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The *International Journal on Responsibility* (IJR) is an international, peer-reviewed, interdisciplinary forum for theoretical, practical, and methodological explorations into the various and complex issues of responsibility. Animated by the question "Who or what is responsible to do what for whom?," IJR is a broad-ranging journal that incorporates insights from the full range of academic and practical inquiry from the humanities and the social and natural sciences related to addressing the diverse aspects of responsibility. Affiliated with the Mahatma Gandhi Center for Global Nonviolence and published by JMU (James Madison University) Libraries, IJR is an open access journal that does not charge production costs. It is listed in Ulrich's Periodicals directory.

IJR publishes scholarship and creative works on responsibility. The contents examine intellectual, practical, policy and ethical issues relating to responsibility. In addition, the journal encourages research and reporting on ways in which responsibility relates to issues ranging from the individual to broad public concern, past, present, and future. Themes include the use of responsibility in academic and nonacademic settings; the development of new perspectives on the topic of responsibility; the application of a focus on responsibility in practical problems; and the historical and interdisciplinary dimensions of responsibility.

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Introduction to Volume 6: Criminal Justice Agents and Responsibility

Heather L. Scheuerman

A Letter from the Editor-in-Chief

This special issue of the *International Journal on Responsibility* (IJR) advances scholarship on the various ways responsibility infuses the roles of criminal justice agents. As the inaugural issue of my tenure as Editor-in-Chief, Volume 6 deepens our understanding of responsibility in the context of the criminal justice system, thereby fulfilling IJR's aim and scope. Specifically, the articles highlight issues of responsibility within each component of the criminal justice system: police, courts, and corrections.

Police

Focusing on the use of citations, or field booking arrests, in Columbia, South Carolina, Isom and colleagues highlight the implications of how this intended reform can target already marginalized communities. Reminding us that police are responsible for just outcomes in the criminal justice system, the authors indicate how this alternative, that is meant to prevent costs and burdens imposed on the system and justice-involved individuals, may result in net-widening. The authors find that field booking arrests are mainly given to men of Color and these citations are geographically concentrated in Black communities and areas where the unhoused gather. Their findings suggest that proactive policing strategies may lead to the overpolicing of these groups and remind us to critically examine any policing strategy to ensure that it is being equitably used.

Courts

Griffiths and others examine how responsibility is understood in the context of prosecutorial misconduct. Examining how Texas appellate courts responded to instances of prosecutorial misconduct raised on appeal between 2010 and 2015, the authors find that responsibility for this misconduct is diffused across other legal actors; the defense either invited the misconduct or did not preserve it for review; or trial judges did not properly remedy the misconduct when it occurred. With few exceptions, this misconduct is also perceived either as an aberration or harmless, which allows appellate courts to minimize or ignore prosecutorial responsibility for misconduct and privilege the legitimacy of the criminal justice system in determining case outcomes. Their findings highlight how responsibility has different meanings in the criminal justice system, especially when focusing on abuses by powerful actors who are almost always given the benefit of the doubt based on their roles as ministers of justice.

Nir and Liu investigate how the professional background of state court judges, i.e., whether they served as a defense attorney (defense judges), prosecutors (prosecution judges), or both (hybrid judges), affects their sentencing decisions. The authors find that defense judges prioritize defendants' social upbringing, support systems, and support of others, while prosecution judges emphasize victim input and impact and evidentiary strength when crafting sentencing decisions. Last, hybrid judges appeared to appreciate various viewpoints and nuances in sentencing decisions. These findings highlight how prior legal background affects the responsibility judges have in determining just outcomes after an offense occurred. When sentencing, defense judges focus on the circumstances of the defendant, while prosecution judges hone in on the defendant's criminal history. These results add nuance to the

responsibility state judges have to communicate with their colleagues to make more balanced and informed sentencing decisions.

Kaplun focuses on how attorneys and victim advocates perceive the responsibility of judges to the law when dealing with cyberstalking and cyberharassment cases. The author finds that attorneys and victim advocates view judges as a barrier to victim advocacy because of their lack of knowledge and understanding about the harms of cyberstalking and cyberharassment. These practitioners argue for more judicial responsibility to the law by enhancing the knowledge judges have regarding these crimes and the technologies that are used to perpetrate them.

Corrections

Berryessa studies how responsibility affects the decision making and recommendations of probation officers when evaluating defendants. Using a focal concerns framework, the author investigates how defendant remorse affects how probation officers attribute offender blameworthiness, protection of the community, and practical effects of sentencing. The author finds that only two out of these three focal concerns, blameworthiness and community protection, are used to guide sentencing recommendations in pre-sentencing reports. Specifically, defendant remorse leads officers to attribute less blame and greater rehabilitative potential to defendants thereby leading them to recommend more lenient sentencing to the courts. The author suggests that probation officers, as central sources of information about defendant remorse, may feel strongly that it is their responsibility to convey this information to the courts so that just sentencing outcomes may occur.

Schumann and Yule examine how responsibility is transferred from the state to ordinary citizens in the context of the Canadian criminal justice system. Concentrating on bail sureties (relatives, friends, and employers of justice-involved individuals), the authors investigate factors that affect whether sureties report bail violations. They find that although sureties take their responsibility to supervise the accused seriously, whether bail violations are reported depends on a variety of factors that include the best interests of the accused, severity of the violation, fairness of bail conditions, and how sureties perceive the law. Sureties thus uphold and redefine their responsibility to the criminal justice system and to the accused, thus illustrating various dimensions of responsibility when holding the accused accountable for their actions.

Summary

In sum, all the scholarship included in Volume 6 highlights various ways responsibility manifests within the criminal justice system by examining its agents. In doing so, these scholars identify how responsibility can either promote or hinder just outcomes in the criminal justice system. Understanding when and how responsibility can affect justice for justice-involved individuals brings to mind the duties we as a society have for fostering just punishment.

Dr. Heather L. Scheuerman
Editor-in-Chief

Injustice in the Field? A Look at Field Booking Arrests in a Southeastern City

Deena A. Isom, PhD[1]
Kaitlen E. Hubbard[2]
Hiuxuan Li, PhD[3]

Abstract

Issuing citations in lieu of arrests, or field booking arrests, is touted as beneficial by reducing the costs for the criminal legal system; reducing the burdens placed on individuals by avoiding arrest records, possible pretrial detention, and financial obligations; bettering community relationships with officers; increasing officer safety and efficiency; and reducing jail overcrowding. Yet, there are still substantial concerns that the practice may be disproportionately utilized and lead to net-widening. Using data obtained from a Freedom of Information Act (FOIA) request, we assess a snapshot of field booking arrests in a Southeastern city. Specifically, we assess if there are racial and gender disparities in who is being arrested as well as the severity of the charges. We also assess where these arrests are occurring to see if certain areas and neighborhoods are disproportionately targeted. We find most field booking arrests are given to Black men. Evidence also suggests they are largely being utilized with marginalized populations, particularly the unhoused and in communities of Color. Through this assessment we gain some insight into who is bearing the burden of field booking arrests and their potential collateral consequences. Suggestions for further research and how police may consider more equitable procedures are discussed.

