**Flagrant criminal offences in Chile:**

**Bracketing and contextualizing matter-of-factness**

**Abstract**

Drawing on ethnographic data gathered in lower criminal courts and in one unit of the Prosecutor’s Office in Santiago, I explore the way in which criminal offences considered “flagrant” are constructed and treated by the Chilean criminal justice system. Mobilizing the literature on legal technicalities and its attention to documents, procedures and apparently irrelevant aspects of bureaucratic work, I show that flagrant criminal offences’ matter-of-factness is fictionalized through practices that make possible to avoid to directly refer to the alleged facts and to presume a certain scale, one that mirrors police’s gaze. The flagrant character of a criminal offence – the result of the application of the legal fiction of the detention *in flagrante delicto* – conveys certain epistemological and ontological assumptions about how to get to know what happened and that constitutes the criminal offence. Or, more precisely, about what cannot, for the moment, be known and can, therefore, be ignored throughout the judicial process.

**Keywords**

Chile – criminal justice – lower courts – technicalities – misdemeanors – *in flagrante delicto*

**Introduction**

The courtroom was full. Seated at one corner of the room, on one of the six benches assigned to the public, it took me some time to realize that the different people there had taken a very specific place: those who knew the defendant sat on the three benches behind the desk of the defense attorney, and those who knew the victim on the three other benches behind the desk of the prosecutor. It was the last case being treated consecutively by the court that afternoon, and the most serious one. The defendant had assaulted his live-in partner and was found by police in possession of a firearm without the appropriate permits. Allegedly, of course, since at that stage of the judicial process the evidence is preliminary and a trial needs to happen before the defendant is considered guilty. That the woman who sat next to the prosecutor and who was the victim in the case had been indeed assaulted, though, was obvious. She had bruises in her face and arms, and walked with some difficulty. While we were all waiting, friends and family members of both victim and defendant had progressively arrived in the hallways of the court, chitchatting about what had happened, phoning other people, and elucubrating about the potential outcome of the hearing.

After the gendarmes brought the defendant in handcuffs to the courtroom, the prosecutor explained what had happened, reading some excerpts of the police report. The night before, after the man – angry because the victim had arrived home later than she had said she would – beat the woman, she sent a picture of her injuries to her mother, who in turn called the police, who went to the victim’s home, found a firearm hidden in a closet and arrested the defendant. The prosecutor asked for pre-trial detention [*prisión preventiva*] while more evidence was being gathered before the trial. The defense attorney said that the defendant did not know about the firearm, that it belonged to the victim’s husband, who was at that time in prison; that the charge of illegal possession of weapons [*porte ilegal de armas*] did not proceed since the home, and therefore the weapon, were hers; and that, with the information available at that point, his client could only be accused of assault, charge for which a house arrest would be enough. In the end, the judge, after having asked the prosecutor to repeat what two reports in the file stated, one issued by a doctor describing the gravity of the injuries and another that had qualified the domestic violence risk as “high,”[[1]](#footnote-1) decided that the defendant had to remain in jail. We heard a dry shout – “bitch” [*perra*] – muttered by one of the relatives of the defendant, and, heavily surveilled, left the room.

In my fieldwork, I had approached these hearings suspicious of the criminal justice system’s promises of fairness, and had certainly read about its proclivity to punish people with certain characteristics – poor and marginalized populations, as it was probably the case of the defendant here. And yet, I left that courtroom absolutely convinced that this man had undoubtedly aggressed that woman. The fact that the assault had happened the night before, the conversations and intense looks exchanged by people in the public, and the visible bruises of the woman contributed to this perception. How could I be so sure? Why did this aggression seem so evident and obvious to me? Was it evident and obvious for the prosecutor, the defense attorney and the judge in the case? For the police officers who went to this couple’s home and found her injured? Why? In fact, this case was one of the many that are brought to these courts because the defendants are found *in flagrante delicto* by police, clearly committing the criminal offence and therefore arrested. So, in some degree, the criminal justice system is attributing some matter-of-factness to these criminal offences, somehow and at some point, convinced – like me – that these criminal offences did happen and were committed by the defendants brought, in handcuffs, to these courtrooms.

However, this matter-of-factness is precisely the object of debate and controversy in the criminal justice system. Legal procedures aim at establishing, through a series of mechanisms that include in the case of adversarial systems – like the Chilean one – the performed confrontation between two opposed sides, if what happened can be qualified as a criminal offence and if it was indeed committed by the person accused. No matter how inculpatory it may be, no video, picture or testimony alone can render the legal procedures irrelevant; in principle, the flagrant character of a crime does not have its place in the criminal justice system. “It is impossible, in any case,” wrote Latour (2010[2002], 151), “to define the expression ‘to say the law’ if we eliminate from it the hesitations, the winding path, the meanders of reflexivity: the reason why we represent justice as blind, and holding scales in her hands, is precisely because she hesitates.” Where are these hesitations in the case of flagrant criminal offences? How is “evidence”, understood not as “pieces of” but as the adverbial qualification, as in “evidently, obviously, clearly”, confronted, challenged, acknowledged or rejected throughout these specific legal procedures? How is this particular legal notion, the *flagrante delicto*, applied and how does it participate in practical “truth-making routines” (Maguire and Rao 2018)? What kind of “engines of truth” (Schneider 2015), “technologies of doubt” (Good, Berti, and Tarabout 2016) or “factuality operators” [*opérateurs de factualité*] (Dulong 1997, Chateauraynaud 2004), different concepts all referring to practical ways of attributing matter-of-factness to legally relevant facts, are engaged in the legal treatment of flagrant criminal offences?

In this article, I explore the way in which flagrant crimes’ matter-of-factness, ever-present in public discussions on delinquency in Chile, is constructed. People caught *in flagrante delicto* are brought to specific socio-legal configurations and to specific ways of connecting facts and law, truth and procedures, one specific flagrant crime and the rest of them. Drawing on ethnographic data gathered in lower criminal courts and the prosecutor’s office in Santiago, and mobilizing the scholarly literature on legal technicalities (Riles 2005) and its attention to documents, procedures and apparently irrelevant aspects of bureaucratic work, I ultimately show that the flagrant character of criminal offences, as they travel from their encounter with police to the courtrooms, is both bracketed, made inconsequential to the case, and contextualized as the result of a generalized social problem of increased delinquency on the streets. I show that the flagrant character of a crime conveys certain epistemological and ontological assumptions about how to get to know what happened and that constitutes the criminal offence. Or, more precisely, about what cannot, for the moment, be known and, therefore, can be ignored throughout the judicial process. In other words, in these cases, everything is organized so actors in the criminal justice system can avoid asking themselves the same question that bothered me so much: “how can I be so sure?”

