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Feminist Judging in Lower Courts

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Much of the literature on feminist judging concentrates on judges and judging in appellate and superior courts. This article extends that literature by investigating whether and how feminist judging manifests in lower courts, which deal with the vast bulk of criminal offences and civil claims. It does so through analysis of transcripts of non-trial criminal proceedings in Australian magistrates courts, focusing on judicial practices rather than gender or other known characteristics of the magistrates. Clear instances of feminist judging are relatively rare. Where they occur, they are often in the form of isolated feminist ‘moments’ rather than a magistrate exhibiting a distinct feminist orientation. The article reflects on what these findings suggest about the nature of judging in lower courts and the possibilities for feminist judging in that context.

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Feminist Judging in Lower Courts

INTRODUCTION

Much of the literature on feminist judging concentrates on judges and judging in appellate and superior courts. It discusses the ways judges have taken or might take a feminist approach to developing and interpreting the law, applying law to facts, understanding facts and writing judgments, which are the characteristic activities of these courts.¹ Relatively little attention has been paid to practices of feminist judging in lower courts – courts of summary jurisdiction – which deal with the vast bulk of criminal offences

¹ See, e.g., B. Baines, 'Must Feminist Judges Self-Identify as Feminists?' in *Gender and Judging*, ed. U. Schultz and G. Shaw (2013) 379; C. Boyle, 'Sexual Assault and the Feminist Judge' (1985) 1 *Cdn. J. of Women and the Law* 93; P.A. Cain, 'Good and Bad Bias: A Comment on Feminist Theory and Judging' (1988) 61 *Southern California Law Rev.* 1945; S. Cowan et al. (eds.), *Scottish Feminist Judgments: (Re)Creating Law from the Outside In* (2019); H. Douglas et al. (eds.), *Australian Feminist Judgments: Righting and Rewriting Law* (2014); M. Enright et al. (eds.), *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity* (2017); L. Hodson and T. Lavers (eds.), *Feminist Judgments in International Law* (2019); R. Hunter, 'Can Feminist Judges Make a Difference?' (2008) 15 *International J. of the Legal Profession* 7; R. Hunter, 'Justice Marcia Neave: Case Study of a Feminist Judge' in *Gender and Judging*, ed. U. Schultz and G. Shaw (2013); R. Hunter and E. Rackley, 'Feminist Judgments on the UK Supreme Court' (2020) 32 *Can. J. of Women and the Law* 85; R. Hunter and E. Rackley, 'Lady Hale: A Feminist Towering Judge' in *Towering Judges: A Comparative Study of Constitutional Judges*, ed. R. Abeyratne and I. Porat (2021); R. Hunter and D. Tyson, 'Justice Betty King: A Study of Feminist Judging in Action' (2017) 40 *University of New South Wales Law J.* 778; E. McDonald et al. (eds.), *Feminist Judgments of Aotearoa/New Zealand – Te Rino: A Two-Stranded Rope* (2017); D. Majury, 'Introducing the Women's Court of Canada' (2006) 18 *Cdn. J. of Women and the Law* 1; E. Rackley, 'Why Feminist Legal Scholars Should Write Judgments: Reflections on the Feminist Judgments Project in England and Wales' (2012) 24 *Cdn. J. of Women and the Law* 389; J. Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges' (1988) 61 *Southern California Law Rev.* 1877; S.E. Rush, 'Feminist Judging: An Introductory Essay' (1993) 2 *Southern California Rev. of Law and Women's Studies* 609; E. Sheehy (ed.), *Adding Feminism to Law: The Contributions of Justice Claire L'heureux-Dubé* (2004); M.E. Solimine and S.E. Wheatley, 'Rethinking Feminist Judging' (1995) 70 *Indiana Law J.* 891; K.M. Stanchi et al. (eds.), *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (2016).

and civil claims. Our research aims to begin to fill this gap by exploring feminist judging in lower courts.²

Judges are bound by their judicial oath to deliver justice impartially, without fear or favour. Feminist judging is not a form of bias in which women are automatically privileged. Rather, it aims to correct existing biases and exclusions in law. Feminist judging is judging informed by feminist consciousness, feminist theory, feminist values and/or feminist methods.³ Judges taking a feminist approach aim to be inclusive of women's lives and experiences (and often the lives and experiences of others traditionally marginalized from the law) and to achieve gender justice. Feminist judging cares about victims and the community, as well as defendants, and is concerned with broader structural issues of (gendered) inequality, exclusion and injustice. By being inclusive, feminist judging is arguably better judging than an approach which fails to question law's masculinist assumptions and blind spots.⁴

² The focus of this article is on feminist judging. This is distinct from the gender and judging literature generally (e.g. U. Schultz and G. Shaw (eds.), *Gender and Judging* (2013)) and specifically from the empirical research, often located in political science, which attempts to determine whether women judges produce different outcomes than men judges (e.g. C.L. Boyd et al., 'Untangling the Causal Effects of Sex on Judging' (2010) 54 *Am. J. of Political Science* 389; C.L. Boyd, 'Representation on the Courts? The Effects of Trial Judges' Sex and Race' (2016) 69 *Political Research Q.* 788; D.R. Songer et al., 'Gender Diversity in the Intermediate Appellate Courts of Canada' (2016) 37 *Justice System J.* 4; E. Martin and B. Pyle, 'State High Courts and Divorce: The Impact of Judicial Gender' (2005) 36 *University of Toledo Law Rev.* 923). Our research does not identify magistrates by sex/gender or as feminist judges. We start with observed judicial practices and attempt to draw inferences about the possible feminist qualities or character of the judging. We draw no conclusions about the gender identity or feminist consciousness of the judicial officer.

³ See, e.g., Hunter (2008), op. cit. n. 1; R. Hunter, 'Feminist Judging in the "Real World"' (2018) 8 *Oñati Socio-Legal Series* 1275. It is not our intention in this article to engage in debates around different strands of feminism – liberal, radical, cultural, postmodernist, third wave, etc. The limited evidence available makes it impossible to affix any such labels to the judicial practices found in the transcripts discussed here.

⁴ B. Hale and R. Hunter, 'A Conversation with Baroness Hale' (2008) 16 *Feminist Legal Studies* 237. For critiques of feminist judging see, e.g., S. Motha, 'Mistaken Judgments' in *Law's Mistakes*, ed. A. Sarat, L. Douglas and M. Umphrey (2016) 18; R. Hunter, 'The Power of Feminist Judgments?' (2012) 20 *Feminist Legal Studies* 135. These critiques focus respectively on feminist judgments as academic scholarship and the effects of written appellate judgments, and do not directly relate to feminist judging in lower courts.

At the same time, feminist judging is necessarily a limited and contingent activity. It can only occur in legal spaces where there are ‘leeways of choice’ for the judge.⁵ The scope and nature of the choices available to judges vary depending on the judge’s position in the court hierarchy. At the lower court level, judicial work tasks include managing the courtroom, interacting with parties and lawyers, assessing credibility, and discretionary decision-making in matters such as bail, adjournment applications and sentencing. Many cases do not directly raise issues of gender justice or call for a feminist judicial response.⁶ And while judges might bring a feminist consciousness to the way they manage the courtroom, interact and communicate with others, it may be difficult to identify anything specifically feminist about their procedural practices in this regard.

The aim of this article is to investigate what feminist judging looks like in lower courts. While the characteristics of feminist judging in lower courts have previously been addressed in theoretical analysis and in interviews with judges,⁷ our focus here is on identifiable practices of feminist judging in that setting. Our data is derived from a large dataset of transcripts of non-trial criminal proceedings in Australian magistrates courts⁸ collected by

⁵ J. Stone, *Precedent and Law: Dynamics of Common Law Growth* (1985), p. 97.

⁶ Hunter (2013), op. cit. n. 1; R. Hunter, ‘More Than Just a Different Face? Judicial Diversity and Decision-Making’ (2015) 68 *Current Legal Problems* 119; R. Hunter, S. Roach Anleu and K. Mack, ‘Judging in Lower Courts: Conventional, Procedural, Therapeutic and Feminist Approaches’ (2016) 12 *Intl J. of Law in Context* 337.

⁷ See Hunter et al., *ibid*; Hunter (2008), op. cit. n. 1; Hunter (2018), op. cit. n. 2.