Keywords: police, law enforcement, race, ethnicity, gender, justice, legitimacy

Introduction

The persistence of citizens of Color – men, women, and children – encountering excessive force at the hands of police across the United States (U.S.) (and the world) is a vivid reminder of the prolonged tumultuous relationship between the criminal legal system and communities of Color. Communities of Color, as well as groups with a lower socioeconomic status (SES), and the housing insecure, among others, are often vulnerable targets to the receipt of marginalization from the police (see Reid, 2000). Furthermore, the targeting of these marginalized communities by law enforcement is evidenced by police strategies such as zero tolerance policing and stop-and-frisk, which are heavily criticized by scholars and activists (Boyles, 2015; Butler, 2017; Crump, 2019). Black Americans are more likely to be stopped by police, have more contact in general with law enforcement, and have an increased risk of experiencing force at the hands of police than white Americans (Davis et al., 2018). These statistics suggest marginalized communities, particularly those of Color, are targeted, harassed, and over-policed throughout the U.S. (Evans et al., 2014; Weisburd et al., 2015). Yet, these communities also are often

[1] University of South Carolina, USA
[2] Department of Criminology & Criminal Justice, University of South Carolina, USA
[3] Arnold School of Public Health, University of South Carolina, USA

Corresponding Author: Deena A. Isom, PhD, Department of African American Studies, Department of Criminology & Criminal Justice, University of South Carolina; e-mail: isom@mailbox.sc.edu

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overlooked and underserved when they are in need of service and protection (Boehme et al., 2022; Rios, 2011).

The strained relationship between law enforcement and communities of Color has existed since the founding of America, from the Fugitive Slave Act (Reichel, 1988; Walker, 1980), and Black Codes and Jim Crow laws (Anderson, 2016; Bass, 2001), to the treatment of those involved in the Civil Rights Movement of the 1960s (Alexander, 2011; Braga et al., 2019), all fueling the modern era of mass incarceration (Alexander, 2011; Sawyer & Wagner, 2023). In 1994, the Violent Crime Control and Law Enforcement Act (1994 Crime Bill) allotted over $30 billion dollars[1] to law enforcement and crime prevention efforts (Evans & Owens, 2007). Driven largely by a moral panic (Goode & Ben-Yehuda, 2009) around "super predators" (Pizarro et al., 2007), the 1994 Crime Bill contributed to aggressive policing strategies and mass incarceration (Rosenfeld, 2020), with the burden being felt most in marginalized communities of Color (Alexander, 2011; Forman, 2017), further deepening the divide between police and the community. Following the attacks of 9/11, federal programs, such as 1033 and 1122, allowed local law enforcement to obtain military equipment and greatly attributed to the militarization of policing (ACLU, 2014; Ray, 2021) and creation of the "warrior" cop (Carlson, 2020). While the Obama Administration greatly invested in police reform and improving community relationships (President's Task Force on 21st Century Policing, 2015), concerns over institutional and systemic racism within law enforcement remain high, particularly among marginalized groups (Boyles, 2019; Garza, 2020).

The President's Task Force on 21st Century Policing (2015) states "[b]uilding trust and nurturing legitimacy on both sides of the police/citizen divide is the foundational principle underlying the nature of realties between law enforcement and the communities they serve" (p. 1). Legitimacy is defined as the perceived effectiveness, fairness, and legality of police (Tankebe, 2013; Tyler, 2005). Legitimacy stems from the concepts of procedural and distributive justice which entail the ideas of fair, just, and neutral law enforcement actions and decisions (Tyler & Jackson, 2013). Personal encounters involving fairness and respect between police and the public are a way legitimacy can be built through the principles of procedural and distributive justice which may increase the public's confidence in police. Officers who portray fairness in their actions can build community trust and in turn increase the legitimacy of law enforcement (Tyler & Fagan, 2008; Tyler & Fischer, 2014).

In the present work, we look at one police department in the Southeastern U.S. that has embraced promoting legitimacy, and the other recommendations from the Task Force (2015) – including addressing the diversity of officers, racial bias training, and increased use of force policies and training – to better serve the community. One particular policy is the use of field booking arrests, otherwise known as a citation in lieu of arrest, which are when an arrest is made in the field, the accused is booked and released in the field, and then provided an order to appear for further proceedings instead of being taken to the police station or jail for traditional booking. Such citations are often used for traffic as well as more minor, misdemeanor offenses (Thacher, 2023). These "arrests" not only streamline the booking process for officers, but (in theory) make the encounter less burdensome and traumatic for citizens. However, like many policies, there are potential detrimental effects if field booking arrests result in a net-widening of who is entangled in the system, or if they are disparately used on certain populations. Using data obtained from a Freedom of Information Act (FOIA) request, we assess a snapshot of field booking arrests in Columbia, South Carolina. Specifically, we assess if there are racial and gender disparities in who is being arrested as well as the severity of the charges. We also assess where these arrests are occurring to see if certain areas and neighborhoods are disproportionately targeted. Through this assessment we gain some insight into who is bearing the burden of field booking arrests and their potential collateral consequences. We begin with an overview of field booking arrests and how they may or may not serve the aims of justice

and legitimacy. We then provide an overview of Columbia, South Carolina and its police department before presenting our assessment of field booking arrests.

Justice, Legitimacy, & Policing

In general, social psychologists say "justice" exists when procedures, distributions, and interactions align with one's expectations and shared social rules (Cohen, 1986; Hegtvedt & Markovsky, 1995; Jasso, 1980). Examinations of procedural justice within the criminal legal system began in legal psychology where it aimed to find people's preexisting agreement with and perceived legitimacy of court decisions (Lind, 1982), and was later applied to police encounters. Procedural justice focuses on the perceived fairness of the process more so than the outcome (Lind, 1982; Tyler & Lind, 1988). Specifically, it is thought individuals are more likely to view law enforcement as legitimate and trustworthy if they have been treated in a just and fair manner, regardless of the officer's decision or situational result (Tyler, 1990). This can occur through allowing the individual to explain themselves, officers treating them with respect, and police being neutral decision makers (Mazerolle et al., 2013; Nagin & Telep, 2020). Research finds a strong statistical relationship between procedural justice and trust, legitimacy, and acceptance of police procedures, as well as outcomes, or distributive justice (Sunshine & Tyler, 2003; Tyler & Folger, 1980; Wolfe et al., 2016).