**Tracking flagrant criminal offences in Santiago**

Unlike most Anglo-Saxon criminal justice systems, where detention is a common law police’s prerogative, civil law traditions explicitly describe when someone could be legally detained. Chilean criminal procedure code describes two such situations: when a judge had issued an arrest warrant [*orden de detención*] or when the person is caught *in flagrante delicto*. This latter case is described in the code’s article 130:[[2]](#footnote-2)

“It will be understood that someone is in situation of flagrancy when he or she: a) is currently committing the offence; b) just committed it; c) fled the place where the offence was committed and is pointed out by the victim or other person as the author or accomplice; d) is found, within an immediate time following the perpetration of the offence, carrying objects proceeding from the offence or with signs, on him/herself or in their clothes, that could make the person suspect of having participated in the offence, or with the weapons or tools that could have been used to commit it, and e) is pointed out by victims asking for help, or in-person witnesses, as the author or accomplice of an offence that had been committed within an immediate time, f) appears in an audio-visual recording committing the crime or simple criminal offence which is accessed by police within an immediate time. For the purposes of letters d), e), and f) it will be understood as immediate time all that time that passes between the realization of the fact and the capture of the defendant, as long as no more than 12 hours had passed.”

The sloppiness of the text’s writing can be explained by the successive modifications that has suffered since 2000, when the new criminal procedure code was adopted.[[3]](#footnote-3) Since then, congress has increasingly extended the scope of the article to cover more potential situations: originally, the article had unspecific time definitions – the “just committed” criminal offence, the “immediate time” – which was later defined as 12 hours; originally, only victims could point to the alleged culprit, which was later expanded to include witnesses as well; and, in 2016, a whole line was added to include videos as a way of legally justifying the detention, which means that, in practice, someone who appears committing a crime in a video can be detained by police within the 12 hours following the crime.[[4]](#footnote-4) Although the different modifications made to the text of the article have been criticized by some jurists, who have indicated that its current version goes against the spirit of the criminal procedure reform (Meneses Pacheco 2010, Vitar Cáceres 2011), most controversies on the legal regulation of crime in Chile have been caused not by the modifications to articles regulating detentions *in flagrante delicto*, but rather by those regulating police’s rights to ask for IDs and strip search people (Duce 2016).[[5]](#footnote-5)

Article 130 itself, therefore, raises little controversy in public discussions on criminal policy and delinquency, which is consistent with the role it plays in the general criminal procedure mechanics: the flagrant character is merely an attribute of the detention of a person and not something that could, in principle, have an important impact on the adjudicative outcome of the case; it is intended to be always read with other articles, the ones that describe the actual offences in the criminal code. It does not refer to a specific type of criminal offence either: from murder to threats, including sexual harassment, robbery and drunk-driving, all these criminal offences can be the object of detentions in *flagrante delicto*. This kind of low-key, only technical, role of this article contrasts, though, with what happens with what has come to be known as “flagrant crimes” in public discussions on delinquency in Chile, which are widely evoked, examined, and debated in public and private conversations. The apparently peripheral character of this article contrasts, as well, with the way in which the criminal justice system treats “flagrant crimes”: despite little systematic evidence thereof (Fondevila and Quintana-Navarrete 2020), flagrant crimes are seen as “good” cases for prosecutors, who can build their case on a suspect, witnesses and evidence that have already been identified,[[6]](#footnote-6) which would make easier or more likely to obtain a guilty verdict in a trial (Ríos Leiva 2012). Studies on Argentina (Kostenwein 2018) and Chile (Fandiño et al. 2017, Pásara 2009, Castillo Val, Tapia Mansilla, and Urzúa Salvo 2011) have shown that flagrant crimes somehow work as a self-fulfilled prophecy, casting doubt upon the effectiveness of the criminal justice system for criminal offences that are not flagrant.

After police detains someone *in flagrante delicto*, they must inform the prosecutor’s office within 12 hours, at which point the prosecutor will decide whether the person should be released or not. In this latter case, on which I focus in this paper, the detainee will be brought to a court to participate in a detention review hearing [*audiencia de control de detención*] in front of a judge, which also has to happen before another 12 hours have passed.[[7]](#footnote-7) Legally, the objective of these hearings is to check whether the defendant’s detention was carried out by police in respect of their prerogatives and, when applicable, articles regulating detentions *in flagrante delicto*. In practice, at these hearings, less than 1% of detentions are declared illegal (Fandiño et al. 2017) and the application of article 130 is seldom questioned (Rebolledo et al. 2008); they are rather the occasion of the defendant’s arraignment [*formalización*] during which the prosecutor explains the charges and proposes a legal procedure to treat it, depending on the offence, the defendant’s criminal record and the prosecutor’s judgement. Though infrequently, the prosecutor, in some less serious cases, can also ask for a kind of speedy procedure [*procedimiento abreviado* or *procedimiento simplificado*] to close the case quicker. In this latter case, a lower sentence will be imposed on the defendant who accepts responsibility or on the defendant who agrees to be the subject of a summary trial, one in which the judge will evaluate and condemn with the – rather scarce – information available at that point of the criminal investigation. In these latter cases, the sentence will often be considered served with the time the defendant has already spent detained. In any case, none of the described procedures and hearings are specific for defendants detained *in flagrante delicto*; this is, nevertheless, what happens with most of them: they are caught and, if the prosecutor decides it, they are arraigned in a court hearing in less than 24 hours after their detention.

Therefore, from a strictly legal perspective, “flagrant crimes” do not exist in Chile: the flagrant character is an attribute of the detention and not of the offence. And yet, they seem to be everywhere, both in the criminal justice system and in public discussions about delinquency and crime. Taking article 130 as a methodological starting point, in this article I follow flagrant crimes as they travel from the places on which police “find” them, to their treatment at detention review hearings. I did not follow the same individual case through the different stages, but rather tracked flagrant crimes as a category that configures practices – specifically, as a technicality, a legal fiction – through the treatment of different judicial cases. I am interested in flagrant crimes not as much as they emerge as the result of cognitive operations of classification carried out by particular individuals – though they do – as they make certain situations possible, situations in which the matter-of-factness that made the crime flagrant in the first place can be ignored and replaced by references to a generic context of urban delinquency. I focus on the descriptions of the role *in situ* of technical and material devices, such as legal provisions and case files, in order to show how “different realities or versions of the crime in question are enacted by different parts of the criminal justice system” (Lam 2015, 54), from the translation from police’s version of facts into the administrative and bureaucratic language of law, and back to the questioning – or rather the un-questioning – of facts at the detention review hearings. By following article 130 and its subsequent connections with other legal provisions, with documents, with people, with other cases considered similar and with the alleged facts, I question the presumed stability of legal rule and “track the slow composition of a unique trajectory of legal truth; to register the specific processes and techniques deployed to fuse a continuous pathway out of scattered elements of uncertain relevance” (McGee 2015, 62). I document the fragility and contingency of article 130 as it is applied in the criminal justice system, as people’s troubles are simplified and contorted in order to make them fit within pre-established categories, and as issues of delinquency and crime are selectively invoked.

Concretely, the article draws on data collected through 18 months of ethnographic research in Santiago between 2018 and 2020. Although the fieldwork included the gathering of different materials, as well as my presence in different sites, the text is mainly based on the observations I carried out in a regional prosecutor’s office (150 hours) and in lower criminal courts (300 hours). The analysis is based on two different ethnographic accounts, written in Spanish, one describing the daily life in the prosecutors’ office and the other the daily life in the public spaces of the building where detention hearings take place, including descriptions of the hearing themselves. The two sites where I conducted observations play different roles in general in the Chilean criminal justice system – this particular unit of the prosecutor’s office receives all kind of cases reported by police, involving or not detentions – and the criminal court treats different cases according to different procedures, not only those involving detentions *in flagrante delicto*, but they work together when such detentions happen.