⁸ Each Australian state and territory has a magistrates court (called the Local Court in New South Wales and the Northern Territory) as the lower court in a multi-tiered court system. Magistrates are legally qualified and appointed from the ranks of practising lawyers to full-time, tenured and salaried judicial posts in the same way as other judges, although they tend to have backgrounds as solicitors or in government or community legal services, while superior court and appellate judges tend to have backgrounds as barristers: F. Bartlett and H. Douglas, “‘Benchmarking’ a Supreme Court and Federal Court Judge in Australia’ (2018) 8 *Oñati Socio-legal Series* 1355; S. Roach Anleu and K. Mack, ‘The Professionalization of Australian Magistrates: Autonomy, Credentials and Prestige’ (2008) 44 *J. of Sociology* 185. By contrast, magistrates in England and Wales are not legally qualified, act on an honorary basis and usually sit part-time. While judicial appointment processes vary widely across the USA, many state court judges face elections, either for initial entry into the judiciary or to retain judicial office after executive appointment.

Roach Anleu and Mack as part of a national court observation study.⁹ Based on our knowledge of feminist lawyers appointed as magistrates, and discussions and interactions with magistrates identifying as feminists,¹⁰ we were interested to see whether instances of feminist judging and judicial practice would be discernible. The transcripts give us access to magistrates' day to day practices, rather than what they say they do or the judicial philosophies they may espouse. We do not know whether any of the observed magistrates do or do not self-identify as feminist. Our aim is to discern instances of feminist judging from judicial decisions, actions, language and style of communication. This creates the opportunity to refine the markers and techniques that could be used to identify feminist judging in the absence of feminist self-identification.¹¹

In addition to the qualitative analysis we employ to identify feminist judging, we present quantitative findings on the overall incidence of feminist judging discerned in the dataset. This adds to the qualitative analysis in two ways. First, it enables us to contribute to debates on the relative scope for and limitations of feminist judging, in the particular context of lower court decision-making. Secondly, it enables us to reflect on the potential limitations of our methodology and to identify areas where further research would be valuable.

The next section details the context of lower court judging and Australian magistrates courts. The subsequent section discusses the methodology used to analyse the transcripts.

⁹ See S. Roach Anleu and K. Mack, *Performing Judicial Authority in the Lower Courts* (2017), at 187-92. Funding for the research on which this paper is based includes a 2001 University-Industry Research Collaborative Grant with Flinders University and the Association of Australian Magistrates ('AAM') and financial support from the Australasian Institute of Judicial Administration; an Australian Research Council ('ARC') Linkage Project Grant (LP0210306) with AAM and all magistrates courts; and three ARC Discovery Project Grants (DP0665198, DP1096888, DP150103663), and a School of Social and Policy Studies (Flinders University) Research Support Grant in 2017. All phases of this research involving human subjects have been approved by the Flinders University Social and Behavioural Research Ethics Committee. Further information about these Projects is available on the Judicial Research Project website <<http://www.flinders.edu.au/law/judicialresearch>>

¹⁰ Personal contacts and Hunter (2018).

¹¹ See Baines, op. cit. n. 1; Hunter et al., op. cit. n. 6; Hunter and Tyson (2017), op. cit. n. 1.

This is followed by the presentation and discussion of our findings before, in the conclusion, considering their theoretical implications.

LOWER COURT CONTEXT

Lower courts in the English-speaking common law world hear and determine the vast bulk of criminal cases, usually subject to a maximum penalty that can be imposed. Offences typically include driving under the influence of alcohol or drugs, theft or other crimes of dishonesty, assault and minor drug offences. Lower courts tend to see a higher proportion of female defendants compared to courts dealing with more serious criminal offences.¹² Family violence – the most common type of gendered crime – is also a substantial part of the work of lower courts.¹³ Many court users face considerable social, economic, and other disadvantages, circumstances not adequately addressed by other political, governmental, or social institutions.¹⁴

The court transcripts used in this research are from the daily list of criminal non-trial matters heard in Australian magistrates courts.¹⁵ When a person is arrested or summonsed to face a criminal charge, he or she is given a date to appear in court, along with many others, comprising the criminal list for that day. The list may also include people making second or

¹² Australian Bureau of Statistics, *4513.0 - Criminal Courts, Australia, 2016-17* (2018), at <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4513.0Main+Features12016-17?OpenDocument>>; D.M. Britton et al., *The Gender of Crime* (2018, 2nd edn.); M. Chesney-Lind and L. Pasko (eds.), *The Female Offender: Girls, Women, and Crime* (2013, 3rd edn.). From July 2014 to June 2017, 24% of matters finalized in lower courts involved female defendants, compared with 13% of matters in higher courts: Australian Bureau of Statistics, *4513.0 - Criminal Courts, Australia, 2016-17* (2018), at <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4513.0Main+Features12016-17?OpenDocument>>, Tables 1-6.

¹³ Australian Bureau of Statistics, *4513.0 - Criminal Courts, Australia, 2016-17*, ‘Experimental Family and Domestic Violence Statistics’ (2018), at <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2016-17~Main%20Features~Experimental%20Family%20and%20Domestic%20Violence%20Statistics~19>>; H. Douglas and K. Chapple, *National Domestic and Family Violence Bench Book* (2020), at <<http://dfvbenchbook.aija.org.au/contents>>.

¹⁴ S. Roach Anleu and K. Mack, *Performing Judicial Authority in the Lower Courts* (2017).

¹⁵ This may be known as the arraignment list or the docket in some jurisdictions.

further appearances as part of preliminary procedures before trial, or appearing for bail applications. As most criminal cases are resolved by guilty plea,¹⁶ sentencing is a significant part of judicial work in the general criminal list. Defendants on the criminal list may be in custody or on bail, legally represented or not. Considerable judicial work is required to manage these non-trial procedures.

Australian magistrates sit alone without a jury. Decisions are usually announced orally *ex tempore*. In contrast with intermediate and higher trial courts and appellate courts, their cases are brief, factually-focused and rarely involve written judgments. Although they have limited 'leeways of choice'¹⁷ with regard to what the law is, magistrates must interpret and apply the law, make assessments of credibility, decide on the significance and weight to be given to the evidence presented, and exercise their sentencing discretion.¹⁸ Moreover, as single judicial officers whose decisions are rarely appealed, magistrates may have a greater sense of autonomy than judges in higher courts who may decide with an eye to the appeal court, or appellate judges engaged in collegial decision-making.

Legal representation is less available in lower courts, compared with higher courts, and is more likely to be inexperienced, unskilled or overburdened.¹⁹ Unrepresented or inadequately represented defendants may require direct engagement from the judicial officer to explain procedure and elicit evidence and information,²⁰ which may present more

¹⁶ A. Flynn and A. Freiberg, *Plea Negotiations: Pragmatic Justice in an Imperfect World* (2018).

¹⁷ Stone, *op. cit.* n. 5, p. 97.

¹⁸ Sentencing legislation varies from state to state and the introduction of mandatory sentencing for some kinds of matters in some states was a source of complaint among judges interviewed for the Australian Feminist Judgments Project: Hunter (2018), *op. cit.* n. 2.

¹⁹ Roach Anleu and Mack (2017), *op. cit.* n. 14, pp. 23-29.

²⁰ In a national survey of the Australian judiciary, 58% of magistrates presiding in lower courts indicated that their time is always or often taken up explaining things to unrepresented litigants, while less than 10% of judges in higher courts reported this experience: *id.*, p. 46.

opportunities for relational and empathetic interaction.²¹ Even where defendants appear with legal representation, this may be a duty lawyer who has met the defendant only briefly before the court appearance and may not be able to answer all the magistrate's questions. As well as directly communicating with the defendant, the magistrate may also communicate with others who have been affected by the crime, or who will be affected by the sentence imposed or bail decision.²² On the other hand, the pressure of time and volume of cases in the daily criminal list,²³ and the need to meet court efficiency performance measures, can limit opportunities for judicial interaction and inter-personal engagement. Interactions may become brief, routinized and impersonal.²⁴ Thus, the nature of the work in lower courts offers opportunities for feminist judging, but may make a commitment to any form of more engaged judging difficult to sustain.²⁵

METHODOLOGY

The Primary Data

The transcripts analysed in this study were obtained as part of a project to examine the everyday work of judicial officers, including the ways they deliver decisions, their

²¹ Empirical research from Australia finds that when imposing sentence, magistrates speak directly to defendants in 87% of matters, regardless of whether the defendant is legally represented. For other procedures, when a defendant is legally represented, the magistrate speaks directly to the defendant in only 42% of matters: *id.*, p. 144.

²² K. Mack and S. Roach Anleu, 'Opportunities for New Approaches to Judging in a Conventional Context: Attitudes, Skills and Practices' (2011) 37 *Monash University Law Rev.* 187.