Building on this theoretical framework, scholars have also examined whether citizens find law enforcement legitimate and trustworthy. Research suggests legitimacy and trustworthiness in police is generally low, but particularly low for people of Color (Engel, 2005; Johnson et al., 2017; Tyler, 2005). Tyler (2005) argues that people of Color's trust in police is heavily based on the procedural fairness of the policies and practices law enforcement employ. Research aligns with this argument as Black individuals are more commonly victims of police procedural injustice than their white counterparts (Brunson & Weitzer, 2009; Gau & Brunson, 2010). Furthermore, shifting community racial and ethnic composition is associated with increased reports of discriminatory encounters with law enforcement (Stewart et al., 2009). These findings point to the importance of police following just and fair procedures for all citizens, but particularly those that are marginalized and vulnerable. Yet, while process is important, outcomes also matter in who is likely to bear the burden of the criminal legal system.

Social psychology demonstrates that in addition to procedures, individuals often evaluate experiences based on the outcomes of the encounter, then they adjust their behavior and attitude accordingly (Lind & Tyler, 1988). Tyler (1990) addressed both procedural and distributive justice in his theory of legitimacy of the criminal legal system. In this context, distributive justice is defined as the perceived fairness on the distribution of outcomes delivered by police, such as stops, searches, tickets, and arrests (Greenberg & Tyler, 1987; McLean, 2020). Therefore, police are viewed as more legitimate when they allocate services and outcomes evenly and fairly (Tyler, 2003). Many studies find distributive justice to be an important predictor of legitimacy, not just for police, but for all criminal legal officials (Sunshine & Tyler, 2003; Tankebe, 2013; Tyler, 1990; Wolfe et al., 2016). Recent findings suggest distributive justice judgements are conditioned by procedural justice assessments, thus contextualizing why procedures are significant for legitimacy (McLean, 2020). Applying a racialized lens, extensive research suggests that Blacks' perceptions of law enforcement mirror who is policed, how they are treated, and where it occurs (Boehme et al., 2022; Cao, 2011; Isom, 2016; Schuck et al., 2008; Sharp & Johnson, 2009; Stewart et al., 2009; Taylor et al., 2010, 2015). Therefore, understanding how to facilitate justice and legitimacy in police-citizen interactions is essential to improving police-community relationships. One such way is to minimize the burden on citations for more minor offenses, such as utilizing field booking arrests.

Field Booking Arrests

The National Conference of State Legislatures (NCSL) (2019) defines a citation in lieu of arrest (i.e., a field booking arrest) as, "a written order, in lieu of a warrantless arrest, that is issued by a law enforcement officer or other authorized official, requiring a person to appear in a designated court or governmental office at a specified time and date." These arrests were first used for traffic violations in New York in the early 20th century, with other states quickly adopting these practices (Busher, 1978; Thacher, 2023). However, only two states, New York and West Virginia, utilized these summonses in place of arrests for other minor violations (Warner, 1942). It was not until the 1960s that New York aimed to greatly extend the use of citations for non-traffic misdemeanor crimes through the Manhattan Summons Project (Busher, 1978; Thacher, 2023). The Project, which resulted from a collaboration between NYPD and the Vera Institute of Justice, eventually mandated police arrest and release for the majority of misdemeanors (Thacher, 2023). These two agencies, along with the court officials, worked together to create and improve screening criteria to help police decide when to issue a citation instead of making an arrest (Thacher, 2023). This policy was deemed successful through research and was endorsed by many organizations in the U.S., leading to more than two-thirds of all states implementing noncustodial arrests for other nontraffic misdemeanor crimes by the 1980s (Berger, 1972; Busher, 1978).

Issuing citations in lieu of arrests is claimed to be beneficial by reducing the costs for the criminal legal system (Hirschel & Dean, 1995), reducing the burdens placed on individuals by avoiding arrest records, possible pretrial detention, and financial obligations (Gless, 1980; Lowenkamp et al., 2013; Monaghan & Bewley-Taylor, 2013), bettering community relationships with officers (Busher, 1978), increasing officer safety and efficiency (Davis, 2005; IACP, 2016), and reducing jail overcrowding (Baumer & Adams, 2006). Even though some scholars identify the benefits of utilizing citations in lieu of arrest, there are still concerns about net-widening. Net-widening is the result of a program or policy that is supposed to reduce the amount of people who become entangled in the criminal legal system, but instead causes more individuals to become entrapped (Klein, 1979). Research, however, on whether citations in lieu of arrest are causing net-widening is scarce and the results are mixed. Some studies find evidence of net-widening (Brown & Frank, 2005; Horney, 1980), while others do not (Berger, 1972; Nadel et al., 2018). For instance, Horney (1980) found evidence of net-widening for simple assaults and larceny. Yet, a more recent study found net-widening was not a concern and, instead, the procedure was diverting individuals from the criminal legal system (Nadel et al., 2018).

There is evidence suggesting citations in lieu of arrests are being utilized in certain situations more than others. First, research finds people of Color are often more likely than whites to generally be arrested overall (Kochel et al., 2011; Rojek et al., 2004) and be traditionally arrested instead of receiving a citation (Brown & Frank, 2005; Camplain et al., 2020). Specifically, one study examined alcohol and drug-related arrests from 2009 to 2018, and found Latines[2], Blacks, and Indigenous Americans were all more likely than their white counterparts to be booked into jail rather than receive a citation and be released (Camplain et al., 2020).

Second, receiving a citation in lieu of arrest is also found to be dependent on the gender of the suspect, with men having a greater chance than women of being traditionally arrested instead of receiving a citation (Brown & Frank, 2005). And, previous criminal history increases the likelihood of a traditional arrest over a citation (Brown & Frank, 2005). Thus, while there are potential benefits for law enforcement and citizens alike for police to utilize field booking arrests, there is still a potential of harm to some, particularly more vulnerable, and often marginalized, citizens. The City of Columbia, South Carolina, Police Department employs such a procedure, and we aim to understand if there are potential disparate impacts for some citizens and communities or not.

The Current Study

Columbia, SC Police Department

Before the potential implications of field booking arrests in Columbia, South Carolina (SC), can be understood, we must first provide an overview of the social and political landscape of the city as well as its police department. Columbia, SC, is the state capital and located within Richland and Lexington Counties near the center of the state. With a population of 137,966, Columbia is the second largest city in the state and the 198th largest city in the U.S. Encompassing nearly 140 miles, the population density of Columbia is 1,015 individuals per square mile. It is home to the University of South Carolina, the flagship public university of the state (World Population Review, 2023), as well as two renowned historically Black colleges and universities – Allen University and Benedict College (UNCF, 2023). Columbia is also the home of the U.S. Army's Fort Jackson, greatly increasing its population of service members as well as veterans (World Population Review, 2023). It also has one of the oldest homeless shelters in the country (WIS, 2018), as well as a significant unhoused population (South Carolina Interagency Council of Homelessness, 2020). The city of Columbia is also substantially more liberal than much of the remainder of South Carolina (Best Neighborhood, 2023). The median age of Columbia residents is 28.2 years old, and 50.7% of the population identify as men. Whites compose 52.58% of the population of the city, whereas Blacks account for 39.6% (World Population Review, 2023), making the population of the capital city a bit more diverse than the overall state ([South Carolina overall: whites (68.9%); Blacks (26.3%)] U.S. Census Bureau, 2022). The racial distribution of the city is depicted in Image 1.[3] The overall average individual earnings for the city are $38,057 (World Population Review, 2023), lower than the overall state, which ranks 44th in the nation for average earnings (U.S. Bureau of Labor Statistics, 2023). Over 30% of the Black Columbia population live in poverty whereas around 14% of the white residents do (World Population Review, 2023), though both poverty rates are higher than the national rate of 12.8% (Creamer et al., 2022). Columbia has a diversity score of 88 out of 100, which is much higher than many cities in the South as well as the overall U.S., though significant segregation still exists (Best Neighborhood, 2023). Thus, Columbia is distinctly diverse and progressive in a myriad of ways, yet still struggles with vast wealth and education gaps (as well as a traumatic racialized history [see Fordham, 2008, 2009; Greene & Parry, 2021]), and thus overall equity.