**Law, bureaucracies and technicalities**

Socio-legal scholars have been empirically researching institutions in charge of applying criminal law for more than half a century. The works of David Sudnow (1965) on a public defender office, of Robert Emerson (1973[1969]) on a juvenile court, and of Malcolm Feeley (1992[1979]) in a lower criminal court are paradigmatic in this sense. These authors showed that, in these places, much more was at stake than simply applying laws and that the different actors involved mobilized knowledge and preconceptions on what they were doing, what was a crime and who committed it. More recent studies have taken up this empirical and fieldwork-based work, more directly addressing questions of race, gender, and social class, showing how criminal law intersects with logics of marginalization (Barrett 2012, Gonzalez Van Cleve 2016) and how specific legal mechanisms such as legal hearings (Russell, Carlton, and Tyson 2020, Besnier 2007, Gagné 2018), negotiations between prosecutors and defense attorneys (Bowen 2009) and quick procedures addressed to misdemeanors (Kohler-Hausmann 2018, Christin 2008) reinforce the marginalization of already marginalized groups, despite the mixed and hesitant attitudes of the different actors toward this unintended outcome.

Another growing body of literature has also focused on institutions involved in the application of criminal law, not taking law as the point of entry to the analysis but rather the State as something that, through mundane practices, is reified as an autonomous social institution (Mitchell 1999). Describing, documenting and looking into these mundane practices as research objects in their own right, and not as mere manifestations of an apparently discrete and uniform institution, gave shape to the approach of the anthropology of the state (Sharma and Gupta 2006). Pushing to study the state from below, this literature opened up a broad range of ethnographic fields that allowed researchers to examine bureaucracies and the daily situations that happen in the name of the state, from local welfare offices in neighborhoods to international organizations. In this context, one particular space of interaction has caught the eye of researchers: the one between lay people and bureaucrats (Lipsky 2010[1980]). Drawing on ethnographic fieldwork in offices managing welfare and poverty-related benefits, Watkins-Hayes (2009), Dubois (2010[1999]), Auyero (2012) and Zacka (2017) have shown how bureaucrats balance normative considerations and make sense of regulations in the exercise of their discretion, how political identities, modalities of political participation, and *de facto* policies are shaped through these relationships, and how what happens at the bottom of government organizations matter as much as what happens at their top. More closely to anthropology, the work of Didier Fassin and others “[e]xploring the heart of the state” meaning “literally, to penetrate the ordinary functioning of public institutions, but also, metaphorically, to examine the values and affects underlying policies and practices” (Fassin 2015[2013], 2), doing fieldwork in mental health centers, courts, and employment centers, among other places, have shown how political processes that occur at the micro-level lie on specific moral economies and subjectivities. When applied to courts and institutions involved in the criminal justice system, and although with specificities regarding disciplinary and national traditions (Biland and Steinmetz 2017), this literature sheds light on how these institutions not only may (or not) differ from, implement, or question political projects of justice, fairness, and impartiality – the socio-legal scholar’s “external” perspective – but also how the criminal justice system, through its daily and banal internal bureaucratic practices, participates in moral and ethical *de facto* economies as well.

At the heart of this quest for the ways in which state’s practices unfold, we can find Latour’s ethnography of the *Conseil d’état* (2010[2002]). Unlike research approaches that end up reproducing the distinction between law and society, isolating the technical legal specificities of state organizations’ work and focusing instead in exclusively “social” phenomena, Latour’s invitation to study the “making of law” inaugurated a focus on law itself; the socio-legal scholar’s “internal” perspective turned into the object of study. Also empirically grounded, his bet was to inquiry directly into law’s mechanisms of enunciation, qualification and imputation, its “obsessive effort to make enunciation *assignable*”(Latour 2010[2002], 274). Here, the focus is not as much on individuals’ and institutions’ moralities, subjectivities, and discretion, or on policies and state’s projects, but on legal tools themselves – rules, standards, documents, files – that connect people, things and assertions, and make this continuous imputation possible. Contributing to or inspired by this literature, a series of studies have been carried out on documents and state’s documentation practices. Among many others, Hull (2012) and Weller (2018) who, mobilizing ethnographic approaches, have explored the indexical role of documents besides their semiotic one, highlighting both the banality and the complexity of bureaucratic artifacts’ such as maps, certificates and files.

Within this project of taking “law seriously […] opening up the black box of legal knowledge and paying renewed attention to its particular forms, rationalities and logics” (Sylvestre et al. 2015, 1362), stands out the work of Annelise Riles on “technicalities”. Looking at the use of collateral – “the paradigmatic private regulatory device” (Riles 2011, 224) – in international financial markets and having done fieldwork with the lawyers in charge of drafting and filling out the multiple forms and agreements involved in the establishment of contracts in large financial institutions in Japan, Riles (2011) is concerned with the specificities of collateral as a legal tool that coordinates the parties’ actions and, at the same time, appears as marginal for the whole operation, as just means to an end. In fact, Riles explains, in international markets collateral functions on the assumption that the other party will honor its obligations, which is ultimately uncertain:

“Why would market participants believe in something so fictional? The answer is that they don’t, at least in the traditional sense of ‘belief.’ For them, these fictions are just techniques, tools, means to an end. From the point of view of those who deploy them, legal fictions are more like machines than stories – they are practical interventions with concrete consequences […] It is rather a command, or a mutual agreement, simply to act ‘As If.’” (Riles 2011, 173)

Legal fictions have been widely theorized by specialists in legal theory. Yan Thomas (2005), for example, affirmed that legal fictions are assumptions of something that we know is false and that, unlike presumptions, they are not meant to be refuted. Beyond doctrinarian discussions about them, authors agree on the fact that they imply some awareness of falsehood and that they play a role by making law “move forward”: through legal fictions, it is possible to suspend the fact but retain the normative consequence (Del Mar 2013). By treating collateral as a legal fiction, as “a guarantee of something that by definition cannot be guaranteed” (Riles 2010, 804), Riles goes beyond doctrinarian discussions and proposes that by looking deep into the way collateral is used in practice in international financial markets – that is, by sitting next to and talking to the lawyers drafting legal agreements and contracts between financial institutions in Japan and the US, adopting the anthropology of the state’s approach – we can learn about law’s fabrication: “modes of action which are lodged in rich, culturally-specific, layers of texts, practices, instruments, technical devices, aesthetic forms, stylized gestures, semantic artifacts, and bodily dispositions” (Pottage 2004, 1). Another example of this kind of research exercise, carried out through ethnography, can be found in Barbara Yngvesson’s work on adoption as upheld by legal fictions on kinship and nationality (Yngvesson 2007, 2010). Although relying on legal cases’ and archives’ analysis, studies on financial swaps (Cornut St-Pierre 2019), a type of legal contract used in financial markets, and on patent law and its definition of “invention” (Pottage and Sherman 2010) follow a similar analytical path: by looking at the apparently irrelevant and mundane aspects of technical legal devices, particularly as they articulate assumptions on truth and falsehood – playing a series of epistemological “tricks” on reality in order to resolve situated dilemmas – these researchers can tell stories about the financialization of the world, industrial manufacture, technocracy, identities, and race.

