Craft skills and legal rules: How Australian magistrates make bail decisions

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Abstract

This paper pursues an ethnomethodological approach in describing the work of magistrates making bail decisions in Australian lower courts. Because researchers are committed to examining the practical nature of occupational work, this approach has potential to provide a detailed account of rule-use in legal settings. It will be shown how magistrates employ and are permitted to employ considerable discretion when working within bail legislation, and in interpreting legislation. This account of legal work is relevant to long-standing debates about rule skepticism and formalism; and to policy debates that seek to limit judicial discretion.

INTRODUCTION

In at least one criminal court in the USA, the discretion exercised by judicial officers in making bail decisions has been replaced by computer programs that recommend outcomes from risk scores (Livni 2017). Although we should not expect similar initiatives in other countries any time soon, those concerned about terrible offences committed by defendants who are at-large on bail,[1] or seeking to save costs, are considering alternatives to the current system.

The paper will start by comparing how the use of rules has been understood in the field of jurisprudence, from the perspectives of legal realism and the sociological tradition of ethnomethodology. It is written for a general readership concerned about fairness and justice in the same way as early ethnomethodological research about criminal courts (for example, Sudnow 1965). Employing this approach, the central part of the paper presents empirical data obtained through observing bail

[1] A recent example in Australia is what became known as the Bourke Street rampage (McKay and Zervos 2017). A mentally disturbed offender was granted bail, and the following day drove at speed into a crowded shopping mall, killing five people, including a baby.

applications in Australian magistrates courts, and explicates the practical, interpretive methods in applying these legal rules.[2] The third part of the paper will consider the extent to which judicial discretion can be controlled through legislation. Magistrates apply tests that make it more difficult to obtain bail, yet they still exercise discretion. The conclusion will review the implications for those advancing philosophical arguments about legal practice, and for current debates about bail policy.

ETHNOMETHODOLOGY AND JUDICIAL DISCRETION

A variety of disciplines seek to improve our understanding of law as a social institution. Many studies in the interdisciplinary field of law and society see the value of mixing together ideas from different frameworks and even entire disciplines, and assume that this can be done easily. This section will explain the similarities and differences between the realist tradition in jurisprudence and ethnomethodological research on law. The focus is on how each tradition understands and attempts to research legal rules.

Legal realism

Legal realism is a movement in legal thought that emerged in opposition to the philosophical view of law as a formal system presented by the late 19th century establishment in law schools (Hunt 1978; Twining 1973). Legal realism was active between the 1920s and 1960s through three generations of thinkers. The early realists included Oliver Wendell Holmes (1841–1935), and Roscoe Pound (1870–1964). The best known later realists were Karl Llewellyn (1893–1962) and Jerome Frank (1889–1957). The law and society movement that brought together law and different social scientific disciplines starting in the 1960s, and subsequently the critical legal studies movement in legal philosophy, were both influenced by realism (Garth 1998). Legal realism also was a political movement, since some proponents used ideas associated with it to argue for changes in legal education and the law itself (Pound 1910). The central focus, as in jurisprudence more generally, is how to understand the legal rules applied or made by judges in the higher courts.

There are two elements to legal realism: rule scepticism and fact scepticism (Hunt 1978). Prior to the ascendancy of the realists, it was common to present judges as following case precedents and rules mechanically or scientifically. Christopher Langdell (1826–1906) promoted the view, as Dean of Harvard Law School from 1870 until 1895, that each new decision logically followed from underlying

[2] This approach owes a great deal to my doctoral research in the ethnomethodological studies of work tradition supervised by Wes Sharrock at the University of Manchester in the late 1980s (see Travers 1997; Travers and Manzo 1997). Rod Watson has also influenced my work on studying individualised discretion through examining transcripts of legal hearings.

principles in the development of the relevant body of law. Accordingly, judicial officers followed established or pre-existing rules.[3] By contrast, Holmes (1881) as a rule sceptic argued that judges in the higher courts could make rules, as well as follow them, through drawing on different precedents, and distinguishing facts. Llewellyn (2009) employed this approach to undermine the claims made by legal philosophers about the supposed objectivity of law.[4] Frank (2009) extended the approach to considering how decisions about facts were made by trial courts.