²³ Australian Government Productivity Commission, *Report on Government Services, Part C, Section 7 Courts* (2020); K. Mack and S. Roach Anleu "'Getting Through the List": Judgecraft and Legitimacy in the Lower Courts' (2007) 16 *Social and Legal Studies* 341; K. Mack, et. al., *Judicial Workload: Time, Tasks and Work Organisation* (2012); Roach Anleu and Mack (2017), *op. cit.* n. 14;

²⁴ R. Hunter, 'Styles of Judging: How Magistrates Deal with Applications for Intervention Orders' (2005) 30 *Alternative Law J.* 231; K. Mack and S. Roach Anleu, 'Performing Impartiality: Judicial Demeanor and Legitimacy' (2010) 35 *Law & Social Inquiry* 137; M. Mileski, 'Courtroom Encounters: An Observational Study of a Lower Criminal Court' (1971) 5 *Law & Society Rev.* 473; C. Tata, "'Ritual Individualization": Creative Genius at Sentencing, Mitigation and Conviction' (2019) 46 *J. of Law and Society* 112; M. Travers, 'Business as Usual? Bail Decision Making and "Micro Politics" in an Australian Magistrates Court' (2017) 42 *Law & Social Inquiry* 325.

²⁵ S. Fay-Ramirez, 'Therapeutic Jurisprudence in Practice: Changes in Family Treatment Court Norms over Time' (2015) 40 *Law & Social Inquiry* 205.

demeanour, time management, and interaction with other participants in the courtroom.²⁶ The study did not explicitly investigate feminist approaches to judging; the research reported here involves re-analysis of the transcript data to address a question not contemplated by the original research.

The original study included observations of 30 court sessions involving 27 different magistrates in 20 different locations – capital city, suburban and regional – across Australia, from August 2004 to July 2005.²⁷ Most observation sessions covered a single magistrate in one court from the beginning to the end of the day.²⁸ The unit of observation was the ‘matter’, defined as an event in which the magistrate dealt with some element of a defendant’s case, whether the defendant actually appeared or not. ‘Matters’ rather than ‘cases’ were taken as the unit of analysis partly to reflect the fact that the observations might only capture part of a case (which could involve several court appearances over a period of time), and also because, in some very brief matters in the criminal non-trial list, it was not possible to tell which case was concerned as the defendant was not present and the defendant’s name was not mentioned. Consequently, if a case was called during an observation session, then stood down and recalled later in the same session, that counted as two matters, as it represented two separate events. Defined in this way, the observation study comprised a total of 1287 matters. In each session, two observers each completed

²⁶ K. Mack and S. Roach Anleu, “‘Getting through the List’: Judgecraft and Legitimacy in the Lower Courts’ (2007) 16 *Social & Legal Studies* 341; Mack and Roach Anleu, op. cit. (2010), n. 24; S. Roach Anleu and K. Mack, ‘Performing Authority: Communicating Judicial Decisions in Lower Criminal Courts’ (2015) 51 *J. of Sociology* 1052; Roach Anleu and Mack, op. cit. (2017), n. 14; S. Roach Anleu and J. Milner Davis, ‘Thinking About Judges, Judging and Humour: The Intersection of Opposites’ in *Judges, Judging and Humour*, ed. J. Milner Davis and S. Roach Anleu (2018); S. Roach Anleu et al., ‘Judicial Humour in the Australian Courtroom’ (2014) 38 *Melbourne University Law Rev.* 621

²⁷ This is the only research on Australian Magistrates Courts of this scope, depth and national coverage undertaken to date. Court visits undertaken in subsequent years suggest few changes in the general structure of criminal lists or the patterns of case types, forms of processing or time pressures operating. Feedback from presentations of research findings at magistrates conferences and in publications suggests that the data retains currency despite the lapse of time since its collection. For more information on the court observations, see Roach Anleu and Mack, id., (2017), pp. 187-92.

²⁸ Id.

standardized pre-printed forms to record a range of variables such as the types of matters, the participants in court including legal representation, the magistrate's demeanour, and the time taken for each matter.²⁹ Where court proceedings were recorded,³⁰ transcripts of the sessions observed were also obtained, either provided directly by the court, or via court provision of audio tapes or electronic audio files which were transcribed by the Judicial Research Project at Flinders University.³¹ It is these transcripts that are the primary empirical data for this investigation of feminist judging.³²

1. The Data Subsets

As the aim of the present study is to identify the existence and nature of feminist judging in magistrates courts, we focused our reading on transcripts from matters we considered would offer the greatest opportunities for feminist judging: that is, (a) where there are opportunities for direct interaction between the magistrate and defendants and (b) where the case involves or is likely to involve a subject matter of feminist concern. (These categories are separate but potentially overlapping.) To operationalize these categories, we selected three subsets of matters from the entire set of transcripts.

1. All matters of at least three minutes' duration in which the defendant was unrepresented. This subset (n=101 matters, 100 separate defendants, heard by 15 magistrates) offers opportunities for direct interaction in terms of time (the median

²⁹ S. Roach Anleu et al., 'Observing Judicial Work and Emotions: Using Two Researchers' (2016) 16 *Qualitative Research* 375.

³⁰ In one of the state and territory jurisdictions in which observations were conducted, proceedings were not recorded.

³¹ Since, 2000, the Judicial Research Project has undertaken wide-ranging empirical research into the Australian judiciary, addressing the changing nature of judicial work, the attitudes and experiences of the judiciary, and aspects of gender and judging and emotion and judging.

³² As with all text based, archival material, there are limitations to this data: E.J. Webb et al., *Unobtrusive Measures: Nonreactive Research in the Social Sciences* (1966), pp. 104-11. Some transcripts are not complete, some details were inaudible and therefore not transcribed, and there are potential errors in the transcription process itself. It was sometimes difficult to identify the nature or circumstances of the charges, which might not be apparent in a very brief matter such as a quick and uncontested adjournment.

time for all observed matters was 2 minutes and 20 seconds) and anticipated needs of unrepresented defendants (category (a) above). Half of these are sentencing hearings (n=50), and previous research suggests more engagement with defendants when magistrates deliver sentencing decisions and when defendants are unrepresented.³³

2. All matters concerning domestic violence (DV),³⁴ evident from the facts, or the offences charged. This subset (n=39 matters, 37 separate defendants, heard by 15 magistrates) includes matters lasting less (or more) than three minutes and where the defendant may be represented or unrepresented. It involves a subject matter which has received extensive feminist attention (category (b) above). There were relatively few DV matters in the original court observation study, as the study investigated only the general non-trial criminal list, whereas in most Australian magistrates courts DV matters are listed and dealt with separately, sometimes in hearings closed to the public.
3. All matters with a woman defendant. This subset (n=134 matters, 115 separate defendants, heard by 24 magistrates) involved potential feminist issues in terms of the understanding of women's lives and the treatment of female criminality (category (b) above). Again, this subset includes matters lasting less (or more) than three minutes and where the defendant may be represented or unrepresented.

After identifying these three subsets, a detailed spreadsheet organized the matters by magistrate to remove any duplication, as some matters might appear in more than on subset. In total, the three subsets yielded 249 discrete matters involving 225 defendants (115 women,

³³ Roach Anleu and Mack, *op. cit.* (2015), n. 26.

³⁴ The term 'domestic violence' as used here indicates that the matters dealt with in the criminal list in magistrates courts at the time of the study invariably involved some form of physical assault.

110 men), heard by 24 magistrates. As explained below, we subsequently reviewed all matters heard by four magistrates, including those matters not captured by the three primary data subsets. This resulted in 318 matters reviewed in total.

2. Analysing the Transcripts

Analysis of the transcripts was qualitative and interpretive. All three researchers closely read the text to investigate surface content of words spoken as well as any underlying meanings, including apparent gaps and silences, the nature of interactions between speakers, and references to or other connections with wider social discourses.³⁵

Each of the magistrates in the original court observation dataset was assigned a code number; this reduced the risk of interpreting transcripts from an implicit or unconscious gender frame.³⁶ Information directly identifying the location of the court was also removed before review, though this might have become apparent in the transcripts through references to particular state legislation or local suburbs. The two authors, Roach Anleu and Mack, who conducted the court observations, did at one time know the identity of all magistrates observed. However, as the field observations took place more than 10 years before this phase of analysis, and the process involved looking only at anonymized subsets of the transcript data (with relatively few cases for some magistrates), neither of these authors can identify the magistrate involved in any particular matter considered in this research. Since completing the

³⁵ J. Lofland et al., *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (2006); A. Strauss and J. Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (1998).

