magistrate)

However, most commented that it was hard to generalise because there were good and bad defence representatives (as found by Hucklesby (1994b) too), just as there were good and bad CPS lawyers. Defence representatives themselves agreed that they would never lie to the court but argued that it was not always possible to verify information and they had to rely on what their clients told them at times. Defence solicitors in Hucklesby's (1994b) study also commented on the problems of verification,

Some defence solicitors said that they did not verify the information they received from the defendant. One solicitor, when asked, said 'No, in case

he's telling lies." Other solicitors said they verified information but explained that it was not always possible and that they only checked information by phone or from past files. Often solicitors verified information through the defendant's relatives especially concerning an address. (Hucklesby 1994b:278).

Eight interviewees spontaneously commented on defence representatives' use of body language and phrases such as "my client tells me that..." to communicate to the bench their own reservations about the veracity of the information they were putting before the court. This has been commented on previously in research studies (Baldwin and McConville 1977; Hucklesby 1994b; McConville, et al. 1994; Shapland 1981).

there are times when they repeat what their client has told them but you know perfectly well that they don't believe a word of it, they have ways of putting it over, 'my client tells me that...' is a bit different from 'I know that my client...'. So I think that that they have a responsibility to be as truthful as they can about the facts of their client's situation. They're not going to stand up in court and say 'my client has told me a pack of lies' but sometimes you know that they don't believe a certain amount of what they're told. So they've got a responsibility to be as truthful as they can while defending their client's right to freedom. (male magistrate)

You can't stand up there and swear black is white. You look a fool. And you can't tell the court your client is a bare-faced liar, even if it's obvious to everyone that he is. Instructions have, instructions should be followed but you need to do something when you know that you're peddling lies. (male defence representative)

#### e) ...To Protect Their Professional Reputation

Defence representatives were concerned with protecting their professional standing in the court. The above quotes illustrate the technique of using careful language to satisfy clients whilst still protecting their reputation for being trustworthy and respectful to the court that has also been found in other studies (Hucklesby 1996; McConville, et al. 1994; Shapland 1981).

Another example would be defence representatives not making a bail application when they feel it would be futile and a waste of the court's time. Defence lawyers argued that their reputation was a key tool of their trade and they had a responsibility to themselves and to their clients to protect it. It was felt by defence representatives that if they got a reputation for time-wasting or making frivolous applications, magistrates may be less accommodating to their requests for more time to take instructions or their bail

applications may carry less weight. Concern with protecting credibility has been found in other studies too (Hucklesby 1994b; McConville, et al. 1994; Shapland 1981).

Cases were observed where defence representatives retracted comments or approaches when it became clear that they could damage the defence representatives' reputations in the court.

#### *Example 7.16*

In a bail application at Castleford Road, the mixed bench were responding very sympathetically to the defence representations that her client had been in custody on remand for far longer than was normal. The defence representative went on to try to explain a failure to attend, saying that her client had phoned up the court to check the date but the court officer had been "rude" to her so she did not follow through with the enquiry and so did not know when to attend. At this point, the clerk took exception and interrupted the bail application to say

court staff work extremely hard and make every effort to be courteous and efficient and I object to your client defending her own failure to attend by attacking court staff.

The magistrates expressed their support for the clerk by nodding and through their approving facial expressions. The defence representative immediately back-pedalled and said

I apologise if I gave the impression that I was criticising court staff and I am sure my client did not intend to do so when she instructed me either. I have only ever found staff to be helpful and professional.

When the defence representative's regard in the court was threatened by association, she took measures to signal to the court her own support for court staff and to distance herself from her client and the instructions she had been asked to follow. The bail application, which had been interrupted by the clerk, was not resumed.

#### **Clerks' responsibilities:**

Clerks were widely perceived to be the neutral guarantors of the remand process. Their primary role was one of ensuring procedure is followed correctly and advising magistrates on matters of law. Their role varied considerably depending on whether they appeared with district judges or magistrates as the former, being legally qualified and very experienced, required little legal advice and were familiar with the procedure so the role of the clerk is to attend to administrative matters such as filling in bail forms or setting court dates etc. Lay magistrates relied on clerks to a much greater degree and clerks were observed to be actively engaged with managing court proceedings

(Darbyshire 1984; McLaughlin 1990). Despite evidence that they were clearly proactive participants in proceedings when lay benches sat, in interview they maintained that magistrates were the decision-makers, not the clerks. Whilst it is true that magistrates formally made the decisions, clerks were observed directing magistrates.

a) ...To Protect The Defendant

Clerks all felt they had an important role in protecting the rights of defendants, particularly when they did not have a legal representative. In such cases, clerks were observed spending some time persuading defendants to see the duty solicitor; this was also evident in Hucklesby's (1994b) study too.

*Example 7.17*

At Old Market Street a woman was on overnight custody for a number of offences including prostitution. The hearing was proceeding when the clerk pointed out that the defendant could not be charged as a known common prostitute because there were no previous offences of prostitution on her antecedents. On advice from her defence, she changed her plea from guilty to not guilty. As neither the CPS nor the defence representative had checked that the charges were correct, the clerk took responsibility for this.

When lay magistrates were sitting, clerks also seemed to feel that it was their responsibility to make sure that defendants understood what was happening at every stage of proceedings. When sitting with district judges, clerks tended to defer to their expertise and take more of a back-seat role.

b) ...To Ensure Procedure Is Correctly Carried Out

Allied to this concern for defendants' rights was a focus on ensuring that procedure was adhered to and the law was correctly carried out. Again, this role was felt more keenly when sitting with a lay bench than with district judges who were generally deferred to because of their legal knowledge and experience. One of Hucklesby's (1994b) respondents complained that clerks did not always act as guarantors of correct procedure and ensured magistrates considered only relevant mitigation

in [Court C] the magistrates' clerks rarely provide such advice with the result that irrelevant considerations are raised by the defence (Hucklesby 1994b:154).

One of the most common examples of clerks enforcing correct procedure that was observed was clerks telling lay magistrates that they had forgotten to give reasons and/or grounds for a remand in custody. At times, particularly when it was a weak

and/or inexperienced lay bench, clerks went beyond prompting magistrates and supplied the reasons and grounds themselves. The degree to which clerks are in fact active participants in the remand process is evident in the following example.

*Example 7.18*

A woman was remanded into custody by a mixed bench at Orrington Street. The bench failed to announced the grounds or reasons for the refusal of bail. The male clerk told the bench

You have not given your reasons. I anticipate that you will find the reasons to be risk of reoffending and failure to attend based on the nature and character of the offence and a history of failing to appear.

The clerk was observed filling out the reasons on the bail form even before the magistrates confirmed they agreed.

c) ...Not To Influence Magistrates' Decision-Making

The Justice of the Peace Act 1979 (s.528(3)) defines the role of clerks as providing advice "about law, practice or procedure" if requested to do so by magistrates or if they feel it necessary to alert magistrates to an issue. Clerks are not supposed to interfere with magistrates' decision making but previous research has found that clerks do, in fact, influence magistrates,

One striking conclusion from this research is that the role of the clerk in summary proceedings is far more important than seems to have been established previously. No longer can the behaviour of lay magistrates be examined without taking into account the behaviour of their clerks (Darbyshire 1984)

Clerks' formal and informal powers are important influences on remand decision making. Their role is significant,

not only in what they are seen to do (advising magistrates, administering courts), but also in what they are not seen to do (in giving advice in the retiring room, setting court lists, and training magistrates). (McLaughlin 1990:367).

Since the implementation of the Human Rights Act, clerks have had a more active role in the process by helping lay magistrates word the individualised reasons for refusing bail. A consequence of this additional role is a concern not to influence (and not to be seen to influence) magistrates' decision-making beyond prescribed boundaries. All the clerks were adamant in interview that the decisions should be the magistrates' decisions,

not theirs. However, clerks admitted there was a very fine line between providing legal advice on how to frame grounds for refusing bail and improperly influencing decisions. Even though they all said they had never improperly influenced magistrates' decisions, three admitted to using a particular phrase or body language to communicate approval or disapproval of decisions to magistrates, thus influencing decision making. The example below illustrates the use of these subtle techniques.

They often say to you 'we've decided to do this but what do you think? and then you, if you agree with it entirely you just say 'no problem' straight away and off they go but if you don't agree you can't just say 'well I don't agree with that'. I strongly suspect some of my colleagues do say that but you're not supposed to and I don't. I'll use the phrase 'that's legally correct.' I do say to them when they say 'you're not very happy about this' and I say 'what you're proposing is legally correct' and then I say 'however...'. And that often works actually. (male clerk)

This clerk admits to using a phrase in order to influence decisions even when they are "legally correct". His intention to alter the decision is evident when he says that his technique "works" i.e. it results in a different decision.

## Defendants' Responsibilities:

Whilst the role of the defendant in a remand hearing is very limited, they are an important group that are too often left out of the analysis of criminal justice processes. Defendants also make choices. They may be constrained or poorly informed choices, but they do impact on proceedings and must be included in any analysis. For example, research has found that black men plead not-guilty more often than other groups charged with comparable offences and this impacts on remand decisions (Hood 1992). Defendants have the right to be represented and, as discussed above, clerks made efforts to persuade unrepresented defendants to see the duty solicitor.

### a) ...To Be Actively Involved In The Process

A defendant's primary choice was whether or not to try and involve themselves further in the process through a) giving instruction rather than simply accepting the advice of their defence representative, and b) communicating directly with the magistrates. Some defendants did not instruct their representatives but simply took advice whilst others told them what they wanted said on their behalf. In particular situations defendants also determined whether or not a bail application is required: they decided whether they

want to be sentenced immediately rather than remanded for a PSR. As defendants rarely spoke in remand hearings, it was impossible to know how many had instructed their defence representatives and how many simply accepted their solicitor's advice.

In interview, two of the women on bail said that they knew women who had chosen not to apply for bail in order to access the drug detoxification support available in prison. In most of the observations, it was unknown whether the defendant was following her defence representative's advice or was choosing a remand in custody herself as the reasons for not applying for bail are never stated. However, two cases stood out where the defendants' motivations in their remand applications were evident and illustrated the essential need to include defendants' choices in any meaningful analysis of criminal justice processing and outcomes.

*Example 7.19*

A woman appearing on a charge of attempted theft chose not to make a bail application. At her second court appearance, her defence representative said she now wished to make a bail application and explained why no previous application had been made:

Her mother has sole care of her five children. She knows that if she is going to get her children back, she will have to become drug free. She is determined to do this and she instructed me not to make a bail application on her last appearance in court because she wanted to take advantage of what might be called the compulsory detoxification at [prison]. (female defence representative)

*Example 7.20*

A woman had deliberately caused a disturbance of the peace in an attempt to get herself remanded into custody so she could access psychiatric support. She had been released from prison a few days before and the community psychiatric team had not linked with her so she had no medication. She had tried to get support from hospitals but, for reasons that were not clear, it appeared that she was prevented from accessing immediate medical support in the community. She refused to make a plea and demanded to be remanded in custody. When it became evident that the court had no power to remand her in custody because the offence was so minor, she attempted to assault the warders in order to get herself charged with a more serious offence. She was a very small, frail woman and was easily restrained. In evident extreme distress she told the court she would assault the first person she saw on being released from the court. The court was clearly concerned and a great deal of court time was spent trying to access support for the woman but, as it was a Saturday, none could be found. The woman was released.

There are myriad questions about the appropriateness and effectiveness of using prison as a detoxification unit or a psychiatric support centre but, in infrequent cases, such

choices were observed in court. The cases illustrate that, on occasion, female defendants actively choose custodial remands for their own purposes which bore no relation to the officially recorded reasons for that decision.

Occasionally defendants were prepared to engage directly with their hearings. For example, they wrote letters for the bench to read or they spoke to the magistrates themselves.

I leave it to them [the defence representative] but obviously if I think of things like there's a few things I want them to say to put it clear to them then you know I'll tell them that. At the end of the day, I'll speak to the judge for myself. I know I need a solicitor but at the end of the day sometimes it's better coming from me what happened. (woman on conditional bail to bail hostel)

The words and behaviour of one woman appearing at Old Market Street (on charges of going equipped for theft and failing to surrender to court) may well have secured her bail had it not been realised that she was subject to another warrant and was designated 'not for release.'

#### *Example 7.21*

Bail was unlikely as she had previously been remanded in custody in these proceedings, then was arrested on a fail to attend warrant after being released on conditional bail. The defence representative made it clear that it was his client who had asked for the bail application to be made and admitted that "nothing has changed" in her circumstances that would warrant bail being given on a change of circumstances. The defendant had written a letter to the bench about "where she thinks she's at in terms of these [drugs] issues" (female magistrate). Despite her poor bail record, on reading the letter the bench made every effort to secure the defendant a place in a bail hostel, making it clear to the probation officer that they believed she had "turned over a new leaf". At this point unfortunately it became clear that she was not for release so the bail hostel was not an option.

Two CPS and four magistrates volunteered the information without being prompted by a question that hearing directly from defendants could benefit the defendant if they successfully challenged magistrates' views of them and encouraged the magistrates to have a more individualised approach to the defendant and the decision (see Chapter Five).

You see people sitting there and you form a view, you think 'oh dear, what a nasty looking bloke' and they sit there and the defence is doing the usual sort of defence thing, what they've got to say. It's what they've got to say, they've got to go through it all and fair enough. But it's what we've heard before, we've all us people in the court, heard it a thousand times before.

The only person who might bring something fresh is sat there and doesn't say anything. Every now and again you see it happen, something happens so the bench ask 'do you mind if we ask your client?' and the clients speaks so well that you think 'gosh!' and it just takes you back and if you're on the bench you think 'well I was quite struck by him or her and I think they might be worth a punt on bail here'...if they spoke well and they looked like they were sincere then suddenly the borderline bail decision goes in their favour. (male CPS)

However, in observed cases where women, themselves, did try to speak, their defence typically made efforts to keep them quiet. Defendant's evidence is regarded with suspicion when delivered by the defendant, but has more credibility when filtered through their defence representative (Shapland 1987). Whilst some magistrates did grant the defendant an opportunity to speak, the majority of magistrates dealing with this situation responded by attempting to keep the defendant quiet: they either expressed their irritation that the defendant was disrupting proceedings or they urged the defendant to speak through their representative in case they said something that harmed their application. This is an example of how magistrates must choose how to resolve the tension between respecting the rights of the defendant to speak for herself; protecting the defendant from self-incrimination; and the inclination to maintain correct courtroom procedure and decorum.

Defendants have very little influence over court proceedings as they are given a passive role by the structure and organisation of the remand system. Court dynamics are dominated by the interplay between the various professionals involved (magistrates, clerks, lawyers and sometimes probation officers) and defendants are rendered almost powerless by this.

Opportunities for defendants to involve themselves in the remand process were indeed observed to be very limited. That the majority only speak to confirm their name and address is a consistent finding in courtroom research. Hucklesby found that defendants were

rarely asked questions by the magistrates or asked if s/he had any comments to make (Hucklesby 1994b:303).

Although the accused are hardly distinguishable from one another, this group of men (and occasionally women) are the reason for the proceedings. For the most part, their role is a passive one and they are moved in and out of the prisoners box...frequently making repeat appearances over the course of the day (Kellough 1996:160).

[A defendant] would not be allowed to speak ‘for himself’ unless it was in the witness-box, and even then in guarded fashion. On the contrary. If he sought to speak from the dock, the judge might remind him, as one judge did remind a defendant, ‘You must keep silent and if you don’t remain silent I’ll send you down and I’ll think seriously about your bail.’ (Rock 1993:240).

Daly (1994) also found defendants rarely spoke in court and female defendants contributed on even fewer occasions than male defendants. Not only do defendants rarely speak, they are treated almost as if they are not present in court; they are receivers of, not significant participants in, the justice process.

Counsel had no sight of the defendant: their backs were to him, and they argued about him almost as if he were absent...A defendant would often be discussed as if he were not present. (Rock 1993:240).

Rather than being an active adversary, he sits there mute while the crown attorney and his own lawyer talk around him...treating him like a dependent child who is to be seen and not heard. (Ericson and Baranek 1982:181).

Although this thesis advocates placing defendants more centrally in studies of criminal justice processing, defendants were not observed to exert any influence over the social organisation of remand courts – though they were certainly affected by it. The observed professional monopoly on the nature interaction in courts swiftly discouraged and disempowered those defendants who do sought to challenge it by portraying them “as being either out of place, out of time, out of mind or out of order” (Carlen 1976:129). For example, in one hearing where a defendant repeatedly tried to insist on her need to be bailed for the sake of her children, the district judge ignored her but addressed her defence representative and said, “I am warning you that if your client continues to interrupt proceedings she will be found in contempt”. Despite the defendant’s attempts to assert herself, she was not acknowledged as a full participant in the process, even though she was the one most affected by it.

