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Business as Usual? Bail Decision Making and "Micro Politics" in an Australian Magistrates Court

Max Travers

Between the 1970s and 1990s, political scientists in the United States pursued a distinctive research program that employed ethnographic methods to study micro politics in criminal courts. This article considers the relevance of this concept for court researchers today through a case study about bail decision making in a lower criminal court in Australia. It describes business as usual in how decisions are made and the provision of pretrial services. It also looks at how traditionalists and reformers understood business as usual, and uses this as a critical concept to make visible micro politics in this court. The case study raises issues about organizational change in criminal courts since the 1990s, since there are fewer studies about plea bargaining and more about specialist or problem-solving courts. It is suggested that we need a new international agenda that can address change and continuity in criminal courts.

INTRODUCTION

Among the inspiring achievements of the law and society movement in the United States and Canada is the research conducted by political scientists between the 1970s and 1990s based on the close observation of criminal courts (Nardulli 1979; Eisenstein, Flemming, and Nardulli 1988; Flemming 1982; Flemming, Nardulli, and Eisenstein 1992; Ulmer 1997). Numerous ethnographic studies conducted during this period examined procedural fairness at different stages of the criminal justice process, especially plea bargaining (Blumberg 1967; Heumann 1977; Church 1978; Feeley 1979; Mather 1979). The studies conducted by these political scientists contributed to this literature, but were distinctive in examining judicial politics and institutional change. Since the 1990s, a new generation of researchers has investigated developments such as specialist or problem-solving courts (Burns and Peyrot 2003; Mirchandani 2005; Hannah Moffat and Maurutto 2013; Fay-Ramirez 2015), but often without considering political issues within courts. Taken as a whole, these diverse literatures raise questions as to how criminal courts have changed, and how they might change in the future. This article will partly consider these larger questions, and also the extent to which the North American literature can assist in understanding changes in criminal courts outside the United States.

Max Travers is a Senior Lecturer in the School of Social Sciences, University of Tasmania (max.travers@utas.edu.au). His research and teaching interests are in the sociology of law and qualitative research methods. The author thanks Michael Hill, Jeanne Hersant, and Cécile Vigour for their encouragement, and four anonymous reviewers for helpful feedback.

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The main focus will, however, be the "micro politics" of courts as a research question or problem. The enduring value of studies by political scientists such as Eisenstein, Flemming, and Nardulli (1988) is not simply the scale and quality of the qualitative and quantitative research, not normally possible today, but their systematic analysis of political processes in courts.

Drawing on research conducted in the Australian state of Tasmania about bail decision making and organizational change in a magistrates court, this article is written in a different time and place, but it is part of the same tradition in seeking to understand the work of judicial officials and legal practitioners, and contribute to public policy debate. Tasmania is the smallest of the seven states and two territories in Australia, with a population of 500,000, about the same as a regional country area in larger states such as Victoria or New South Wales.[1] Nevertheless, for historical and geographical reasons, it is a separate state with its own parliament, legislation, and case law. Hobart, the capital, in the south of the island, has a population of 200,000; the next largest city, Launceston, in the north, has a population of 100,000. Magistrates are legally qualified, and make decisions sitting on their own in a similar way to stipendiary magistrates in the United Kingdom, supported administratively by a court clerk. Eight magistrates sit in Hobart, including the Chief Magistrate and Deputy Chief Magistrate, and there are an additional six magistrates based in Launceston, Burnie, and Devonport in the north of the island.

Crime is not a significant issue in Tasmanian politics, and there is limited community activism in favor of either due process or crime control (Packer 1968), or in favor of either tougher punishment or rehabilitation. The routine work of Tasmanian judicial officers and practitioners has the character of business as usual, and is only understood as a political issue by a few liberal critics, people who have limited influence in determining policy.[2] Nevertheless, this court has changed organizationally in the last twenty years. The Youth Justice Act 1997 established a diversion list for young offenders, which has since become a dedicated list, run on therapeutic justice principles, by a dedicated magistrate (Travers, White, and McKinnon 2013). In addition, problem-solving lists have been introduced for eligible defendants who are drug users or have mental health problems (Tasmanian Department of Justice 2008). In drug courts, defendants who plead guilty are given the opportunity to rehabilitate in therapeutic programs under the supervision of a judicial officer instead of receiving a prison sentence (Nolan 2001).

Even though they are constrained by limited resources, some judicial officers and practitioners in Tasmania would like to expand and improve the services and rehabilitative programs available to defendants at the pretrial stage. Although this might seem like a new idea in Australia, similar reforms were advocated by US law and society researchers during the 1960s and 1970s.[3] An empirical project conducted by a law school demonstrated that risk factors could predict whether offenders would meet bail (Sturz 1963). It also proposed that social support and

1. Victoria and New South Wales had populations in 2014, respectively, of 5.9 million and 7.5 million.

2. These critics include the reform-minded academics and practitioners in the Law Reform Commission, based in the law school at the University of Tasmania.

3. For a review of this extensive literature, see Feeley (1979).

therapeutic assistance at the pretrial stage could prevent or reduce crime. In the United States, these initiatives have gradually been accepted and institutionalized in many states, partly as a means of reducing the prison population (VanNostrand and Rose 2009; Castellano 2011). There has so far been little interest among policy makers or practitioners in Australia. However, a recent initiative in the state of Victoria (Department of Human Services 2005) provides a model for introducing pretrial services in Tasmania and other states.