The Columbia Police Department (CPD) has 436 sworn officers, 125 authorized professional staff, and an annual budget of over $43 million. Black officers make up over 37% of the police force, with white officers accounting for 55%, thus closely aligning with the racial distribution of the city. Women make up over 21% of the police force. The patrol bureau is responsible for responding to calls for services as well as patrolling the city. They work across five regions within the city limits: East, Metro, North, South, and West (Fort Jackson is under U.S. Army jurisdiction), which are presented in Image 2. In 2021, CPD made 4,220 arrests and responded to over 174,000 calls for service (Columbia Police Department, 2021).

Research Questions

Field booking arrests (or citations in lieu of arrest) are a tool employed by the Columbia Police Department to enforce the law efficiently and effectively for more minor misdemeanor and felony[4] violations. While such citations may have benefits for officers and citizens, they may also lead to net-widening if some people receive citations they may not have otherwise, or certain areas are policed and cited more than others. In other words, some communities may be overburdened by such enforcement. To begin to evaluate the equitability of field booking arrests in Columbia, we assess if there are racial or

gender disparities in field booking arrests as well as in the severity of charges. Given that South Carolina officers may issue a field booking arrest for actions ranging from nuisance offenses (e.g., loitering or noise

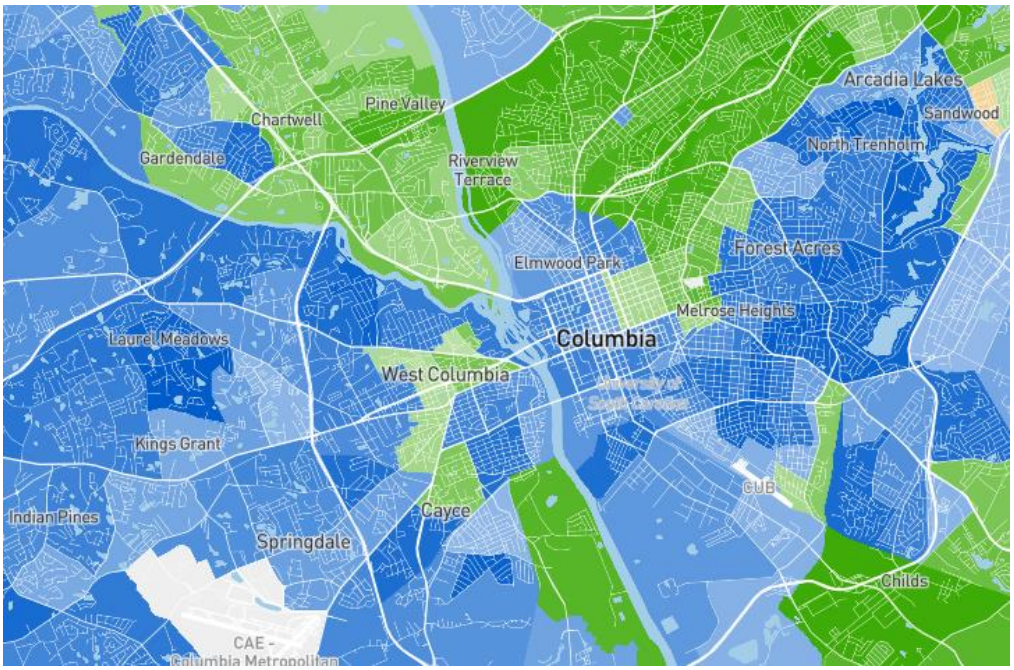


Image 1. Racial Distribution of Columbia, SC Neighborhoods
Image taken from Best Neighborhood (https://bestneighborhood.org/race-in-columbia-sc/)
Key: Blue = majority white; Green = majority Black; Yellow = majority Latine.

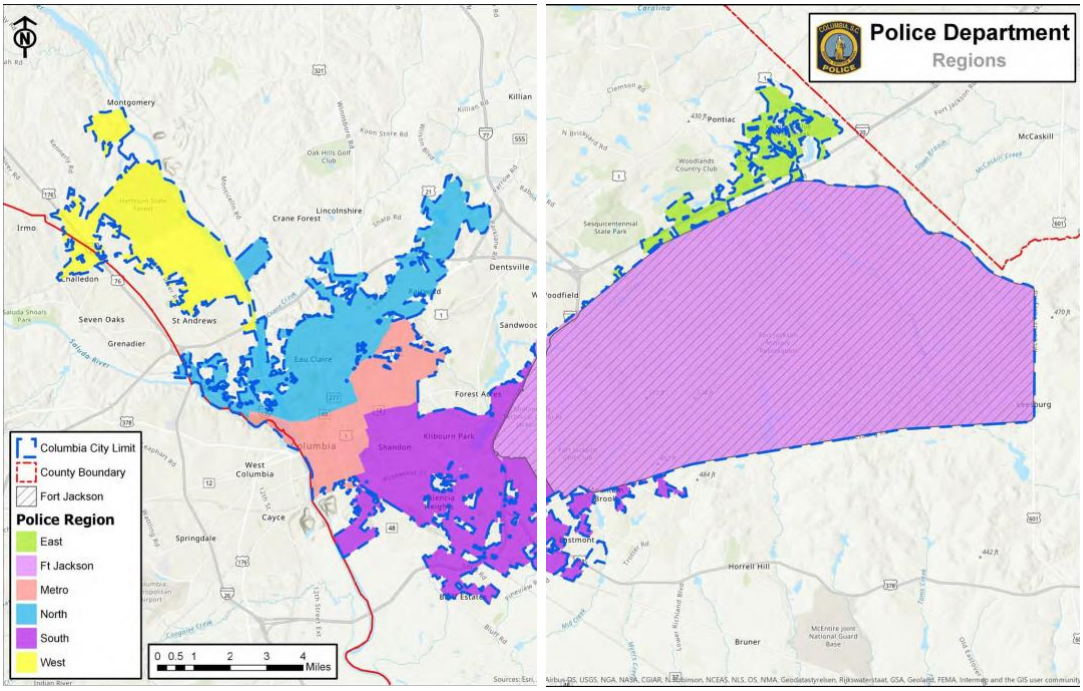


Image 2. Columbia Police Department Regions
Image taken from Columbia Police Department Annual Report 2021
(https://columbiapd.net/wp-content/uploads/2023/06/CPD_final-for-web-2021-annual-report.pdf)

violations; most often utilized on unhoused and younger populations) to minor-level felony offenses (e.g., assault), knowing the severity of the charges provides some insight into how certain behaviors committed by specific people are being policed in this way. We also examine where field booking arrests occur to explore if certain neighborhoods and locations are targeted more frequently than others. Specifically, we assess who is most likely to receive a field booking arrest and for what in Columbia, SC, and where in the city field booking arrests are most likely to occur. By answering these questions, we can better determine if field booking arrests are being employed in a just manner or if potential net-widening is occurring. Understanding if disparities exist will provide the foundation for future research into if such practices are truly just for all citizens.