## Conclusion

This chapter has illustrated that remand decision making is a social process as well as a legal one, where outcomes are negotiated between all the participants, often with the exception of the defendant herself who was found to be largely excluded from the process by the conventions of professional interaction.

It has furthered our understanding of how and why inconsistent remand decisions are made. Firstly, notwithstanding the inherent ineffectiveness of regulatory structures and procedures in a system with high levels of formal and informal discretion, the demonstrably collective nature of remand decision making means that decisions cannot be regulated by requiring magistrates alone to adhere to certain standards and forms of decision making. For example, although it appeared that clerks' own professional codes of conduct did, in fact, largely prevent them from inappropriately determining remand outcomes, it was possible for them to directly influence magistrates' decision without any scrutiny, if they chose to. Similarly, it was observed that the ways in which CPS officers constructed and presented their own recommendations on remand varied. Whilst some gave carefully reasoned recommendations, others offered the facts to the magistrates and gave, what appeared to be, less considered recommendations. Given that magistrates are largely dependent on the court's lawyers for the information they use in their decision making, it is unsurprising that outcomes are inconsistent when those lawyers' information-giving practices are inconsistent.

Secondly, as demonstrated, participants had to constantly choose between a multiplicity of roles and responsibilities that all variously affect remand outcomes. An actor's choices about which of their roles to prioritise, and the subsequent nature of interaction with other participants, shaped the processing and resolution of remand cases. The roles that actors chose between reflected the conflicts between and within a range of influences including their professional responsibilities, such as a duty to represent a client; systemic/organisational influences both those general to the remand system, such as the inherent difficulties in securing sufficient verified information in the time available, and those specific to particular courts, such as localised shortages of probation officers to do PSRs and make referrals to bail hostels; and personal/professional concerns, such as the maintenance of reputation. Explaining a number of models for sentencing decision making, Shapland (1987) suggests the role that actors assume affects the information available to sentencers.

the final set of information and opinion presented to the sentencer will reflect not only which type of professional is involved but the viewpoint that that individual takes in intra-professional disputes about sentencing or the role the professional should play in it. (Shapland 1987:82).

This chapter demonstrated that an individual's 'viewpoint' or role did, indeed, influence decision outcomes. The selection of which role actors played was a product of the

interplay between the socio-political and organisational pressures, outlined in Chapter Four; which of the remand models applied, discussed in Chapters Five and Six; and the social dynamics of the courtroom. Given the complexity of the influences on remand decision makers, it is unsurprising that inconsistencies are evident between and within courts.

However, although the choices actors made, and the subsequent nature of the interaction between participants, was complex, it was not completely unpredictable and unstructured. The next chapter identifies and explains the nature of the underlying social structure in the courts in this study, and explores how this affected the ways in which actors chose to define their own, and others', roles and the consequences this had for remand outcomes.

# Chapter Eight

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## The Social Organisation Of Remand Hearings

The previous chapter showed that how actors defined and prioritised their own (and others') roles and responsibilities shaped the processing and outcomes of remand hearings. Previous research has also concluded that justice is negotiated and is consequent upon the social dynamics of the courtroom (Baldwin and McConville 1977). Whilst acknowledging the influence of structural constraints (Chapter Four) and the decision making framework (Chapters Five and Six) on how actors chose to define their roles, this chapter argues that courts' underlying social structures also framed how actors chose to conduct themselves in remand hearings. It is argued that the underlying nature of courts' social organisation can account for the persistent variation between courts' remand rates, that has been reported by other authors, because it encourages actors to fulfil certain roles, and not others. Distinctive and stable 'court cultures' were not evident in the courts studied. Actors' participation in remand hearings, and the subsequent remand outcomes, were found to be structured, instead, by the more fluid balance of conflict, collaboration and deference norms evident in the courts studied.

### Introduction

Many previous remand studies have commented on the variations found between the remand rates of different courts (e.g. see hearings (Bottomley 1970; Burrows, et al. 1994a; Doherty and East 1985; East and Doherty 1984; Hucklesby 1994b; King 1971; Zander 1971; Zander 1979)). Typically these variations are explained not only in terms of inputs (i.e. differences in the offence or offender characteristics) but also as a consequence of persistent and distinctive working practices, often referred to as 'court culture'. Jones (1985) analysed variation between custodial remand rates using official statistics. Notwithstanding the accepted fact that remand statistics from magistrates' courts are problematic (Home Office 2003a), he found strong evidence that, controlling for legally relevant factors,

considerable variation did exist between the areas in the overall proportions of defendants remanded in custody. (Jones 1985:117).

It was concluded that differences in court practice might explain this variation. Lydiate (1987) argued that the absence of statutory rules of procedure in bail hearings contributed to courts developing idiosyncratic practices. Brown et al (2004), Hucklesby (1994b; 1997a) and Paterson and Whittaker (1995) all found significant variation in courts' use of custodial remand that could not be wholly explained by differences in external factors, such as the nature and seriousness of a court's caseload. Instead, variation in remand outcomes in different courts is often explained by the impact internal court cultures have on the processing and, consequently, on the outcomes of cases. Hucklesby defined court culture as

a set of informal norms which are mediated through the working relationships of the various participants (Hucklesby 1997a:129).

The working relationships between participants in the remand process are central to the formation, perpetuation and nature of court cultures. Descriptive accounts of court cultures characteristically identify unusual or exaggerated dynamics in courtroom interaction and use this to account for the atypical remand outcomes a court produces. For example, Hucklesby (1997a) reported that one court had developed a reputation for being harsh and this was directly related to the practices of the stipendiary magistrate who usually heard remand applications. She found that the CPS and defence representatives both anticipated the views of this forthright magistrate and tailored their own contributions to bail hearings accordingly. Jones (1985) found that some courts were uncommonly influenced by police remand recommendations. Paterson and Whittaker (1995) reported that, in one court, sheriffs often challenged prosecutors to recommend custodial remands but this was rare in the other courts studied<sup>31</sup>. These examples show one group in the remand process exercising an unusual degree of influence over the other participants thus affecting the outcomes of remand hearings (usually, though not necessarily, resulting in an increased use of custodial remand).

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<sup>31</sup> This study was conducted in Scotland where the law prohibits sheriffs from remanding in custody unless the Procurator Fiscal has recommended it. The court where sheriffs often publicly criticised the prosecutors' decisions not to remand in custody, had a higher custodial remand rate than the other courts where sheriffs respected prosecutors' role in the remand process. This suggests that the sheriffs who were unusually pre-disposed towards custodial remands exercised influence over decisions that should have been made by the prosecutors alone.

In the following discussion of the nature of interaction and decision making in the courts, the defendants themselves are absent. As discussed in Chapter Seven, defendants had very little influence in remand hearings. Whilst they could, and did, exert some decision making authority at times in relation to their own hearing, observations revealed that they were incidental to the ways in which the courts' insiders, the professionals, related to each other. This chapter is concerned with interprofessional dynamics, consequently there is little discussion of defendants.

## Court Culture

If court culture operated within the courts studied we would expect to find general patterns in the choices that actors made. For example, any noticeable differences between courts in the degree of correspondence between CPS recommendations and magistrates' decisions may indicate a culture which encouraged unquestioning reliance on CPS recommendations and/or magistrates to prioritise the safety of the public over the rights of defendants. Unlike Hucklesby's (1994b) study, this research did not analyse substantial data sets so it was not possible to identify whether there were any significant differences between remand outcomes in the various courts which may have indicated the existence of a court culture. Too few cases were observed to find sufficient matched pairs of cases on which meaningful direct comparisons could be made. Where comparisons could be made between similar cases, it was unnecessary to explain any variation in the use of custodial remand in terms of court cultures as it could be accounted for by differences in offence seriousness and offender history. For example, Central District was renowned as a shopping area and many of the shoplifters processed by the courts there appeared to have travelled to the district with the express purpose of shoplifting and they typically had very extensive criminal records. In contrast, the shoplifters processed in Outer District tended to have lesser records and were usually stealing goods of lower value. That the former court remanded a greater number of shoplifters in custody than the latter reflected the differences in the nature of their case loads, not in their working practices.

Observation and interview data both suggested that whilst some of the courts could be characterised in very general terms (e.g. "Inswick Corner are a bit more formal than us" (male clerk), "Connorton Road is more organised, a bit more professional than Old Market Street" (male CPS)), none were identifiably harsher or more lenient, either in

observations or by reputation. All those interviewed, who had experience of more than one of the courts studied, believed that, excluding Orrington Street (see below), the differences between benches *within* a particular court were far greater than differences *between* courts. This is a significant problem for the 'court culture' rationale of variation in decision making: it is over-predictive.

The 'court culture' explanation however, cannot account for differences in the decisions made by magistrates working in the same court. (Dhami 2001:54).

One interviewee who had worked both as a clerk and a CPS solicitor said:

This is drawing on my range of experience, that in different [city] boroughs, you will see changes within particular benches, perhaps on days, whereas the pattern probably wouldn't be repeated between individual boroughs because I think benches, unless it's a particularly small bench, they are usually broad enough and draw from different types of people that you will get within a particular bench, you may have a tough Monday bench and a weak Wednesday bench, that's a stereotype, but overall there will be a variety of decision making and it may well even itself out and that's probably repeated from bench to bench throughout [the city] and probably beyond as well. (male CPS)

This evidence suggests that the courts studied, and others across the city, do not have particularly strong internal cultures.

Although the courts directly studied were not perceived to have different cultures, one additional magistrates' court, that was tangentially connected to the research, was reported to have a distinct culture. Once a week, Old Market Street was designated as a juvenile court and, consequently, no adult cases could be heard there. If any adult defendants had been held by the police on overnight custody in Outer District, their remand hearings were held in one courtroom in the courthouse of a neighbouring district. One courtroom in this courthouse, Orrington Street, was allocated to Outer District for the day and was completely staffed by the professionals who populated Old Market Street courthouse i.e. no personnel from the neighbouring district were involved in these weekly hearings. Consequently, proceedings and court dynamics in the Outer District courtroom at Orrington Street were the same as those held at Old Market Street itself.

The only difference between the courts was that, as the court at Orrington Street only heard overnight custody cases (i.e. it was rare for anyone to be bailed to appear in this courtroom), the courtroom typically had a far slower pace than those at Old Market Street. Firstly, on some days only a small number of overnight cases needed to be heard. Secondly, the administrative problems of working from a different courthouse, and the fact that all the cases were overnight custody cases, meant that proceedings were often delayed for up to two hours whilst the defence representatives took instructions from their clients, information was checked and files were retrieved, etc. As a result, it was easier to engage in discussions with court personnel there than in the busier courts in the study, partly because there was more time available and partly because the CPS officers, defence representatives, and list callers were often keen to engage in conversation to relieve the boredom of waiting for cases to be ready for court. Interaction with court actors was further aided by the fact that the courtroom itself was small so discussions could easily be held in conversational tones. Court staff and defence representatives were sometimes overheard discussing the personnel and practices of Orrington Street courthouse.

These observations revealed attitudes about Orrington Street courthouse which were later confirmed in interviews with Old Market Street staff, who worked there once a week, and with defence representatives whose clients also appeared in the Orrington Street courtrooms used by the neighbouring borough. Excepting the weekly overflow court from Old Market Street, Orrington Street magistrates' court was widely regarded as being

[P]ro-CPS and so is pro-custody. It's a safe, rather it's a safer bet getting custodial remand there than at Old Market Street. (female CPS).

[Y]ou know the odds are a bit stacked in [that] court. I wouldn't say it's unfair, just has an approach. (male defence solicitor)

In interview and in observations, other views about the culture of this court were expressed. For example, comments were made about the unusually low regard the court's lay magistrates typically had for the district judge. It was observed by interviewees that this was no reflection on the particular district judge, but was a consequence of the lay Bench's dislike of professional magistrates operating in 'their' courthouse.

At Orrington Street, if you say the district judge said this, then they would do exactly the opposite. Well, that's probably an exaggeration but very often it doesn't do to mention that the district judge has made a decision because then immediately it sets them sort of, there's this great sort of rivalry, well not rivalry but Orrington Street Bench don't much like the district judge because it upsets their rotas, basically... It's a very curious court. (male CPS)

In interview, two of the Old Street clerks and two CPS officers commented that clerks at this courthouse did not seem to be held in such high esteem as they were in Old Street and in other courts they had experience of. It was felt that the Bench regarded their own legal and procedural knowledge to be more than adequate, and treated clerks more as administrators than as qualified and experienced legal advisors. The data that was gathered on this court<sup>32</sup> suggested that it did have a court culture: distinctive working practices that affected the processing of remand cases and, consequently, remand outcomes.

The fact that many interviewees did identify the Orrington Street courthouse as having a distinct culture, and attributed differences in outcomes to this culture, indicates that they were not insensitive to the possibility of courts having distinguishable cultures. Their differentiation between Orrington Street and the other courts in the study substantiates observation data that suggested the courts in this study did not have distinct cultures of the kind evident in Orrington Street courthouse and in the work of other authors.

The distinctive nature of Orrington Street raised the question of why a court culture emerged in one court but not another. The CPS, clerks and defence representatives interviewed who were familiar with the courts attributed the distinctive and persistent working patterns in the Orrington Street courthouse to the unusual way in which the court's benches were organised. When magistrates were appointed to that court, they were permanently allocated to sit on a particular day. This fostered the development of unusually strong daily bench cultures.

I think the difficulty at [Orrington Street] certainly are that there are these certain people who always sit together and then they will always decide in a particular way...dare I say it, you know that if you come before a certain

<sup>32</sup> It is regrettable that this court was not fully included in the research as a comparison with the other, more uniform, courts in this study. The area was, in fact, originally incorporated in the study but delays with access to other courts meant there was insufficient time to undertake observations in four separate districts. With the benefit of hindsight, more effort would have been made to include this particular, and somewhat peculiar, Bench in the research.

bench there's not a hope in hell, basically....I've never understood it that you can have a Monday bench, Tuesday bench and so it goes on. And it even extends to, just before Christmas, we had an invitation saying 'the Thursday Bench invites you, whoever, to a little get together'. So, it's that sort of formalised. It's very strange and it ought not to happen. (male CPS)

A key element in the development of court culture is stable court workgroups which establish and maintain certain working practices (Eisenstein and Jacob 1977). Observations did confirm that the same people populated each individual courthouse. However, although to a large extent the personnel themselves were constant in the courts, the work groups they formed were not so stable. All the courthouses were large and very busy. Each contained a number of task-specialised courtrooms e.g. means hearings (enquiries into the financial situation of people who had been fined and setting the terms of repayment if difficulties had been encountered), remand courts, trials, etc. The remand courts all tended to be in constant use from the moment the courts opened and they frequently over-ran into the afternoon session. When this happened in Outer District, it was not unusual for a different lay bench to be presiding in the afternoon. In Central and Inner Districts, however, the same district judges were more commonly observed sitting in the morning and the afternoon. Court personnel would move between the courtrooms (and defence representatives would also move between the courthouses) as individuals and not in set groups. Whilst district judges tended to remain in the remand courts<sup>33</sup>, clerks, the CPS, probation and defence would move around each day. Lay magistrates worked part-time and were organised into a rota so they were very unlikely to regularly sit on a bench with the same colleagues.

At Old Market Street, as in all the courts, the district judge dominated proceedings when he sat, and the clerks took a more administrative role than they did with lay benches where clerks also advised on law. Although in Old Market Street it was always the same district judge presiding, his ability to instil distinctive working practices on the court was limited by the fact that he only sat half the time. When he wasn't sitting a lay bench presided and, typically, the clerks took a more central role, particularly if it was an inexperienced bench. However, sometimes strong bench chairs took control of proceedings and clerks had a slightly lesser role again. So, although the personnel were relatively stable, their relative power to direct proceedings altered according to the

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<sup>33</sup> "I think [district judges] choose remand courts because they think the work is more interesting. Also, and this is to be fair to the district judges, it can be very fast and furious in a remand court and if you're always having to consult with the three it doesn't go as smoothly and I think they undoubtedly handle them more efficiently than we do." female magistrate.

configuration of the court on a given day. In Central and Inner Districts, district judges presided over the vast majority of remand hearings. However, district judges only worked for short periods of some days or weeks at any one time. Again, the locus of power to establish working practices shifted. Constant, albeit limited, variation of potentially key individuals typified the staffing of the courtrooms and this restricted their influence on the development and nature of court culture.