³⁶ See C.L. Ridgeway, 'Framed before We Know It: How Gender Shapes Social Relations' (2009) 23 *Gender & Society* 145. Although 27 magistrates were observed in the original observation study, only 24 are included in the data set for this research, as there were no transcripts available for the sessions in which the remaining 3 magistrates were observed.

analysis, none of the authors has sought to identify any of the magistrates whose matters are discussed.³⁷

In the kind of inductive analysis employed, the ‘chief risk is misclassifying observations so as to support an emerging hypothesis’³⁸ – a variant of confirmation bias. To minimize this risk, each of the three authors independently read all the transcripts in the three subsets, organized by magistrate. Each author marked sections of text they assessed as displaying feminist characteristics (the nature of these characteristics is discussed further below). The three authors then met together in person to discuss the material each had highlighted.³⁹ Inevitably there were disagreements. Although all three authors self-identify as feminists, and our interpretations of statements, decisions and interactions often converged, assessments of what counted as ‘feminist’ in the judicial practices in the transcripts sometimes differed. We talked through each instance, debating the reasons why we individually did or did not characterize it as feminist. This process forced us to articulate the rationales for and assumptions underlying our interpretations more clearly to each other (and to ourselves). Instances considered marginal were discarded, so that our ultimate decisions about what constitute feminist practices are shared and robust.

3. Identifying Feminist Judging

³⁷ Our findings are based on externally observable practices, and we do not conflate ‘feminist’ with ‘female’. Accordingly, the identity of the magistrates, including their gender, or whether or not they consider themselves to be feminists (which the authors would not necessarily know) would neither confirm nor refute the findings. See further, e.g., Hunter and Rackley (2020), op. cit. n 1.

³⁸ E.R. Babbie, *The Practice of Social Research* (2016), pp. 332.

³⁹ The court observation study pioneered this analytical procedure. After separately but together observing magistrates and their courts and matters Roach Anleu and Mack carefully compared notes which ‘entailed discussion of any differences in the characterisation of the observed events and unpacking of rationales for classifying the magistrates’ conduct and decisions’: Roach Anleu et al., op. cit. (2016), n. 29, p. 382.

An essential part of this process was to operationalize feminist judging: ‘How will we know it when we’ve found it?’,⁴⁰ as feminism is a term with many meanings.⁴¹ The development of the meaning of feminist judging in this context was an iterative process, done in multiple phases. We started with previously identified elements of feminist judging practice, reviewed and discussed the transcripts, then expanded and refined the identified features of feminist judging as the basis for further intensive transcript analysis and additional discussion.

In reading transcripts, each author initially sought to identify evidence or markers of feminist judging practices, by reference to our own background understanding of feminism, as well as to existing theoretical work on feminist judging.⁴² This theoretical work suggests that feminist judging is not a programme or system. It does not have any essential or ‘core’ elements, but consists of ‘a collection of habits, techniques, concerns and dispositions’ that may be deployed in the performance of the judicial role.⁴³ For the initial reading of the magistrates court transcripts, qualities and practices of feminist judging were not distilled into a definitive schema or fixed checklist but provided markers, guides and orienting principles to suggest the presence or absence of a feminist approach.

Feminist judging practices may relate to procedural aspects of judging (the management of the courtroom, interactions with other participants, the way in which

⁴⁰ D.F. Chamberliss and R.K. Schutt, *Making Sense of the Social World: Methods of Investigation* (2016, 5th edn.), pp 69; R. Hunter, ‘An Account of Feminist Judging’ in *Feminist Judgments: From Theory to Practice*, ed. R. Hunter et al. (2010) 30.

⁴¹ M. Davies, *Asking the Law Question* (2017, 4th edn.). See above n. 3.

⁴² See Hunter (2008), op. cit. n. 1; Hunter (2010), op. cit. n. 40; Hunter (2019), op. cit. n. 1; Hunter (2018), op. cit. n. 2; Hunter et. al., op. cit. n. 6; L.L. Berger et al., ‘Using Feminist Theory to Advance Equal Justice Under Law’ (2016) 17 *Nevada Law J.* 539; B.J. Crawford et al., ‘Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment’ (2017) 47 *University of Baltimore Law Rev.* 167; S.J. Kenney, ‘Toward a Feminist Political Theory of Judging: Neither the Nightmare nor the Noble Dream’ (2016) 17 *Nevada Law J.* 549; M. Shine Thompson, ‘Doing Feminist Judgments’ in *Northern/Irish Feminist Judgments: Judges’ Troubles and the Gendered Politics of Identity*, eds. M. Enright et al. (2017) 49.

⁴³ Hunter (2010), op. cit. n. 40; see also Hunter (2018), op. cit. n. 2.

judgments are written). Feminist judging also has substantive aspects (interpretations of law and fact, deciding the case and determining sentences or remedies).

Procedural features of feminist judging considered in our initial analysis include taking an engaged, relational and less formal approach; adopting an ethic of care;⁴⁴ displaying compassion and empathy; assisting parties to feel comfortable in the courtroom and understand the proceedings, and so enabling them to tell their stories; taking steps to prevent intimidation or re-traumatization; acknowledging and engaging with emotion; actively seeking information to get to a fair or just result; taking a problem-solving approach; affirming and validating women's experiences of trauma, victimization and abuse; holding violent men to account; and not allowing sexist language in the courtroom.⁴⁵ There are obvious overlaps between a feminist procedural approach and approaches based on procedural justice and therapeutic jurisprudence. These approaches are underpinned by different philosophies of judging, but their external manifestations may be very similar.⁴⁶

Substantive aspects of feminist judging considered in our initial analysis include being alert to the ways in which apparently neutral or objective legal rules and practices may impact differently on women and men; acknowledging and incorporating the experiences, perspectives and interests of women and other traditionally marginalized groups in decision-

⁴⁴ There is an extensive feminist literature on the 'ethic of care': see, e.g. C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982); V. Held, *The Ethics of Care: Personal, Political, and Global* (2005); N. Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (1984); J. Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges' ((1988) 61 *Southern California Law Review* 1877; S. Sevenhuijsen, *Citizenship and the Ethics of Care: Feminist Considerations on Justice, Morality and Politics* (1998); S. Sherry, 'Civic Virtue and the Feminine Voice in Constitutional Adjudication' (1986) 72 *Virginia Law Review* 543; J. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (1992); R. West, *Caring for Justice* (1988); and in the context of feminist judging: Hunter (2008), op. cit. n. 1; Hunter (2018), op. cit. n. 2; Hunter et al., op. cit. n. 6; Hunter and Tyson (2017), op. cit. n. 1. We use the term in this article to refer to 'an approach towards the people before the court that is relational, connected, caring and responsible rather than abstract, distant, disengaged and legalistic': Hunter (2018) at 1284.

⁴⁵ Hunter (2008), op. cit. n. 1; Hunter (2018), op. cit. n. 2; Hunter et al., op. cit. n. 6; Hunter and Tyson (2017), op. cit. n. 1.

⁴⁶ Hunter et al., op. cit. n. 6.

making; challenging gender bias; employing contextual rather than abstract reasoning (understanding the realities of parties' lives and the gendered or intersectional social contexts in which the issues in the case arise); understanding issues through the lens of feminist theory or feminist 'common knowledge'; understanding the nature of gendered harms; according credibility to allegations of domestic and sexual violence, treating them seriously and being sceptical of excuses for violence and victim-blaming; seeking to remedy injustices and to improve the material conditions of women's lives; promoting substantive equality; and purposive interpretations and applications of progressive laws.⁴⁷ These substantive aspects of feminist judging are often (although not always) manifested more directly in written or verbal form, and thus may be more readily visible in judgments and case transcripts, compared with the procedural and interactive features.

After our initial reading and discussions, transcripts were re-read and re-analyzed and further discussions took place among the three authors. This process generated a more refined operationalization of feminist judging applicable in the lower court context. While these elements of feminist judging described below are conceptually distinct, they may overlap when being observed in practice. And, as with our initial reading and analysis, these qualities were not distilled into a checklist or formal coding frame.

Procedural features of feminist judging practice we found in the transcripts included respectful interactions with defendants and others in the courtroom (e.g. no talking down, use of lay language); speaking directly to the defendant and others, using informal, everyday language; providing explanations of what is happening, what the magistrate is doing and why; a polite demeanour displaying engagement and patience. Practices which could be characterized as procedural and/or substantive include actively eliciting information from the

⁴⁷ Hunter (2008), op. cit. n. 1; Hunter (2010), op. cit. n. 40; Hunter (2013), op. cit. n. 1; Hunter et al., op. cit. n. 6.

defendant or the defendant's representative and displaying apparent concern or care regarding the defendant's wellbeing. Practices which are more substantive in nature include actively seeking to solve underlying problems rather than routine processing of generic cases; awareness of context, such as gendered family or personal situations, especially women's caring responsibilities or financial difficulties; understanding the dynamics of domestic violence, including its effect on victims, and the importance of holding perpetrators to account; understanding the gendered nature of crime and harms experienced; and compassionate sentencing, seeking alternatives to prison.