Investigating rule-use

Ethnomethodology developed as a research program in the late 1960s, some years after the legal realists advanced their critique of formalism.[5] There are several strands of enquiry, but the best known research studies are ethnographies that investigate occupational practices in detail.[6] The field of conversation analysis originates in the work of Harvey Sacks developed in the 1960s and '70s, and has become the larger tradition. A key theoretical argument made in early ethnomethodology was that human activities are not determined by following rules. Theoretical statements directed against Parsons include an essay by Thomas Wilson (1971) distinguishing the 'normative' (rule-governed) and 'interpretive paradigms'. There are also empirical studies that advance this critique through examining different kinds of rule-following. These include Harold Garfinkel (1984a) on following coding rules, Don Zimmerman (1971) on a welfare agency, and D. Lawrence Wieder (1974) on the convict code in a half-way house for drugs offenders. In these empirical studies, ethnomethodologists focused on settings in which rules were explicitly employed in guiding actions. They recognised an indeterminate number of interpretive methods employed in accomplishing the objective character of any social setting that cannot be captured by understanding members as following rules.

Ethnomethodology is distinctive in recognising that even the most technical activities rely on common-sense methods and knowledge. One such method for making sense of factual information is what Garfinkel (1984) identified as the

[3] It would be a mistake to see this Langdellian view of law as only having historical interest, since 'we are all realists now'. When I gave my first paper to a law school in the early 1990s, a legal philosopher took the view that the arguments made by different sociological traditions were interesting but only related to the 'surface' of legal activities. There were underlying universal principles that law students discover through engaging with different fields of black letter law.

[4] For a recent demonstration of the indeterminacy of law that employs similar methods in de-constructing judgements, see Constable (2014), chapter 2.

[5] Ethnomethodology developed through Harold Garfinkel's engagement with questions raised by Talcott Parsons on how to explain the orderly nature of society, and with philosophers in the phenomenological tradition, particularly Alfred Schutz. For an overview, see Heritage (1984).

[6] For recent studies about judicial work influenced by ethnomethodology, see Dupret (2011) and Geraldo (2015); and for a study about a distinctive French appeals court Latour (2009).

'documentary method of interpretation' (he adapted a concept used by Karl Mannheim). For Garfinkel, it is not a specialised method for scholars, but one used by virtually 'everyone' including judges or juries making sense of evidence to reach a finding of fact in a legal case. Similarly, everyone employs an 'ad hoc' method that Garfinkel (1984a: 20ff.) called 'Let it pass' when making a decision without adequate information. Judges often have to reach decisions quickly by drawing on imperfect information. In bail decisions, their burden is eased by not having to give systematic, structured reasons (or any reasons) for their decisions. 'Everyone' also inevitably and unavoidably has to rely on our shared common-sense knowledge in assessing factual information (Garfinkel 1984a).

Some ethnomethodologists, most notably Wes Sharrock and his collaborators (for example, Sharrock and Anderson 1984, Sharrock and Dennis 2008, Greiffenhagen and Sharrock 2009), and also Michael Lynch (1993), have discussed rules as a central example in advancing a Wittgensteinian critique of conventional social science. This critique combats 'skepticist' readings of Wittgenstein on how we understand and apply rules (Lynch 1993: chapter 5), and advances an anti-foundationalist response to the 'cognitivist edifice' in the human sciences (Sharrock and Dennis 2008: 35).

There are four sociological insights that one can obtain about legal practice from this Wittgensteinian literature. Firstly, it recognises that there are many types of rules which are part of complex 'language games' (Sharrock and Dennis 2008: 46). Secondly, it recognises that rules, once learnt, are 'followed blindly' in the sense that practitioners do not reflect on the established practices they use for following them (Sharrock and Dennis 2008, Greiffenhagen and Sharrock 2009). Thirdly, it argues that not every activity involves following rules. As analysts, we can over-use the concept. Fourthly, it argues that rules cannot be understood in any general sense, but are learnt through participation in specific practices:

> *Part* of portraying an activity may well involve portraying rule- governed or rule-guided aspects of it, and even identifying the rules that the activity involves, but it should not be supposed that these are tasks *for the philosopher* or *the sociologist*. ... This is, of course, the very thing that participants in the activity themselves must do' (Sharrock and Dennis 2008: 46; emphasis in original).

This observation is part of a philosophical critique of conventional theorising in social science. It invites empirical investigations by ethnomethodologists into practices in different occupations that may involve following rules. It strengthens the philosophical foundations of ethnomethodology, but leaves much work for describing practices in a variety of occupational settings.

Legal realism and ethnomethodology

There is no direct way to connect debates between realists and formalists in law with Wittgensteinian arguments about science or mathematics. There is some similarity between realist arguments about the indeterminacy of legal rules with the 'skepticist' reading of Wittgenstein in the sociology of science (Sharrrock and Anderson 1984).[7] One difference is that the arguments advanced by realists could be viewed as part of legal practice, or as part of political debates about law.[8] This can be contrasted with purely philosophical debates about science or mathematics that do not affect or concern practitioners. Otherwise, legal realism and ethnomethodology have something in common in advancing a constructionist, sociological view of law that can be contrasted with legal formalism, and also with structural sociological accounts in which there is less focus on decision-making. They share an interest in how judicial officers understand and interpret legal rules in case-by-case judgments.