So although individuals were recognisable to each other, and levels of interpersonal familiarity were observed to be quite high in many cases, the formation of solid and persistent work groups was not observed. This is a likely explanation for the lack of coherent court cultures: they were inhibited from developing because of the fluid nature of staff allocation. Unlike Lipetz's (1980) findings, the work groups that did form were not coherent or consistent enough to perpetuate a culture and regulate infractions when new participants joined them.

Although not discussing court culture, Skolnick's (1967) comments on cooperation and conflict in the adversarial system provide interesting support to the findings of this research. He observes that,

Participants in the criminal process generally recognize the guilty plea as an efficient means of adjusting limited court facilities to large numbers of criminal cases. Thus there might be thought to exist a positive relation between size of jurisdiction and guilty plea percentage. It turns out, however, that the pattern cannot be well expressed in terms of a correlation. Nevertheless, an examination of the scatter diagram suggests that the greater the size of the county, the less the variation in proportion of pleas of guilty. Small-size counties, that is, can have a very high proportion of their cases settled by the accused's plea of guilty, or a very low percentage, or can fall somewhere in between. When one observes the larger counties, however, their capacity to vary from one another seems reduced. These findings suggest that in smaller counties idiosyncratic relations between defence attorney, prosecutor, and judge are freer to assert themselves. In larger counties, however, similar structural conditions appear to impose similar restrictions on the parties. (Skolnick 1967:54).

The point is not developed in the article but Skolnick (1967) observed that courts which process fewer criminal cases are more prone to 'idiosyncratic relations' than busier courts. These findings echo those of the present study which also suggest that relations in busy courts are more routinised and less variable because individual cultures could not establish themselves.

However, to say these courts did not have distinctive cultures is not to say that the courts were without individual character. The courts did vary, for example in the physical layout of the courts and that impacted on the formality of the court and on participants' interaction (for the importance of physical space in courtrooms, see (Carlen 1983; Rock 1993; Stimson 1986) ). Individual sittings could possess very distinct natures and comments such as "the bench is very pro-bail today" were not unusual, but they did not seem to endure beyond the immediate situation; they were made and re-made at each sitting.

## The Adversarial System

It is argued here that in those courts where stable work groups did not form, and so idiosyncratic working practices were not established as routine, individual actors were consequently and necessarily involved in an on-going negotiation and re-negotiation of their relationship to other participants and of the nature of their role in remand hearings e.g. whether or not to challenge magistrates' decisions. Given this, the potential for variation and disorganisation in remand hearings seems great. In reality, remand hearings were observed to be far more routinised than might be expected both within and between courts, so the problem then becomes not to explain variation, but to identify and explain the underlying organisation of remand hearings. Following on from Rumgay's (1995) argument in relation to sentencing outcomes, remand decisions are understood here as manifestations of the dynamic balance between potentially unpredictable social interactions and the influence of the more established and enduring normative and legal frameworks within which they take place.

As we have seen, this research found that the legal framework was not rigidly adhered to but it did contribute to the nature of the primary decision making framework: the three models of remand. Whilst unpredictable decisions were occasionally made, the overwhelming majority of decisions were "pretty self-evident in terms of bail or custody" (female CPS officer). It was the cusp cases which were most vulnerable to inconsistent decision making as they were, by definition, not "self-evident". While the assertion that a decision was "self-evident" should be treated with caution, it is true to say that remand decisions took place within a framework which made outcomes fairly clear cut in most cases. For example, despite sometimes strongly argued bail applications, few violent offenders were expected to get bail and most were remanded

into custody. So, although the legal framework did not necessarily structure decision making, the informal framework, in part derived from the legal framework, did govern remand outcomes.

The second factor which Rumgay (1995) cited as exercising a regulatory influence on decision making was the normative framework of the court. Skolnick (1967) argued that the underlying structure of courts is based on conflict and he compared court dynamics to those of sporting events.

Underlying the sporting event, however, is the principle of conflict. Within the ethic of the institution it is understood that each fighter will attempt to throw his best punches, that each will strain to achieve victory. Otherwise, the fight is not considered genuine. *Procedure* is as important as *outcome*. (Skolnick 1967:52 original emphasis).

Courts are highly complex and unusual working environments because they contain a number of professional groups, all with conflicting aims and perspectives. Although magistrates have the formal power to take the final decision in remand hearings, they do not have the influence to determine the nature and purpose of interaction in remand hearings.

The criminal courts consist of separate institutions without a hierarchical system of control. There is no central authority. A judge cannot reward a clerk, a prosecutor or a public defender who performs well. The courts are not a central organization. Each of the courthouse regulars is a representative of a sponsoring organization, which in various ways monitors their activities, hires them, fires them, and rewards them. (Neubauer, D., 1998:99 cited in Rock 1993:132)

Within the courthouse could be discovered the representatives of a collection of notionally independent bodies whose relations were continually negotiated and often tenuous. (Rock 1993:132).

The paradox is that courts' adversarial proceedings actually foster cooperative working practices in order, for example, to speed up proceedings and for administrative ease (Ericson and Baranek 1982; Rock 1993; Skolnick 1967; Stimson 1986).

[T]he administrative requirements characterizing the American administration of criminal justice makes for a reciprocal relationship between prosecutor and defense attorney that strains towards cooperation. (Skolnick 1967:53).

Consequently, there is a tension in the adversarial system between maintaining the legitimising conflict and this documented drift towards cooperation.

The point is that all conflict systems share a similar problem of social control; that problem is conflict maintenance, or the control of tendencies toward cooperation. (Skolnick 1967:53).

Skolnick cites practices such as plea bargaining as evidence of the systemic pressures towards cooperative working. He illustrates how cooperation undermines the underlying principle of conflict in the adversarial system, which is dependent on each 'player' trying to win.

While the adversary system contemplates an aggressive defense, the "cooperative" systems alters the nature of the services that the defense attorney is capable of performing for his client. He may often act less as an advocate than as a "coach", preparing his client to meet the behavioural and attitudinal standards acceptable to criminal law officialdom.... Thus "cooperation" implies an understanding of the requirements of other functionaries in the system... and "rationality" or "reasonableness" suggests the *acceptance of prevailing assumptions*. (Skolnick 1967:62-63 emphasis added).

Where actors forfeit their obligation to fight their own corner, and instead participate in the remand system on the basis of 'prevailing assumptions' i.e. a common approach, the adversarial system no longer functions to balance conflicting needs and rights. Courts with strong internal cultures have clearer hierarchies, based around key individuals or professional groups who exercise unusual degrees of influence over interaction and decision making. Unusually high (or, occasionally, low) custodial remand rates in courts with distinct cultures are evidence of the detrimental affect of collaborative or deferential working practices in a system that is designed to be based on challenge and dispute. For example, professional participants and observers commented that magistrates' deference to CPS views in Orrington Street, and their resulting failure to challenge CPS recommendations, resulted in custodial remands being more common in this court.

It would be an exaggeration to say that all the courts in this study, except Orrington Street, always maintained adversarial relations, and displayed no signs of cooperative working practices that are based on common acceptance of 'prevailing assumptions'. However, the relations between professional groups in remand hearings were observed

to be largely structured around adversarial principles. The adversarial system is organised around challenge and each group of participants takes a particular position in relation to bail hearings. Thus, the CPS put the state's case, the defence representatives put the individual defendant's case, the clerks ensure that the law and proper procedure are observed, and magistrates are the final arbitrators between the disputing parties.

Of course, other factors did affect the interaction between the involved professionals at times (as explored in the next chapter), and lapses from these ideal-typical adversarial relations were observed. The reasons for the lapses in adversarial relations in the courts in this study are discussed in a later section.

In support of an adversarial conceptualisation of interaction in the courts in this study, it was observed that there were some distinct differences between professional interaction and remand decision making in this study's courts compared to others. In Hucklesby's (1994b) account of remand hearings, she argued that the majority of bail decisions were negotiated between the defence and the CPS prior to the magistrates sitting. When questioned on this, all the CPS and defence representatives in this study said that it was very unusual for them to 'bail bargain' prior to the hearing and, in fact, they rarely even discussed bail prior to the hearing. Dhami (2001) has also commented on the paucity of evidence that bail bargaining takes place. The conversations that they were observed to engage in in the remand court (prior to the magistrates sitting, during lulls in proceedings, etc.) were typically about procedural matters such as dates for hearings or disclosure of information. In contrast to the collaborative working practices recorded by Hucklesby (1994b), in this study the CPS, in particular, felt that it was not appropriate for them to usurp the magistrates' role in the remand process, which was to act as arbitrators between the CPS and the defence position. Even where there were common expectations about the probable outcome of a hearing because of, for example, offence seriousness (see Chapter Five), the CPS and defence still did not usually engage in discussions about acceptable bail conditions.

It's not a decision that should be made between prosecution and defence, it's a matter for the court. You do get some defence representatives try and resolve conditions with you before court, but I tell them that's not our job. It's the court's decision. (female CPS)

[Defence representatives] come up to me and say 'what are you saying about bail?' and they are very rarely going to agree with me unless it's one

of those where I've looked at it and said 'yes of course they are going to commit further offences but I'm not going to ask for custody in this' and then it's one of those when I say 'have you got an address?', or whatever conditions might be appropriate, rehearse them briefly and they are usually, because you are not opposing bail so you are making their life easier, they are usually happy to agree to your conditions....But I personally don't get in to this agreeing a bail package generally because that's the responsibility of the bench. If conditional bail as a principle is appropriate then it's up to them to find the right conditions not me.... If conditional bail is appropriate then you've got a lay bench there and defence who knows the personal circumstances, then we're in this situation where almost my role is gone. (male CPS)

Although this was the majority view, this was not, however, always the case and some CPS officers reported that they preferred to resolve cases prior to a hearing rather than 'fight it out' in the court.

My approach to it is, basically if they are remanded in custody and having made a decision as to whether I'm going to seek a remand in custody and the defence come to me, I'll tell them I'm going to seek a remand in custody but actually take instructions from your client and see what you can come up with and my view may alter on that. I think it's much better really if you can come to some sort of agreement over it rather than to fight it all out. (male cps)

A female CPS officer gave an additional reason for not agreeing bail terms with defence representatives, prior to a hearing in front of magistrates, which highlights the adversarial nature of interaction in the courts in this study. She said she did not want to be unprepared in case the defence representative did, in fact, appeal to the magistrates for different bail terms i.e. she did not trust defence representatives not to take advantage and go back on an informal arrangement. This is a good example of how the potential for challenge in the system can work to prevent inappropriate cooperative practices.

When working with lay magistrates, clerks were observed to take seriously their adversarial responsibility to ensure that the law and correct procedure were adhered to. It was noticed in observations that clerks publicly challenged lay magistrates on points of law and procedure. Even with senior magistrates who were very experienced, it was claimed in interview and observed in court, clerks would still object to magistrates' actions if they were incorrect or improper. However, it was also noticed in observations that clerks who were vocal, assertive and very engaged with proceedings when working with lay magistrates would be silent, deferential and never participate in proceedings,

unless explicitly asked to, when working with a district judge. This is further discussed below. Although there is no independent evidence of this, as no observations were made in the retiring room, clerks also reported in interview that they sometimes challenged magistrates' reasons for refusing bail. The salient point here is that even though magistrates have formal authority over a court, clerks were regularly observed challenging magistrates to ensure adherence to appropriate standards and they were never observed to allow lax practices by deferring to a lay bench. They did, however, routinely defer to district judges.

Hucklesby (1997b) found that magistrates usually followed CPS recommendations and concluded that "most magistrates place considerable faith in the recommendations put to them by the CPS" (Hucklesby 1997b:275). Hucklesby considered the CPS to be so influential that she reported the CPS to be the most influential people in the remand process.

Unlike the deferential relationship between the CPS and lay benches that Hucklesby found, the relationship between the two groups was more adversarial in this study. On the whole, lay magistrates were observed to approach their role in remand hearings conscientiously. Although some were predisposed to accept the truth of CPS officers' statements (see below), in interview the majority of magistrates defined their role in remand hearings as that of impartial arbiter, required to balance the evidence of the CPS and the defence representatives.

It has already been observed that the CPS felt it was inappropriate to try and supersede the decision making authority of the magistracy, and believed the final remand decision was the responsibility of the bench, not the CPS. In turn, magistrates reported an awareness that the CPS were arguing one side of a case, and so did not automatically feel obliged to concur with CPS recommendations, even though they accepted the factual truth of their arguments (see below). Magistrates were aware that CPS reasoning was, to some extent, partial.

From my point of view it's as simple as what the adversarial system does is the prosecution lays out all the information the court needs to understand what is alleged to have happened, puts the prosecution case at its highest, the defence does likewise and the bench is supposed to be able to find a balance in there somewhere. (female magistrate)

You've got to listen to both of them. You're not there either to support the CPS who sometimes make wildly draconian suggestions but equally you're not there just to be a social worker for the defendant. You've got to find some sensible balance. (male magistrate)

Their recommendations? Sometimes they're useful. Sometimes you get a CPS person who is very up front and they seem fairly fair. Other times, I suppose it's unfair to say they seem a bit vindictive or a bit over-zealous but, well, they are! (male magistrate)

This view was supported by all the clerks who, in interview, stated that they believed magistrates were not more influenced by the CPS than by defence representatives. As the clerks were ready to criticise magistrates on other points, it is believed that their assessment of magistrates' fairness is probably honest.

I think they do listen equally to both sides. They take their role very seriously, most of them. They do pay attention and they do give it due consideration. (female clerk)

On balance, I'd say they probably do give equal weight to the CPS and the defence. But again, a good one on either side will be more persuasive and then they'll probably get more of a hearing. (male clerk)

Magistrates were also observed to support defence representatives at the expense of CPS requests. For example, in four of the observed cases, magistrates warned the CPS that instructions would be written on the court file to the effect that if there were any more delays in proceedings, the case should be dismissed by the next bench. Magistrates were also routinely observed to repeatedly put cases back in order to give defence representatives more time to take instructions. On one occasion at Old Market Street, the bench refused to allow the CPS to start a remand hearing because they anticipated it could take some time and, as it was nearing lunchtime, they were concerned that the hearing might be rushed. To ensure the hearing was not pressured by time and the defence could be fully heard and considered, they put the hearing back.

Thus, it is argued that the persistent cooperative working practices evident in previous research were not apparent in this research. Relationships between professional participants in the remand process were, on the whole, structured by their designated formal roles in the adversarial system rather than on the basis of established idiosyncratic informal rules of interaction.

## The 'Non-Exercise' Of Power

It would, however, be a misrepresentation to argue that adversarial roles were always dutifully and fully adhered to. Although less routinised than in courts with strong cultures, it was apparent that some professionals in the remand system did sometimes relinquish the responsibilities of their roles to some extent. In the context of negotiated remand hearings, this can be understood as the 'non-exercise' of power because participants did not fully assert their influence over remand outcomes. Whilst at times the consequences of such actions could be unproblematic for all concerned, at others they were very damaging, particularly for the defendant – the least powerful and most dependent person in the remand system.

[D]eployed in an appropriate manner, the under-use of power constitutes 'the best' form of prison officer work...This best work consists of the diligent and skilled use of *discretion*. Used in the wrong way, the under-use of power can be regarded as lax, unprofessional and, at worst, as a form of 'conditioning' or omission of duty. (Liebling and Price 2003:78 original emphasis).

Two reasons for professionals failing to assume adversarial positions and, consequently, ceding power to each other have been extrapolated from court observations, and supported by interview data: individual reputation and professional reputation.

### Individual Reputation

If an individual was familiar to other court actors, this could provide them with a degree of influence which would upset the balance of the adversarial relationships. An individual's reputation could be a very powerful resource. For example, where defence representatives were personally known to the magistrates on the bench, they could overcome suspicions of their veracity and even convince magistrates to make 'risky' decisions. Again, because the work groups were not stable, these personalised interpersonal dynamics did not become entrenched in courts' interaction but emerged periodically when certain individuals, who were all familiar with each other, happened to be present at a hearing. The following is an example of reputation affording a particular individual the power to influence the choices made by others, and thus impact on remand outcomes.

### Example 8.1

In interview, a male clerk recounted the following story:

This particular solicitor was very regular and he became a stipendiary magistrate and he was sitting as a stipe in [one district] but he was still acting as a solicitor in private practice in [Outer District]. It was a bail application on a murder. He was representing and making a bail application for this guy charged with murder. When the bench retired to make their decision, now this is one where I didn't go out because we didn't go out in those days, the bench used to go out, come back and give their decision. While they were out, I said to him, 'now tell me, if you were sitting would you have given bail?' and he said 'absolutely no chance' he said 'absolutely no way would I give this man bail' and he'd just made a bail application and I said to him 'I guarantee you they'll give him bail'. He said 'yeah, they probably will.' And of course they did, they came in and gave him bail. Because he was a really good advocate, very good and he was the most well known local solicitor at the court and the bench knew him. And it was a good application but it shouldn't have got bail. It was his reputation. Now he would never have got bail if that had been someone who they didn't know making that bail application. He'd never have got bail. I'm convinced of that.