Once we collectively worked through the transcripts, and located what we agreed were instances of feminist judging, our analysis identified two distinct manifestations of feminist judging: 'moments' and 'orientations'. Feminist 'moments' are brief, discrete episodes or small flashes of what we characterized as feminist judging, occurring occasionally and in isolation among the matters in our data subsets.⁴⁸ A feminist 'orientation' is identified when a magistrate's practice (procedural and/or substantive) appears to be systematic, taking a feminist approach in several or most of their matters where such an approach is available. Four magistrates (10, 17, 20 and 21) were identified as potentially evincing a feminist orientation. In order to assess whether these magistrates' overall orientation appeared to be feminist, we then read the transcripts of all their matters collected as part of the original court observation study (in addition to those previously reviewed in the three primary data subsets). We also referred to the quantitative coding from the court observation study of factors such as the magistrate's demeanour, and the extent to which the magistrate directly looked at and spoke to defendants.⁴⁹

⁴⁸ The term 'moments' draws on the work of Vicki Lens, who, in her analysis of therapeutic judging, refers to observed 'therapeutic moments' (p. 709) and 'morsels' (p. 713): V. Lens, 'Against the Grain: Therapeutic Judging in a Traditional Family Court' (2016) 41 *Law & Social Inquiry* 701.

⁴⁹ Mack and Roach Anleu, op. cit. (2010), n. 24; Roach Anleu and Mack, op. cit. (2015), n. 26.

FINDINGS AND THEMES

From the three data subsets plus the additional matters from the four magistrates, we identify 18 moments of feminist judging. The largest group of feminist moments are found in the women defendants subset (n=8 moments), with three from the domestic violence subset, two from the 3+ minutes subset, and three from overlapping subsets (one woman defendant 3+ minutes, and two domestic violence 3+ minutes).

Of the 24 magistrates who appear in one or more of the three primary data subsets, ten have at least a single feminist ‘moment’. Of these six have only one such moment. Magistrates 10 and 20 have two feminist moments, but in each instance they occur in relation to a single case (i.e. the same defendant appearing in two separate matters), the former in the 3+ minutes data subset and the latter in the female defendants subset. Magistrate 2 has two feminist moments concerning domestic violence, while Magistrate 21 has six feminist moments: four in relation to women defendants and two concerning domestic violence. As discussed more fully below, all feminist moments display substantive feminist understandings of defendants’ circumstances and of issues in the case, such as the nature of domestic abuse, the demands of caring responsibilities, and the need to hold abusers to account. Of the four magistrates (10, 17, 20 and 21) identified as potentially evincing a feminist orientation, only one (Magistrate 21) was confirmed as having a general orientation that could be characterized as feminist.

1. Feminist Moments

Feminist moments are generally, although not exclusively, found in magistrates’ sentencing speeches. A guilty plea typically begins with the charges being noted and clarified if necessary and the defendant’s previous offences, if any, provided to the magistrate. The police prosecutor then hands up or recites the facts, and the defence lawyer (if there is one)

presents an argument in relation to the sentence.⁵⁰ Where the defendant is unrepresented, the magistrate might also give some explanation to the defendant as to what is happening. The magistrate may ask if the defendant has anything to say or may ask questions to elicit information relevant to sentencing, possibly leading to more dialogue between the magistrate and the defendant. The magistrate proceeds to give an *ex tempore* judgment summarizing the issues and his or her assessment of them, responding to points raised in the plea, and announcing the sentence to be imposed and the reasons for it. This speech is generally delivered directly to the defendant.

(a) Women Defendants

The most striking theme among the feminist moments relating to women defendants is the magistrates' understanding of women's lives, especially their relational nature. In these moments, women defendants are seen not as atomized individuals but within their familial context, and particularly the context of responsibilities for children and other adults.⁵¹ Women defendants are situated within a gendered social context in which care work and caring responsibilities are disproportionately allocated to women, and in which the economic burdens and consequence of care are disproportionately borne by women.

In matter 413, for example, the unrepresented Indigenous defendant was facing two charges of driving while disqualified and one of driving an unlicensed vehicle. She had several prior offences, unpaid fines which had resulted in her licence suspension, and appeared to be caught up in bureaucratic tangles trying to clear her obligations. Magistrate 14 initially explained her options: she could adjourn to another day to obtain legal advice, or she

⁵⁰ Although most criminal charges in Australia are resolved by guilty plea, often after discussion and agreement, the actual sentence is not part of the agreement; judicial officers have no role in plea discussions: New South Wales Law Reform Commission, *Encouraging Appropriate Early Guilty Pleas* (2014).

⁵¹ K. Daly, 'Discrimination in the Criminal Courts: Family, Gender, and the Problem of Equal Treatment' (1987) 66 *Social Forces* 152.

could plead guilty or not guilty. On her electing to plead guilty, the magistrate sought information about her personal circumstances and her income and then imposed a sentence which responded firmly but compassionately to that information:⁵²

All right, Ms [D]. You've pleaded guilty to two counts of driving without a licence whilst legally disentitled. The offences are serious and you've been previously placed on a suspended prison term for the same offence. You must get the message that you simply cannot continue to drive. If you drive whilst legally disentitled, you face the real prospect of being imprisoned. You owe an enormous amount in fines. You don't have the ability to pay those fines. You're a single mother with six children and clearly, a fine would be out of the question here. In any event, I would have thought that the offences are so serious that a fine would not be appropriate in any event. A term of imprisonment is appropriate here. The only real question is whether or not it is suspended. I'm going to suspend the prison term for two reasons, firstly because if I send you to prison, the impact upon your children in particular, which will be significant – and there's Supreme Court authority to say that the court should have regard to the impact upon the children of a sentenced prisoner. And further, I note that in the past when you're placed on a suspended prison term, you complied with that order and therefore, there's a prospect for your complying with the orders made by this court.

(Magistrate 14, matter 413)

⁵² For all quotations in this article, transcripts have been given a consistent format rather than retaining the relevant court's local formatting. M indicates magistrate; DR indicates a defence representative; P indicates a prosecutor; D indicates defendant. Names have been omitted, and on occasion other details such as dates or location have been removed, if they potentially identify a location or participant, though some variations in local practice in different courts have been retained.

These remarks include elements which are more characteristic of a formal, authoritative approach to defendants in magistrates courts ('You must get the message that you simply cannot continue to drive').⁵³ Nevertheless, this magistrate clearly acknowledges the defendant's inability to pay the fines she owes due to her responsibilities to support six children. The magistrate demonstrates concern for the impact on those children of sending their mother to prison. A particular concern to avoid imprisoning women because of the consequences for their children has emerged as a feminist issue in sentencing in Australia.⁵⁴ The magistrate's reference to Supreme Court authority on this point is notable given the infrequent explicit reference to case law in magistrates court proceedings. Here, the reference appears to function as 'cover' for a position which might be considered controversial. Further, the magistrate demonstrates their own ethic of care in actively eliciting information from the unrepresented defendant about her personal and financial circumstances in order to arrive at an appropriate sentence.

In matter 1085, the defendant was represented and pleaded guilty to charges of drug possession and possession of stolen goods. The defendant had a six-month old baby, and it appeared that the main perpetrator was her former partner, who was now incarcerated for a significant period. Magistrate 25 takes into account the defendant's caring and financial circumstances and her consequent inability to pay a fine, and takes a problem-solving approach to find an appropriate disposition (a period of supervision by the probation service), designed to support her to avoid re-offending. Despite the defendant being represented, the magistrate speaks to her directly to explain how to work with the probation service to ensure that no problems will arise during the period of supervision. '[Y]ou are making good progress....Take advantage of the additional support this order will give you....then that will

⁵³ See, e.g. Hunter et al., *op. cit.* n. 6; Hunter (2005), *op. cit.* n. 24.

⁵⁴ Hunter (2018), *op. cit.* n. 2.

be the end of the matter.’ Further, rather than holding her individually responsible for making poor choices, the magistrate notes the likelihood that the defendant’s offending behaviour had occurred under the influence – possibly duress – of her former partner, which reduces her culpability. She ‘was certainly influenced by another party, perhaps quite substantially so.’ This contrasts with the approaches of other magistrates in some observed matters, such as matter 595 where Magistrate 4 describes a woman defendant’s offences (fraud) as resulting from ‘leaving her family for an unfortunate liaison’ and so ‘getting herself into a bundle of trouble...her own creation.’

In matters 718 and 723, Magistrate 20 displays considerable empathy for the represented defendant and apologises for having to refuse bail and remand her in custody. The defendant, already on bail for another drug offence, was charged with trafficking heroin, and so the magistrate had no choice but to remand her, while leaving open the possibility of a successful bail application at a later date. As in the previous cases, the magistrate sees the defendant in a relational context, acknowledging the presence and support of her husband and child:

What makes me so upset about you, is that you look as though you're still fairly healthy, you've got a couple of folk who love you and want to try and help, and yet you can't battle this without getting charged again and this is the third time this year, plus you've got a couple of other times you've had. It's very serious stuff.