BAIL DECISION-MAKING

The next section of this paper is an ethnomethodological analysis of how magistrates make bail decisions. It is unusual in this setting to find these judicial officers discussing or openly interpreting legal rules. The legal rules offer guidance on making decisions, but also give magistrates considerable discretion. Nevertheless, these legal proceedings take place within a legislative framework.[9] They offer what Garfinkel calls a 'perspicuous' setting for investigating judicial discretion.

There are no rules on how to conduct an ethnomethodological study about legal practice, although Garfinkel (1984a) recommended certain study policies, including that one should treat any fact or social phenomenon as an accomplishment. Conversation analytic studies are concerned with explicating conversational rules, including the specialised turn-taking system in courts. Ethnographic studies often demonstrate how practitioners, through their practical and interpretive

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[7] In both cases, theorists argue that rule-use depends on external conventions, making possible a relativist argument. Those ethnomethodologists combatting a 'mis-reading' of Wittgenstein argue that 'rules contain within themselves what comprises compliance with them': in the technical terms of this philosophical argument, there is an 'internal relation' between rules learnt in different activities and how they are applied (Sharrock and Dennis 2008: 42).

[8] It is possible that even John Rawls (1955), whose ideas are discussed in Greiffenhagen and Sharrock (2009), does not sufficiently recognise this aspect of legal practice, exemplified by the realist tradition, when he distinguishes between 'two concepts of rules'. Most lawyers follow procedures 'blindly', but there are also reform movements within law. Some practitioners even question the value of imprisonment.

[9] Michael Lynch described the work of judges in managing hearings in a Canadian court. However, he acknowledged that 'an analysis from the gallery has an indefinite, and uncertain, relation to the intelligibility of court proceedings for the principal parties' (Lynch 1997: 104).

work, maintain a set of sequential procedural rules (for example, Lynch 1997, Burns 2000). However, conceptual elaboration in terms of rules is not taken too far in analysing legal decision-making.

Most of Garfinkel's (1984b) study of jurors does not explicitly refer to rules, but describes how jurors draw on common-sense knowledge in establishing the facts of a case. But one could argue that the communicative and interpretive methods in establishing facts were employed by jurors in applying legal rules. In this spirit, the following analysis of bail applications examines the interpretive work of identifying facts and applying legal statutes. It explicates some of the situated methods and knowledge that constitute exercising judicial discretion.

An ethnographic study

This study was conducted over thirty days, in 2014-15 and 2017-18, in metropolitan courts in the four Australian states of Tasmania, South Australia, Victoria and New South Wales.[10] There is a comparative element to the project in that legislation differs between the states, and there is also a significant difference in the remand rate as measured by the Australian Bureau of Statistics: Victoria had a lower remand rate until recently.[11] The researchers conducting this project found, unsurprisingly, that in any magistrate's court, decisions are made through employing similar methods and considerations.

The rules relating to bail varied between the four states. This is significant if one is working as a lawyer in a particular jurisdiction. However, practitioners acknowledged that, despite differences in terminology and even in legal tests between states, there was largely the same purpose and content. This is evident when you consider that, in Tasmania, there has so far been no legislation on bail, and the criteria are set down in the common law case *R v Fisher*.[12] The criteria are what you might expect: the magistrate is asked to consider, through weighing up relevant factors, whether the defendant is likely to attend the next hearing or commit offences while at-large on bail. Similar criteria are set out explicitly in bail statutes. Here, for example, are some of the factors to be considered in determining whether there is an 'unacceptable risk' under the Bail Act 1977 in Victoria:[13]

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[10] This project about bail decision-making and pretrial services in Australia was funded by the Criminological Research Council in 2017-19. The investigators were Max Travers, Rick Sarre, Isabel Bartkowiak-Theron, Emma Colvin, Christine Bond and Andrew Day.

[11] In 2011, the remand rate per 100,000 in Victoria was 19.6, while in New South Wales the remand rate was 49.1 (Brown 2013). In 2018, Victoria had the highest remand rate.

[12] In common with many judgements, this case from 1964 is not available in a law report or computer data base. Nor is it regularly consulted. When visiting a magistrate, I inquired if it might be possible to see the case. After some searching by an administrator, a typed loose-leaf volume of reported cases in 1964 was located in a store room.

[13] For changes following the Bourke St. rampage, see the Bail Amendment (Stage 2) Act 2018 (Vic).