Similarly, where a CPS officer was particularly well known and respected by a bench, they may have been able to exercise a greater degree of influence over magistrates' decision making. However, in the present study, evidence was found that familiarity often resulted in less, not more, faith being placed in CPS recommendations. When asked about the role of the CPS, five magistrates spontaneously voiced the opinion whilst some CPS solicitors were excellent "we all groan when we see on the list that we've got [certain CPS officers] for the day" (female magistrate). The five magistrates who raised this issue did state, however, that they had greater reservations about these officers' *recommendations* which "seem to be plucked from nowhere, frankly, sometimes" (male magistrate). Familiarity with the officers meant that magistrates were sensitised to the question of officers' competence before they even came into court. Consequently, magistrates' familiarity with the individual CPS officers who sat in the court actually reduced particular officers' power to influence court decisions because magistrates anticipated poorly reasoned recommendations and having to be more proactive in the remand hearing. These individual officers' reputations meant they were not trusted to fully and adequately fulfil their role in the adversarial system, and other participants adapted their own role in response.

Equally, the ideal-typical balance of power in the adversarial system could be upset by defence representatives and CPS officers anticipating magistrates' likely views and tailoring their bail recommendations correspondingly. Such familiarity could explain

observed concordance between CPS and defence requests and magistrates' decisions. Hucklesby found that lawyers who were familiar with individual magistrate's standpoints would anticipate decision outcomes and adapt their requests accordingly. For example, if a court had a harsh reputation, the CPS would make more applications for remands in custody and defence solicitors, expecting bail applications to fail, advised their clients against applying (Hucklesby 1997a). They sought to protect their own reputations. This self-protective behaviour by defence representatives should also be framed in terms of the personal characteristics of the magistrate. For example, more defence representatives and CPS officers might be concerned about their reputation, and temper their bail applications accordingly, when in front of a magistrate known to be short tempered or have particularly strong views on remand<sup>34</sup>. Familiarity with others in the court afforded court personnel the knowledge of when they could risk arguing a case without damaging their credibility, and when they should not.

In Hucklesby's (1994) study, these anticipatory practices reinforced court cultures. In the current study, this aspect of court interaction was not found to be critical as the only group who felt confident in predicting magistrates' decisions were the clerks. A female clerk said that because she was familiar with them as individuals she felt able to predict magistrates' decisions

95% of the time. I say that not based on the merit of the application or the way it's put forward but on knowing the magistrates. Okay, I would say most of the time, say 80% of the time I could predict what they were going to do...They're just people. There are 150 people on the bench here, I could give you the names of three who would sell their own granny and remand her in custody without any hesitation. Equally I could give you three who wouldn't even consider remanding anyone in custody. (female clerk)

None of the CPS lawyers felt as confident as the clerks. Not being as familiar with individual lay magistrates, they perceived decision-making as unpredictable

Because of the differences in benches that I was talking about earlier, I personally can honestly say that I never sit there confident about bail decisions. Never, never. Which is why I carry in my jacket pocket a bail appeal form. I do, I carry one with me. The one I appealed [a violent car-

<sup>34</sup> Whilst the importance of factors such as 'charisma' in influencing the outcome of decisions is acknowledged, interpersonal characteristics of individual actors are not discussed in this thesis. It was not possible because of the broad focus on all participants in a number of different courts. In a more ethnographic study, it would be possible to explore the impact of individual personalities on other participants' actions and, consequently, on decision outcomes.

jacking at gun-point], I would never in a million years have thought a bench could give him bail, but they did. I can't tell. Maybe my colleagues can, I don't know, but I can't. (male CPS)

The often peripatetic defence solicitors felt even less able to predict magistrates' decisions and felt anticipatory practices were more likely to be based on daily assessments of the particular district judge or lay bench that was sitting. None of the four defence solicitors interviewed felt their preparedness to make an application was influenced by prior knowledge of magistrates. Two did, however, comment that they used their knowledge of an Inswick Corner district judge's addiction to smoking to protect themselves.

I have tried to jump the queue or bump myself off the queue to avoid the hour or so before lunch if she hasn't had a chance to rise all morning. In other words, if she hasn't had a fag for hours. She can be tough. I don't mean her decisions, I don't think I'd say she's harsher on the defendants. But, God, does she take it out on us! You must have seen her, she'll tear strips off advocates sometimes. (female defence representative)

When asked, none of the defence representative said they had ever advised a client against making a bail application because of the reputation of a district judge or panel. When prompted, all four said the main reason for advising a client against a bail application in the magistrates' courts was to not squander a bail application and "keep your powder dry". This was either to give the defence representative more time build a strong bail application (e.g. to find sureties or accommodation), or to save the application for the crown court where, three of the four defence representatives felt, the chances of a successful bail application would be greater as magistrates "tend not to be brave with serious offences" and refuse bail where a crown court judge may well grant it.

In sum, the actions or recommendations of CPS and defence representatives were adapted when they appeared before particularly well known magistrates and district judges and magistrates responded differently to lawyers with whom they were individual familiar. However, court personnel did not remain in any particular court long enough or regularly enough for such behaviours to be established as routine working practices. Thus, the unexercise of power that affected decision outcomes, and was observed to stem from knowledge of individual professionals involved in a hearing,

should be understood more as a situational factor (Rumgay 1995), rather than as an example of an established court culture.

## Professional Reputation

It was observed that some actors in the remand system appeared to feel it was unnecessary to fulfil their adversarial role when working with groups of professionals who were held in particular high regard. Consequently, the decision making power dynamics were unbalanced. Regarding the influence that consultants had over other professionals when making referrals to forensic psychiatric units, one consultant in Grounds et al's (2003) study commented,

I think you could direct it one way or another. I mean, I could...in quite an influential way, because of the position that I have, not because of *who* I am but of *what* I am, I suppose. (Grounds, et al. 2003:129 original emphasis).

In this scenario, it is not an individual's personal reputation that matters, but the esteem accorded to a particular profession as a whole. It is argued here that this is not evidence of court culture as the same professions were esteemed in all the courts studied, except for Orrington Street. In this study, clerks and district judges emerged as universally esteemed professions. Thus, it was observed that professional respect for district judges and clerks was inherent in the general culture of magistrates' courts and it was only in idiosyncratic Orrington Street that, in fact, both of these professions were held in unusually low regard.

In previous studies, prosecutors were a powerful group in the remand process and exercised a great deal of influence over magistrates (Bottomley 1970; Doherty and East 1985; Hucklesby 1994b; Jones 1985; Zander 1971), but this was less true in this study. Firstly, as discussed above, CPS officers were understood to be the state's representative in a remand hearing. This role encouraged magistrates to trust the veracity of their accounts - they did not regard the CPS as being personally involved in the cases and therefore had no reason to be less than honest.

The CPS are there, often with a lot of cases to get through, and I don't think they have the time or the inclination to get involved in cases, really. It's not like they've got a personal relationship with any, or any commitment to the, I think they process them as cases but defence represent individual clients.  
(female magistrate)

This did afford the CPS a degree of influence that defence representatives did not always have.

I don't think the CPS tell porkies, I don't think they need to but I think the defence will be quite happy to admit telling you something if they thought that might help get their way. (male magistrate)

However, the role also meant that they were commonly perceived by magistrates as presenting just one side of an argument, and it was magistrates' role to balance the CPS view with the defence view. Moreover, this inclination not to defer unquestioningly to CPS recommendations was fostered by magistrates' views on the professionalism of the CPS. Magistrates' attitude to the CPS is an interesting example of how resourcing can also impact on professional reputation and therefore on social dynamics in the courtroom. Amongst the magistrates interviewed, it was a commonly expressed opinion that, historically, the lawyers who had joined the CPS were not as talented as those who went into private practice where they could make more money.

The CPS have structural difficulties in the way that the whole organisation is set up and arranged. By definition they are going to be middle ability lawyers at best. Many of them are going to be part time lawyers and therefore they are not going to be as good as a full time professional defence lawyer. So, they start off from being probably of lower ability and lower commitment. Obviously it's generalising, there are a number of very good CPS lawyers and you tend to know who they are and when you look at the court listing and you see who is prosecuting you breathe a sign of relief and say this man or woman is actually going to know their job. (male magistrate)

I think if the file isn't properly brought together and if you've got a morning charges [i.e. remand] court with a lot of cases I think the CPS, if it's not a well documented file and the police have not done their bit in terms of verifying names, spellings of names, ensuring previous and things like that and have not got things like dates to avoid, all of which make it much less easy for the CPS to put up cogent reasons. The paperwork, the administration can be a huge barrier to them, the CPS and their recommendations, being valuable to the bench. (female magistrate)

I think the CPS have got enormous problems. I think the biggest problem with the CPS is the CPS itself. It, I have to say I've been quite appalled in recent years how poor sometimes the CPS is. It appears in court without the right papers, not having served the papers on the other side, you know, it's failed to get a DVLC readout for driving offences. They even appear in court with the wrong papers. You often get the defence saying 'my learned friend might like a copy of this' which has been sent to them but the CPS

just don't seem to have. The quality of some of the CPS prosecutors is also pretty patchy, being charitable there. (male magistrate)

Although the quality of CPS officers was seen by magistrates to be improving, it was felt that they were now also hindered by a lack of resources and by being overworked. Magistrates also felt frustrated that the shortage of CPS officers in the area meant agency officers often appeared as prosecutors in court (i.e. lawyers in private practice who acted as prosecutors when a permanent CPS lawyer was unavailable). Some agency officers were considered to be perfectly competent, although they were not expected to have the same level of experience as a permanent officer. Many other agency officers, however, were considered to be inept.

You get the measure of them pretty quickly, can they read a file and speak at the same time? Some can't! You can usually ascertain the facts but sometimes they're no more help than that (female magistrate).

In the courts in this study, the CPS were not a profession generally held in especially high regard by magistrates for a variety of reasons. Consequently, magistrates in this study's courts were probably more prepared to challenge the CPS than magistrates in courts where the CPS were documented to be more esteemed.

Clerks were observed, and reported in interview, to be highly respected by other professionals. As was seen in Chapter Five, following the Human Rights Act, clerks routinely joined magistrates when they retired to help them frame individualised reasons for refusing bail. It was also noted that clerks would be able to influence magistrates' remand decisions if they so desired. Given that retiring with the magistrates could afford clerks the opportunity to exercise this influence, one of the clerks interviewed registered his surprise that this procedure had never been challenged by a defence representative. He attributed the absence of any dispute to the trust that defence representatives had in clerks.

When asked, two CPS officers (male and female) both said they "trusted" clerks not to exercise undue influence in the retiring room as this would be overstepping their role. It could be argued that this trust resulted from the CPS officers knowing the individual clerks in the local courts. However, defence representatives' trust could not be based on such personal knowledge as they worked in courts all over the city. This study found

clerks to be universally trusted by all other court actors. There is no suggestion of any impropriety in the behaviour of the clerks in this study, but such comprehensive trust in a profession could potentially obscure individuals' misconduct by preventing the checks and balances of the adversarial system taking place.

The second group that was commonly deferred to without challenge was district judges. Although a district judge and a panel of lay magistrates have the same formal powers, district judges were generally regarded as superior because of their expertise. In this research, district judges were universally perceived to make better decisions and this was explained in terms of their legal expertise and their greater experience. All of the defence representatives and all the clerks interviewed felt that defence representatives could more easily "run rings around" or "pull the wool over the eyes" of a lay bench than a district judge. This was explained in terms of experience: a lay magistrate is only required to sit 26 times a year and, in Central and Inner Districts, would only rarely sit in a remand court<sup>35</sup>. Consequently, defence representatives had much greater success in persuading a lay bench to accept their mitigation. A male clerk explained:

It's not that they're [the lay bench] softer [than the district judge], it's that they don't have that experience to know when it's genuine or not. If you're in court every day like me, you get a sixth sense, you know when to trust people. Our district judge has got it, but he would, he's an excellent magistrate, very experienced. (male clerk)

The respect invested in district judges' professionalism meant that even where they behaved inappropriately or arbitrarily, they were not challenged. Other participants routinely deferred to district judges which meant that they were afforded even greater power to determine remand decisions than their formal authority actually conferred. In the observations, clerks were never observed to challenge district judges except on matters of fact e.g. the number of previous convictions. In Example 7.4, when the district judge remanded the defendant in prison, refusing to hear a bail application from the defence, the clerk did not comment even though the clerk would clearly have been cognisant that the defendant's rights were being neglected. Some district judges routinely failed to give the reasons for a remand in custody and this was never observed to be challenged by clerks. In contrast, clerks would regularly point out such omissions

<sup>35</sup> "When you start, even in my first five years, half the time I probably didn't know what was going on and certainly at Ipswich Corner where we have seven court rooms, though we don't usually use all seven, you can go for very long periods without being in a remand court" (female magistrate).

if lay magistrates were sitting. Clerks' role, and their own perceptions of their responsibilities, altered depending on whether they were working with district judges or lay magistrates. Clerks always deferred to district judges, assuming a more administrative role. When working with lay magistrates, who do not have district judges' legal experience and expertise, clerks assumed the far more assertive role of legal advisor as well as administrator.

The views of someone from a respected profession could, at times, also be used by others as resources to influence remand decision making. One clerk and two CPS officers reported using district judges' authority vicariously: when a lay bench was hearing a second bail application and the clerk/CPS feared they would grant bail, they would make a point of informing the bench when the initial bail decision was made by a district judge. This would ensure that the magistrates refused bail as they deferred to the district judge's decision. Similarly, if a defence representative could offer the view of an expert and respected professional, magistrates would usually defer to it, even against their own judgement at times.

#### *Example 8.2*

An 18 year-old woman appeared on overnight custody at Orrington Street charged with robbery. Force was used and the victim was 13 years old. Bail was opposed by the CPS. The CPS told the court that the defendant was on bail for five other robberies and the current offence was committed on bail. A crown court judge had given her bail to attend a drug rehabilitation centre but she had not been attending. This information was supplied to the CPS by a police officer who attended court. Although she was eventually remanded in custody, the female bench were clearly discussing granting bail. Given the nature and number of the offences, it was highly unusual for the magistrates to even consider bail; the most likely explanation is that they were unsure if they should remand in custody because a senior authority (the crown court judge) had already granted bail. It is evident that they struggled with the decision to remand in custody as they spent an unusually long time on this hearing (47 minutes), asked numerous questions about whether the judge had had access to the same information as they did, and also took evidence from the police officer who attended court on this case.

#### *Example 8.3*

A woman was appearing before a male district judge at Inswick Corner charged with breach of bail as she had absconded from a bail hostel. The bail hostel staff requested that she be bailed back to the hostel. The district judge voiced his opinion that they had made the wrong decision and judged her likely to abscond again. However, he did bail her, saying "it's not for me to question their judgement, they know more about running a bail hostel than I do." On no occasion was a magistrate observed refusing to bail to a hostel if the hostel staff had accepted the referral.

## Conclusion

This chapter sought to further develop an understanding of patterns of decision making in remand hearings by identifying the nature of the underlying normative framework in the courts in this study. It was argued that actors' choices about how they conducted remand hearings (how they resolved their roles and responsibilities and how they related to other participants) were largely determined by three factors: firstly, the framework of what a particular remand decision was 'for' (i.e. the three models discussed in Chapters Five and Six); secondly, unpredictable situational factors (Rumgay 1995), such as a charismatic, and thus persuasive, defence representative; and, thirdly, the nature of the normative structure of interaction in the courts studied. This chapter focused on the latter. It was argued that the social rules of interaction made it more or less likely that an individual would behave in a certain way, and thus affect the processing and outcome of a remand hearing. If a particular individual or group had disproportionate influence in a court, they would have the power to affect how that court collectively resolved remand hearings.

'Court culture' has been advanced by other authors to explain patterns of interaction in particular magistrates' courts. It was argued in this chapter that the concept did not explain behaviour in the courts in this study because their organisational structure prevented stable work groups forming, thus preventing idiosyncratic and informal working practices from becoming established. Instead, it was observed that professionals routinely conducted themselves, and related to each other, through their ascribed roles in the adversarial system i.e. CPS officers represented the interests of the state, defence representatives represented the interests of the defendant, clerks ensured correct legal procedure was followed, and magistrates were the final arbiters between the competing viewpoints. Defendants had no impact on courts' interaction. Where they did seek to assert themselves, they were swiftly disempowered by courtroom professionals and by the structures and procedures of the magistrates' court.