...Ms [D], I'm terribly sorry, but I still have to do the job as I see it. You'll be remanded until the 20th. Now if before that day you can get enough - or [DR] thinks you've got enough things going with you to make another bail app, you can bring it forward. You don't have to wait that long, but speak with her about that. Good, thanks. You'll be remanded until 20 April, bail is refused. [To DR] And you shall have a chat with the

husband and make sure that the family know all about what's happening. Thanks.

(Magistrate 20, matter 723)

In viewing women defendants in a relational context, these magistrates also demonstrate a focus on the impacts of law on the wider community. Broadening the judicial focus beyond the individual defendant is most clearly seen in feminist moments concerning domestic violence.

(b) Domestic Violence Matters: Male Defendants

While the cases involving women defendants did not necessarily raise issues of gender justice per se (being concerned with charges of fare evasion, unlicensed driving, drug possession and dealing), domestic violence cases do so. Feminist moments in these cases situate the particular facts within a gendered social context of masculine aggression and female victimization and take the opportunity to pursue gender justice.

In matter 638, for example, the defendant pleaded guilty to four counts of assault on his partner. The plea included a claim that the defendant had a record of contributions to the community, but that his schizophrenia was not being properly managed at the time of the assaults. Magistrate 2 challenged this argument, noting two previous assault convictions, and probed for further details. Neither of the other assaults had been domestic, but one had involved a knife. The magistrate's sentencing judgment ran as follows:

Well, I take into account what is said on your behalf. On the one hand it's said that on the soccer field you're able to exercise patience and show restraint and deal fairly with difficult situations that might crop up. It's a pity you didn't transfer that ability to your personal life. One thing that is shown is that over a course of a month you persisted in using violence against your partner. On the last occasion, or the occasion when you

punched her to the chest I think it was, yes on three occasions, and kicked her to the nose, that action resulted in her receiving a split nose, she required hospital treatment and the nose required stitching. She went along with your request that she spin a yarn to the hospital and tell them that she received that injury in falling down some steps. So to that extent it's shown that you were exercising an undue amount, an unfair amount of control over her, which no doubt made you even that more ready to have your way by showing violence to her. You had the benefit of a partly suspended sentence in the past, in the recent past ... when you were dealt with in the Supreme Court and received a term of five months imprisonment for an assault you committed. Apparently that was with a weapon, a knife according to the jury's findings, I'm told. That was partly suspended on the condition that you be on good behaviour for two years upon your release from prison. That did not serve to deter you from committing these offences against your partner who should have been able to trust you and expect protection from you rather than violence. Quite clearly these matters are deserving of a term of imprisonment.

(Magistrate 2, matter 638)

Here Magistrate 2 concisely conveys a feminist understanding of the nature and dynamics of domestic abuse.⁵⁵ The magistrate does not minimize the seriousness of the assaults or use euphemisms to describe the defendant's actions but details the physical and psychological harm the defendant caused the complainant. This magistrate also details evidence of the defendant's exercise of power and control over the complainant and demonstrates awareness that domestic abusers often display very different behaviour in their

⁵⁵ For a summary of the feminist understanding of domestic abuse, see R. Hunter, 'Narratives of Domestic Violence' (2006) 28 *Sydney Law Rev.* 732.

public and private lives. The magistrate further emphasizes the seriousness of domestic violence as an abuse of trust and a violation of norms within intimate relationships. Moreover, in conventional criminal justice terms, the defendant has previously been given a chance to reform but has continued to resort to violence. For all of these reasons, the magistrate imposes a term of imprisonment.

In matter 247, Magistrate 9 dealt with a charge that the defendant had assaulted his wife. His counsel argued that the couple had been going through a rough patch during which the defendant's wife had become 'overly familiar' with a co-worker, and the defendant had been drinking and allowed his anger to spill over. However, the couple were now reconciled, the wife was present in court, and the defendant had undergone counselling for anger management. The magistrate delivers a stern lecture on domestic violence, again avoiding minimization, detailing the harm caused and actively refusing to blame the victim – '[P]erhaps if you were carrying on this way with a problem with alcohol, well whatever she's doing, she may well be justified in her own mind'. These statements offer support to the wife and signal to her that the court takes violence seriously and she does not have to put up with it. Further, the magistrate does not accept that the defendant has sufficiently addressed his propensity for violence and orders him to attend a domestic violence perpetrator programme, as well as effectively imposing a restraining order (via the conditions of a good behaviour bond) and a fine.

(c) Other Matters with Male Defendants

Feminist moments in two other matters involving male defendants reflect the themes of holding abusive men to account and taking into account a defendant's caring responsibilities. In matter 788, Magistrate 17 was dealing with a defendant's application to cancel a community-based order (CBO) and be re-sentenced. The CBO had required the defendant to

attend a sex offenders programme.⁵⁶ Despite his consent to the order, he had not complied after almost 12 months. He lived in a country town and claimed through his counsel that he had not realized that the programme would be run in the capital city and he was therefore unable to attend due to work commitments. The magistrate tries to find local alternatives, but it appears nothing suitable is available. Eventually the magistrate requires the individual to obtain a psychological assessment so that ‘that expert can provide a report to the court and let me know - give some insight into where he stands. It seems to me that he's belittling the offence, and that is a great concern to the court.’

This magistrate is not prepared to allow the defendant to avoid facing up to the nature of his offending but insists on obtaining an expert report before deciding the application. This forces his counsel to make arrangements for him to see a psychologist. The magistrate also ensures that the expert is given full details of the offence – ‘I think that whoever it is that he goes to ought have the report from the Office of Corrections that I've just read’. Here the magistrate displays concern about the impact of the court’s decisions on victims and the wider community as well as on the defendant, alongside other feminist themes of taking sexual offences seriously, contesting the minimisation of abuse and holding abusers to account.

In matters 280 and 283 (the other single case with two feminist moments) the unrepresented defendant pleaded guilty to three charges of unlicensed driving, driving under the influence of alcohol and negligent driving. As in some of the feminist moments with women defendants described above, Magistrate 10 tries to take a problem-solving approach to achieve a disposition that will fit with the defendant’s caring responsibilities for his father

⁵⁶ From the field notes for this matter taken during the court observations, the underlying offence was ‘indecent act with a child under 18’. The gender of the victim was not noted.

and prevent him from re-offending. The magistrate seeks as much information as possible about the unrepresented defendant to identify every opportunity to avoid imposing a custodial sentence and orders a pre-sentence report rather than simply relying on the defendant's own account. The magistrate's efforts to check the defendant's understanding are notable. At the end of the hearing the magistrate offers further help by suggesting that at the next court appearance: 'If you want to bring any references or anything like that, from any friends or work, you're welcome to do that and you should bring them with you on the next occasion, do you understand?'

Taken together, the identified feminist moments constitute only a very small proportion (around 5.6%) of all the matters in the transcripts we read. Most of the time, magistrates took into account individual circumstances without reference to gendered social structures and expressed disapproval of domestic abuse in fairly conventional terms, neither displaying a particular depth of understanding nor egregiously minimizing it. This raises two different questions. Why were there so few feminist moments? Why were most of the feminist moments apparently isolated and random occurrences? These questions are investigated further below after first discussing cases heard by those magistrates who did appear to demonstrate a more consistent orientation.

2. Orientations

On reading through the three data subsets, some magistrates appeared to have a notably consistent approach to their matters. We termed these approaches 'orientations'. Four magistrates exhibited a general orientation in combination with at least some feminist moments: Magistrates 10, 17, 20 and 21. Magistrate 17 had one feminist moment, Magistrates 10 and 20 each had two feminist moments (in single cases), while Magistrate 21 had the highest number of feminist moments. We then carefully read the transcripts for all

matters for these four magistrates, including those not in the original three data subsets. This consisted of six matters for Magistrate 10, 25 matters for Magistrate 17, 32 matters for Magistrate 20 and 37 matters for Magistrate 21.⁵⁷ We conclude that only Magistrate 21 could positively be identified as having a feminist orientation.

Magistrate 10 takes a problem-solving approach, gives defendants options, seeks alternatives to imprisonment, actively elicits information about defendants' circumstances, gives them advice and encouragement and recognizes their interests. However, this approach applies uniformly to defendants with caring responsibilities (as in matters 280 and 283 discussed above as a feminist moment), and to defendants in domestic violence matters such as matter 282, where the magistrate minimizes the seriousness of the defendant's actions and displays no awareness of the fear engendered in the victim. It is not, therefore, possible to characterize this magistrate's orientation as feminist.