Using bail decisions in Tasmania as a case study, the article seeks to clarify and explicate what is political about courts, the nature of routine work ("business as usual") for judicial officials and other practitioners, how pretrial services are offered to particularly vulnerable defendants in these courts, and how organizational change takes place. In doing so, I am combining ideas and methods from two social science traditions that rarely speak to each other. The first is ethnomethodology, a theoretical tradition in sociology that seeks to make visible the practical and interpretive methods employed in routine work, and also how organizational culture is produced and understood within organizations (Lynch, Dupret, and Berard 2015). The second is the political science literature that employs a combination of ethnographic and quantitative methods in researching courts, and is interested in political activity and organizational change (e.g., Eistenstein, Flemming, and Nardulli 1988). These internally diverse traditions are each committed to naturalistic observation, and understand official statistics critically as the product of interpretive work. Both traditions employ ethnographic methods, such as observation and interviewing. Ethnomethodologists prefer to analyze transcripts that preserve the practical content of work activities that is not available from interview studies.[4]

The article starts with a critical review of the literature on criminal courts in political science, showing that there are several ways of conceptualizing political activity in courts. It then explains the qualitative methods employed in this case study. The rest of the article seeks to describe and then problematize business as usual, understood both as the routine work that can be observed in hearings, and a member's concept, but also a means of asking critical questions about organizational change.[5] The middle sections describe some aspects of how bail decisions are made and services provided to vulnerable defendants. This is a description of business as usual that takes place every day in these courts, and will be familiar to practitioners in many jurisdictions. The article then looks at how traditionalists and reformers understand and use the concept of

4. The political scientists in this tradition did not write at great length about methods or methodology (the theoretical assumptions that inform the collection and analysis of research data). They had a commitment to fieldwork, with an emphasis on conducting large numbers of interviews. Their assumptions seem similar to those of symbolic interactionists in sociology: it is possible to understand the different occupational perspectives that constitute this social world without becoming too technical or worrying about philosophical issues (Blumer 1969). Some ethnographic studies by ethnomethodologists also have this character (e.g., Sudnow 1965; Cicourel 1968), and these have influenced the approach in this article. There are also technical methods of analysis in ethnomethodology, such as conversation analysis and membership categorization analysis (e.g., Licoppe 2015), that seek to explicate members' concepts and practical reasoning in greater depth.

5. The term "business as usual" is a member's (emic) concept. Even if practitioners do not use the term, they understand their work in this way. The term "micro politics" is, by contrast, an analyst's (etic) concept, since disagreements in a workplace are not always understood as being political.

business as usual when talking to an interviewer about these occupational practices and the desirability, prospects, and opportunities for change. The final section considers micro politics and bail reform in this court. One intriguing finding from this research project is that organizational change takes place today in Australian courts, and perhaps more widely internationally, apparently for reasons different from those discussed by Roy Flemming (1982) in relation to US courts. The conclusion considers the need for a new research agenda that builds on research on judicial politics conducted in the United States, but is more international and comparative, and recognizes both business as usual and organizational change.

CONCEPTUALIZING POLITICS IN COURTS

There are a number of views, advanced by different disciplines, on how courts are political organizations. In the sociology of law, there is a large and diverse critical literature influenced by the conflict tradition that looks for, and finds, power relations in any social institution, and relates this to wider structural conflicts (e.g., Carlen 1976; Smart 1989). Empirical research on courts and lawyer-client interaction influenced by these ideas (e.g., Conley and O'Barr 2005) has been criticized from an interpretive perspective in sociology for providing too negative or reductive a view of legal practitioners (Travers 2006). Political scientists can also be criticized for only viewing judicial work through a political lens. Nevertheless, one can accept that US criminal courts, in which judges and district attorneys are elected, are intensely political organizations.

Macro Politics

The Supreme Court, and other appeals courts, as agencies independent from the executive, make consequential political decisions under the US Constitution. Political scientists have been interested in the social and psychological factors that influence Supreme Court judgments (Baum 2006), and there is also a large literature on decision making in the lower courts (Hogarth 1971). Michael Lipsky (1980) has suggested that judicial officers make policy, or can obstruct legislators, as "street-level bureaucrats" through exercising discretion both as individuals and collectively. He gives the example that, when sentencing, judges decide "who shall receive a suspended sentence and who shall receive maximum punishment" (Lipsky 1980, 13). This has led to attempts by state governments to control judicial discretion through legislation, such as the three-strikes rule in California (Tata and Halliday 2002). On these occasions, judicial decision making becomes a political issue in the sense that there is public debate and commentary, and voters are asked to decide on criminal justice policy in state elections.

Micro Politics

US courts are also political organizations at what is described by sociologists as the "micro level" of society. Erving Goffman (1982, 2) implies that the political

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activity that takes place face to face or in small groups can be studied as "a substantive domain in its own right." From this theoretical perspective, the interaction between professionals and clients or between the judiciary and defendants in courtroom hearings can be understood as a struggle for power and dominance. It also becomes possible to recognize the importance of politics at the micro level within organizations and professional groups that is often taken for granted or concealed in court ethnographies.[6] Flemming, Nardulli, and Eisenstein (1992), drawing on empirical research in nine medium-sized courts conducted in the 1970s, have argued that everyday work in courts, what they call the "craft of justice," is thoroughly or fundamentally political. They portray the relationship between district attorneys, public defenders, and judges as "adversarial," especially in relation to plea bargaining, although the form and content of these conflicts varies considerably between courts. They also claim that all the agencies are characterized by internal political conflict, including the bench:

> The centrifugal and centripetal forces within courts meant that decisions about organizing work generate political conflicts on the bench. Judges must decide how to divide their time among different tasks, allocate work and cases among themselves, choose whom they want as a leader, and settle on how they want to be led .... With few guidelines other than personal preferences and professional norms to follow, the policies judges select for their court's operations reflect local bench politics .... Equally difficult problems centering on equitable distributions of work loads and efficiency in the courts also surface. Court policies ultimately reflect the social, professional, and political relationships among judges and how the judges resolve these conflicts. (Flemming, Nardulli, and Eisenstein 1992, 81)

One response might be that the political nature of these "micro-level" disagreements is exaggerated. The central norm governing behavior in courts, just as in university departments, is collegiality. This makes it possible for Supreme Court judges to come to decisions based on widely different interpretations of previous cases. It also makes it possible for judges in the lower courts to be lenient or tough, for example, when making bail decisions. There is almost no managerial oversight, aside from the fact that decisions can be appealed on legal grounds.

Are Courts Still Political Organizations?

Flemming, Nardulli, and Eisenstein portray a criminal court in which disputes about organizing judicial work were shaped by structural conflicts between the District Attorney's Office, the Public Defender Office, and the bench. Judicial elections were fiercely contested, sometimes on ideological grounds. They give the example of an "insurgent" prosecutor, seeking to change some organizational practice in hearing plea bargains, who leaked information to the press suggesting that a

6. See Ball (1987) for a study about micro politics in schools.

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judge was soft on crime (1992, 26–30). Today, this view of courts as political organizations seems less useful.[7] Fewer law and society researchers in the United States are angry about the injustices caused by plea bargaining. The rise of problem-solving courts (Nolan 2001) or pretrial programs (VanNorstrand and Rose 2009) does not appear, at least from the outside, to involve heated political or ideological debate. The internationalization of law and society research also raises questions about the value of these studies for understanding court communities outside the United States in which judges are not elected. To his credit, Flemming (1982) has argued that each court has to be understood as an unique institution facing challenges in a local political and institutional context. This is why conducting new case studies in criminal courts both inside and outside the United States has scientific and political value.

SETTING AND METHODS

This research project arose because there was interest in revisiting the issue of bail among Australian criminologists who were involved in reform initiatives during the 1990s aimed at reducing the remand population (King, Bamford, and Sarre 2005). Bail is currently a political issue owing to the Sydney café siege in which the gunman Man Monis was on bail despite having been charged with serious offenses, due to a series of errors by prosecutors (Bibby 2015). However, while some are calling for tougher bail laws, there are also concerns about a growing remand population. Relatively little research has been conducted in Australia about the different responses by states to defendants at the pretrial stage.[8] This study in Tasmania has involved observing forty bail applications in the "lock up court," which takes place on Mondays or on the Tuesday following a public holiday, over twenty days of fieldwork.

Court ethnographies employ a variety of methods, including observation, interviewing, and the analysis of documents (Paik and Harris 2015). It has become common to combine the analysis of short transcripts with extracts from interviews to describe and document professional work (e.g., Kupchik 2003; Harris 2009; Fay-Ramirez 2015). This study employs similar methods. However, I prefer working with slightly longer extracts from transcripts with the scientific objective of preserving and addressing how different factors are weighed up, and the decisions made, during particular applications; and also with the political objective of showing how defendants are affected (see Application 4). In this study, it was not possible to obtain audio recordings of court hearings, but it was possible to make transcripts through taking contemporaneous notes.[9]

7. The statements by candidates in judicial elections today do not suggest an ideological contest (http://ballotpedia.org/Portal:Judicial_elections). Instead, candidates seek to demonstrate they are competent and experienced, and have community ties.

8. In 2011, remand rates per 100,000, calculated by Brown (2013), were: Tasmania 21.5; South Australia 52.1; Victoria 19.6; New South Wales 49.1. At a workshop for practitioners in South Australia, a prosecutor argued that the statistics for this state were misleading because they included home detentions.

9. For examples of how this method has been employed in researching courts, see Holstein (1993) and Travers (2012).

In addition to observing hearings, I conducted eight audio-recorded interviews with practitioners, including magistrates, defense lawyers, and prosecutors, about their work,[10] and the possibility of doing things differently through offering integrated pretrial services. Shorter, informal interviews were conducted around hearings, making it possible to obtain an insight into the legal and practical issues in those applications. In addition, four interviews were conducted with agencies providing services to defendants while they were on bail, and two with community groups or individual practitioners interested in bail reform. It has unfortunately not so far been possible to look at case files, or documents such as police summaries of offenses, or often to interview practitioners about specific decisions. This is partly because agencies, which were all in different ways under pressure or subject to efficiency drives, had little time to assist, but also because it seemed politically prudent not to seek permission from an ethics committee to access case files.[11]

The practical challenges of court research have been well described in Flemming, Nardulli, and Eisenstein (1992, 14). These researchers obtained considerable support from agencies, making it possible to obtain records, administer questionnaires to practitioners, and conduct "interviews with 306 members of the courthouse communities" (16). Nevertheless, many of the ideas were developed inductively through brief conversations around hearings, so perhaps the differences between these ethnographic traditions can be exaggerated. In this study, it was only possible to obtain a few glimpses into the "back stage" of these organizations (Goffman 1959) in which there are from time to time political debates about resources or policy options. This may, however, reflect harmonious working relations, and a consensus around business as usual in this court, as much as a reluctance to discuss internal politics with outsiders. By contrast, a US researcher found that some informants wanted to "let off steam" or "settle old scores" (Flemming, Nardulli, and Eisenstein 1992, 17).