It was reported that, in the absence of established informal working practices, the majority of social interaction was structured by these ideal-typical adversarial roles. However, it was also observed that, in certain circumstances, adversarial relations were forsaken. Certain individuals familiar to, and respected by, the court could exercise unusual degrees of influence, as could certain professions, i.e. clerks and district judges, who were treated with deference by the other participants and were rarely challenged

even where they self-evidently behaved inappropriately, and at times illegally. This absence of challenge meant that they had disproportionate power to influence remand proceedings and, as a result, remand outcomes. It was argued that the 'non-exercise' of power evident in this interaction did not result in established idiosyncratic working practices, a court culture, because the organisational fluidity of courts' staffing prevented stable work groups from forming.

There was some limited evidence of cooperative working practices in the courts studied. On occasion, defence representatives, the CPS and magistrates would agree a course of action to overcome problems. Most commonly, this occurred when a remand decision was being made to satisfy the organisational and information needs of the criminal justice process itself (see Model Three in Chapter Five). Although this could be argued to be an example of 'best practice' in the exercise of discretion (Liebling and Price 2003) because it secured a common aim quickly, the fact that defence representatives participated in these cooperative practices was of some concern. In these cases it was not uncommon for defendants to be remanded in custody for additional periods of time, something which was unlikely to be in their best interests. Whilst such practices may make administrative sense, there is a danger that any drift towards cooperative working practices between professionals leaves the defendant, the least powerful person in the remand hearing, even more vulnerable, and their interests inadequately represented or even overlooked.

# Chapter Nine

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## Conclusion

This chapter explores what this thesis contributes to our understanding of remand decision making. It discusses the theoretical framework adopted for analysis and the research questions set out in Chapter One in light of the main findings from the research. Later sections look at the policy implications of the work, and identify areas for future research.

### Introduction

This thesis began by commenting on the rapid expansion of the female custodial remand population and observing that we know too little about how and why courts make remand decisions to be able to explain this increase. This research used in-depth analysis of decision making in magistrates' courts in three metropolitan districts to try to remedy our lack of knowledge on this subject. The focus was on women at risk of a custodial remand as we have no specific research data on women and remand. We cannot simply extrapolate from men's experience of the remand system as the evidence that does exist suggests that the treatment of men and women varies. Quantitative data demonstrate that trends in the female custodial remand population differ from those in the male population, with the female custodial remand population being one of the fastest growing groups in the prison system. Whilst statistical data indicate that there are important issues to explore, it is difficult to make sense of these developments as there has been virtually no qualitative work on this subject so we do not know how and why women are (with increasing frequency) being remanded in custody.

The primary aim of this research was to address our current lack of knowledge on how and why courts remand women in custody. This question is explored through an examination of four interrelated issues: the relationship between the legal framework and actual remand practice; the nature of courts' social dynamics and their impact on decision making; the reasons why women are remanded in custody; and why the

number of women remanded in custody is increasing. The thesis also sought to address the broader theoretical question of how to conceptualise and explain decision making within the complex environment of a criminal justice organisation i.e. magistrates' courts. In tackling these questions, the research adopted qualitative research methodologies. Of particular note are the case vignettes which were successfully used to test emerging theories and elicit data that could not be obtained using other research techniques.

## Theorising Remand Decision Making

This thesis has focused on remand decisions made about female defendants, but some of its findings on the nature of decision making in the remand system may equally apply to men. For example, the strategic choice that clerks and others make in deferring to district judges is evident in hearings for both men and women. This first section will discuss the broad contribution this thesis makes to our understanding of remand decision making. The following four sections address the more specific research questions in light of the research findings.

This research has established that remand decision making is subject to a number of different interacting influences. We need to adopt a conceptual approach which incorporates a series of theoretical insights in order to fully comprehend the nature of remand decision making. In sum, remand outcomes are produced by the application of three models of remand decision making (loosely based on the law and organised according to offence seriousness, individual assessment and case processing needs) in the social and organisational environment of magistrates' courts. The remand system as a whole is located within a socio-political context which can also exert influence on how and why remand decisions are made.

The legal framework did provide an overall structure for remand decision making, and key principles, such as the right to bail, were evidently embedded in magistrates' approach to remand. However, formal and informal discretion resulted in the legal framework being adapted to suit the rationales of the different models – the same criteria were used in different ways depending on the aims and objectives of any given model. It was evident that a one-dimensional assessment based on the seriousness of the offence category informed the majority of remand decisions. Even where the evidence

of the case or the actual nature of the offence suggested the opposite course of action would be appropriate, decisions were still primarily made on the basis of the offence category. It was clear from the data that offence seriousness was the primary rationale for bail decisions and law was differentially applied depending on the seriousness of the offence. It has been observed in previous research that offence seriousness is extremely important in explaining patterns of remand decisions and that factors such as age, race, gender, etc. are not primary determinants of remand decisions. However, this research found that different types of cases were processed differently and thus the importance of particular decision making cues varied according to the nature of the case.

In cusp cases offence seriousness was not the primary determinant because, by definition, the cases were on the borderline of offence seriousness. Where offence seriousness was not easily classified, it was evident that the personal characteristics of the defendant became far more important in case resolution. Moral assessments of defendants were, in this study, found to be closely linked to conventional gender roles and expectations.

Although fairly robust and predictable, the application of these models to remand decisions varied. Firstly, it was evident that the production of remand decisions was a social process. Whether and how models were applied in particular cases was affected by actors' choices about how they defined their own roles and responsibilities in the system, and how they negotiated with other participants in the remand hearing. These choices, in turn, were influenced by the underlying normative framework of social interaction in court – for example, whether typified by cooperation or conflict, whether idiosyncratic or consistent with other courts. Secondly, organisational factors such as the lack of resources influenced participants' expectations about how it was possible to resolve cases, for example a shortage of probation officers may have meant fewer PSRs were requested.

Although the data from this research cannot demonstrate this, it has also been suggested that, over time, structural influences (such as socio-political debates or changes in the law) may act upon the models to change how certain offences and/or defendants are perceived and categorised, and thus change how they are processed. It is suggested that magistrates' courts are adopting harsher sentencing practices and remand decisions which take place in this environment reflect the greater propensity to make custodial

decisions. Historical research exploring which categories magistrates allocated particular offences to may help to illuminate this point.

There is no deterministic relationship between these different levels of influence. For example, changes in the legal framework could alter the models either through direct restrictions on the use of discretion (e.g. magistrates altered their approach to first time burglars following the Lord Chief Justice's advice, see Chapter Four) or, perhaps, through altering perceptions about the general rationale for custodial remands. However, it was evident from the failure of the regulatory mechanisms that the legal framework could also be disregarded by decision makers who exercised a great deal of formal and informal discretion in how they constructed and resolved remand cases. The different levels interact with each other, individually and collectively generating the structures and processes which govern remand decision making. It is suggested that where laws or legal advice are precisely framed and specific (as with the initial advice on remanding burglars), they are more likely to alter behaviour. However, the nature of the remand decision (the pressure on time, problems with securing verified information, the multiple official and unofficial purposes it serves, etc.) means that the majority of decisions cannot be legally circumscribed so precisely, and the exercise of discretion is essential and unavoidable.

It should be noted that the relative importance of decision making cues can also vary with the nature of the court. For example, both Hucklesby (1994b) and Rungay (1995) found that decision outcomes were influenced by whether or not a defendant was local to the area. Perhaps reflecting the nature of the courts and the city environment, magistrates in this research did not appear to incorporate this factor into decision making. Defence representatives commented that as Crown Courts' case loads consisted of graver offences, they were more prepared to grant bail in cases which magistrates automatically remanded in custody because, in comparison to the bulk of cases in magistrates' courts, the offences were perceived to be too serious for bail. It may be that magistrates' courts which serve areas where case loads consist of more or less serious offences would also be found to have different thresholds for the use of custody.

Whilst the nature of the court can clearly be important, this study, in fact, found there was unexpected consistency in the culture and working practices of the different courts. Previous research has shown that courts' working practices can vary and this affects

remand processing and outcomes. The professionals interviewed in this study, who had experience of multiple courts in the city, stated that there was more variation within courts than between courts and this was also noted during observations. The daily culture of a court did vary according to situational factors such as the composition of the particular bench. However, these emergent cultures did not become embedded in the courts in this study as work groups were not stable enough for particular working practices to take hold. Interaction in courts was found to be structured more by formal adversarial relationships than by idiosyncratic inter-professional dynamics. It was, however, observed that professionals in these courts did sometimes fail to adhere to their formal roles and responsibilities, and arbitrary and unexpected decisions were the result.

Previous studies have sought to establish which group of participants in the remand process was the most influential, for example many have commented that magistrates defer to police and/or CPS recommendations. Importantly, as Jones (1985) points out, the relative influence of any group varies depending on the working practices of a court. This research has demonstrated that it is necessary to understand the social organisation and working practices of a court in order to understand the origins of the relative influence of different groups. For example, the unusual way that benches were organised at Orrington Street fostered a self-confident and assertive Bench which adopted an identifiable and persistent approach to remand cases which reportedly favoured the CPS and so tended to result in an increased use of custodial remand. Although statistical data can reveal differences in remand rates between courts, they tell us little about the dynamics of decision making. Thus, a high use of custodial remand might indicate a Bench deferential to the CPS's pro-custody recommendations, or it might be a product of the CPS and/or defence representatives anticipating magistrates' decisions and adapting their contributions to remand hearings in light of a predictably pro-custody Bench. Whilst the outcome in each example is a higher custodial remand rate, the dynamics of the process differ. Any measure to reduce the use of custodial remand would need to be tailored to the normative structure of each court if it was to be successful.

This research has demonstrated that analysis of decision making within a complex criminal justice organisation, such as a magistrates' court, needs to adopt a multi-layered approach if it is to capture and make sense of the complex influences on the

process. An integrated model of decision making allows us to explain outcomes in individual cases as well as any general patterns in decision making. Analysis which focuses solely on either the legal framework, political and economic factors, court culture, or offence/defendant characteristics will provide only a partial explanation of the production of remand decisions. This chapter will now address the specific research questions in more detail in light of the empirical findings from this thesis.

## The Relationship Between the Legal Framework And Remand Practice

An important finding of this research has been that the high degree of formal and informal discretion evident in remand decision making permitted significant variations in the way that remand law was applied. The use of bail law varied depending on rationale of the three models: the first model identified the importance of offence seriousness; the second was individualised decision making influenced by moral assessments of defendants; and the third was based on the administrative needs of the justice system. The research illustrated that the impact of the legal framework on working practices was limited; legal rules were sometimes followed, sometimes flouted, and frequently circumvented. It is possible that subsequent guidance and legislative amendments to the Bail Act have undermined the clarity of the principles contained in the Bail Act, and the variable adherence to the legal framework that was observed in this research reflects magistrates' attempts to make decisions within this more confused situation.

This research sought to identify and explain the underlying reasons for remand decisions rather than simply accepting that the legal criteria for refusing bail corresponded unproblematically to participants' actual reasons. An important finding was that the formal reasons cited in court for remanding a defendant in custody were sometimes only tenuously connected to the real reasons. In such cases, the formal reasons given in court were *ex post facto* accounts required by systems designed to ensure accountability, but were not a record of the actual rationale for a custodial remand. Even where decisions were based on the Bail Act exceptions, this research found that the citing of reasons was erratic: sometimes reasons and/or grounds for decisions were not given, illegitimate reasons were given (i.e. bail was refused because of the nature of the offence), and reasons given at different hearings, although based on

the same information, were inconsistent. It is clear that formal accounts of remand decisions should not be accepted as unproblematic records of magistrates' remand reasoning. This finding presents problems for future research on remand decision making as it undermines the validity and reliability of one aspect of remand records: although the *fact* of a custodial remand would not be in dispute, the *meaning* or purpose of that decision could not be established from records of the official reasons. As was seen in Chapter Four, some participants in the process themselves admitted that the reasons given in court could conceal rather than illuminate magistrates' decision making criteria. Consequently, it is suggested here that further directives to magistrates to give full reasons and grounds for refusing bail will do little to improve accountability in the remand system as it is currently organised.

It was found that bail law actually has the effect of limiting the extent to which magistrates could be honest about the real reasons for some custodial remands as only certain reasons are officially acceptable. This study identified other reasons, not contained in the Bail Act 1976, which formed the basis of remand decision making but which were usually concealed behind the requirement to cite one of the official exceptions to the right to bail. However, this research, reflecting Hucklesby's (1994b) findings, observed that magistrates have actually adopted one of the Bail Act *grounds* for refusing bail (offence seriousness) as a *reason* in itself. Although a custodial remand cannot officially be justified solely by the nature of the offence, offence seriousness was offered as a reason for custodial remands and this was found not to be challenged by other participants in the remand process. "The nature and seriousness of the offence" is an acceptable ground when used, for example, as supporting evidence for refusing bail because of risk of failing to appear (as the likely sentence might encourage the defendant to abscond) but is not a formal reason in itself. It appears to have been accepted, however, as an informal reason, and the fact that it is established amongst all practitioners is demonstrated by the fact that it is rarely challenged by defence representatives or clerks. This is a clear illustration of how remand decisions are organised by the three models and the adherence to the legal framework is adapted accordingly.

Previous studies have criticised observed deviations from the formal legal framework and criteria for decision making. For example, most studies comment on the lack of information provided in some cases and call for more thorough remand hearings

hearings (Bottomley 1970; Burrows, et al. 1994a; Doherty and East 1985; East and Doherty 1984; Hucklesby 1994b; King 1971; Zander 1971; Zander 1979). What these studies miss, because of their focus on the legal framework, is that whilst additional information might seem desirable, it would, in many cases, make little or no difference to whether or not a defendant was remanded in custody. This is because case outcomes are not typically based on a convincing and extensive argument about the legalities of a defendant's situation. This research found that the resolution of the vast majority of cases needed little debate as they were 'taken for granted' or 'axiomatic' (Hawkins 2002). Such cases did not require the remand process to be played out in full as the outcome was organised around issues that were not formalised in bail law, but were known and appeared to be accepted by the majority of participants. These informal, but widely accepted, procedural rules were observed to override formal legal rules. This loose interpretation of bail law clearly illustrates that decision makers operated with a wide degree of discretion.

As the aim of the thesis was to identify and explain actual decision making practices, rather than simply measuring the extent of divergence from formally sanctioned practice, it was important to develop an understanding of what characteristics made a case 'self evident'. This research found that remand law was routinely ignored but the majority of remand decision making was not idiosyncratic or haphazard. On the contrary, it was highly regulated and organised around the informal rules of the three remand models. These informal rules of the remand system were evident in the routine working practices of the magistrates' court.

The first and most obvious example of routinised practice that dispensed with some aspect of the legal framework was the common decision *not* to apply bail law. As explored in the first model of remand decision making, if an offence was unlikely to attract a custodial sentence, the defendant would not be remanded in custody. At the opposite end of the scale, the working rule was that if an offence involved violence against the person, the defendant would be remanded in custody. These practice rules persisted even when legal criteria that suggested the opposite course of action should be taken. For example, with non-serious offences, even when magistrates anticipated that a defendant would break the law, they rejected the powers afforded to them by bail law and instead applied practice-based rules that discouraged the use of custody in such cases.

Whilst the majority of remand decisions were axiomatic because they were based on offence seriousness, some cases could not be easily categorised and thus required more involved and individualised decision making practices: the cusp cases. These were the cases which required a full discussion based on comprehensive information and so, typically, these were the cases that took longest to resolve. A later section will discuss the gendered aspect of decision making in cusp cases more fully. In this section, it is simply observed that this research found three practice-based models of remand decision making that were structured by offence seriousness, moral assessments of defendants, and case processing needs. Instead of shaping practice, the legal framework appeared, in fact, to be a resource that was selectively drawn upon to suit the rationale of each model.

In other studies of remand, it has been argued either that the degree of correspondence between, for example, CPS officers and magistrates illustrates that magistrates defer to CPS officers or that the prosecution anticipates the decisions of magistrates and adjusts recommendations accordingly. This research questions whether we need to explain correspondence in decision making through the influence that one group exerts over another. It is argued that in the majority of remand hearings, the decision outcome is “self evident”. That little information is supplied and levels of agreement are high does not demonstrate one group is deferring to another, it illustrates that there is a clear framework of how cases should be resolved i.e. the three models of remand. There appeared to be a high degree of consensus about which category a case fell into and so, subsequently, there was also agreement about how a case should be processed. This was evident, for example, in cases where a custodial remand was inevitable because of offence seriousness but a defence representative had been instructed to make a bail application i.e. they often used body language and verbal cues to signal to the court that they knew the application would be unsuccessful. Equally, if a case would automatically attract bail, the participating professionals would frequently bypass stages of the remand hearing. For example, even when CPS officers raised concerns about bail risk (often in the knowledge that they would be disregarded by magistrates) defence representatives were observed not to address the issues raised but simply state that the offence was not serious.