Method

Data & Measures

Data were obtained from the CPD through a Freedom of Information Act (FOIA) request in late 2022. To provide a snapshot of patrol officer practices, data on all field booking arrests was requested, including race, gender, age at arrest, charge, arrest location, and date of offense between January 1, 2022, and June 30, 2022. Thus, the raw data contained all cases within this six-month period. Data were provided in an Excel file by case number for each individual charge, encompassing 669 unique charges during this timeframe. Charges were listed by their Uniform Crime Report (UCR) code, statute, as well as in descriptive form. Charges were sorted by their UCR code and then ranked by severity based on statute and description. Traffic offenses were coded as 0, with the remaining charges ranked as either low (1), moderate (2), or high (3) severity level offenses. *Low level* offenses include public nuisance charges, such as public urination, loitering, littering, and noise ordinances, and account for 16.1% of the cases in the analytical sample. *Moderate level* offenses include things such as minor larceny, public drunkenness, trespassing, and resisting arrest, and account for 63.3% of the cases in the analytical sample. *High level* offenses include vandalism, weapon violations, and simple assault, and account for 20.6% of the cases in the analytical sample.[5] Data were sorted and restructured by case number, thus tallying the number and severity of charges for each police encounter. The highest severity charge for each case was identified and serves as one of our primary variables of interest. When the data were restructured by case number instead of individual charges, the sample size became 507 unique cases with 23.3% having more than one charge. Traffic violations accounted for 109 of the cases and were removed from the analytical sample. Thus, the final data contains 398 unique cases of field booking arrests for non-traffic offenses within this six-month period.

The data also contained the race and gender of the individuals charged at each field booking arrest. *Gender* was classified as "M" for male and "F" for female and recoded into 0 = man, 1 = woman. Men compose 71.4% of the cases in the final analytical sample. Race was originally classified as W = white; B = Black; A = Asian American/Pacific Islander; I = Indigenous/Native American; and U = unknown. Ethnicity was also recorded as H = Latine-origin; N = non-Latine origin; or U = unknown. These classifications were recoded and combined, with anyone classified as Latine coded as Latine no matter their race and all other individuals coded by their race. The final analytical sample was coded for *race and ethnicity* as follows: 1 = white, 2 = Black, 3 = Latine, 4 = other race/ethnicity. Whites account for 28.1%, Blacks for 68.1%, Latines for 2.5%, and other races and ethnicities for 1.3% of the cases in the final analytical sample. Age ranged from 18 to 79 years of age with a median of 38 years.

Analytic Strategy

To determine if there were disparities across gender and race in the severity of field booking arrests, we graphed the distributions of severity of charges across groups by gender, race/ethnicity, and in combination. We also calculated chi-square statistics to determine if the differences between the groups were statistically significant. To better contextualize the distributions, we compared the percentages of arrests by race and gender to the population of Columbia, SC. Furthermore, we mapped the location of arrests to determine if there were specific neighborhoods or areas where arrests were more likely to occur. Graphs were created in Excel and all statistical analyses were completed in SPSS 27. All spatial analysis and mapping for arrest patterns were performed using ArcGIS Pro 2.7.1. The heat maps were created with Kernel density analysis in ArcGIS.

Results

Our investigation addresses two central lines of inquiry: 1) if there are racial and gender disparities in who is being arrested as well as the severity of charges; and 2) if certain areas and neighborhoods are disproportionately targeted by field booking arrests. To begin to answer the first, we initially examined the distribution of arrests between men and women and across racial and ethnic groups compared to the distributions of the Columbia, SC population. Looking at Table 1, we see whites make up about 49% of the Columbia population but account for less than 30% of all field booking arrests, with most of these being men. Furthermore, Blacks account for a little over 39% of the city population but make up 68% of all field booking arrests, with again the vast majority being men. And, despite already representing a smaller percentage of the city's residents at 12%, Latines and other racial and ethnic groups account for less than 4% of field booking arrests. Of additional consequence, we see the majority of charges are for moderate-level severity, or incidents such as minor larceny, public drunkenness, trespassing, and resisting arrest, with Black men accounting for the largest proportion of these arrests. Thus, these distributions suggest there are disparities across race and gender in who is being arrested and the severity of the charges.

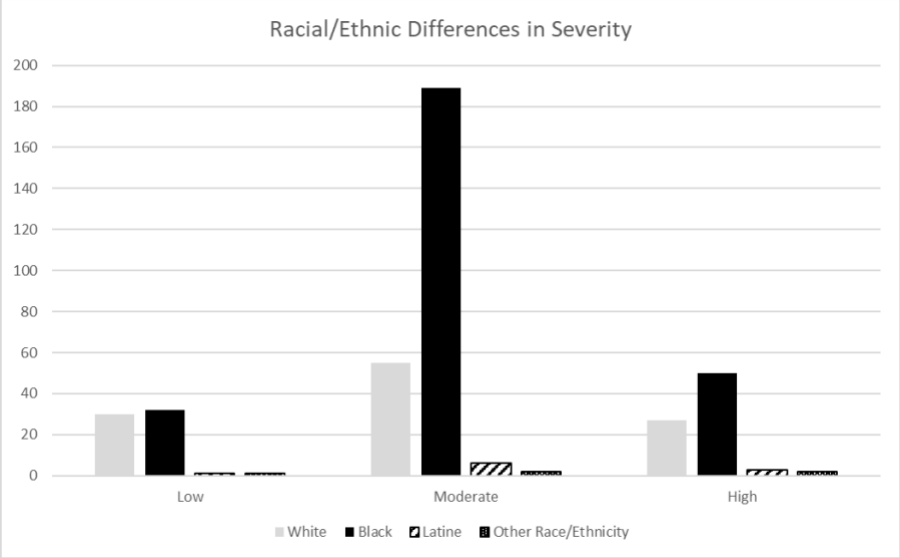
Table 1. Racial and Gender Distribution of Field Booking Arrests and City Population