BUSINESS AS USUAL: HOW BAIL DECISIONS ARE MADE

The phrase "business as usual" conveys the routine, taken-for-granted character of decision making in most aspects of work in this magistrates court. Practitioners come into court and do their jobs collaboratively in a manner that displays their routine, ordinary character.[12] There are few dramas or surprises, and the sense that any procedural problem can be solved without too much effort. Even the defendants give the impression that they are comfortable with the surroundings, and rarely react emotionally to decisions or when security guards stand over them in the dock in a way that looks intimidating to an observer. Crime in these communities in deprived suburban areas on the outskirts of Hobart was a way of life for some people, and it was common, and even a badge of honor in some circles (Feeley 1979,

10. These interviews were deliberately kept short, even if this meant not covering all topics adequately, in order to save time for practitioners.

11. The response on previous applications was that written consent from each defendant would be required to examine confidential records.

12. For an ethnomethodological discussion of ordinariness, see Sacks (1985).

201), to be remanded in custody. This observation is not intended to suggest that defendants were responsible for difficult, often intergenerational, social and economic circumstances. Many practitioners interviewed believed that nothing could be done. By contrast, those interested in reform provided examples of how individual lives had changed through interventions. To question or even challenge business as usual requires both acknowledging the social causes of crime, and believing that specialist or problem-solving courts can make a difference.

Magistrates make individualized decisions through weighing up and balancing different factors.[13] In the following hearing, the magistrate was asked by the prosecution to refuse bail under Section 12 of the 2004 Family Violence Act (Tas) on the grounds that the safety of his partner after an incident of domestic violence could not be guaranteed. This is a slightly abridged transcript of the hearing:[14]

Application 1[15]

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 are
4. section 12 grounds. Previous convictions have been admitted. There is a
5. history of taking cars … and drink driving … My point in bringing it up is
6. to show there is a drink problem for this defendant. The events of
7. []. The defendant is twenty seven years old and lives at []. He was
8. living with []. He moved to Tasmania from Queensland and they have
9. been living together for three months. On [] they had an argument about
10. his employment … The defendant arrived home at 11.30 pm intoxicated.
11. He woke her up saying she was "a fucking cunt, a fucking whore."
12. She said she did not want to be in the relationship. He held her on the
13. throat so it hurt. He pushed her into the stairwell and caused her to hurt
14. her head … The defendant again grabbed the victim by the throat and
15. squeezed the throat. The defendant only stopped when two neighbours
16. came over. The defendant closed the door on them. The witnesses called
17. the police.
18. [The defendant was taken to the police station, and charged and
19. bailed the next day after he had sobered up, under a police Family
20. Violence Order]
21. The police attended the victim the next day. The defendant was
22. within fifty meters and so arrested and taken to the police station.
23. Your Honour, there was a Family Violence Order and he breached it
24. so he needed to be remanded under section 12. He has interstate
25. connections so is a flight risk. The victim said that he was going
26. to move to Launceston so he might not answer to bail. There is no
27. surety. He cannot satisfy section 12. That is my submission.
28. M: Miss Wood.
29. LA: Mr. Roberts has been a chef the last three years, employed in
30. different states in Australia. He is in reasonable good health. He

13. See Harris (2009) on "focal concerns."

14. Some details have been disguised to make it more difficult to identify the defendant (even though hearings in Tasmania can be reported in full once a case is finalized).

15. All identities in the four transcripts are anonymized.

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

P: prosecutor, LA: Legal Aid lawyer, M: magistrate.

The magistrate hearing this application had to consider the risk of harm to the complainant, viewed from the police perspective as the victim of domestic violence (line 25). In this case, the defense might be able to show that there was a low risk given that the defendant would be living in a different city (lines 32–33). In other applications observed, magistrates were willing to grant bail for a first offense if the defendant moved to a different neighborhood, and perhaps if there were conditions to report twice a week to a police station. Offering a surety (line 37) who would pay $500 or $1,000 was also often sufficient to obtain bail. A prior record (lines 5–6), especially if this involved domestic violence or breaches of bail, would make refusal more likely.

In some applications, the defense lawyer attempted to demonstrate a weakness in the prosecution case. In this application, the defense lawyer may not have had time to take full instructions other than to plead not guilty, or perhaps saw no reason to reveal her hand given that the defendant was moving to Launceston. This magistrate was known for giving clear reasons, and generally adopting a tough approach. He was affectionately known by some in the court community as "our hanging judge." Other magistrates were lenient and did not give reasons, in some hearings interrupting the defense lawyer to give a favorable decision. There were magistrates in the middle who carefully weighed up the pros and cons when giving reasons for the decision on each application, so it was difficult to predict how they would respond to similar circumstances. Even if a magistrate was likely to grant bail, the prosecutor had to oppose on Section 12 grounds because this was police policy. Because of this, some applications gave a sense of prosecution and defense lawyers going through the motions, but this was also part of business as usual.

Magistrates often gave a least one chance for a breach of bail, such as not attending a court hearing, reporting to the police station, or complying with a curfew. A breach of bail was itself a criminal offense, and defendants received a sentence for these bail offenses when they were sentenced for the substantive offense. It was more difficult to obtain court bail if other offenses were committed on bail. The following extract is an example in which it was alleged that a defendant had committed offenses while on bail. He also committed a breach of a curfew, unusually by phoning police near the property where he was staying in an intoxicated state and asking to be sent to prison.