(3) In assessing in relation to any event mentioned in subsection (2)(d)(i) whether the circumstances constitute an unacceptable risk the court shall have regard to all matters appearing to be relevant and in particular, without in any way limiting the generality of the foregoing, to such of the following considerations as appear to be relevant, that is to say—
(a) the nature and seriousness of the offence;
(b) the character, antecedents, associations, home environment and background of the accused;
(c) the history of any previous grants of bail to the accused;
(d) the strength of the evidence against the accused;
(e) the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail;
(f) any conditions that may be imposed to address the circumstances which may constitute an unacceptable risk.

In making laws in the higher courts, judges select and distinguish cases in order to achieve what they see as a legally correct or just outcome. In bail applications, magistrates exercise even greater discretion. They have complete freedom in weighing up the criteria and bail conditions for managing risk. They can, for example, give second or third chances after breaches. In contrast to decisions made in the higher courts, magistrates are not required to give reasons. A bail decision is not appealed. Instead, defendants can make a fresh application to a higher court.

Applying the law

In any bail application, the magistrate is required to establish the relevant facts, and apply a legal test about risk, assuming that the risk can be managed by an appropriate condition. In many applications, the prosecutor has to demonstrate that there is an 'unacceptable risk'. In others the defendant has to satisfy the magistrate that there is a low level of risk, or that the risk can be managed. There is, however, no technical discussion of the law in these hearings. Each magistrate hears submissions, establishes and weighs up the various factors, considers if the risk can be managed, and reaches a decision. Here it is helpful to look at an actual example of decision-making. The application was heard in Tasmania:

Application 1[14]

1. LA: He is pleading Not Guilty. The Prosecution are opposing bail.
2. M: I'll hear the grounds of opposition.
3. P: [Reading extracts from the police summary] Your Honour, there

[14] All identities in the transcripts are anonymised.

are section 12 grounds. Previous convictions have been admitted. There is a history of taking cars… and drink driving. … My point in bringing it up is to show there is a drink problem for this defendant. The events of [ ]. The defendant is 27 years old and lives at [ ]. He was living with [ ]. He moved to Tasmania from Queensland and they have been living together for 3 months. On [ ] they had an argument about his employment. … The defendant arrived home at 11.30pm intoxicated. He woke her up saying she was 'a fucking cunt, a fucking whore'. She said she did not want to be in the relationship. He held her on the throat so it hurt. He pushed her into the stairwell and caused her to hurt her head. … The defendant again grabbed the victim by the throat and squeezed the throat. The defendant only stopped when two neighbours came over. The defendant closed the door on them. The witnesses called the police.
[The defendant was taken to the police station, and charged and bailed the next day after he had sobered up, under a police Family Violence Order.]
The police attended the victim the next day. The defendant was within 50 meters and so arrested and taken to the police station. Your Honour, there was a Family Violence Order and he breached it so he needed to be remanded under section 12. He plans to move to Launceston so he might not answer to bail. There is no surety. He cannot satisfy section 12. That is my submission.

M: Miss Wood.

LA: Mr Roberts has been a chef the last three years, employed in different states in Australia. He is in reasonable good health. He had medication for [ ]. My instructions are that this was a brief relationship … . Mr Roberts was recently offered the position of a chef in Launceston. He plans to move to Launceston tomorrow. We are trying to contact the restaurant owner. There was a breach but the police were present at the time. In any case he could attend with the police to retrieve his belongings.

M: He does not have a surety, I presume.

LA: No. There is the employer [who could be a possible surety].

M: [Two minutes of thought, with hand on chin]. I recognize this as being partly on the borderline and I'm frankly unclear on whether section 12 justifies remanding in custody or to put it another way justifies being bailed. So I'm going to

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46.      adjourn the matter for a period of time for two reasons. One
47.      reason is, if there is no surety, it is important I receive
48.      confirmation of this. It is also confirmation that the
49.      defendant really is going to be employed and more important I
50.      receive that he is going to be living in accommodation in
51.      Launceston. … If it were only the first reason, it could be
52.      done at 2.15. For the other points I need [documentary
53.      proof]. So we should meet at 9.45am Court 3 on [ ] for
54.      further submissions.

LA = Legal Aid lawyer
M = magistrate
P = prosecutor
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Establishing the facts

The magistrate heard submissions on risk from the defence and prosecution. The prosecution case was that there was some risk of harm to the complainant who alleged that she had been assaulted. However, there was apparently no medical report about injuries. The defendant was contesting the charge, but his version of events was not presented to this court, possibly because the lawyer did not want to reveal the defence case.[15] There was a breach of the Family Violence Order imposed immediately following the alleged assault (lines 25–26), but this was not an act of violence. After being released from custody, the defendant approached the complainant, breaching the fifty metres limit imposed by the order, while police officers were present.