Charge Severity	Low	Moderate	High	Total	Population
White					48.94%
Men	21 (5.3%)	43 (10.8%)	17 (4.3%)	81 (20.4%)	
Women	9 (2.3%)	12 (3.0%)	10 (2.5%)	31 (7.8%)	
Black					39.06%
Men	26 (6.5%)	139 (34.9%)	27 (6.8%)	192 (48.2%)	
Women	6 (1.5%)	50 (12.6%)	23 (5.8%)	79 (19.8%)	
Latine					5.80%
Men	1 (0.3%)	4 (1.0%)	2 (0.5%)	7 (1.8%)	
Women	0 (0.0%)	2 (0.5%)	1 (0.3%)	3 (0.8%)	
Other Race/Ethnicity					6.20%
Men	1 (0.3%)	2 (0.5%)	1 (0.3%)	3 (0.8%)	
Women	0 (0.0%)	0 (0.0%)	1 (0.3%)	1 (0.3%)	
Total	64 (16.1%)	252 (63.3%)	82 (20.6%)	398	137,966

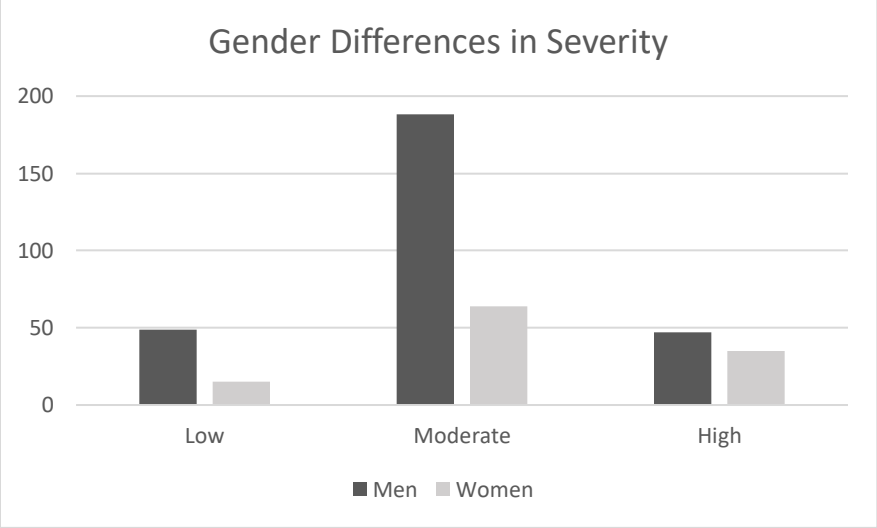
Note: Totals do not match or total 100% due to rounding; population numbers from https://worldpopulationreview.com/us-cities/columbia-sc-population

To further disentangle these disparities, we conducted a series of chi-square goodness of fit tests to determine if there were significant differences in arrest severity across and between race and gender groups. We first assessed racial and ethnic differences finding the distributions did significantly differ by racial categories, χ^2 (6, 398) = 19.74, p = .003. We then assessed gender differences again finding distributions did significantly differ between men and women, χ^2 (2, 398) = 10.06, p = .007. We then merged the groups to create four intersectional classifications: white men, men of Color, white women, and women of Color. We again found significant differences in the distribution of arrest severity across categories, χ^2 (6, 398) = 28.28, p = .000. We then graphed each of these distributions in Graphs 1-3. Our findings reveal that the majority of field arrests fall in the moderate severity category and are given to Black men.

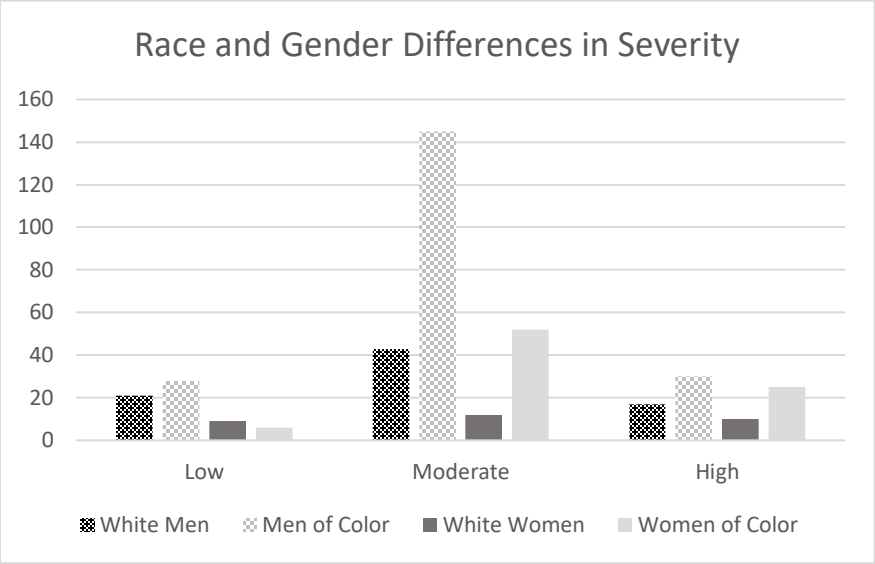
Graph 1. Racial and Ethnic Differences in Field Booking Arrests Severity



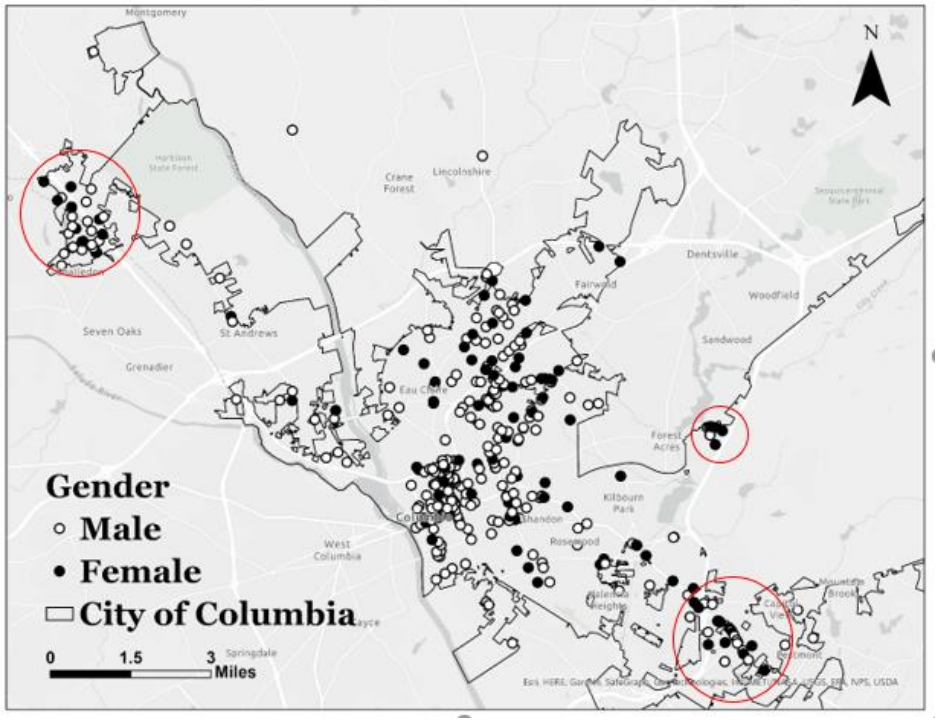
Graph 2. Gender Differences in Field Booking Arrests Severity