It is with this heuristic purpose that I propose to analyze the idea of a criminal offence caught *in flagrante delicto* in Chile as a legal fiction. The agonistic attempt at describing all the possible situations in which a person can be found so evidently committing a crime –article 130 cited above – illustrates the complexity of the practical dilemma to which actors in the criminal justice system are confronted: it remains unlikely that a police officer finds someone, at that very moment and within eye’s reach, introducing their hand in the pocket of a distracted passenger, violently punching the face of their neighbor, threatening someone, stealing something from the supermarket or mugging someone in the park; in other words, most people are not really caught *in flagrante delicto*, “in blazing crime”, as the Latin expression defines it. But it does not matter: the criminal justice system works assuming that this was the case and this makes legal the detention of the person considered the author of the criminal offence. As a tool, the idea that the suspect was caught *in flagrante delicto* supports the drafting of “a script for a particular kind of collaboration” (Riles 2011, 59) assuming, at least in the present, “as if” the accused person was indeed caught red-handed committing the crime. In order for this legal fiction to “work”, it is beside the point from the users’ point of view whether the person was, in reality, caught red-handed. This kind of approach allows me to take distance from analyses of whether legal provisions about detentions in Chile are, or not, respected and applied in practice, and to focus instead on how this very legal tool makes possible to not discuss them; the mechanics of the legal fiction – a working truth in the meantime (Riles, 2011) – articulates and connects people, things, and practices in such a way that, as I will show, the flagrant character of the criminal offence, its matter-of-factness, can be bypassed and put permanently “on hold.” In the same way that “patent law had to fictionalize scarcity” (Pottage and Sherman 2010, 4) in order to justify the conception that one same idea can be possessed by only one person, the tool of the detention *in flagrante delicto* allows for the fictionalization of matter-of-factness.

**Bracketing matter-of-factness: Documentary practices**

Municipal security guards were surveilling the streets and detained someone who apparently had just mugged a passerby; the neighbors called the police after hearing a man assaulting his partner; someone was driving drunk and was pulled over by police on the road. All these situations may lead to the detention of people *in flagrante delicto*, ultimately carried out by police.[[8]](#footnote-8) Legally, they are the ones deciding if a person should be detained, i.e. whether the conditions described by article 130 are met, and, if deemed so, they must inform the prosecutor’s office. In these decisions, urban logics of marginalization and over-policing of specific populations (Dammert 2016), as well as the use of detention as the privileged tool for dealing with situations related to security and public order (Brisson-Boivin and O’Connor 2013, Yi 2016), certainly play a role. My fieldwork, however, comes chronologically after and analytically beside police intervention. From my point of observation – the prosecutor’s office – police’s decisions on someone’s detention were already made.[[9]](#footnote-9) In this office, clerks receive calls from police officers on the ground, who inform the prosecutor’s office about these detentions: throughout these phone conversations, they temporally and spatially arrange the facts, separate the relevant from the irrelevant information and propose a preliminary legal qualification for the case. Clerks will also write a narrative describing what happened according to what was reported by the police officer, description that will be part of the file but, in principle, will not be of much help in court from an evidentiary perspective since, legally, what counts is the police report [*parte policial*]. In fact, more than part of the file, this narrative constitutes a control and coordination tool between police and the prosecutor’s office, stating not only what police report about the case but also when and how police report what they report.

At this stage of the criminal procedure, the alleged facts that led to someone’s detention do not matter as much as when and where they happened. On the phone, highly trained clerks make sure that the place where the criminal offence supposedly occurred falls within this office’s jurisdiction and that the time of the detention comply with legal provisions – that 12 hours had not passed neither between the alleged facts and the detention nor between the detention and the call. Once the clerk registers this information in the form on the computer’s screen, along with the preliminary narrative of the case, a file with an internal number is created. A prosecutor has to formally make a decision: will the detained person, at this point called “defendant” [*imputado*], go through a detention review hearing at the criminal court? The decision of whether a defendant remains detained depends on the type of criminal offence of which the person is accused and, except in some very specific cases, is made “routinely”, as socio-legal scholarship has shown for many legal and judicial offices: “*Routinely* means an immediate typical understanding of the circumstances and on attribution of some normal meaning” (Lempert and Sanders 1986, 78). Did the defendant steal something valued less than a certain amount of money? He will be released. Did the defendant threaten or assault someone? Did the defendant refuse to take the breathalyzer when apparently driving drunk? He will remain detained and go through a hearing at the court. In any case, the file will include the name of the prosecutor who formally made this decision and, if the defendant remains detained, another clerk will coordinate the scheduling of the detained person’s hearing. The detained person will be directly brought by police to the criminal court, and not to this office.

At the prosecutor’s office, clerks also receive calls about situations that are not all strictly flagrant crimes, i.e. without a person detained by virtue of article 130, but that had been recently reported to police: a family coming back home after a weekend away found their house had been robbed; someone who had been walking and someone else, running fast, grabbed their wallet without the victim being able to do anything; a mother whose daughter told her that she had been abused by a member of the family some months ago. All these situations are reported to the police who, in turn, call this office in order to report the crime and get instructions on what to do next as prosecutors are the ones legally in charge of guiding criminal investigations in Chile: should the police try to obtain videos, should they bring the girl to a medical center, should they interview someone, and so on. All the calls that this office receive, and not only those that involve detentions, are associated to a case number; however, only those in which people have been detained and will remain it will be translated into a physical file, one that will be called as such: “file folder” [*carpeta*]. These file-making operations characteristically translates an administrative way of working case-by-case (Weller 2018), “vertically” (Vismann 2008), and performatively producing two worlds: the one of “law itself” and the one of the “world out there” (Van Oorschot and Schinkel 2015), the file performing the connection between both worlds. Only those calls in which detentions *in flagrante delicto* are reported will be translated into physical files that, some hours later, will be also matched with physical detained bodies in the courtrooms.

In the case of the files produced for the cases of people detained *in flagrante delicto*, the symmetry effect between file and reality is the result of the processes that contribute to their fabrication, and not of the matter-of-factness of the criminal offence itself. This is likely what happens with all kind of legal cases and files – law and documents approach reality “obliquely” (Hull 2012, McGee 2015) – but in the case of flagrant crimes in Chile, the processes that contribute to the fabrication of the files for flagrant criminal offences allow actors to precisely avoid the discussion about this apparent symmetry. While in other cases there are occasions, such as trials, for iteratively and recursively come back to the facts (Scheffer 2010), to challenge them, to question, uphold and refute signatures, countersignatures, stamps and seals, sometimes rather than “facts” (Suresh 2019), the detention *in flagrante delicto* launches a series of practices in which the criminal offence itself – the theft, the assault, the threat – is not discussed. In other words, the legal fiction of the detention *in flagrante delicto* permeates and spreads throughout the subsequent judicial process. The complexity of the detailed enumeration of the different situations in which a person can be legally detained according to article 130 contrasts with the simplicity of most flagrant crimes. One typical call describing such a case would go as follows:[[10]](#footnote-10)