The risk potentially would be reduced if the defendant could show that he was living in Launceston (lines 35–36). To understand the relevance of this possible move to Launceston requires local knowledge. Launceston is a three-hour drive from Hobart. Moreover, in terms of local geography, it is viewed as a long drive on a demanding road. It is difficult to know from these remarks whether this was the key factor that made this a 'borderline' case, or whether offering a surety would be enough to reduce the risk of further offending (line 40). Normally, a surety is offered by a family member or friend who pays money into court that would be forfeited if the defendant fails to attend the hearing. The defence lawyer offered to approach the new employer, although perhaps neither the lawyer nor the magistrate expected that the defendant would obtain a surety.

[15] It is possible that another lawyer would have done things differently, although this was still a correct submission in the circumstances. See Travers (1997).

The prosecutor made two submissions that were ignored by the magistrate, and which did not even result in a response by the Legal Aid lawyer.[16] It was suggested that, although the defendant had not committed previous offences relating to domestic violence, he did have a previous offence related to drinking. The magistrate did not, apparently, accept the implication that a drinking problem in itself might result in a violent assault on his partner. The prosecutor also submitted that there was a 'flight risk', or rather that if the defendant was living in Launceston there was a risk that he would not attend the next court date in Hobart. This might be seen as a contradictory argument since the defence could respond that moving to Launceston would protect the victim.

Bail decisions do not, therefore, involve a decision-maker being faced with an agreed set of facts. Instead, the magistrate interprets, establishes and selects facts that make possible certain outcomes. The concept of the 'occasioned corpus', employed by Don Zimmerman and Melvin Pollner (1971) in another critique of Parsons is helpful for seeing how facts in legal hearings are products of local interpretive work. They define the occasioned corpus as those 'features of socially organised activities which are particular, contingent accomplishments of the production and recognition work of the parties to the activity' (Zimmerman and Pollner 1971: 94). This does not, however, mean that the facts cannot be established. In this application, the defendant was asked to supply documentary proof of the job offer and availability of accommodation in Launceston.

Applying the law

Section 12 of the Family Violence Act 2004 (Tasmania) reverses the burden of proof for defendants charged with offences that relate to domestic violence. They have to persuade the court that victims will not suffer harm if they are granted bail. This might seem a high hurdle, until you realise from observing hearings that fifty percent of applications are allowed (the same acceptance rate for applications that do not involve domestic violence). The magistrate noted that the application was 'partly on the borderline'. This is not an objective assessment of the risk. It is rather an indication of how this particular magistrate approached decision-making. The meaning is not clear, however. An observer who has not seen the magistrate decide other cases would not know how such borders are identified. What is clear is that the magistrate was collecting information methodically. There was a two minute pause while the magistrate deliberated, indicating that each decision required thought. Like other judicial officers, he was required to weigh up the factors he thought relevant to the risk of reoffending, and decide whether they could be managed by conditions in a bail order, such as a place restriction. We do

[16] Not every argument made in submissions is given the same weight or even acknowledged by the magistrate in a summary.

not know how the magistrate weighed up each factor, and it is also impossible to predict the outcome of this bail application. Another magistrate might have granted bail even if the defendant was living in Hobart, subject to a place restriction.[17]

Fairness for all practical purposes

In hearing bail applications, magistrates tried to ensure that any custodial remands did not exceed the sentence of imprisonment that was appropriate for the substantive offences. Critics of the bail system have argued that many defendants spend long periods in custody, even though they do not ultimately receive a custodial sentence. There also are defendants who are likely to go to prison. In one case observed, the bail decision was intended to ensure that the time spent on remand did not exceed the anticipated time in prison. This was a rare hearing in which we were able to interview the magistrate about how he came to a decision.

There were two hearings. In the first, the defendant was represented by a Legal Aid lawyer because her own private lawyer, who would not have received payment, could not attend court. The defendant had failed to appear for a hearing, and a warrant had been issued for her arrest. It was suggested that she had not appeared because she was caring for her mother. There was no information available about how she was pleading to a few charges. There was also a suspended sentence from a previous conviction, so if found guilty she would have to spend at least three months in prison. In these circumstances, the magistrate felt it best to keep her in custody overnight in the hope that her own lawyer could attend the next day.

The next day, before the defendant was brought into the court, the magistrate told the defence lawyer that she could spend a long time in prison. He understood that she was caring for her mother but had no further details. He had heard some basic facts, but not much in relation to the different matters.