Magistrate 17 appears to manifest an ethic of care by providing explanations to defendants in lay language, checking their understanding, engaging directly with represented defendants and inquiring whether one defendant has anyone with him in court. This magistrate also actively seeks information from or about defendants and takes their circumstances fully into account. In imposing penalties, Magistrate 17 is generally lenient, seeks to find conditions with which defendants will be most able to comply, is concerned to provide defendants with opportunities to address particular problems and issues, advises defendants on how to avoid further trouble, and wishes them well at the end of proceedings.

⁵⁷ Two other magistrates exhibited patterns of conduct or practices that could be characterized as orientations: Magistrate 26 is generally helpful, and Magistrate 15 is generally kind to defendants. However, as their transcripts include no content suggesting any substantive feminist concerns or potentially feminist procedural elements, we did not read all their transcripts, beyond those already in the data subsets. Magistrate 10 had six matters in the combined data subsets, and was selected for further analysis because in those six matters they exhibited a discernible general orientation combined with two feminist moments. As it turned out, however, Magistrate 10 had no additional matters in the full observation sample, hence the disparity between the total number of matters analysed for Magistrate 10 compared with Magistrates 17, 20 and 21.

Unusually, Magistrate 17 also displays care for other participants in the criminal justice process. In matter 785, the defendant had absconded from a taxi without paying the fare. The magistrate orders him to write a letter of apology to the taxi driver, and also offers the use of court facilities to write and photocopy the letter. In matters 790 and 800, the magistrate suggests to defendants that they should thank the people who have written references for them – ‘You should thank these people that wrote these very lovely supportive words on your behalf’. As discussed above, Magistrate 17 also has a feminist moment in the case of the defendant trying to get out of attending a sex offender’s programme (matter 788). Overall, however, while this magistrate’s orientation is consistent with a feminist approach, there is not enough substantive feminist content for us to make any clear finding that the orientation can be said to be feminist.

Magistrate 20 is concerned to check that the defendant understands what is happening, and in several cases also checks to make sure that people accompanying the defendant understand what is happening. In addition, in some matters, the magistrate has a pleasant exchange with the defendant, addresses a represented defendant directly, gives explanations in lay language, or wishes the defendant all the best at the conclusion of proceedings. There are also some caring elements in Magistrate 20’s approach, looking out for the defendant’s best interests, demonstrating flexibility about formal requirements, being helpful in ensuring defendants’ medical needs are attended to in custody, and encouraging defendants to make use of available support and address their problems. Again, this magistrate has one feminist moment in the case of the woman charged with trafficking heroin (matter 723). While Magistrate 20’s orientation is consistent with a feminist approach, there is again not enough substantive feminist content to enable any firm conclusion of a feminist approach.

Magistrate 21, by contrast, is not nearly as good natured towards defendants as Magistrates 10, 17 and 20. Magistrate 21 comes across as no-nonsense and certainly not a soft touch for either defendants or prosecutors. At the same time, this magistrate is not patronizing, demeaning, authoritarian or moralizing. This magistrate is helpful to defendants in a number of small ways and often imposes lenient sentences in response to defendants' circumstances raised in the plea.

We identified six moments of feminist judging among Magistrate 21's matters. Three of these moments concern violence by male defendants. In matters 754 and 762 (a single case commenced, stood down and resumed later in the day), the unrepresented defendant was charged with recklessly causing injury to his nine-year-old son during a contact visit and was applying for diversion from the court system after having undergone counselling. The magistrate, however, makes it clear that the charge is extremely serious, and ultimately decides that diversion is not appropriate in a case of a parent injuring a child. Matter 757 was a bail application by a represented defendant charged with assaulting a woman. The magistrate immediately seeks contextual information, asking defence counsel whether the alleged victim is the defendant's partner, whether there is any other connection between them, and whether the victim has a protection order against the defendant. Once the magistrate is satisfied that it is not a case of domestic abuse or breach of a protection order, the matter proceeds and bail is granted.

Magistrate 21's other three feminist moments involve women defendants. In matter 765, the defendant, a single mother, pleaded guilty to two counts of unlicensed driving and one of failing to give way, against a background of several previous driving offences. The magistrate emphasizes that the defendant's record is 'pretty terrible' and sentences her to short terms of imprisonment in addition to fines. However, the sentences are suspended and

the licence disqualification is imposed for less than 6 months, with the explanation that, ‘The only reason I am keeping the suspension to a short time is because you have two children’.

The defendant in matter 744 pleaded guilty to two charges of possessing and handling stolen goods. She had committed these offences, as well as several previous offences, with her then boyfriend. This prompted the following rather cynical exchange:

M: Is she still with Mr [X]?

DR: That relationship has come to an end.

M: When? Five minutes before she walked into court maybe?

(Magistrate 21, matter 744)

The defendant’s counsel explained that the defendant was no longer with Mr [X], she had obtained assistance from a welfare agency in addressing her drug and mental health issues, had found employment, and was accompanied in court by a support worker from the agency. The magistrate’s sentencing remarks begin with commending the defendant for the steps she has taken to turn her life around:

M: Ms [D], you have done extremely well since I last sentenced you to a term of imprisonment which you served under [a supervised community-based order]. It's good that you've split with Mr [X] because that was not going to do you any good, was it, and in fact brought you before the court here, and I don't think Mr [X] has changed any of his ways in recent years.

[The magistrate declines defence counsel’s invitation to impose a good behaviour bond for two reasons:]

You already have these supports through [the welfare agency], you have good support from the local doctors, you have family support, everybody is supporting you. You now have a house, you've got all that sort of assistance, that's terrific. I don't think you need any court order to make you continue to consult with [the agency] or take help when you need it.

The other reason that really prevents me from acceding to counsel's request is that you have such an extensive history that it just wouldn't be appropriate. Today you're going to be convicted and fined an aggregate of \$500 and you can have plenty of time to pay that off. That shouldn't be seen as any extra burden on you, you can just pay it off per month or you can save it up and pay it off in one big go, whatever you like.

(Magistrate 21, matter 744)

In the circumstances, the fine is intended to be a less burdensome penalty than a good behaviour bond, given that the defendant's employment gives her the capacity to pay over time. The magistrate also explains various payment options, and finally wishes the defendant 'Good luck'. The magistrate acknowledges the defendant's relational context but unlike the previous cases discussed, this does not include caring responsibilities. Rather, it is the end of the relationship with Mr [X] and the support of her family, doctors and the welfare agency which will help to ensure the defendant does not re-offend. This is a model of firm but caring and empathetic engagement with a troubled defendant, an approach also reflected in Magistrate 21's final feminist moment.

In matter 766, the defendant was charged with shoplifting and had been held in custody as she was already on bail for three other shoplifting offences, all of which involved minor thefts from supermarkets. Her application for bail was opposed by the prosecution who

referred, among other things, to her twelve previous convictions for shoplifting, as well as the fact that she was the primary carer of three children, including pre-school-aged twins. Her lawyer noted that the defendant's partner was in the court building, to which the magistrate responds: 'He's right there behind you with the twins'. The magistrate then queries, 'What is the reason behind all this? ... Does she have a psychological problem as well as a drug problem?' The lawyer explained that she was on the methadone programme, but also suffered from severe depression, and had relapsed into re-offending when she stopped taking anti-depressants. The magistrate then asks:

M: Does she have other family supports, other than her partner? I can see he's supportive because he's here with the children, but does she have a sister or - ?

DR: I haven't asked her about that. She did tell me that her -

M: I'm thinking of releasing her on bail with a condition that she not attend at any supermarket, unless in the company of an adult.

DR: What she actually discussed with me at lunchtime was that [her partner] do the shopping, basically.

M: I don't mind if she goes, but she has to be with somebody who's an adult.

(Magistrate 21, matter 766)

The magistrate proceeds to explain to the defendant: 'I'm going to release you on bail, despite the fact that this is now your fourth lot of offending since November of last year. I accept that there are exceptional circumstances from the matters raised by [your counsel].' In this case, we see the magistrate again understanding the defendant in a relational context, being attentive to the presence of her family in court, actively eliciting information about her

circumstances, and crafting a solution that takes into account her position and the needs of her children while also addressing the prosecution's concerns about her risk of re-offending. In summary, Magistrate 21 exhibits a disposition towards problem solving, empathy and an ethic of care, combined with substantively placing defendants within a gendered social context, and exhibiting feminist knowledge, knowledge of women's lives and understanding of marginalized experience. This combination led us to conclude that Magistrate 21's judicial practice displays a feminist orientation.