Application 2

P: It might seem a minor matter but Mr. Brown breached bail on [] on his curfew. He was residing at [] with a curfew from 9 pm to 7 am. He called police from a phone box near this address, intoxicated. He was taken to the police station. He said that he had a machete and wanted to go to prison . . . He was bailed to appear on [] to reside at [] with a curfew between 9 pm and 7 am. On 4 am of [] police checked and he was not present. On [], a yellow Mitsubishi was stolen. Items in the car were forensically linked to the defendant who was on bail. Your Honour, he lives with his mother and continues to offend . . .

LA: Mr. Brown currently resides at []. He has to stay there between 9 pm and 7 am. He instructs that tensions between his mother and grandmother caused some problems. Unfortunately, Mr. Brown on that night had an argument and was asked to leave. He left and does not recall saying he had a machete. In any event he has phoned [his girlfriend] and she is more than happy to have him staying there. It is my submission Mr. Brown is not trying to leave the jurisdiction. He phoned the police to report a breach of bail. He committed [serious] offences in 2011 and 2012 but has seen some improvement since then.

M: Once again difficult circumstances. The court gets to see that he has been doing breaches. The conditions are to protect the community. I will remand until [] at 9.15 am. If he wants to go to the Supreme Court he can go, but we will see him on [].

P: prosecutor, LA: Legal Aid lawyer, M: magistrate.

The magistrate may be commenting in line 21 on the "difficult" social issues, perhaps alcoholism, or family breakdown, that could not concern the court when reaching a decision since it could only assess legally relevant factors.[16] The key legal issue is that the defendant had "been doing breaches" (lines 21–22). He had been linked "forensically" to stealing a car (line 8), even though he had not yet been charged with this offense. The prosecutor noted that even though he lived

16. This remark was made after hearing two applications in which there were also continuing offenses on bail. It illustrates how magistrates were not directly talking to the defendants (who were mainly referred to in the third person) but to the court workgroup. It might indicate a reluctance to refuse bail, but that this was not possible in these applications due to continuing breaches.

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with his mother, a condition of the original bail application, he continued to offend (line 10). The magistrate acknowledged that this decision was appealable to the Supreme Court (line 24), perhaps because this breach of a curfew hardly put the public in danger.

Many law and society researchers will understand this example in political terms. It illustrates how a defendant from a disadvantaged background was managed by professionals without receiving social support. It is possible, even today, that having a surety (being able to post a bond) gives such defendants the best chance of obtaining bail, so the underlying issues have not changed since the 1960s. By contrast, practitioners do not normally understand their work as raising either "macro" or "micro" political questions. The craft skill of magistrates (Flemming, Nardulli, and Eisenstein 1992), which cannot be fully described or explicated in this article, lay in ensuring that any custodial remands did not exceed the sentence of imprisonment that was appropriate for the substantive offenses, such as stealing cars. This involved making a rough estimate of how long it would take for a defendant to plead guilty to the offenses, or for a trial to be arranged in the case of a not guilty plea.[17] The overall objective was to keep defendants out of prison before trial, while responding to technical and substantive breaches, and protecting the public.

THE PROVISION OF PRETRIAL SERVICES

The pretrial programs offered in the Australian state of Victoria, and in many US states (Clark and Henry 2003), target therapeutic programs and social assistance to groups based on an assessment of risk, whether this means reoffending or not appearing for the next court date. Actuarialism has become a popular way of talking about punishment and welfare in courts and other government agencies (Heydebrand and Seron 1990; Feeley and Simon 1994). However, alongside or underlying this contemporary policy language, many practitioners believe that crime has social causes, and that the most "vulnerable" groups should receive support and assistance.[18] This is partly why children's courts, drug courts, and mental health courts have been established in the last two decades, even if they have a variety of objectives, including crime prevention and punishment (Miller and Johnson 2009). It is also the objective of pretrial services that, for example, provide temporary accommodation in bail hostels to homeless defendants. However, the difficulties that arise in working at a distance from agencies with limited resources were evident in these court hearings.

The following extract from a transcript illustrates how a defendant who had assaulted his elderly neighbor, allegedly in a frenzied attack with a pitchfork, was referred for an assessment in prison by the Forensic Mental Health Officer.

17. Mistakes were sometimes made, but these were managed through informal procedures rather than becoming a political issue.

18. "Vulnerability" is a term used by academic commentators (e.g., Bartkowiak-Theron and Asquith 2012), but also by policy makers and practitioners seeking to justify interventions that "help" specially disadvantaged groups.

Application 3

P: The incident took place at 7 pm on []. The complainant at the time was doing washing up. The defendant was yelling and banging on the door. The defendant became enraged thinking Mr. X was staring at him. The defendant grabbed him through the fly screen of the window and attempted to pull him through the window. The complainant managed to free his hand but the defendant threw various items . . .
At the time of the incident, Tasmania police and the ambulance service attended. The defendant was placed under arrest and detained overnight since there was a problem in obtaining a statement. Forensic services attended the scene and found a large pitch fork covered in blood. It was likely that this was used to puncture the defendant's body.
At 9.15 am the defendant participated in a recorded interview. The defendant states he had six beers during the day. He had ongoing issues with the complainant. The complainant had poisoned his dog six months ago and he complained he stared at him all the time. He stated that he had had enough . . . He denied using the pitch fork and stated he did not use excessive force . . ..
In relation to the bail application Your Honour, I can indicate that . . . I have spoken to [] council and they have asked him to vacate his unit. Our application for a restraining order may change depending on his bail status after this application.