* Office of the public prosecutor[*Fiscalía*], good evening, how can I help you?
* This is the policeman [*carabinero*]Luis González, I would like to report a procedure with a person arrested for a minor assault [*lesiones leves*].
* Tell me.
* The victim arrived home from work and found out that his neighbor had used his parking spot. This is a very crowded street and, apparently, they had somehow distributed the parking spots and this one was the one of the victim, but it’s informal and there is a history of conflict between them because of the parking situation…
* Ah, ok, so there is a history of conflict here.
* Yes, so when the victim arrived, he was mad that he couldn’t park his car, so he went knock at the door of this man [*sujeto*], the defendant [*imputado*], and asked him, apparently kindly to move the car so he can park his…
* Ah, ok, I see.
* But this guy didn’t want to, so he started shouting that he was tired of this neighbor, the victim, always hassling him because of the parking, and then the other, the victim, replied shouting too, you know how it is, the whole conflict escalated and the defendant took a wood stick he had in his house and hit the victim with the wood stick, the victim has minor injuries in his arms. At that point, with the brouhaha, other neighbors had arrived and controlled the guy, the defendant, and called us.
* Ah, ok, does the defendant have injuries as well? Was it more a fight or an aggression?
* No, it was really the aggression, I don’t think the victim wanted to fight, he wanted to talk to the defendant, other neighbor said that this guy, the defendant, is the violent one…
* I understand, tell me, at what time did this happen?
* About 7pm, when the victim arrived home.
* Time of the arrest?
* 7:45pm.
* Ok, give me the information of the victim and the defendant please.
* [The policeman gives the information on both the victim and the defendant: complete name, address, phone number and, most importantly, personal identity number[[11]](#footnote-11)]
* Did you check the identity of the defendant?
* Yes, it’s verified.
* Did you bring the victim to a health center?
* Yes, I have the report from the medical center here.
* Can you read the description of the injuries please?
* The report says, “hematoma on right upper-arm consistent with minor injuries”.[[12]](#footnote-12)
* Ok, the defendant will be in the detention hearings tomorrow morning.

At the end of the conversation, the clerk gives the policeman the number assigned by the system to this case and the name of the prosecutor in charge of it. Between that call in the evening and the next morning, a clerk in this office will prepare the file, including the narrative written by the person who received the call, the personal file associated to this defendant in case he has had other troubles with the criminal justice system – his criminal record – the medical report stating the gravity of the injuries, and, the most important document, the police report describing what happened from the point of view of police, including the statement of the victim. As the dialogue described above shows it, the evidence is constructed through a series of narrative and documentary practices that add more documents but not necessarily more information on the criminal offence: the file contains a document written by a clerk who wrote what the policeman told him, which is what in turn the victim told the policeman. While the routinely scrutiny of this chain of reporting is a common feature of adversarial procedures, the legal fiction of the detention *in flagrante delicto*, in which actors collaborate acting “as if” the policeman was right there witnessing the assault, allows for avoiding such scrutiny.

For each case that included a detention and in which the defendant will go through a hearing at the court, workers at the prosecutor’s office will go over the different documents, review them, print them out and put them together in a paper folder with a new number that will be created for the case, this time matching the court’s filing system. In some parts of the documents, the workers add Post-it notes so the prosecutor who will be present at the detention hearing review, who is not the one that was at the office the night of the call and who will likely have access to the documents only briefly before the hearings start, can quickly retrieve key information. The list of necessary documents and information for each case is standardized in the procedures of the prosecutor’s office; although there is space for adaptation according to the characteristics of the case. In practice and in most cases, it is quite straightforward: besides the police report, which is necessary in all cases, in the case of threats in the context of domestic violence [*amenazas en contexto VIF*], they need to include some document that proves the relationship between the victim and the defendant. In the case of the criminal offence of causing damages to property [*daños*], it is important to include something that shows the estimated value of the damages. In the case of assaults, the medical report is key. Also, in some other cases, it is very important that the police report states very specific information: for threats for example, the report needs to literally describe what the defendant allegedly said, including all the swears and high-caliber insults, which will be read out loud at the hearing, making for an odd mix with the formality of law procedures – “a curious mix of theatre and the mundane” (Sylvestre et al. 2015, 1347). In all these cases, anyway, the documents included in each file do not directly address the criminal offence itself: they communicate the value of a good, the gravity of an injury, the relationship between two people, the wording of a threat; whether this good, this injury, this relationship or this threat correspond to the legal definition of the criminal offence in which the detained person participated is the result of contingent filing practices.

At the detention hearings, the file that was carefully assembled some hours earlier becomes the main protagonist. As illustrated by the conversation between the clerk and the police, the case draws primarily on the police report and, if available, other documents, which will be rarely shown or referred to in court. At the hearing, the prosecutor reads excerpts of the police report, particularly the parts that respond to the definition of the crime according to the criminal code. The defense attorney then responds, reading from documents taken from the same file, which is physically exchanged between the two of them during the hearing, passing it back and forth between their desks in front of the judge. At that point of the judicial procedure, there is nothing more on which they could rely for their arguments, no more information, no more evidence than what is in that file. When there is some discussion between them, it does not get closer to the offence itself: Is the police report worded in a way that resembles the type of crime? At what time was the person detained and at what time was the prosecutor informed about it? Do we know approximately how much the damage caused by the defendant costs? Does it matter that the defendant had been denounced, but not condemned, for similar crimes before? If the defendant is the owner of the house where the victim has been living with him for only some weeks, is he still the one who has to leave the house in a case of threats? Paradoxically, the least important thing in these hearing is what supposedly so blatantly – in such “flagrant” way – happened. Evidence seems to be more a question of method rather than of epistemology (Engelke 2008).

**Contextualizing matter-of-factness: The (police’s) eyewitness gaze**

One call received at the prosecutor’s office stood out among the many others. It involved an old woman who had been assaulted by a security guard, according to what she told the police officer. As it is normally the case with people who assault other people, the security guard had been arrested. “Why would the security guard assault this woman?” asked the clerk at the prosecutor’s office, over the phone. I could imagine the policeman at the other side of the line shrugging his shoulders while he was explaining that “I don’t know, apparently she asked him a question and that bothered him.” Usually, nobody questions whether what happened, as reported by police, did indeed happen;[[13]](#footnote-13) the conversations revolve around what documents need to be produced and what kind of investigative actions the police needs to carry out, not about the situation itself. Not because the work carried out by clerks, prosecutors and police is clumsy or unskilled, but because the details are supposed to be sorted out later; at this point of the judicial procedures, that there was someone who said that was assaulted is enough, article 130 of the criminal justice procedure states it clearly. Twenty minutes after the first call, though, the policeman sent a video – that had been sent to him by someone who was present during the alleged assault – in which we could see that the old lady was the one smacking the guard’s head with her handbag. With this new information, the security guard was released.