DISCUSSION

Overall, we identified 18 feminist moments out of 318 matters and one magistrate out of 24 with a feminist orientation. Although the aim of this research was not to determine the distribution or frequency of feminist approaches to judging, on any assessment, these are small numbers. These findings raise two different questions: Why were there so few feminist moments? Why were most of the feminist moments apparently isolated and random occurrences?

Several factors might account for the scant appearance of feminist moments in our data. First, by confining our initial reading to the three selected data subsets, we may have looked in the wrong places. However, the fact that only two additional feminist moments were identified when we examined all the matters decided by Magistrates 10, 17, 20 and 21 suggests that the three data subsets effectively isolated those matters where feminist moments were most likely to appear.

Second, while we selected matters lasting more than three minutes with unrepresented defendants as providing the greatest opportunity for direct judicial interaction with defendants, it turned out that most of these matters involving male defendants did not raise any substantive gender issues, and so provided little scope for feminist moments. It seems

that in the general criminal list, the scope for substantive feminist judging is relatively limited. A magistrate may have a feminist consciousness but not have the opportunity to express or act on that consciousness in judicial practice.

Even where opportunities were available, few magistrates adopted a feminist approach in practice, or even an engaged or problem-solving approach which might give rise to the occasional feminist moment. It is notable, indeed, that we only found four magistrates who demonstrated a sufficiently consistent approach to their matters to enable us to classify them as having any particular orientation. This was not necessarily related to the number of matters for each magistrate appearing in the three data subsets. For example, we originally read only four of Magistrate 20's matters, but the consistency of approach across these matters led us to further examine all cases for which transcripts were available for this magistrate (n=32). By contrast, other magistrates with a large number of matters across the three data subsets did not display a sufficiently consistent approach to enable us to discern any particular orientation.

This absence of identifiable general orientations may help to answer the second question – how do we account for the mostly isolated, 'one-off' nature of feminist moments appearing in our data? The generally engaged, problem solving or caring approach to judging displayed by Magistrates 10, 17 and 20 could occasionally give rise to a feminist moment when a defendant's relational context was recognized and responded to, or a defendant's minimization of harm was rejected. For the other magistrates who had single feminist moments, these appear to have been individualized responses to the unique facts of the matters in question – concerning domestic violence for Magistrates 2 and 9, and the particular family circumstances and predicaments of women defendants for Magistrates 13, 14, 16 and 25.

The apparent commitment to case-specific responses and the absence of discernible overall orientations found in this research may be a manifestation of a conventional understanding of the core judicial value of impartiality – that cases are to be decided on the information presented in court and the applicable law rather than by reference to wider social structures or context. This understanding of impartiality has been extensively challenged by academic research from several perspectives: legal realism, feminism, critical legal studies, critical race theory and others.⁵⁸ Judicial education worldwide now involves and even emphasizes the importance of broader social understandings for good judging.⁵⁹ However, such education may have limited purchase if it cuts against other entrenched judicial values and practices.

Cyrus Tata's recent work on 'ritual individualization' sheds further light on our findings.⁶⁰ Tata notes the tension for lower and intermediate criminal courts between routinization ('a system of perfunctory, mass case disposal') which enables judges to get through their long daily lists with minimum effort, and individualization, by which courts can be seen to uphold 'cherished values, including the presumption of innocence; free defendant choice and participation; and attention to the unique individual'.⁶¹ Routinization involves treating all cases according to a set of heuristics, standardized patterns and established typologies regardless of individual differences, while individualization involves responding

⁵⁸ R.J. Cahill-O'Callaghan, *Values in the Supreme Court: Decisions, Division and Diversity* (2020); Davies, op. cit. n. 41.

⁵⁹ See, e.g., Canadian Judicial Council, *Training that Never Stops*, at <<http://judicialeducation.cjc-ccm.ca/programs/>>; Judicial College of Victoria, *Programs and Events* (2020), at <<http://www.judicialcollege.vic.edu.au/judicial-education/>>; J.K. Elek et al., *Elements of Judicial Excellence: A Framework to Support the Professional Development of State Trial Court Judges – Project Final Report* (2017).

⁶⁰ Tata, op. cit. n. 24.

⁶¹ Id., p. 112.

separately to the details of each defendant's story.⁶² This is a tension between efficiency and legitimacy. In Tata's account, these imperatives are reconciled by the process of ritual individualization, in which standard practices such as pre-sentence reports and the plea in mitigation present the defendant to the court as an individual who accepts their guilt and culpability and takes personal responsibility for their actions.⁶³

What we discerned in the transcripts, in relation to feminist judging, was much more individualization than routinization. Magistrates were more likely to display feminist moments when something in the individual story triggered an opportunity for a feminist response, rather than to adopt a characteristic orientation towards all cases. This approach tends to promote legitimacy, with each person treated as a unique individual and each case turning on its own facts.

At the same time, individuals are seen as disconnected from their social context, with an insistence on individual responsibility for criminal offending rather than any explanatory role being given to structural forces.⁶⁴ As Tata explains: 'Judges and lawyers are confronted daily with repeat individualized stories of social deprivation, unemployment, childhood neglect and abuse, addictions, and so on, that they can come to see them as unremarkable'.⁶⁵ Similarly, the pervasive context of gender inequality, gendered disadvantage, domestic violence, coercive relationships and caring responsibilities can be rendered invisible and unremarkable. Given that a feminist approach involves recognising the relevance of these social contexts and structural forces, and necessarily entails a structural understanding of at

⁶² R.M. Emerson, 'Holistic Effects in Social Control Decision-Making' (1983) 17 *Law & Society Rev.* 425; C.A. Heimer, 'Cases and Biographies: An Essay on Routinization and the Nature of Comparison' (2001) 27 *Annual Rev. of Sociology* 47.

⁶³ Tata, op. cit. n. 24; See also C. Tata, *Sentencing: A Social Process: Re-Thinking Research and Policy* (2020), chs. 4 and 5.

⁶⁴ Tata, op. cit. n. 24.

⁶⁵ Id., p. 132, italics and footnote omitted.

least some crimes and criminal behaviour, it could be said that the process of ritual individualization is actively inimical to feminist judging. This may help to explain why a feminist approach is so rarely apparent in our magistrates court transcripts. Perhaps what is surprising is not that there was so little evidence in our data of feminist orientations, but that any magistrate should display an identifiable feminist orientation at all.

CONCLUSION

This research first draws on and extends existing feminist judging analysis to envision how feminist judging might manifest in lower courts.⁶⁶ We then apply this extended analysis to observed judging practices. Close investigation of court transcripts from the non-trial criminal list in Australian magistrates courts reveals the ways judicial practices do (or do not) reflect a feminist approach to judging.

Clear instances of feminist judging are relatively rare in this data. Feminist judicial practices are most likely to appear in cases which involve domestic violence or women defendants, in which magistrates display an understanding of the gendered nature of crime, or the magistrate locates the defendant in a relational context. The nature of interaction between the magistrate and court participants sometimes suggests potentially feminist judicial approaches, but it is difficult definitively to identify feminist judging and judicial practice without some element of feminist substance. There is nothing externally evident which appears to mark out a purely feminist approach to courtroom management or interaction with other participants.

This lack of visible feminist judging may stem from two factors: (1) relatively few opportunities for the articulation of a substantive feminist understanding of the issues in a

⁶⁶ Hunter, Roach Anleu, and Mack, *op. cit.* (2016), n. 6.

case; and (2) the dominant way in which judicial legitimacy is performed, involving responses to facts and circumstances on an individualized rather than structural basis. In light of these factors, even if the number of magistrates identifying as feminists were to increase or ideas about feminist judging were to become more influential, this might not be strongly reflected in the kinds of court proceedings we have analysed.

It must be emphasized that this analysis is conducted from an external point of view by reading and interpreting transcripts. We do not assert that feminist judging can only exist if it bears these external hallmarks. A judge may well consciously adopt a feminist approach which may not be externally recognizable through direct observation or discernible in transcripts.

As a contribution to understanding feminist judging in lower courts, this research on the daily criminal list in magistrates courts reflects the limitations of the court context. It may be that the criminal list, with its rapid succession of bail applications, requests for adjournments, guilty pleas and sentencing decisions, is more likely to elicit immediate, individualized, decontextualized and perhaps less reflexive responses from magistrates than other types of proceedings. Further research focusing on a domestic violence list, on trials and committal hearings for gendered offences, and/or on trials concerning gendered civil claims, as well as matters in which women appear as defendants or parties, may generate greater and different opportunities for feminist judging. Such research would provide a more complete picture of the extent and nature of feminist judging in lower courts. It would also provide the opportunity to test the theory of ritual individualization in those contexts, and the extent to which one may exclude the other.