M: Miss Brown.

LA: He has resided at [] for two and an half years. His instructions are that he can reside with his twenty-six-year-old daughter in []. He has two other daughters, aged sixteen years and ten years. He has sole care.
He last breached bail in 2003. He can comply with the conditions of a curfew if required and comply with conditions []. My submission is that a restraining order not to go to that address can be complied with (the police can assist in getting his belongings). My submission is that relocation would provide the complainant with security. These are my submissions.

M: [Two minute pause] This is another case where one imagines the Prosecution summary of the charges perhaps misses the mark a bit. [His behavior might suggest] paranoia and mental instability. If I had a surety, not a daughter but someone in authority prepared to take an interest, I might take a different view. So I would like some evaluation of the applicant to fill in the holes. Maybe the Prosecution will ask me to make an order that he be examined. So bail is refused till [] of the month by video link. I've left the bail application open.

P: prosecutor, LA: Legal Aid lawyer, M: magistrate

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This application for bail was postponed for three weeks because this was the next date the magistrate was sitting, and would give enough time for an assessment, and perhaps it would then be possible to enter a plea to the charges. The hearing illustrates that, in this court, agencies have little time to investigate social or psychological issues. The prosecutor did not see this level of violence in an apparently unprovoked attack as unusual behavior, or did not feel that it was appropriate to suggest an assessment. The Legal Aid lawyer had little time to take instructions because she had an hour to see six defendants. In this submission, we learn very little about the defendant. It was also unclear from the hearing what would happen to the two younger daughters (lines 28–29), although presumably they could stay with the older daughter. My own understanding is that if there were psychological factors, there were no suitable programs locally in the community that could be offered along with supervision. The most likely outcome would be that the defendant would spend time in prison, and perhaps receive therapeutic treatment in that environment.

This hearing also illustrates why only a small proportion of defendants in Australia who take drugs or suffer from a mental illness are diverted to the drug and mental health courts. To qualify for therapeutic interventions, defendants have to plead guilty and commit to an intensive program of monitoring and supervision. Many defendants do not see their drug habit as a problem. Those with a more serious addiction that can be life-threatening recognize the need for help from intensive programs, but in Tasmania, as in many other Australian states, these agencies do not have the resources to cope with demand. There is often a waiting list for defendants remanded in prison before they can be bailed to a residential facility.

The following defendant is an example of someone who has been drinking himself to death, but also committing acts of violence against his ex-partner and other offenses of disorderly conduct. The latest breach of a restraint order took place shortly after he was released on bail. He went to the house of his ex-partner, who was not there at the time, in contravention of the order. The prosecutor noted that "it is a situation where a rational person would not have gone, but a rational person would not commit the other offences." He would be happy, on Section 12 grounds, if the defendant was admitted to the residential program available locally. However, this was not possible because there was a six-week period of assessment. No one from the program was in court (as might happen in an integrated system of pretrial services), although a welfare officer from a religious charity happened to be there who could contact the program after the hearing.

The following extract is from the end of the application when the defense lawyer sought to obtain bail on the grounds that the most recent breach did not involve violence. The defendant could stay with a "long-term friend … who has been taking him to appointments and to AA meetings and will take him to the program." However, the magistrate took the view that given the number of breaches, he should remain in prison until he was assessed for the program.

Application 4

1. DL: Can I just take some instructions … I'd ask for bail because it is
2. not alleged there were threats to the complainant. So, in terms
3. of section 12, concerns might be minimized. He has also

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witnessed a significant assault at Risdon prison in his unit.
This has had a sobering effect. He is nervous going back to prison. He will do everything necessary to avoid going back.
M: Miss Green, if I do not bail him today, how does it affect the assessment?
DL: This can take place in custody but the program may not accept him for 6 weeks.
M: One alternative is to remand in custody until the assessment and then bail to the program. [Looks at the chaplain from a religious charity who is observing the hearing] Is this possible?
C: I'm the chaplain who links with the agencies. I can contact the program.
M: [Turns to the defendant]. One thing I can do is to remand you in custody to allow you to detox. If you are assessed to be suitable for the program and a bed is available, I can grant bail or you can make an application within 24 hours. Is there a possibility of this?
C: Yes. We have some clients coming from bail.
D: Scuse me, Your Honour, can I say something?
M: You'd better speak to Miss Green.
DL: [Speaks to the defendant in the dock]. There are two things Mr. Derran would have me raise. The first is there is a delay getting into the program. I'm not sure if Mr. Stanley can assist.
C: This has been an ongoing issue.
DL: I'm willing to make the calls. Michael Young is the appropriate person to speak to. The second is that Mr. Derran has pancreatis. He is in pain. He has not received his usual medications in prison. He has indicated he is nervous about returning to prison.
M: Stand up please, Mr. Derran. I note that you have a person in Miss Wilson who can look after you. I also note that you were residing with that person on [] when taken into custody again after the breach of the Family Violence Order. Under section 12 of the Family Violence Order, I must not grant bail unless I am satisfied the complainant is no longer at any risk. It is the case that bail was granted and then three hours later you were at the address highly intoxicated.
D: Can I say something?
M: Just be quiet. I'll remand you in custody till tomorrow morning 10am and let Miss Green speak to the program. You can then be bailed to them.
D: Can I please say something?
M: Yes.
D: It takes six weeks. Then there is my pancreatis. I can only get the medication from my doctor.
M: The warrant I have will say you need specific medical assistance.
D: My doctor is away. I was also hospitalized on Thursday and Friday. I can't do normal things in the unit.
M: The jail will look after you.