That actors in the criminal justice system mobilize a practical, not exclusively legal, knowledge to sort out cases has been widely noted by socio-legal scholarship (Emerson 1973[1969], Sudnow 1965); in fact, this is the kind of inquiry project characteristically carried out by sentencing studies. Flagrant criminal offences in the case of Chile could be seen as the result of such classification effort, the one at work when the clerk doubted about the old woman’s story. Except that the application of article 130, defining flagrant criminal offences, has nothing extra-legal: this is law itself working, guiding the actions of the different actors involved, who do what they do precisely because they all assume that these particular criminal offences, the flagrant ones, happened in a certain way. Had it not been for the video made available almost by chance, the case of the arrested security guard would have continued with all the necessary documents – the police report stating the facts as told by the victim and his detention *in flagrante delicto*. Applied initially *in situ* by police but travelling through different physical and symbolic places – the street, the prosecutor’s office, the courtroom; police discretion, prosecutorial and judicial efficiency, justice’s ideals of fairness and rights – article 130 indexes not only a way of cognitively classifying criminal offences, but also a way of putting in motion, in practice, the criminal justice system, one in which only situations that happened at the local scale of the street and the neighborhood can participate.

One policeman calls to report the case of a woman who had been allegedly raped the night before; another, the case of a mother who apparently saw her brother and her minor daughter kissing and touching each other in the home’s living room; another, the case of a man who had been scammed by someone who pretended to have kidnapped her son;[[14]](#footnote-14) and, another, the case of a woman who, having recently obtained a job as housekeeper and alone in the house, allegedly orchestrated the robbery of all the goods inside the house. In all these cases, police called to report them and give the names of the presumed culprits, creating therefore a file in the prosecutor’s system and eventually making them the subject of more investigations later, but without having detained anybody. “Why?” – I would ask, thinking about all the other situations where police called with people already detained – “Why don’t you tell the police to detain the suspect? Why haven’t they done it already?”. The strictly legal answer to this question concerns what prosecutors can legally do: they can only decide about an already detained person; they cannot order a detention, that’s police’s business. The sociological answer to this question involves a broader understanding of what can and cannot be held up by the legal fiction of the detention *in flagrante delicto*: the *voir dire* chain of authority, truth and trust that is produced by the subsequent and documented telling of the story of what happened from victims and witnesses to police, and later from police to clerks and prosecutors, does not work in these cases. They won’t be treated as flagrant criminal offences because, when used in practice and in specific situations, the legal fiction of the detention *in flagrante delicto* presumes a certain scale, one that mirrors police’s gaze and that reverberates in the hearing rooms of the lower criminal courts, where defendants and victims, and their families, find themselves, again, together.

Shifting my point of observation from the clerk listening to police to the audience’s seats at the lower criminal court where detainees are brought, I can see that unlike other courtrooms with scheduled appearances of non-detained defendants in the same building, this room is packed: friends and family members of the detainees try to establish eye-contact with someone through the glass that separates the audience from where the formal discussion takes place, ask questions to the security guard, and discuss between them what could legally happen with their relative, friend or neighbor. Some of them cry, some of them go to the hallway to talk on the phone, some of them struggle to hear what people at the other side of the glass are saying, and some of them try to keep their children quiet. Most of them are there for the person detained and, where they are the victims of a crime or are accompanying one, often they are there for criminal offences committed by someone they knew: threats, assaults, domestic violence. Big retail stores, frequent victims of thefts, are represented by lawyers sitting on the other side of the courtroom, next to the prosecutor. When they are there, victims participate in the process by discussing and validating the measures that prosecutors may propose. “Do you agree with what the prosecutor is asking for?”, the judge would ask the victim momentarily seated next to the prosecutor at the other side of the glass, “yes, I want him to leave our home”, the victim would characteristically reply during the hearing in a case of domestic violence when the man is detained after having aggressed his partner. “I will kill you next time” shouts someone in the hallways and someone who was just released is welcomed by his mother, who emotionally hugs him. In the general atmosphere of the courtroom, we get a glimpse of the kind of situations that made people find themselves there.

Most common criminal offences that are reported to the prosecutor’s office and to the police, are threats, robberies [*hurtos*], and minor assaults [*lesiones leves*] (Author, XXX). Although official numbers about the proportion in which they were born out of detentions *in flagrante delicto* are not available,[[15]](#footnote-15) my observations in both the prosecutor’s office and the courts tend to indicate that those kinds of criminal offences are the ones for which such detentions are made. In other words, most flagrant criminal offences that are treated by the criminal justice system in Chile are not crimes as serious as homicides or rapes but rather what would be called misdemeanors in Anglo-Saxon contexts. These misdemeanors may include a police officer who, in a traffic control, finds that the car that someone is driving had been reported stolen two weeks ago; a woman who called the police after her ex-husband threatened to kill her; two young men fighting on the streets; stolen purses, wallets and cellphones. In itself, as a way “used by various organizations and institutions to organize, sort, classify, relate, and explain” (Valverde 2003, 14), the flagrant character of the criminal offence mobilizes a specific scale: a local, urban world of ordinary violence, economic precariousness, simple transgressions, and low-complexity actions. Worrisome situations that may have serious consequences on victims and communities in general; nevertheless, from the perspective of how the criminal justice system distinguishes between cases, more serious situations – presumed homicides, huge amounts of money stolen, situations with some kind of public relevance – are treated according to their specificity and individuality, not as most flagrant crimes. Analyzing judicial strategies, Wilenmann & Arístegui (XXX) have shown how, in Chile, mass processing of misdemeanors follows specific patterns of collaboration between the different organizations involved in their treatment.

One paradigmatic type of flagrant crimes in this sense is the robbery in a supermarket or a store, when someone takes something, hides it under his clothes or in a backpack, and leaves without paying. The Chilean criminal code only defines “robbery” [*hurto*] in general, not when there is a robbery specifically happening in a store or a supermarket. Depending on the commercial value of the stolen goods, the person detained will get released or will be brought to the court to a detention review hearing. In both cases, the documents that are part of the file are standardized: a legal statement signed by the security guard of the supermarket or the store, describing what he or she saw in person or in the security cameras and a receipt detailing the value of the stolen things are enough. During my fieldwork, I heard about cases and saw detention reviews of people who had allegedly stolen liquor bottles, diapers, royal pine car-fresheners, blue jeans, cosmetics, backpacks, bed sheets, cheese, meat, coats, a drill, among many other disparate things. Once, a young man had been detained for having stolen a heater – “he took and appropriated, for profit [*con ánimo de lucro*] and against the will of its owner, a Toyotomi heater valued in $150,000 pesos [USD$210], crossing the cash register’s zone without paying its value”, said the prosecutor – without no one even raising their eyebrows. While his grandmother wept next to me in the court’s hearing room, I could not stop wondering, knowing this kind of store, how a robbery like this, of something of that size, could be even possible. With time, though, I learned that people accused of this kind of robbery would apparently try different strategies; their creativity and resourcefulness would end up reduced to the same patterned description provided by police. In any case, what exactly happened – and whether the defendant did commit the criminal offence – at least at this point of the judicial treatment of the case, is beyond the point.