Application 2

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1.  DL:  Yes well I can certainly clarify those matters Your Honour.
2.  CC:  [The defendant is led into court from the cells]. Trish
3.       Gordon? Take a seat.
4.  DL:  I appear for Miss Gordon today.
5.   M:  Thank you for coming down today. I assume that the defendant
6.       is grateful.
7.  DL:  The first matter is [ ]. I am instructed Miss Gordon will
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[17] Some magistrates in this court would still give a second chance if the defendant breached the place conditions.

plead guilty. For the driving offences she will plead guilty. For matter [ ], she will plead guilty. For the breach of the suspended sentence, my recollection is that was at index 28.

M: Yes it is 4445. So I'll set that aside for the moment.

DL: Matter 29 is a common assault matter. That is a plea of not guilty. In terms of estimated hearing times, I suspect that will be two hours. Index 30 the stealing charge is old. From March 2006 she pleaded not guilty and I'm instructed that that is maintained. What is not apparent from the file is that there is no video footage so whether the prosecution would want to review that. There's an interview [ ] Matter at index 31 there was a previous plea of not guilty. I am instructed to plead guilty to counts 1 and 2 but plead not guilty to the assault on police officer charges. There are not any photos of the alleged injuries. That matter would take a couple of hours. The next matter of unlicenced driving. There will be a plea of guilty. The final matter is index 32 unlawful possession. This is set for hearing. There are some issues with that matter [ ].

M: Traffic matters.

DL: There are potential subsequent offences punishable by imprisonment. They are noted.

M: They certainly are. What do you want me to do? I'm inclined to give bail. She was on bail, but failed to attend court. There were new matters of X and Y brought to court last time. There were no conditions attached to bail as I recall.

DL: My instructions are that she failed to appear for family issues. [ ] She has a child in care. She has returned to live with her mother who suffers from chronic illness.

M: I think she should be bailed. I say that for no reason other than the matters will take a long time to resolve. I think the defendant's residence seems stable. So I am considering bail before I am not sure if it is opposed or not [Prosecutor indicates there is no objection]. There is no surety. I know that [she faces allegations that would attract a period of imprisonment]. So those are the reasons and it may be I bail for mention on all the matters. One of the matters is from 9 years ago. The Prosecution should look at this. So there are some issues yet to be sorted out and it is not appropriate for her to be in custody.

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DL = defence lawyer
CC = court clerk
M = magistrate
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When I spoke to the magistrate after the first hearing, it was still unclear whether or not this defendant would obtain bail. If the matters could be finalized quickly, it made sense to keep her in custody and backdate the sentence of imprisonment. But if, as turned out to be the case, finalizing the matters would take some time, it was 'not appropriate' to refuse bail. In this hearing the magistrate spelt out the reasoning, perhaps because this would help to understand the decision. I was left wondering what might happen if there were more offences whilst on bail. The magistrate gave this reply after the second hearing:

> Well, if there are more offences on bail, she then comes back before someone else as to whether she's re-bailed or not. It becomes quite messy ...

One of the issues that magistrates are asked to consider in statutes on bail is the length of time a defendant will spend in custody (line 32), and the likely sentence. However, in this state magistrates were not asked to consider such issues explicitly when making bail decisions. There was also no guidance on how to make an assessment. In this application, the number of charges was unclear, and it was also unclear when the matters would be finalised.[18] For example, it was not even clear if this defendant would be found guilty of a charge that triggered the suspended sentence (lines 23-24). This decision could be seen as orienting to a legal rule ('consider the length of time in custody before trial'). But it also has the character of a craft skill that cannot be learn from legislation, but only from experience in seeking to achieve fair outcomes.

This example illustrates that the formal considerations in statutes recognise the consequences of possible delay in scheduling hearings.[19] It also shows how the magistrate required advice from the right lawyer to make the decision. This defendant had committed numerous offences while on bail. There were various unresolved issues in the defendant's past record, and she would be sent to prison for breaching a suspended sentence. Any decision-maker, whether a police officer or a new magistrate, had to make sense of this prior record when considering a new bail application. Finally, fairness achieved was in ethnomethodological terms 'for all practical purposes' (Garfinkel 1997). To produce a fair outcome, the magistrate was required to work with whatever resources and information were to hand.

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[18] A case would be finalised when there was a trial date for charges in which the defendant had entered not-guilty pleas, following preliminary hearings to review evidence. This defendant was also pleading guilty to some charges.

[19] The only estimate in this hearing was that 'the matter would take a long time to resolve'.