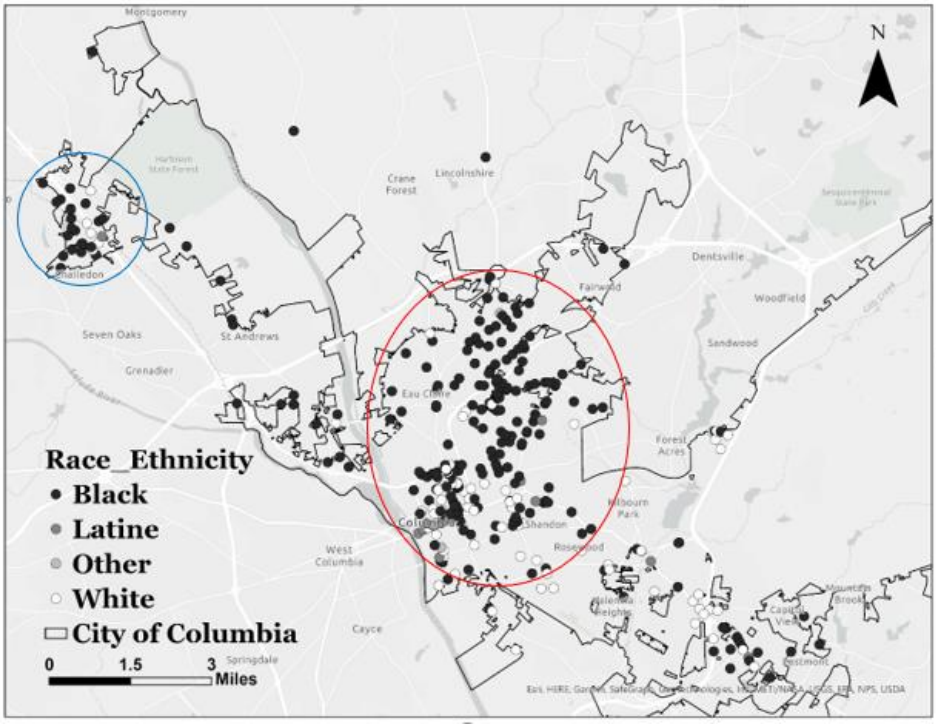
Graph 3. Race and Gender Differences in Field Booking Arrests Severity



To address our second question, if certain areas and neighborhoods are disproportionately targeted by field booking arrests, we employed GIS analysis. Map 1 represents the gender distribution of arrests across the city of Columbia. The map reveals no definitive gender divisions in locations of arrests. However, there are clusters of women arrested in the South Region as well as West Region (see Image 2 for CPD Regions; circled in red on Map 1), where there are several shopping districts. Given that women are more likely to arrested for property offenses than other types (Federal Bureau of Investigation, n.d.), then it is likely these potentially represent more minor cases of larceny. Map 2 reveals the locations of field booking arrests by race and ethnicity. Again, the significant differences revealed in earlier analyses are reiterated on the map. We do see that, overall, arrests are primarily clustered in the Metro and North Regions (circled in red on Map 2). Referring to Image 1, we see that the largest cluster of arrests corresponds to the areas in green in the downtown area between Melrose Heights and Elmwood Park and heading northeast, which are predominantly Black neighborhoods. Map 2 also reveals significant arrests clustered in a small portion of the West Region that houses the Columbiana Mall and numerous food and entertainment establishments frequented by teenagers (circled in blue on Map 2).