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54. D: I want to get into the program or into [].
55. M: Miss Green will look into this and
56. D: How can I []
57. M: She will make the inquiries [Miss Green motions him to calm
58. down].
59. DL: I will find out.
60. M: Sorry. Take him down please for 10 am tomorrow.

DL: defense lawyer, M: magistrate, C: chaplain, D: defendant

This hearing rather starkly demonstrates that in this court, only a limited amount could be achieved in offering therapeutic or welfare programs at the pretrial stage. Ideally, it was not desirable to send an alcoholic to the maximum security wing of a prison after breaching a noncontact order. However, there was no other way of protecting his ex-partner under Section 12. In this application, the magistrate apologized to the defendant (line 60), before asking the guard to "take him down." This illustrates the contradictory nature of contemporary criminal courts that often recognize the social and psychological causes of crime, without having the resources to assist vulnerable defendants.

QUESTIONING BUSINESS AS USUAL

The majority of practitioners working in courts, or in any other agency delivering services, do not describe their work as business as usual. To use this term acknowledges or implies that there might be ways of doing things differently. However, in the way they work, and how they talk about their work, they are in ethnomethodological terms "doing business as usual" (Sacks 1985). Traditionalists either did not want practices to change, or believed that this was impossible in Tasmania since there were not sufficient resources to support new initiatives or overcome deep-seated social problems. By contrast, critics are more likely to use this term, including academics, who are trained to think comparatively for scientific purposes.

Traditionalists

It was suggested by one magistrate that only older practitioners had conservative objections to specialist courts or new ways of working. However, most were traditionalists by necessity: they could not imagine alternatives. When interviewing practitioners, I included a question inviting views on whether anything should change. Invariably, the interviewee interpreted the question as inviting the expression of a professional viewpoint on some technical aspect of decision making.

> I: There seem to be people here with all kinds of problems. Is there anything we can do differently in giving bail?
> M: I think that it is difficult for one magistrate to answer. We are all quite different. Some magistrates, as I understand it because we never sit in each other's courts, some magistrates hardly give any reasons at all and we're not required to give reasons. We just hear the application and grant bail or not

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> …. I tend to go an extra mile and I suspect some magistrates would say, "Oh you are wasting your time either grant it or don't and move on."

Many practitioners in these courts did not know much about pretrial services:

> Prison is not the right place for these people but there's no alternative we can see at the moment. Perhaps, if someone could look behind it and gather the information [that would make possible effective interventions].

Others were fatalistic, believing that deep-seated, even intergenerational social problems caused offending:

> They have no motivation to work. You might be third generation unemployed. You have no incentive. Why should you do anything at school? Because your Dad hasn't been working for a long time and your grandfather was in and out of things. I've even got fourth generation clients. I started off with some approaching middle age in the 70s, gone through them, the sons, grandsons and now moving onto the great grandsons.

It was not clear how a rehabilitative program could help those leading "chaotic," disorganized lives. There was no expectation that anything would change, given that there was limited funding in this state even to consider or evaluate alternative programs.

Critics

There are a few practitioners and academics in Tasmania who are critical toward business as usual. They seek to reform the criminal justice system, although they have more the character of a discussion rather than a pressure group. One policy objective, advanced by reflective practitioners in their Masters dissertations in criminology at the University of Tasmania, is for the government to fund more rehabilitative programs in Risdon prison, including programs to support ex-prisoners. I also interviewed Elizabeth Coleman, a community activist who has more radical views on reforming the criminal justice system and providing services to offenders.[19] When Coleman learned that I was observing hearings, she pointedly asked: "How is your heart?". Underpinning such reform movements is the idealistic hope that a community-based, humane response to crime could replace courts and prisons.

MICRO POLITICS AND BAIL REFORM

The term "micro politics" is often used by law and society researchers to describe power imbalances in lawyer-client interaction or in the treatment of

19. Elizabeth Coleman is a campaigner who had decided, for religious reasons later in life, to offer shelter to ex-offenders, initially in her home, and later through establishing community housing (Paine 2013).

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subordinate groups by professionals in court proceedings (e.g., Conley and O'Barr 2005). This kind of critical social scientific analysis requires locating the criminal justice process within a wider structural context, even when those being researched do not understand their actions in these terms. In my view, the lawyers and defendants in the bail applications described in this article are not engaged in a political contest. There were, however, political processes outside the courtroom that resulted in organizational change.

Flemming's *Punishment Before Trial* (1982) compared bail reform in Detroit and Baltimore. This analysis of organizational change was possible because there were political debates taking place in these courts and the wider community. Flemming found that protests about prison overcrowding, and significant budgetary pressures, forced the criminal court in Detroit reluctantly to change its bail practices.[20] By contrast, in Baltimore, political lobbying by the police prevented reform (Flemming 1982, 77–86). Although relatively little information is given about "micro politics," for example, what happened in meetings, there was some evidence that decision makers (in these courts, administrative officers) were influenced by the desire to keep their jobs in a political environment. They faced pressures from judges who were under public scrutiny and accountable at elections.