Making decisions from within

Ethnomethodology is perhaps most distinctive in revealing how decisions are made in real time within occupational practice. This has similarities with the realist critique of formalism, although realists do not describe judgmental work in much detail. There is still a tendency among legal theorists and law school teachers to see black letter law as a rational activity, based on applying rules to facts. When conducting research, it is easy to assume that, if only there is access to the information in every file, it should be possible to explain decision-making as a response to causal factors. In contrast, when you have the opportunity to spend time with practitioners, it is evident that they often have imperfect and limited information.

On one occasion, I was fortunate enough to accompany a Legal Aid lawyer who was about to take instructions from defendants before a hearing.[20] Each interview was completed under ten minutes. The only information available to the lawyer was a fact sheet for the breach (nothing was known about the original, substantive offence), and a list of prior convictions. It was not clear how long the defendant had been in custody.[21] There were defendants who were homeless and had mental health problems, and drug habits. But the lawyer went into court without any details of the history or what medication was currently prescribed. In other cases, there was no time to contact family members who could supply a surety. Yet working together, the practitioners in court quickly made a bail decision with this incomplete information, before moving to the next application. What might be called 'low stakes' defendants were released after guilty pleas, with the condition that they seek appropriate medical help, and with the warning that, if they continued to offend, they would be given a custodial sentence.

LEGISLATION AND JUDICIAL DISCRETION

Magistrates in Australia are criticised by commentators on each side of the law and order debate. Most criticism comes from right wing 'shock jocks' and politicians responding to a series of terrible offences committed on bail. Magistrates and states with allegedly soft bail laws are criticised for not protecting the public. It is, however, difficult to assess whether tough bail laws change judicial practices. They may only have symbolic or political value. Two applications illustrate the difficulties.

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[20] See also Sudnow (1965), and Travers (1997).

[21] There was a department in the prison service that had this information, but the line was often engaged.

A 'show cause' application

In the legislation in New South Wales, a defendant can be asked to 'show cause' in certain circumstances, such as when an 'indictable' (more serious) offence had allegedly been committed on bail. This reverses the burden of proof, and makes it difficult to obtain bail. The test in the legislation is more complicated in that, if the defendant does 'show cause', the prosecution can still seek to prove there is an 'unacceptable risk'.[22] There is a dual test, which sends a strong message politically that it should be difficult to obtain bail.

In the following application, the defendant had breached a bail condition that required him not to drink in a public place. He was also charged with a new offence of affray, for threatening an officer with a fork. A magistrate accepted the defence argument that the prosecution had over-charged the defendant in order to take advantage of the 'show cause' provision:

Application 3

DL: Release application.
P: And detention application. Not to be intoxicated in a public place.
M: A detention application.
DL: There was a condition of not being intoxicated in a public place. He thought that drinking in a bar was OK. That's all I'd say on that Your Honour.
M: [reads] Yes Mr. Jones.
DL: Yes in relation to the show cause it seems to be a case of common assault. He was holding a fork eight centimetres away there was no physical contact. But the prosecution have laid affray charges that sets off the show cause. An affray charge causes a greater maximum penalty. Certainly in terms of affray it is at the lower end. It was handled by the police officer there and the fork was only taken so he could eat. There are other factors in the antecedents. He is a painter and is not on Centrelink. He owes money on his childcare payments. If he was in custody, this would go away. They are the main factors I would raise to show cause. And also if the offence related to his family, it would be a whole different category.

[22] This does not do justice to the complexity of the New South Wales legislation. An attempt by the Attorney General's Office to reduce the number of tests failed after political pressure to strengthen the bail law (Brown 2013).

M: Mr. C. You are charged with affray so there is a show cause provision. Were the situation otherwise it would be a simple common assault. In addition [because you are pleading not guilty to the first substantive charge] you could spend a significant amount of time in custody. On that basis, the court is prepared to come to the view that you have shown cause.

P: Your Honour bail is not opposed. Our concern is the safety of his family. The prosecution will press for a residence condition. Also there should be an alcohol restriction.

[M questions the custody officer about the defendant's address]

DL: I can't say anything on the conditions. The address should be … . We'd ask that the conditions be replicated and perhaps it could be made clear what that means.

M: [writes]

M: Mr. C this matter goes to the [ ] court on 6 June 2017 9.30. There is conditional bail to continue to reside at … . And there is an express condition not to consume alcohol in a public place. This includes pubs and clubs. You can drink in a private dwelling.