The ‘cusp case’ category contained those cases where there was no obvious consensus about how to proceed and, consequently, a full remand hearing was necessary. Cusp cases were not common, particularly in this research which focused on women. These hearings were typically much longer and often contained significantly more information about both the offence and the defendant than in cases where there was a consensus based on offence seriousness or the organisational needs of the criminal justice system. In cusp cases, because of the inherent lack of agreement, the influence of other factors, such as the social dynamics of the courtroom became more important. This is discussed below.

This research found that the legal framework did not define working practice. It was a resource which decision makers could draw upon, or bypass, depending on the nature of the case they were hearing. It would be wrong, however, to characterise the legal framework as totally without impact on decision making. Examples were cited in Chapter Four which illustrated that specific legislative changes and/or central government directives could have an immediate impact on decision making. It is unfortunate that this research did not cover a period long enough to record the integration of such central government advice into the routine working practice of magistrates’ courts. It is possible that, given time, the impact of such instructions would be softened and would ultimately be assimilated by magistrates into the accepted framework for processing offences. Although these specific changes in remand law were observed to have an immediate impact on decision making, the majority of decisions were observed to be based on a rationale that was only loosely coupled to remand law.

## **Social Dynamics In Magistrates’ Courts**

This research found that the framework of how cases should be resolved was structured by the rationales of the three models: offence seriousness, individual assessment, and case processing needs. However, these models were applied within the social environment of a magistrates’ court. Thus, although the models could predict the outcome of the vast majority of cases (primarily because of the defining importance of offence seriousness), they were not the only determinants of remand outcomes. This study found that remand decisions were primarily the outcome of the three models, which were loosely coupled to the legal framework. However, they were also influenced

by unpredictable situational factors, such as the particular personalities on a bench on a given day, and by the social dynamics of the courtroom.

It was observed in Chapter Seven that professional participants in the remand system had to select from a series of possible options when defining their own role in a hearing, and that the choices they made could alter the outcome of hearings. For example, if magistrates chose to frame their role in terms of protecting the individual defendant from the powers of the state, they would be more likely to grant bail rather than remand in custody. Each group in the remand process had a range of roles which they had to choose between at each remand hearing and the ways in which actors chose to frame their own roles was found to depend on three factors. The first factor was the purpose of the remand hearing as defined by which of the three models it fitted into. For example, if an offence was serious, magistrates prioritised their responsibility to protect the public over their role in protecting the rights of unconvicted defendants not to be imprisoned. If the characteristics of the offence and/or defendant meant it was a cusp case, magistrates typically prioritised their responsibility to make a fair and reasoned decision and encouraged lengthier and more complex remand hearings. Where an offence was not serious and would not result in a custodial remand, magistrates were observed to bypass ‘unnecessary’ legal discussion and procedures to encourage swift decision making in busy magistrates’ courts.

Secondly, fluid situational factors, such as the particular composition of the bench or the mood of a district judge on any given day, influenced how other participants framed a particular hearing. For example, as was seen in Chapter Seven, some defence representatives at Inswick Corner were prevented from taking full instructions because of the desire of a district judge to stamp their authority on the courtroom and insist that the court was not kept waiting any longer. Defence representatives were observed to choose to be deferential to this district judge and protect their own reputation rather than risk opprobrium by trying to defend their clients’ rights to a full consultation with their legal representatives.

Thirdly, the underlying normative framework structured social interaction in the courtroom and this could influence how participants chose to frame their own role and to relate to others. For example, in Orrington Street clerks were not afforded the same respect as they were in the other courts, and this, it was argued by interviewees, affected

their preparedness and ability to challenge magistrates in remand hearings. It is argued that in the courts in this study, with the exception of Orrington Street, the importance of courts' social dynamics was less than that which has been observed in other studies because the courts' organisational structure prevented stable work groups from forming. Without stable workgroups, idiosyncratic working practices were not consolidated into distinctive court cultures.

One of the reasons for selecting courts in different areas was to explore variation in working practice and to relate this to differences in courts' rules of interaction i.e. to identify and explain the choices participants made about their roles according to the nature of the dominant court culture. However, unexpectedly, this research did not find evidence of distinct differences between the social organisation of most of the courts in the study. In contrast to much previous work on remand, it became evident that the pattern to be explained was not *variation* between courts' working practices but the unexpected level of *consistency* between them. This consistency was not identified through statistical analysis of remand rates in the various courts but was evident in court observations and from professionals' comments about their experience of working in the various courts. Interviewees volunteered the view that Orrington Street had a different culture, but argued the other courts in the study did not. This indicates they were not unaware of the possibility of variation between courts, but judged the majority of the courts in this study not to have idiosyncratic working practices.

Consistency between courts has also been illustrated in other research studies. For example, although one of Hucklesby's (1994b) courts had an unusually high custodial remand rate, the figures for the other two courts in the study were very similar. Whilst deviations from the norm are interesting, it is also important to look 'through the looking glass' (Heidensohn 1997:791) and explain not the exception but the rule.

An important finding of this research is that the courts did not have the stable work groups previously identified in research on courts with strong internal cultures. In the absence of such familiarity, which fosters idiosyncratic working practices, the normative structure of the courts in this study was found to be more formally organised around the principles of the adversarial system. Inconsistency in decision making was still possible *within* a Bench, and was indeed demonstrated in this research. However, as

the respondents themselves argued, there were not large and persistent differences *between Benches' remand decisions.*

It was evident that failures to exercise adversarial responsibilities could affect decision making processes and outcomes. Thus, clerks' deference to district judges resulted in their failure to fulfil one of their primary roles and to challenge improper practice in remand hearings. Whilst the majority of district judges' decisions did seem to be well judged and based on extensive experience and professionalism, some examples of the arbitrary exercise of power were observed in this research. It was observed that the clerks in this study would not permit even the most experienced and confident lay bench to behave in this manner. When working with lay magistrates, clerks appeared to assume responsibility for ensuring correct procedure, something they ceded responsibility for when working with district judges.

However, it was only in Orrington Street, where work groups were unusually stable, that these atypical approaches became consolidated into working practices distinct and persistent enough to be defined as a court culture, and to affect remand processing and outcomes. Elsewhere, although the rules of the 'game' did vary on a day-by-day, or even case-by-case, basis depending on the peculiarities of situational factors, the participants kept returning to a common normative framework where interaction was organised around the roles ascribed to them by their position in the adversarial system.

Expressions of concern about 'justice by geography' and individual court cultures are not uncommon. Indeed, Home Office circulars have addressed such issues and urged magistrates to be more consistent in their decision making. In discussing consistency in remand hearings, there are important contributory factors which have not been much discussed in this wholly court-based research. For example, the role of decision makers earlier in the process in defining and filtering cases. It is particularly regrettable that this research was not able to incorporate police decision making into the analysis of courts' decisions as, for example, Jones (1985) identified the importance of police decisions, and courts' responses to those decisions, in explaining patterns of remand outcomes. Notwithstanding this omission, this research does contribute one important finding to the question of how to ensure greater consistency in remand decision making: encourage all participants to adhere to their formal responsibilities as defined by the adversarial system. From observations it was evident that it was when actors failed to

take responsibility for their own roles, ceding power to other participants, that irregular, idiosyncratic and even unjust decision making ensued.

## The Reasons Why Women Are Remanded In Custody

The risks of failing to attend and offending on bail are the most commonly used reasons for all groups remanded in custody. However, as discussed in previous sections, most of the official reasons for custodial remands do not necessarily tell us much about the real reasons why defendants are remanded in custody. This is partly because the official reasons encapsulate a very wide range of concerns and risks. There are two exceptions to this statement which need to be discussed briefly. Firstly, this study found that the specific reason of using a custodial remand because of concerns about a defendant interfering with justice is very rarely used with women, and this reflects the predominantly non-violent nature of female offending. Secondly, women with psychiatric problems were occasionally observed to be remanded in custody under the Bail Act 1976 exception of ensuring the defendant's own protection. With the prevalence of psychiatric problems in the female custodial remand population, it was surprising that more psychiatric custodial remands were not observed. Perhaps this indicates that defendants' psychiatric and psychological needs are not addressed at the remand stage.

It has been argued that bail hostels could be used to divert defendants from custodial remands but the evidence of this study indicates that an increase in the number of bail hostel beds for women would not reduce the female custodial remand population. Magistrates were keen to use bail hostels because the majority were very reluctant to use custody in anything other than the 'last resort'. However, the Home Office female only bail and probation hostel in the city had ongoing difficulties keeping its residence levels up to Home Office requirements, and this was an historical as well as a current problem. The lack of referrals could not be explained by magistrates being unaware of the hostel as its staff made ongoing efforts to raise awareness about the work done at this hostel. Although Outer District magistrates were found to be less familiar with the hostel, Inner District's court was close to the hostel and its profile was much higher there. Inner District was a busy court and its magistrates were reluctant to use custodial remands, a sentiment accentuated by the notorious conditions in the local female prison.

Yet they did not choose to use a local bail hostel with which they were familiar. This strongly suggests that bail hostels do not address the reasons why women are remanded in custody. Magistrates saw bail hostels as a resource to be used when a defendant's accommodation was unsuitable or he (his usually applied to men not women) was of no fixed abode. Observed cases and magistrates' and defence representatives' comments alike demonstrated that women rarely had such difficulties with their accommodation. Interviewees expressed the view that women tended to have more secure accommodation than men because they were more often carers for young children or, where they did not have secure accommodation of their own, they were more likely to have maintained friendship and family networks. This meant they could usually find a satisfactory address for bail purposes if required. If accommodation was not a problem for the female defendants in this study, for what reasons were they being remanded in custody? The evidence of this study indicates that we need to look at the nature of women's offending, and at the characterisation of female defendants by professionals in the remand system in order to answer this question.

As we have seen, considerations of offence seriousness overrode all other factors in the majority of cases. Offences categorised as serious invariably resulted in a custodial remand regardless of the nature of the particular act(s). On the other hand, offences regarded as not serious invariably resulted in the defendant being bailed. Even where Bail Act exceptions to the grant of bail clearly applied, they were typically overlooked and consequently, even where legally justified, custodial remands were very rare in such cases. It was established that there were some offences which could not be easily categorised by offence seriousness: the cusp cases. As was seen in Chapter Five, magistrates approached these cases in a different manner, tending to require more information in the hearing and basing their decisions on individualised assessments of the defendant rather than simply on offence characteristics. Defendants were also observed to be remanded in custody for administrative reasons, although this was rarely the initial reason for a custodial remand.

Women are rarely remanded in custody for the primary reason that the overwhelming majority of female offending is non-violent acquisitive crime. These are the types of offences which only occasionally attract custodial remands. Magistrates' reluctance to use custodial remands in these cases stemmed from a widespread conviction (evident amongst CPS officers, clerks, and defence representatives as well as in the magistracy)

that if an offence would not attract a custodial sentence, it would be unjust to use a custodial remand. As the majority of female offenders commit such offences, they are unlikely to be remanded in custody. However, some women were remanded in custody for such offences when they had extensive antecedents, and where they persistently failed to attend court and/or offended on bail. In 2002, 41 per cent of female remand receptions were for theft and handling (see Table 1.4) so custodial remands evidently are used for non-serious offences. However, the evidence of this research indicates that magistrates typically only used custody in such cases as a 'last resort'. They strove hard to keep defendants charged with these types of offences out of custody, bailing and re-bailing women time and again despite obvious breaches of bail and undeniable risks that they would breach bail and/or offend on bail again. The evidence of this research is that those women who are remanded in custody for theft and handling are typically exceptionally prolific repeat offenders with substantial histories of Bail Act violations. Even in these cases, magistrates were still reluctant to use custody, as was evident in the observations and further explored in the case vignettes.

At the opposite end of the scale, serious offences almost invariably attracted custodial remands. Again, anticipation of sentencing featured in magistrates' rationale, with some commenting that it was to defendants' advantage to get their sentence underway as soon as possible. Magistrates did observe that it was very unusual for women to be charged with such offences and remand decisions about male defendants were considered to be more straightforward because of the more serious nature of their offending.

The evidence of this research suggests that when the rationale for a remand decision was offence seriousness, magistrates tended to rely on the general offence category rather than the specific features of the individual offence. This decision making strategy presents particular problems for female defendants charged with a serious offence and applying for bail. Research on female offenders repeatedly makes the point that appearances of leniency in sentencing disappear when the *nature* of female offending is compared to that of male offending i.e. within a given offence category, women's offences tend to be less serious (Burman 2004; Daly 1994; Hedderman 2004; Hedderman and Gelsthorpe 1997; Home Office 2003a). Therefore, if remand decisions tend to be based on the offence category rather than specific offence details, the seriousness of women's offences will be overestimated, and a custodial remand made more likely.

This raises concerns about the necessity of custodial remands for women charged with serious offences. If decision making was based more on the nature of the particular act, rather than being overwhelmingly influenced by the crude offence category, fewer women might be remanded in custody for such offences.

The evidence of this research illustrates that magistrates are very reluctant to remand women in custody for 'typical' female offences such as theft and handling. Where such offences do result in the use of custodial remand, it is because of the cumulative offending pattern rather than the individual offence. When the offences are more serious, this research suggests that some remands may be unnecessary as they fail to take into account the nature of women's offending i.e. women tend not to offend as seriously or as repeatedly as men.

It is also suggested that women might be particularly likely to be processed as cusp cases because of the relative scarcity of women in the criminal justice system. As magistrates do not have as much experience processing women, they are less likely to have formed ideas of 'normal cases' with female defendants. Thus it is possible that a greater proportion of remand hearings for women would be individualised rather than based on established cues such as offence seriousness alone. In such cases, the evidence from the cusp case vignette and observations suggest that women's remand outcomes are in significant part based on moral evaluations of their characters and lives. This, as we have seen, actually benefited many women but penalised others.

This research analysed magistrates' rationale when taking remand decisions about women in cases on the cusp between conditional bail and custodial remand. These cases illustrated the ways in which participants in the remand system characterised women in the justice system. It is noted again that in the majority of remand hearings, whilst participants may indeed have reached moral judgements about defendants, these views did not influence remand outcomes because of the overriding importance of offence seriousness. It is argued here that although cusp cases were a minority of all remand cases, they are important because, unlike most decisions in the remand system, cusp cases are not axiomatic and so they are the cases most vulnerable to discriminatory practices. Also, these are the cases where trends in the use of custodial remand can be

identified in the longer term – this issue will be returned to in the next section of this chapter.

It has already been established that magistrates were generally reluctant to remand defendants in custody, particularly for non-serious offences, as they were deeply conscious of the harm that could be done by custodial remands and the ‘audacity’ of putting an innocent or unsentenced person into prison. This research found that cusp cases also tended to be framed in terms of a reluctance to use custody to some extent but were additionally strongly influenced by moral judgements about the female defendants rather than on the nature of offending or assessments of bail risk. This was evident in both the narratives that defence representatives used in court to try and persuade magistrates that their clients were ‘worthy’ of bail, and also in magistrates’ discussions of the cusp case vignette. It was found that the moral assessments were often constructed around gender expectations of women. Thus, indications of conformity and control in women’s lives would encourage magistrates to grant bail.

This study found evidence that some women were, indeed, less likely to receive a custodial remand than men for a number of reasons. Firstly, as discussed above, where it was established that women conformed to gender role expectations, they were more likely to be remanded on bail. Although men were not the focus of this study, some evidence did emerge that this was true for men too, as magistrates argued they would try hard to keep a male out of prison if he would lose his job and be unable to support his family as a result. Secondly, a majority of magistrates said that they were reluctant to remand a woman in custody if she was a mother. However, this did not apply in all cases, but only those where it was established that the woman was a ‘responsible’ mother. Thirdly, some magistrates admitted that their general view of women affected their remand decision making. They said that they were less inclined to think of women as entrenched offenders and expressed particular reluctance to remand women in prison because they believed that women found the experience of custody much harder to cope with than men.