Although micro politics normally take place behind the scenes in Australia, there was recently a public row in Queensland resulting from opposition within the Supreme Court over the allegedly political appointment of a Chief Justice (Grewal 2015). Judges may also experience political pressures from influential groups such as the police and the media. Nevertheless, it is difficult to see such a direct mechanism for influencing policies or routine decision making. According to the explanatory model advanced by Flemming (1982), bail reform is unlikely to happen in Hobart or in criminal courts in other Australian states. There is little political pressure from campaigning community groups that could create a prison "crisis." It is, therefore, interesting that significant changes have taken place in this Australian court. First, there have been changes to how lists are managed, partly as an organizational response to fewer prosecutions. These reforms have resulted in a substantial reduction in waiting times before pleas or trial.[21] Second, a drug court, mental health court, and dedicated children's court have been established as diversion lists. The key factor was the appointment in 2009 of a Chief Magistrate who had become interested in therapeutic jurisprudence. These organizational reforms have been described as a "quiet revolution" (Miller and Johnson 2009) because they often do not require legislative changes, and have been mostly ignored by the media and politicians.

20. They also note, however, that when the "crisis" had been addressed, bail decision making reverted to normal.

21. In the applications observed, most defendants remanded only spent a few weeks in custody. A reduction in the time taken to list cases had been made possible through a 36 percent drop in the number of cases coming before the magistrates' court since 2008 (Killick 2015). Possible explanations for why Tasmania has the lowest crime rate in Australia include budget cuts to the police and the success of youth diversion as a preventive program.

ORGANIZATIONAL CHANGE IN CRIMINAL COURTS: TOWARD A NEW RESEARCH AGENDA

Considering bail decision making, and the prospects for bail reform, in an Australian court is interesting in its own right, but also raises wider issues for the study of criminal courts internationally. There has been a large amount of recent empirical research not only on new types of courts (Miller and Johnson 2009) and new institutional processes in courts (Castellano 2011), but also on the skills employed in judicial work (Kritzer 2007; Tata 2007; Darbyshire 2011; Paterson 2013), the effect of new technologies (Feigenson and Dunn 2003), courtroom design (Tait 2011), and the experiences of victims (Fielding 2006). There are also studies that describe the interactional detail of legal work in ethnomethodology and conversation analysis (e.g., Dupret 2011) and critical sociolinguistics (Conley and O'Barr 2005). This has become rather a fragmented literature in that there are numerous studies about different stages of the criminal justice process, but few attempts to make sense of institutional change across jurisdictions in what admittedly seems an era of contradictory messages and policy initiatives.

A broader question raised by this article is the extent to which criminal courts have changed, given that attention seems to have moved from plea bargaining to specialist or problem-solving courts. There were numerous studies by law and society researchers during the 1960s and 1970s on plea bargaining, most contrasting the ideal of due process with how defendants were pressured to plead guilty. This theme or political argument still informs research on the criminal justice system today. However, it can also sound hollow and muted, partly because there seems little prospect of progressive change, but also because more criminal justice practitioners today view offending as having social and psychological causes. Malcolm Feeley (1979) made some critical observations on the punitive character of therapeutic programs at the pretrial stage. Ursula Castellano (2011), who has supplied a detailed description of a contemporary program, has similar misgivings.[22] However, it is now possible to imagine a therapeutic court in which there is less emphasis on due process, more measurement and monitoring of outcomes, and even a subsidiary role for the judiciary.

James Nolan (2001) has argued that the rise of drug courts is influenced by deeper cultural changes in US society, and the practices are only taken up selectively in other countries (Nolan 2011). Individual judges have come to see crime as requiring treatment and therapy rather than punishment, even when there is mass incarceration and courts still use the language of punishment. Critical law and society researchers have also become interested in problem-solving courts, but with a political agenda that seeks to protect economically and culturally subordinate groups. There have been some interesting attempts to find continuities in what can appear as contradictory tendencies in criminal courts. Some critical researchers have seen problem-solving courts as no less punitive than the rest of the criminal justice system (Mirchandani 2005; Hannah-Moffat and Mauruto 2013), or as compromised by the need to process large numbers of defendants (Fay-Ramirez 2015). They could either be described as token welfare measures within an increasingly

22. For an Australian view, see Freiberg and Morgan (2004).

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punitive system (Cunneen et al. 2013) or perhaps as the beginnings of a philosophical and institutional transformation in responses to offending.

Whatever the merits of these different theoretical positions, a striking feature of recent studies is that they are largely insensitive to the micro politics of organizational change. We learn little from these studies about how initiatives develop and whether there is opposition inside courts. It is often unclear, for example, whether drug courts have become a new professional segment (Bucher and Strauss 1961) concerned with relatively few defendants, or disrupt and subvert traditional practices in "ordinary" criminal courts. This may simply be a methodological problem in that it has always been difficult to obtain access to courts as closed communities. This article has, though, demonstrated that it is possible to learn about micro political processes around bail reform in an Australian court through interviewing practitioners and community groups. It seems likely that similar political processes take place in other courts that have introduced new initiatives. The interactionist sociologist Anselm Strauss usefully suggested that we view "most organisations . . . as arenas" in which members "engage in contests, make or break alliances in order to do the things they wish to do" (Strauss 1978, 126).

This suggests the need for a new international research program that brings together insights from the different literatures, and focuses on understanding both business as usual and organizational changes in contemporary courts. Opportunities for reform and political activity in Hobart and similar court communities across Australia are limited by resource constraints, traditionalism, and the routine case-driven character of judicial work. Nevertheless, reform does take place through local initiatives, often "under the radar." It is possible that pretrial services will eventually be funded in Tasmania, with the aim of reducing the remand population, as already happens in the larger, neighboring state of Victoria. This article has, however, used this case study in Tasmania to canvas some wider questions about law and society research on criminal courts. The challenge for contemporary political scientists and sociologists is to develop a coherent theory that can explain both continuity and change in different court communities.

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