Every day, in the hallways of the building where the detention review hearings take place, victims, lawyers, and families and friends of the detainees gather outside the different rooms, waiting for the hearings to start. Nobody knows at exactly what time each of them will, since each case will be treated consecutively without an order known to the public. In fact, each court has its own way of organizing cases, most of the time by the severity of their consequences or, what ends up being almost the same, the kind of procedure that the prosecutor will apply to each case, starting by the simplest cases in which the prosecutor proposes to “suspend” the case, often for a year, if the defendant follows certain conditions, such as avoiding approaching the victim of the assault or the store where the robbery was committed, and finishing with the most serious cases, in which the prosecutor will likely ask the judge for pre-trial detention, in which case the defense attorney will react trying to obtain less serious pre-trial restrictions [*medidas cautelares*]. This order of hearings, which is informally both established by courts and discussed with prosecutors and defense lawyers beforehand, outside my own observation reach, attempts at making the hearings more efficient. When they start, defendants whose cases were grouped together will have their cases treated simultaneously – “you all will be offered something by the prosecutor if you accept certain conditions,” the judge will explain to all of them at the same time, for example. In this context, what the defendants did does not matter as much as into which group they will be put.

Flagrant crimes happen in a generic street that seems the extension of the courtrooms’ hallways; they need to be able to be eventually seen by someone looking from the streets, surveilling a store, or hearing the screams of someone inside a house. Threats, robberies, muggings, domestic drug traffic [*microtráfico*],[[16]](#footnote-16) carrying a knife or a firearm on the street, assaults, among many other common flagrant criminal offences, all refer to situations that happen at this street scale. No bigger than that, as large drug traffic schemes or white-collar sophisticated frauds will never get caught *in flagrante delicto*, and no smaller than that, as the system will very rarely treat as flagrant, for example, sexual abuses that happen in the intimacy of households. In this latter cases, police and prosecutors will probably wait to have the results of other investigative procedures before pushing for an arrest. The legal fiction of the detention *in flagrante delicto* supposes, in itself, the scale at which it can be applied: the street or the local. This type of gaze goes beyond their exclusive scope of police’s work and permeate the definition of flagrant crimes mobilized by lower courts. This gaze is what Valverde (2011) calls the “generic eyewitness gaze”, the one upon which the broken-windows theory was based and one in which what matters is what could be “seen” by some curious journalist who will “write graphically and concretely, but about generic rather than specific objects and places and persons […] a generic street rather than a real place” (Valverde 2011, 573).

**Conclusions**

In this article, I tell a story that has been told many times, about different national contexts and drawing on different methodologies: criminal law contributes to the marginalization of already marginalized populations, monitoring and managing their lives (Kohler-Hausmann 2018, Feeley 1992[1979]) and subjecting them to legal procedures in which the individuality of their cases does not matter as much as their characteristics as members of certain social groups (Makaremi 2015[2013], Christin 2008). Although I do not describe the defendants who participate in the procedures I studied in Chile, many of my interlocutors would often refer to the Chilean criminal justice system with the metaphor of “a machine,” one that specifically treats the lives of poorer people, and this was confirmed by my observations.[[17]](#footnote-17) How does this happen? How a system that aims at treating people impartially ends up serving one particular “clientele” (Jobard and Névanen 2007)? Many complementary answers have been offered by social sciences, looking at different factors that play a role in the process: effective criminal behavior by certain groups, profiling practices by police, bias by actors in the criminal justice system, among others.[[18]](#footnote-18) Tangentially contributing to these answers, I take up the invitation made by socio-legal scholars working on legal technicalities (Valverde 2009, Riles 2016, 2005) to inquire into what seems merely technical and to explore the epistemological and ontological claims into which legal tools are folded. In other words, the invitation to presume that legal tools, when applied in practice, produce and are associated to certain evidential regimes in which certain people, criminal offences, documents, and other procedures end up participating.

As a tool in the Chilean criminal justice system allowing prosecutors, defense attorneys and judges to presume a certain proximity between “the truth” – as in what happened and was experienced by very few persons – and what accounts for it in legal terms, the detention *in flagrante delicto* works as a legal fiction, “a technique for working with and in the meantime […] it defines and manages the near future, the time for which this particular commitment holds true” (Riles 2010, 803). Actors in the criminal justice system know that defendants caught *in flagrante delicto* were not arrested red-handed but rather by virtue of a legal provision that defines a flagrant crime in an extensive way, including in practice a broad array of situations, from hot pursuits to knocking in the door of someone whose neighbors said had done something illegal last night. How these wide-ranging situations fall all eventually into this same practical category of flagrant criminal offences? What do they have in common? Their matter-of-factness is fictionalized through practices that, at the same time, make possible to avoid to directly refer to the alleged flagrant facts and, instead, to point out to a context of generalized urban delinquency and prompt police’s intervention. These bracketing and contextualization practices, actual practices and not cognitive perceptions, which include the production of documents and the execution of ritualized procedures – such as legal hearings – contribute to the fictionalization of the evident and obvious character of certain criminal offences.

When police, prosecutors, clerks, defense attorneys and judges collaborate around criminal offences committed *in flagrante delicto*, they are treating facts that are considered to have happened recently, in which the system worked promptly to capture the alleged culprit; in these cases, facts are considered “fresh,” and so are witnesses’ and police’s recollection of them. This swiftness of the detention of a person, the quick and timely intervention of law-and-order, extends to the way in which legal procedures move forward: the file has to be created in less than 12 hours and the arrested person has to be in a court in less than 24. The case can even find a judicial solution at the detention review hearing. However, this speed also means that the information that can be collected with such short notice is limited. The facts may be fresh, yet there is no time to gather all the potential evidence that could be gathered, despite the efforts that prosecutors may put into it. So, they resort to what they have but that, paradoxically, does not relate directly to the criminal offence itself. The same flagrant character of the facts that legally justified the detention of the defendant is paradoxically not directly addressed by the procedures. Rather than proved facts, in the meantime, police, prosecutors, clerks, defense attorneys and judges work with what they have: their practical knowledge on what happens on the streets, constantly pointed out to them by the crowds gathered in the courtrooms and the common features of the many aggregated cases they treat, which can all be aggregated within some collective story of the community in which these events (may) happen.

Finally, my findings show the heuristic productivity of the analysis of technicalities for a socio-legal approach to criminal law. Used as a method rather than as a theory (Riles 2016), the analysis of technicalities in the application of administrative or public law help us see situations, interactions, documents and people that otherwise would have been reduced to variables or to gaps between law-in-the-books and law-in-practice. When used to answer research questions traditionally associated to administrative or public law, thus associated with the state – its power, its sovereignty, its authority – we are able to grasp the complexities of the workings of the criminal justice system in practice rather than areas of opposition between the state, understood as an abstract entity, and laypeople. In the case of detentions *in flagrante delicto* in Chile, following them through their treatment by the criminal justice system allowed us to see that, despite intentions or perceptions, they are constructed through a series of practices that fictionalize their matter-of-factness. That these fictionalization practices are located both at the heart of the rule of law and at the margins of the society – affecting the poor and dealing with the bulk of low-level criminal offences – and are carried out through mundane practices of street-level bureaucrats, reminds us that vulnerability and power are not necessarily opposed but rather cohabit in the rough-and-tumble of everyday life (Das 2004). Looking at technicalities, especially at those that involve the rule of law as both guarantee of rights and potential of punishment, is a way of looking at this rough-and-tumble of everyday life. That police, prosecutors, judges, defense attorneys and clerks at the different involved offices can avoid the question of “how can I be so sure?” – the one that opened this text – in the case of flagrant crimes through specific “material-semiotic networks of controversy and dispute” (McGee 2015, 65) can inform us about questions of justice and rights as much as statistics on sentencing and doctrinarian discussions.