In this application, the magistrate quickly accepted the argument on over-charging (lines 27–8), and the prosecutor immediately withdrew his opposition to the bail application. The key reason for the decision stated by the magistrate is that, if the defendant was remanded, he would spend more time in custody than was justified by the original offence (the details were not available to the researchers). The subsequent offence of affray might appear to attract a longer sentence, but the magistrate made it clear that he viewed this as over-charging. Exercising discretion in this application involved both interpreting the law and assessing the factual basis of a charge (it is difficult to separate the two). Although this is only one case, it illustrates that not every magistrate made tougher decisions as a consequence of this law.

The 'exceptional circumstances' test

In Victoria, there were considerable concerns about bail, following the Gargasoulas case (see note 1 on 'the Bourke Street rampage'). The Coghlan report (2017) recommended that defendants had to supply a 'good reason' why they should be granted bail. However, the revised Act requires defendants to demonstrate that there are 'exceptional circumstances'. One magistrate explained the law to each defendant in uncompromising terms: the only way of satisfying the test would be if you were 'diagnosed with a brain tumour'. It might appear that, in

this state, no one will be granted bail. Even so, there is room for discretion. There were successful applications. One magistrate accepted a combination of circumstances, for example undertaking drug counselling and providing a surety, as satisfying the test.

CONCLUSION: IN DEFENCE OF DISCRETION

This paper has supplied an account of the work of magistrates making bail decisions that contributes to an under-researched area of legal sociology. It demonstrates the extent of discretion in judicial work, and shows in some detail how this is currently exercised. Although magistrates employ common-sense knowledge and reasoning, they also employ craft skills that can only be learnt and employed in this occupational setting such as how to calculate 'reasonable' periods in prison, and how to interpret legislation.[23]

The first part of the paper explained the distinction between legal realism and ethnomethodology. This is difficult because there are few points of contact between the two traditions, partly because their arguments were advanced within different disciplines. I hope to have demonstrated that ethnomethodology offers a coherent alternative to both formalism and rule skepticism, and to the structural bias of contemporary realists (Mertz et al. 2016), through describing in some detail how legal decisions are made. I also hope to have shown that the Wittgensteinian critique of 'skepticist' readings of Wittgenstein in the sociology of science and mathematics is relevant to understanding constructionist arguments about legal practice.

An important principle in ethnomethodological research is that one should be 'indifferent' to the moral and political questions that interest other sociological traditions (indifferent, not in the sense of callous disregard, but in the selection of cases deemed worthy of intensive analysis). The focus of this paper has been on explicating how magistrates employ discretion, rather than commenting on whether this level of discretion is a good thing. Ethnomethodology as a program, or set of research agendas, has sought to reveal the interpretive practices apparently concealed behind organisational charts and legal rules. There is no political agenda in this program: it can be understood as a debate with other traditions in sociology and legal studies on how to investigate and represent social reality. Nevertheless, ethnomethodological findings can also have political or policy implications. Studies about technology often suggest that new devices or organisational initiatives will not work unless they take account of the social organisation of

[23] A reviewer suggested that the decision made in application 1 could have been made 'in the pub'. Even so, a magistrate is making the decision within a legal framework, knowing what is possible with the resources available, and with the skills to address legal and procedural issues if they arise.

human practices. This paper on judicial discretion may assist those making policy arguments about bail reform.

Perhaps the most striking finding is the extent to which the current bail system is based on discretion. Employing discretion is experienced as normal, and unavoidable, by those working in courts. This can be demonstrated through descriptive statistics, but is particularly evident when talking to practitioners. Magistrates are untroubled by the possibility that another magistrate might decide the same case differently. It is accepted that some magistrates refuse most applications, and others accept most applications. There are also magistrates who carefully weigh up the factors in each application. Some of the interpretive processes involved in assessing evidence, and applying legal rules to facts, have been described in this paper.

Discretion in bail decision-making involves being given the authority to reach an individualised judgement. It means not being accountable to managers or colleagues, or subject to external controls. Magistrates can interpret the law differently, and they can express different understandings of the facts. This may seem unsatisfactory, given the outcome of a bail application depends on the magistrate making the decision. This was the critique made by legal realists. But an ethnomethodological approach reveals that many magistrates consider evidence carefully, and employ craft skills to achieve what they consider 'fair' outcomes.

There are many critics who would like to tame or standardise the unruly human work of bail decisions, and sentencing (Travers 2012). Those concerned about offences committed while-at-large on bail have already achieved tougher legislation. Those favouring a more generous policy in the USA have sought to influence decisions through actuarial guides based on assessing risk (VanNostrand and Keebler 2009). Discretion is not removed but displaced into coding decisions by welfare agencies (Castellano 2011). It seems unlikely that there will be significant reforms that reduce judicial discretion in Australia. Nevertheless, because these arguments are being canvassed, ethnomethodologists can contribute to this policy debate by describing judicial work.

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