The evidence of this research supports findings on sentencing which indicate that although women do benefit from a degree of leniency in the justice system, this is not true for all women in all types of cases (Daly 1994; Hedderman and Hough 1994). Women who are charged with serious offences tend to be remanded on the basis of the

offence category and not the nature of the act. As women's offences within a given offence category do tend to be less serious in nature, and to be less likely to be repeated, this suggests that some women are being harshly treated at the remand stage. Because of the relative scarcity of women in the criminal justice system, remand decision making appears to be more individualised for women than men, and outcomes are often framed in terms of moral assessments of the women. Whilst this benefits those women who can demonstrate gender role conformity, some women attract different treatment because their lives are less conventional. Some lifestyles may indeed be valid evidence of heightened bail risk: for example, magistrates strongly associate substance misuse problems with an increased risk of offending while on bail. However, the danger is that those women who choose unorthodox lifestyles, or are from cultural backgrounds with which magistrates are unfamiliar, might be penalised not because they genuinely present a greater bail risk but because they do not conform to the expectations of magistrates – a fairly coherent group of predominantly white, middle-class and middle-aged individuals.

## Why More Women Are Being Remanded In Custody

Given the evidence from this research that the majority of women commit offences for which magistrates are extremely reluctant to use custodial remand, how can we account for the marked increases in the use of custodial remand for women that has occurred in recent years? Whilst this question cannot be answered from data from this research alone, the findings of this project can be combined with previous work on sentencing patterns to offer an explanation: that more women are remanded in custody because remand decisions are 'contaminated' by sentencing rationale.

The increase in the female sentenced population has been explained by the combination of a number of factors: more women being sentenced, higher custody rates, and longer custodial sentences (Hedderman 2004). Although there has been an increase in the numbers of women being processed by the criminal justice system, the main reason for the rise in the prison population is increased custody rates i.e. more women found guilty of an offence are sentenced to custody rather than given non-custodial sentences.

In terms of the types of sentences awarded, both men and women have seen a reduction in the use of discharges, fines and suspended sentences. For men this was largely offset by a doubling in the use of custody, whereas for women the use of custody tripled but the use of probation also increased.

Combined with the increase in the number of women being sentenced and the decline in the number of men, the net effect of the changes between 1992 and 2000 is that whereas one woman was previously imprisoned for every 20 men, the ratio is now 1 in 10. (Hedderman 2004:84).

How relevant is this in explaining remand increases? It appears that the custody rate has increased as a result of socio-political pressures towards 'tougher' sentencing (Hedderman 2004; Hough, et al. 2003). However, custodial remands *should* be made according to criteria that are, at least formally, largely independent of those that determine sentencing outcomes. Whilst the likely sentence for an offence may have some relevance if there are fears that it would encourage the defendant to abscond, this is generally regarded to apply mainly to long custodial sentences and should not be used as a sole ground for remanding in custody. So, while the increasing use of custodial sentences might justify some of the increase in custodial remands, it does not provide a valid explanation for all of it.

If the offences that women commit were becoming more serious, this might explain the increase in the custodial remand rate as offence seriousness is a strong determinant of custodial remands. However, the evidence demonstrates that women's offending is not getting more serious and so custodial remands cannot be increasing for this reason.

[A]lthough the number of women being dealt with by the courts has increased, the proportions being dealt with at the Crown Court has remained relatively stable. This suggests that the greater use of custody is not being driven by an overall increase in the seriousness of women's offending. (Hedderman 2004:89).

[T]he increased use of custody has occurred at both venues [Crown Courts and magistrates' courts] for all offences, bar robbery at the magistrates' court, indicating that sentencing in general has simply got more severe. Second, the rise in the number of women convicted of theft and handling, and the greater than average increase in the use of custody for this group, lends further support for the idea that the rise in sentenced prison receptions is being driven by a *more severe* response to *less serious* offences. (Hedderman 2004:90 original emphasis).

Table 1.4 showed that as only 22 per cent of females received onto custodial remand in 2002 were charged with serious offences (i.e. violence against the person, sexual offences, burglary and robbery), the majority of women remanded in custody are therefore relatively non-serious offences. Tables 9.1 and 9.2 illustrate that custodial sentences are being used at a greater rate across all offence groups, for example the proportion of

women convicted for theft and handling who were sentenced to custody by magistrates increased from two per cent in 1992 to 14 per cent in 2000.

**Table 9.1: The Use Of Custody For Females (All Ages) By Type Of Court**

	Magistrates' Courts		Crown Court	
	1992	2000	1992	2000
No. sentenced to custody	635	3971	1510	2928
Percentage sentenced to custody	2%	10%	23%	42%
No. sentenced for indictable offences	33,454	40,739	6,536	7,059
Percentage of female offenders sentenced at Crown Court			16%	15%

Source: (Hedderman 2004:90).

**Table 9.2: Proportion Of Adult Women (Over 21) Convicted Of Indictable Offences Who Were Sentenced To Custody**

Offence	Magistrates' Courts		Crown Court	
	1992	2000	1992	2000
	% custody	% custody	% custody	% custody
Violence	2	11	22	33
Sexual offences	0	(13)	(41)	(67)
Burglary	9	32	27	53
Robbery	0	0	58	75
Theft and handling	2	14	21	41
Fraud and forgery	2	8	22	32
Criminal damage	4	5	19	25
Drugs	1	4	39	55
Other (non-motoring)	2	6	22	30
Motoring	0	3	(22)	(32)
All indictable offences	2	11	24	42
() based on less than 100 women sentenced				

Source: (Hedderman 2004:91).

The third reason given to explain the greater numbers of women in prison is that custodial sentences are longer and this swells the average prison population. This could

obviously not account for the increase in the custodial remand population, although it might contribute to a degree to magistrates' assessment that defendants would abscond in some cases. Again, this could not explain the magnitude of the increase in the use of custodial remand.

It appears that the custodial remand population increases with the sentenced prison population. However, this cannot be fully explained by the increase in the numbers of women coming before the courts, by the use of longer sentences, or by changes in the nature of female offending patterns. Moreover, evidence from this and other studies indicates that magistrates are actually very reluctant to remand people in custody. It has been repeatedly noted that magistrates in this study believed they only used custodial remand as a 'last resort'. This reluctance to use custody was also found in a study on the increased use of custodial sentences and, as Hough et al (2003) argue, it appeared to be genuine.

Like most people, [sentencers] will think of themselves as humane and civilized. So at one level it would be surprising if sentencers did not talk in terms of prison as a last resort. However the sincerity with which these views were expressed was striking. Some of them emphasised the difficulty and distaste they felt in imposing a custodial sentence. (Hough, et al. 2003:35).

If, as is contended, magistrates really are reluctant to remand in custody, how can we explain the fact that custodial remands are being used more often even though there are no objective reasons that can account for the increase i.e. the increased use of custodial remands cannot be wholly explained by changes in factors that would legitimately affect the custodial remand rate? The evidence from this research is that the rise in the use of custodial remands is because remand reasoning is 'contaminated' by the sentencing environment. That is, sentencing trends *per se* cannot be used to explain changes in remand rates as sentencing decisions are made on different criteria to remand decisions. However, it is argued here that the sentencing environment, which is in part influenced by legislative changes, does affect remand decision making. Sentencing patterns have been used here to illustrate that custody is increasingly used for offences of lesser seriousness. It is suggested that this rise in the use of custodial remands is a reflection of this shift in what is regarded as serious enough to warrant a custodial sentence. As remand decisions are taken within the same environment as sentencing decisions, and are made by the same personnel, it is not surprising that this increasing punitiveness in sentencing decisions is also reflected in remand decisions.

There was clear evidence that magistrates felt constrained not to use custodial remands in cases where a custodial sentence was unlikely. It is possible that the increased use of custodial sentences for more categories of offences may reduce magistrates' inhibitions about using custodial remand. It is no longer 'unjust' to use custodial remands for offences where custodial sentences have become more likely. Further, sentencing patterns signal changing perceptions about the 'seriousness' of particular types of offences. This research clearly showed that offence seriousness was routinely used as 'perceptual shorthand' (Skolnick 1966) in remand decisions. If an increasing number of offences are perceived as serious then, as seriousness is used by magistrates as a criteria for making remand decisions, the number of custodial remands would also logically increase. So it is argued that despite the fact that women's offences have not actually become more serious in nature, and despite the fact that the right to bail still applies to the same degree, changes in sentencing patterns have resulted in an increased use of custodial remand. It appears that magistrates are still genuinely committed to using custody only as a last resort, but the point at which the last resort is reached (either because of offence seriousness or defendants' characteristics (e.g. see (Hough, et al. 2003)) has altered and, as a result, magistrates are now remanding cases in prison which previously would not have crossed the custodial threshold.

## Policy Implications And Future Research

The findings of this thesis suggest that if greater consistency in magistrates' decision making is desired, any policy directed to this end must address all the participants in the process and not focus solely on magistrates and magistrates' courts. Firstly, at each stage of the remand process, discretion is exercised and cases are defined. This filtering process means that by the time a case reaches the magistrates' court, it has already been framed in a certain way. Magistrates' remand decisions are just the final stage in a cumulative process of decision making that begins with the Police. Secondly, it was demonstrated that the underlying nature of interaction in the court room could act as a regulatory mechanism for decision making. Where courts (and individuals) leant towards cooperative or deferential working practices, arbitrary and idiosyncratic decisions became increasingly likely. Although it might not be appropriate for governments to be issuing unsolicited advice to defence representatives, if all

participants were encouraged to participate more fully in formal adversarial interaction, the drift to informal consensual working in magistrates' courts might be countered. It would be interesting to map courts' deviations from the average custodial remand rates onto variations of courts' key characteristics<sup>36</sup>. For example, this research suggests that the larger, busier urban courts would show fewer variations in remand rates, because they are more likely to be organised along adversarial principles, than courts in rural areas where stable work groups might be more likely and would foster particularised working practices.

If the increase in the female custodial remand population is to be slowed or even stopped, the most important issue to address is the attitudes of criminal justice personnel on the use of custody for both sentencing and remand. This research has shown that women may be remanded in custody for less serious offences than they previously were, even though magistrates are still very reluctant to use custodial remand. It is suggested that this paradox can be explained by a perceptual shift in the threshold at which offences/defendants are defined having reached the 'last resort' and custodial remands become perceived as the only option, and by an increasing emphasis on the offence seriousness model of decision making. The ratchet effect is evident in trends in sentencing practice and, as this research has suggested, is also responsible for increases in the custodial remand population. Simply instructing magistrates and others to use custody only where absolutely necessary will not reduce the custodial remand population in the near future because magistrates already genuinely believe that they only refuse bail when they have no other option. Bail law must remain flexible as not every eventuality can or should be legislated for, and legal changes have been shown to be circumvented anyway. However, attempts to reduce the custodial remand population could include offers of guidance on where the custody threshold lies. There are established routes, such as Home Office Circulars, which could be used to communicate such guidelines. It could be made explicit that, for example, offences of theft and handling should not be regarded as serious enough to attract a custodial remand, except in extreme circumstances such as particularly high value or prolific offending. Although it could not be established in this research, it would be interesting to use historical analysis to explore the extent to which the shift in the point at which custodial remands

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<sup>36</sup> Repeated attempts were made to secure this information from the Home Office but they were unable to supply me with national data on magistrates' courts use of custodial remand.

are defined as 'necessary' or unavoidable is related to the nature of socio-political debates on crime and justice.

Of course legal changes can and do exercise influence over remand practice. Where discretion is restricted by legal rules which contain very specific advice, this research has shown this is reflected in remand decision making (see Chapter Four). However, the wide scope for the exercise of informal and formal discretion in the remand system means legislative changes are not automatically translated into practice. They are often adopted and adapted according to the informal decision making frameworks that dominate remand processing.

In light of this, it is important to comment on government proposals to introduce assessment of substance misuse problems into the remand decision. No doubt this policy will be monitored and evaluated but this research suggests some aspects of the policy which would need particular focus. Given the prevalence of substance misuse in the offending population, will there be sufficient resources available to fund places for all who are referred? Magistrates' and defence representatives' comments on bail hostels show that if they *perceive* a shortage in bed spaces, they will be less likely to suggest and explore the option. Perceptions of access to such resources will be as important as the actual availability of places.

If there are not sufficient places, how will magistrates select candidates? This research illustrated that simple models such as bifurcation, or crime control versus due process, cannot fully explain the complexities of the remand system where multiple decision making models operate. How would the new official purpose of rehabilitation be incorporated into a stage in the criminal process which is already serving myriad (official and unofficial) purposes? Analysis of cusp cases illustrated that moral assessments based on personal characteristics were the deciding factor in some remand hearings. If there is any shortage of spaces and/or any confusion about how access to rehabilitation should be allocated, the evidence of this research is that extra-legal criteria will be used. Moreover, magistrates might be unwilling to bail a defendant to a rehabilitation centre if they feel the defendant is trying to 'play the system' and secure bail without any commitment to being rehabilitated. Again, a lack of clear guidelines will encourage the construction of informal working practices which will structure how this policy is actually implemented.

A further question is whether magistrates would continue the established practice of bailing a defendant accused of non-serious offences when the proposal permits them to remand that defendant in custody if she had refused to participate in a treatment programme. Where the powers contained in a new proposal are incompatible with the principles of established working practices, remand professionals will establish informal rules in order to resolve the conflict. Given the increased use of custodial remand for all offences, the concern must be that these proposals will encourage an ever-faster growing custodial remand population.

The foregoing discussions illustrate that this thesis has provided a great deal more information about the processing of women and remand decision making than was previously available, although it has also, inevitably, raised more questions about the nature of remand decision making which can only be addressed by further research. Most importantly, it suggests a model of remand decision making for women that is different in emphasis from earlier models which did not explore how different types of cases and defendants are processed according to different rationales. Consequently, it provides more indications of how interventions and guidance could be provided to limit remands in custody to the necessary cases. This research suggests that clear statements of principle on what custodial remands should be for are vital to any necessary attempts to reduce the custodial remand populations.

# Appendix One

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## Remand Law

Part I, Schedule 1 of the Bail Act 1976: Reasons for refusing bail.

*“(2) The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not), would –*

- (a) fail to surrender to custody, or*
- (b) commit an offence while on bail, or*
- (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.*

*(2A) The defendant need not be granted bail if –*

- (a) the offence is an indictable offence or an offence triable either way; and,*
- (b) it appears to the court that he was on bail in criminal proceedings on the date of the offence.*

[Paragraph 2A of Section 4 was inserted into the Bail Act 1976 by s.26 of the Criminal Justice and Public Order Act 1994].

*(3) The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare.*

*(4) The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court or of any authority acting under any of the Services Acts.*

*(5) The defendant need not be granted bail where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decision required by this part of this schedule for want of time since the institution of proceedings against him.*

*(6) The defendant need not be granted bail if, having been released on bail in or connection with the proceedings for the offence, he has been arrested in pursuance of section 7 of this Act.*

[section 7: liability to arrest for absconding or breaking conditions of bail].

*Exception applicable to defendants whose case is adjourned for inquiries or a report:*

*(7) Where his case is adjourned for inquiries or a report, the defendant need not be granted bail if it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody.”*

Schedule 1, Part I, paragraph 9 of the Bail Act 1976: Grounds to be considered when applying an exception to the right to bail.

*“Decisions under paragraph 2*

*(9) In taking the decisions required by paragraph 2 or 2A of this part of this schedule, the court shall have regard to such of the following considerations as appear to be relevant, that is to say –*

- (a) the nature and seriousness of the offence of default (and the probable method of dealing with the defendant for it),*
- (b) the character, antecedents, associations and community ties of the defendant,*
- (c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings,*
- (d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted,*

*as well as to any others which appear to be relevant.”*

# Appendix Two

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## Interview Schedules

### Magistrates

Firstly, thank you very much for agreeing to be interviewed. As you know from my introductory letter, I am conducting research on the remand process in a number of magistrates' courts. This interview will last approximately one hour and will, with your consent, be tape recorded. The tape will be kept in a secure filing cabinet at the London School of Economics, your identity will not be disclosed to anyone and everything that you say will be treated confidentially. You can, of course, refuse to answer any question you are unwilling to answer and please feel free to ask questions if you need clarification on any point. I will be using the term 'remand decision/process' etc in this interview and this encompasses both bail (conditional and unconditional) and remands in custody. I will use the phrase 'remand in custody' if we are discussing custodial remands. Do you have any questions?

1 – How many years have you sat on the Bench?

2 – Have you sat on Benches other than [borough]?

*I am now going to present you with three cases and I will ask you to make a remand decision on each. Please feel free to make notes if you would like.*

Case One.... [read out and record decision]

Case Two...[read out and record decision]

Case Three...[read out and record decision]

After each vignette:

*Can you answer the following questions. Please refer to your notes and do ask me to refresh your memory where necessary.*

3 – Can you tell me specifically what you were aiming to achieve when you made this decision?

[prompt: Bail Act legislation allows decisions to be made and used for a variety of reasons. I wonder what reasons you felt were relevant in this case.]

4 – What was the most important information in this case, in your view?

5 – Are there any additional pieces of information that would help you in reaching a decision?

6 – What difference, if any, would it make if the defendant was pleading not guilty?