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1. In the cases of domestic violence, before the hearings, clerks at the prosecutor’s office carry out a quantitative assessment of the risk for the victim, which is based on a questionnaire that translates her answers into a number of points. If the victim answers “yes” to questions such as “does the defendant have access to weapons?” or “has the defendant threatened to kill you before?” the score is higher. [↑](#footnote-ref-1)
2. Original text in the Chilean Criminal Procedure Code: “Se entenderá que se encuentra en situación de flagrancia: a) El que actualmente se encontrare cometiendo el delito; b) El que acabare de cometerlo; c) El que huyere del lugar de comisión del delito y fuere designado por el ofendido u otra persona como autor o cómplice; d) El que, en un tiempo inmediato a la perpetración de un delito, fuere encontrado con objetos procedentes de aquél o con señales, en sí mismo o en sus vestidos, que permitieren sospechar su participación en él, o con las armas o instrumentos que hubieren sido empleados para cometerlo, y e) El que las víctimas de un delito que reclamen auxilio, o testigos presenciales, señalaren como autor o cómplice de un delito que se hubiere cometido en un tiempo inmediato. f) El que aparezca en un registro audiovisual cometiendo un crimen o simple delito al cual la policía tenga acceso en un tiempo inmediato. Para los efectos de lo establecido en las letras d), e) y f) se entenderá por tiempo inmediato todo aquel que transcurra entre la comisión del hecho y la captura del imputado, siempre que no hubieren transcurrido más de doce horas.” [↑](#footnote-ref-2)
3. A new criminal procedure code was adopted in Chile in 2000, when the country, as many other Latin American countries did, implemented substantial changes in its criminal justice system, shifting from an inquisitorial to an adversarial one. However, legal rules describing detentions *in flagrante delicto* suffered little change in comparison with the old criminal procedure code (Vitar Cáceres 2011). [↑](#footnote-ref-3)
4. Changes introduced by Ley 20.074 in 2005, Ley 20.253 in 2008 and Ley 20.931 in 2016. [↑](#footnote-ref-4)
5. This discussion resembles the ones on “stop and frisk” policies that have taken place in Anglo-Saxon contexts, raising questions on profiling and police abuse. [↑](#footnote-ref-5)
6. The opposite type of crime – not flagrant crimes – are those that are reported by victims and that require further investigation in order to identify a suspect and gather evidence. Typically, the case of a robbery in which the victim does not know who did it. In these cases, when suspects where not caught *in flagrante delicto*, prosecutors need to ask judges for detention orders after they have the name of a suspect and have gathered some evidence. [↑](#footnote-ref-6)
7. Unlike other criminal justice systems, where the first hearings after detentions aim at discussing the conditions for the defendant’s release, such as bail hearings (studied, for example, by Kohler-Hausmann (2018)), or where these first hearings could even lead to specific kinds of procedures consisting in a quick summary trial, such as the immediate appearance trials [*comparutions immédiates*] in France (Christin 2008, Makaremi 2015[2013]) or the procedure in flagrancy [*procedimiento por flagrancia*] in Argentina (Kostenwein 2020), in which the type of crime determines if the case can be treated according to this procedure, in Chile the detention review hearing applies to all kind of detentions and all kind of crimes. [↑](#footnote-ref-7)
8. On the basis on civilians’ prerogatives to detain other civilians who are clearly committing a criminal offence, some municipal governments in Chile have implemented security squads to patrol the streets. Although these squads may carry some kind of specialized equipment, they have the same rights as civilians concerning detentions. When they “detain” someone, they must quickly inform police, who are the ones who properly do the arrest. [↑](#footnote-ref-8)
9. In Santiago, the capital of Chile, given the significant amount of cases that require a quick intervention of prosecutors at a given moment, and as a management strategy, the *Ministerio Público* (the General Prosecutor’s Office) decided to implement specialized offices, working 24-hours a day which, among other tasks, are in charge of handling these detentions, they are called *fiscalías de flagrancia*. In the rest of the country, individual prosecutors “on call” deal with these cases. [↑](#footnote-ref-9)
10. In order to protect the anonymity and privacy of people involved in the cases reported to this office, and to respect the conditions imposed to me when I obtained the authorizations to carry out my fieldwork – which included listening to these calls in real time – in this text, besides using pseudonyms, I do not refer to specific cases but rather describe typical situations in a vague fashion. When I describe a specific call, as I do in this section, my field notes are altered in such a way that I do not include the date or time I wrote these notes and that I change some irrelevant details that make the story unrecognizable but still representative of the situation I observed. [↑](#footnote-ref-10)
11. All Chileans and foreigners with legal permanent residency in Chile have an identification number [*Rol único nacional*], administered by a centralized national registration service and widely used by different institutions in the country. [↑](#footnote-ref-11)
12. In cases that include injuries, police take the victims to a public medical center so they can be assessed by a medical specialist, who will write a report stating the gravity of the injuries, which in turn determines the charges and consequently the kind of legal procedure it can be applied to the case. [↑](#footnote-ref-12)
13. There is an important exception to this affirmation: cases of police abuse. During my fieldwork, many situations of police abuse in the context of social protests were reported and even broadcasted live on TV or social media. When police would call to report arrests in the context of protests, trying to justify the injuries of detainees by saying, for example, that they “intensely resisted” the arrest, workers at the prosecutor’s office would try to get more details about the case than they normally do. However, this exception confirms my analysis, since police abuse during detentions is considered, in itself, to be something exceptional. [↑](#footnote-ref-13)
14. This is a relatively common type of scam in Chile: someone calls telling a compelling story about a member of the family in danger, asking for money in order to remedy the situation. [↑](#footnote-ref-14)
15. The prosecutor’s office does not publish systematic statistics on detentions *in flagrante delicto*. The main distinction they make for cases they receive is between “known defendant” [*imputado conocido*] and “unknown defendant”; flagrant crimes fall in the category of criminal offences with “known defendant” but this category cannot be used as a proxy for them, since not all criminal offences with known defendant are flagrant. A recent study estimated that the proportion of flagrant crimes have progressively increased in the last years, passing from 6% of total cases in 2006 to 14% in 2012 (Fandiño et al. 2017). [↑](#footnote-ref-15)
16. The typical situation that leads to the detention of someone for domestic drug traffic, as described by police, is the defendant seen “exchanging something” with a passerby on the street and then found carrying drugs, cash and maybe a weighing scale. [↑](#footnote-ref-16)
17. I did not systematically record the characteristics of the defendants in the hearings I observed – their employment, level of education, or the neighborhood where they lived, for example; however, many of them were unemployed or had informal jobs, and lived in peripheral and poorer neighbourhoods of Santiago. [↑](#footnote-ref-17)
18. The list of scholarly work in these topics is huge. I refer the reader to the reviews made by Stuart, Armenta, and Osborne (2015) on the “legal control of marginal groups” and by Rios, Carney, and Kelekay (2017) on ethnographies of crime, both with an emphasis on the US and mobilizing qualitative approaches. [↑](#footnote-ref-18)