7 – What difference, if any, would it make if the defendant did not enter a plea at this hearing?

8 – *[If the decision was RJC]* What single piece of additional information or change in circumstance, if any, could the defence put forward at the next bail hearing which would encourage you to release the defendant on bail?

Repeat for Case Two and Case Three.

*Thank you. I will not be asking you any further questions about these cases. I am now going to ask you some questions about the remand process.*

9 – Can you recall any changes in remand decision-making during the time that you have sat on the Bench?

[prompt: eg legal, procedural, aim, outcome]

10 – In your view, what is the main purpose of custodial remands?

11 – How often do you think you achieve this purpose?

*I'd like you to think specifically about female offenders in the following questions:*

12 – What do you find most difficult about remand decisions in cases of female defendants?

13 – Can you recall a case where you took a chance by bailing a female defendant instead of remanding her in custody? What factors prompted you to act as you did?

14 – Can you recall a case where you had to remand a woman in custody against your better judgement? What factors prompted you to act as you did?

*And now I'd like to focus on the personnel involved in a bail application:*

15 – What do you think defence solicitors' responsibilities are towards their client and towards the court are when making bail applications?

16 – What issues, if any, do you feel arise from defence solicitors' responsibilities towards the court and to their clients?

17 – From your own observations, do the CPS face any particular difficulties when making remand recommendations?

18 – If someone's first appearance before the Court is from the cells on overnight custody, does this have any impact on proceedings and decision-making?

*And in the final two questions, I'd like you to think broadly about your experience of the remand process:*

19 – If you could make three changes to any aspect of the remand process, what would they be and why?

20 – If you could make three changes to remand legislation, what would they be and why?

*Those are all my questions. But before we finish, do you have any questions or is there anything of importance that you would like to raise which we have not had a chance to cover in this interview?*

*Thank you very much for your time.*

## CPS

Firstly, thank you very much for agreeing to be interviewed. As you know from my introductory letter, I am conducting research on the remand process in a number of magistrates' courts. This interview will last approximately one hour and will, with your consent, be tape recorded. The tape will be kept in a secure filing cabinet at the London School of Economics, your identity will not be disclosed to anyone and everything that you say will be treated confidentially. You can, of course, refuse to answer any question you are unwilling to answer and please feel free to ask questions if you need clarification on any point. I will be using the term 'remand decision/process' etc in this interview and this encompasses both bail (conditional and unconditional) and remands in custody. I will use the phrase 'remand in custody' if we are discussing custodial remands. Do you have any questions?

- How many years have you worked for the CPS?
- Have you worked in courts other than - and -?
- Do you think that different courts have different characters?
- How would you describe - and -'s [courts] character?
- In your experience, do you think court character bears any relation to outcomes?

*I am now going to ask you some questions about the remand process.*

- Can you recall any changes in remand decision-making during the time that you have sat on the Bench?  
[prompt: eg legal, procedural, aim, outcome]
- What difference, if any, do you think that Magistrates being trained in structured decision making made to remand decisions?
- Have you worked in the Video Link?
  - what do you think of it?
- In your view, what is the main purpose of custodial remands?
- In your experience, are custodial remands ever used to serve any other purpose?

*I'd like you to think specifically about female offenders in the following questions:*

- What, if anything, do you find most difficult about remand recommendations in cases of female defendants?
- Can you recall a case of a female where you considered requesting a remand in custody but actually recommended that the Bench bail her?

- What was it that changed your mind?
- Can you recall a case of a female where you recommended a remand in custody but the Bench bailed her?
- Can you recall the last time that a woman was bailed to a bail hostel?
- In your experience, do Magistrates ever request bail hostels if the defence has not offered one?

*And now we're talking about cases of males and females again. I'd like to focus on the personnel involved in a bail application, firstly the Magistrates:*

- In your opinion, what do you think Magistrates' responsibilities are in the remand process?
- To what extent, if at all, can you predict Magistrates' remand decisions?
- In your experience, how often do the Bench not follow your remand recommendations?
- Can you recall the last case where a Benches' remand decision surprised you? Preferably a case of a female being remanded but a male example is fine.
- Have you ever appealed a Magistrates' remand decision?
  - Can you tell me why you appealed it?
- What difference, if any, is there in remand decisions made by Lay Magistrates and District Judges?
- Do you have preferences about whether you appear before a Lay Bench or a District Judge?

*Next, some questions about the defence:*

- What do you think defence solicitors' responsibilities are towards their client when making bail applications?
- And what are their responsibilities towards the court?
- To what extent are the defence and the CPS usually in broad agreement about the remand recommendations?
- In your experience, what percentage of remand hearings have already been agreed between the CPS and the Defence before the Bench comes in?

*I'd like to talk about the defendant now:*

- To what extent, if any, do you think that a defendant's demeanour and body language in court affects remand decisions?
- If someone's first appearance before the Court is from the cells on overnight custody, does this have any impact on proceedings and decision-making?
- Do you think custodial remand status has any impact on remand decisions at the second bail hearing?
- Do you think custodial remand status has any impact on sentencing?

*And now the Police:*

- What contact, other than the recommendations on the MG forms, do you have with the Police on remand recommendations?
- What are the systems of communication between you and the Police?  
prompt: primarily on paper or do you speak?
- How useful do you find Police remand recommendations in ONC cases?
- Can you recall the last time the Police attended a remand hearing?  
why did they attend?  
do you think it makes any difference to the outcome?
- Can you describe for me the nature of your relationship with the Police, I've heard it described as 'semi-Glidewell'.
- Would you personally like to see the Glidewell system in [area]?

*And last, but not least, the CPS:*

- Can you describe for me the process whereby you decide what remand recommendations to make?  
prompt: mags use structured decision making.
- Does this differ for overnight cases?  
eg as you have less time to see them.  
eg as, I assume, a reviewing lawyer won't have had time to look at the file.
- From your own experience, do the CPS face any particular difficulties when making remand recommendations?

*And in the final three questions, I'd like you to think broadly about your experience of the remand process:*

- If the remand process (ie how cases are processed and decisions made) was being reviewed, what changes, if any, would you personally like to see?
- If the remand legislation (ie the Bail Act, exceptions to bail) was being reviewed, what changes, if any, would you personally like to see?
- Decision makers in the remand system have quite a lot of discretion – in terms of the information they can draw upon, decision outcomes, etc. If there was a proposal to reduce this discretion, what would your reaction be and why?

*Those are all my questions. But before we finish, do you have any questions or is there anything of importance that you would like to raise which we have not had a chance to cover in this interview?*

*Thank you very much for your time.*

## Legal Advisors/Clerks

Firstly, thank you very much for agreeing to be interviewed. As you know from my introductory letter, I am conducting research on the remand process in a number of magistrates' courts. This interview will last approximately one hour and will, with your consent, be tape recorded. The tape will be kept in a secure filing cabinet at the London School of Economics, your identity will not be disclosed to anyone and everything that you say will be treated confidentially. You can, of course, refuse to answer any question you are unwilling to answer and please feel free to ask questions if you need clarification on any point. I will be using the term 'remand decision/process' etc in this interview and this encompasses both bail (conditional and unconditional) and remands in custody. I will use the phrase 'remand in custody' if we are discussing custodial remands. Do you have any questions?

- How many years have you worked as a legal advisor?
- Have you worked in courts other than - and -?
- Do you think that different courts have different characters?
- How would you describe - and -'s [courts] character?
- In your experience, do you think court character bears any relation to outcomes?

*I am now going to ask you some questions about the remand process.*

- Can you recall any changes in remand decision-making during the time that you have sat on the Bench?  
[prompt: eg legal, procedural, aim, outcome]
- What difference, if any, do you think that Magistrates being trained in structured decision making made to remand decisions?
- Have you worked in the Video Link?
  - what do you think of it?
- In your view, what is the main purpose of custodial remands?
- In your experience, are custodial remands ever used to serve any other purpose?

*I'd like you to think specifically about female offenders in the following questions:*

- What, if anything, do you think is most difficult for Court personnel in remand decisions on female defendants?

- Can you recall the most recent case where a woman was remanded in custody? what questions, if any, did the magistrates ask you about the remand?
- Can you recall a case of a female where a remand in custody was recommended by CPS but the Bench bailed her? Can you recall the reasons why they bailed her? and again, can you talk me through the questions they asked you?
- Can you recall the last time that a woman was bailed to a bail hostel?
- In your experience, do Magistrates ever request bail hostels if the defence has not offered one?

*And now we're talking about cases of males and females again. I'd like to focus on the personnel involved in a bail application, firstly the Magistrates:*

- In your opinion, what do you think Magistrates' responsibilities are in the remand process?
- To what extent, if at all, can you predict Magistrates' remand decisions?
- In your experience, how often do the Bench not follow CPSs remand recommendations?
- Can you recall the last case where a Benches' remand decision surprised you? Preferably a case of a female being remanded but a male example is fine.
- Have you ever seen a Magistrates' remand decision appealed?
  - Can you tell me why it was appealed? did you agree with the appeal?
- What difference, if any, is there in remand decisions made by Lay Magistrates and District Judges?
- Do you have preferences about whether you work with a Lay Bench or a District Judge?

*Next, some questions about the advocates:*

- What do you think defence solicitors' responsibilities are towards their client when making bail applications?
- And what are their responsibilities towards the court?
- In your experience, what difference, if any, do you think a good defence lawyer makes to a defendant's chances of getting bail?
- In your experience, what difference, if any, do you think a good CPS lawyer makes to a defendant's chances of being remanded in custody?

- From your own observations, do you think the CPS face any particular difficulties when making remand recommendations?
- Do you think that Magistrates listen equally to the CPS and the Defence?

*I'd like to talk about the defendant now:*

- To what extent, if any, do you think that a defendant's demeanour and body language in court affects remand decisions?
- If someone's first appearance before the Court is from the cells on overnight custody, does this have any impact on proceedings and decision-making?
- Do you think custodial remand status has any impact on remand decisions at the second bail hearing?
- Do you think custodial remand status has any impact on sentencing?

*And last, but not least, I'd like to talk about your role:*

- Can you talk me through the kinds of questions that magistrates ask you and the kinds of advice that you give to magistrates?
- What impact do you think that your advice has on magistrates decision making?
- Have you ever been tempted to 'encourage' magistrates to make a different decision if you think they are wrong? Perhaps in a case of a very serious offence?

*And in the final three questions, I'd like you to think broadly about your experience of the remand process:*

- If the remand process (ie how cases are processed and decisions made) was being reviewed, what changes, if any, would you personally like to see?
- If the remand legislation (ie the Bail Act, exceptions to bail) was being reviewed, what changes, if any, would you personally like to see?
- Decision makers in the remand system have quite a lot of discretion – in terms of the information they can draw upon, decision outcomes, etc. If there was a proposal to reduce this discretion, what would your reaction be and why?

*Those are all my questions. But before we finish, do you have any questions or is there anything of importance that you would like to raise which we have not had a chance to cover in this interview?*

*Thank you very much for your time.*

# Appendix Three

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## Case Vignettes

### Case Vignette One: Non-serious Offence

#### Facts:

30 year old woman appearing on overnight custody charged with two counts of shoplifting.

She is not entering a plea to the charge today.

#### CPS:

This is a simple case of shoplifting with no aggravating features. Yesterday, the defendant attempted to leave BHS with two jackets valued at £120, concealing them about her person and making no attempt to pay for the goods. She was apprehended by security staff and was later charged at the Police Station. She had been arrested last week on another charge of shoplifting, clothes to the value of £52 and was bailed by Police but she committed this current offence before she appeared in Court. She has a long history of previous convictions for shoplifting matters, three of which were offences committed on Court bail in the last year. Bail is opposed on the risk of further offending based on her record and the fact that the current offence was committed on bail.

#### Defence:

My client is not entering a plea to either charge today as I need time to see her file – her defence would be one of duress. My client tells me that a former associate, from the time she was involved in drugs, came to her home and he forced her to commit this offence. She told the police this in interview and she was initially bailed by police.

My client is not entering a plea on the substantive offence today as I have not seen the AI and would also need to look at the transcripts of the Police interview. My firm has only just taken over from another firm in this case so I am unsure of what happened at earlier stages. I would ask for an adjournment for one week to take instructions.

The charges are not the most serious and a remand in custody is perhaps rather harsh given the low value of goods taken. My client has no real history of failing to appear, just one in the last year. I would suggest a condition of residence and perhaps reporting to her local police station would be sufficient to focus her mind on not offending and co-operating with the Court.

## Case Vignette Two: Serious Offence

### Facts:

A 28 year old woman appearing on overnight custody charged with domestic burglary.

Pleading not guilty to the charge.

### CPS:

The facts of this case are that the victims were at home at the time of the burglary – 7.30pm. They were upstairs and, hearing noises then the front door closing, they came downstairs. They looked around and found that the key to their car was missing. On checking outside, they discovered that the car was missing. Police were alerted and the defendant's fingerprints were found on the front door. Aggravating features are that this is a domestic burglary and the victims were in the house at the time of the offence. The defendant has an extensive history of deception offences and has received custodial sentences recently. She has offended on bail three times in the last year. The defendant is a crack cocaine addict and she offends to finance her habit. Bail is opposed on risk of failing to attend based on the seriousness of the offence and the risk of further offences based on her record.

### Defence:

My client is pleading not guilty to this offence. The only evidence is one finger print on the outside of the front door – there is no forensic evidence from the inside of the house. My client admits to being in the area and says that she could quite possibly have knocked on this front door, thereby leaving her fingerprints. Her pattern of offending is almost entirely one of deception. She knocks on people's doors posing as a charity worker and asks people for money. She has no record for burglary and this offence is totally out of character. My client is adamant that she is not guilty and I would say that the Crown's case is not a strong one. I would ask for a week's adjournment for the Crown to review the charges.

It is true that my client's record is not a pretty sight and that she has offended on bail in the past. However, she has re-established contact with her family in the last year and although she has offended in this period, her rate of offending has significantly reduced. Her mother and brother are both in the court today and they both live in the area and are willing to now let her reside with either of them. Her mother does not work but her brother is prepared to offer a surety for her up to the sum of £500. They are eager for her to have an opportunity to break her addiction and will support her in this. All her recent sentences have been custodial and my client is aware that custody is the almost certain outcome if she were to be found guilty to a burglary charge. However, she has always appeared in Court in the past and, as I say, she is adamant that she is innocent. The Crown's case is weak and I believe the charges should be reviewed. I would ask the Court to bail my client for a week for this purpose. Conditions of residence with her mother or brother and perhaps a surety if the court felt it necessary could be imposed if the Bench had concerns about my client offending.

## Case Vignette Three: Cusp Case

### Facts:

A 25 year old white woman appearing on overnight custody charged with theft of a handbag.

Pleading guilty to the charge.

### CPS:

This offence dates back around six weeks. The victim of the offence was in a public house with friends. At around 9.30pm she went to get her purse from her bag and realised that her handbag had been stolen. The defendant was observed in an alleyway near the public house by Police on foot patrol. The defendant appeared to be going through a bag and was discarding items. When she noticed them approaching her, she dropped the bag. The Police asked her name and found the bag to contain credit cards and other identifying documents in a different name. When asked if the bag was hers, she admitted it was not. She was taken to the station where she was later arrested and charged. She was released on conditional bail by the court for a PSR but failed to attend her Probation appointment and did not attend court. She was arrested on warrant yesterday. She has a heroin addiction and steals to fund her habit. She has a substantial record for similar offences and shoplifting and she has offended on bail previously. Bail is opposed on the risk of failing to attend and offending on bail based on her previous record and her failure to attend in these proceedings.

### Defence:

She regrets not attending court and realises that she has made things worse for herself. Her reason for not attending, though it does not amount to a reasonable excuse, is that she has been successfully addressing her drug addiction. My client has turned a corner and appears before you a very different person to the one who offended a month or so ago. In that time she has secured herself a place at a drug rehabilitation centre [one that is known by the court]. My client deserves credit for having organised this herself without assistance from any agencies. She attends the centre on a regular basis and tells me that she is on a methadone maintenance script. She is successfully addressing her drug problem and a custodial remand at this stage would jeopardise all the progress that she has made. She realises she should have surrendered to the court and tells me she did intend to do so. She was unwise not to have surrendered before but she has been trying to address her drug habit and her offending behaviour. It is to her credit that she has not come before the courts in the last month. If she had offended, this warrant would have come to light. Her record of offending and failing to appear is not impressive but I ask the court to acknowledge the steps she has taken to sort herself out and to give her a second chance by granting her bail for a PSR to be prepared. She has lived at her current address for 9 months. She would now welcome Probation support and is willing to abide by whatever conditions the court sees fit to impose.

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