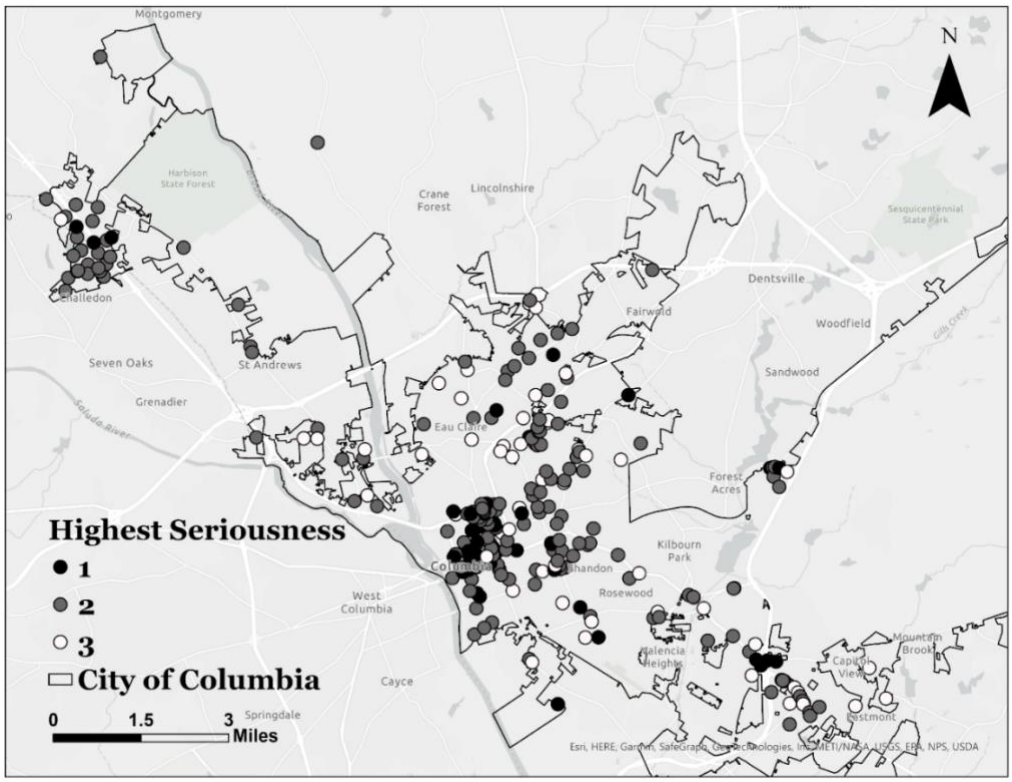


Map 1. Gender Distribution of Field Booking Arrests Across Columbia, SC



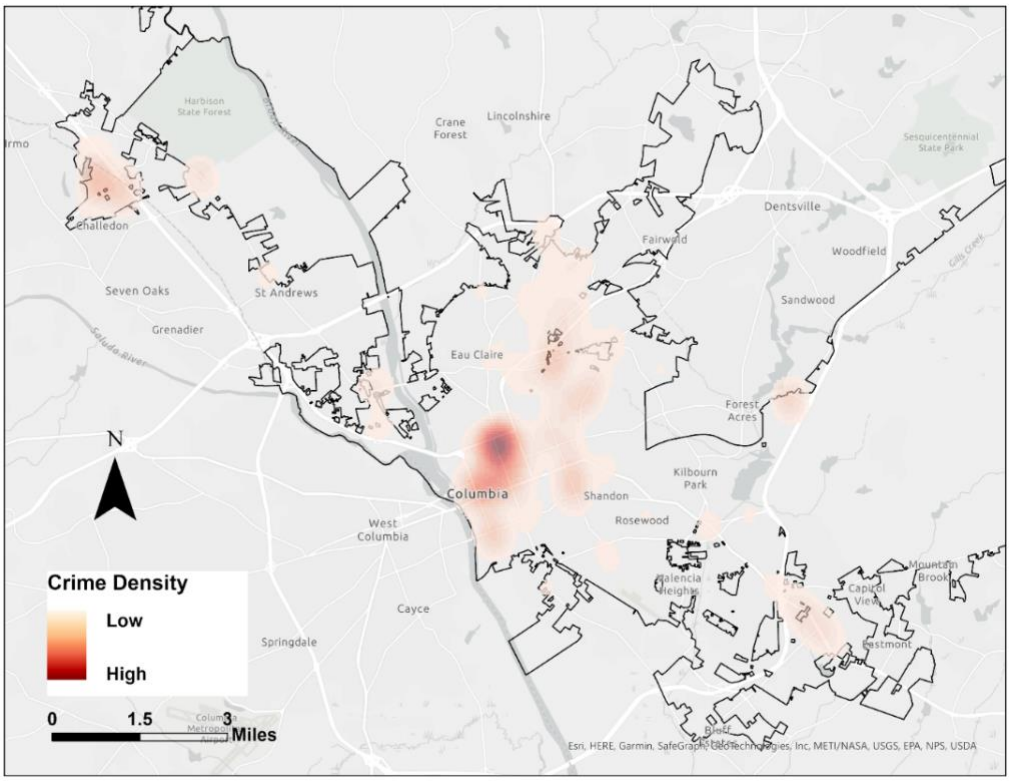
Map 2. Race and Ethnic Distribution of Field Booking Arrests Across Columbia, SC

Map 3 presents field booking arrest locations by charge severity. The distributions seen here align with the inferences related to gender and race/ethnicity distributions already discussed. As such, we see moderate severity charges, which include larceny, largely in the shopping districts noted in Maps 1 and 2. Furthermore, we see the clustering in the Metro and North Regions are also primarily moderate severity charges, which earlier results revealed were disproportionately given to people of Color.

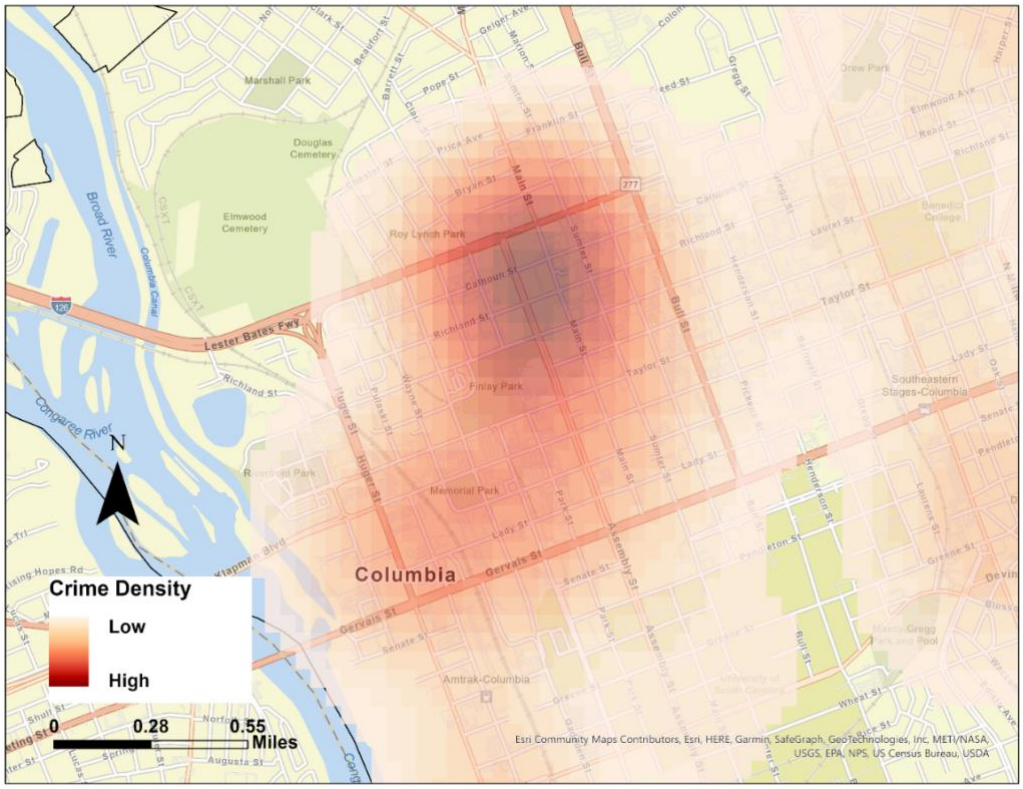


Map 3. Distribution of Field Booking Arrests by Charge Severity in Columbia, SC

Map 4 presents a heat map of field booking arrests in Columbia and reveals again that most field booking arrests are clustered in the areas on the northeast side of downtown that are a historically and predominantly Black neighborhoods, including the locations of Allen University and Benedict College. To further reiterate this point, we zoomed in the heat map to better understand exactly where the clustering of field booking arrests occurred; this is presented in Map 5. Upon closer examination of Map 5, we see the darkest colors, representing higher levels of arrests, encompass the area spanning Finley Park to the intersection of Bull Street and Elmwood Avenue. Finley Park is known for its unhoused population, and the remaining area captures the space between Columbia's two largest homeless shelters as well as the bus station. Thus, while these assessments are not definitive, it appears field booking arrests are largely being used on vulnerable and marginalized populations, particularly the unhoused and in communities of Color.



Map 4. Heat Map of Field Booking Arrests in Columbia, SC



Map 5. Close-Up Heat Map of Field Booking Arrests in Columbia, SC

Discussion

In this descriptive, exploratory assessment, we sought to investigate the distribution of field booking arrests in a Southeastern city to determine the equitability of their use. Looking at data over a six-month period in 2022, we found there were significant disparities in who received field booking arrests across race/ethnicity and gender compared to the city population and that there were significant differences in the severity of charges, with men of Color receiving the bulk of citations, particularly for moderate to high level offenses. Furthermore, we assessed where these field booking arrests occurred, finding clusters in areas where vulnerable and marginalized populations gather, such as the unhoused, as well as within predominantly Black communities.

While, in general, field booking arrests are utilized because they are cheaper and more efficient for police, they aid in keeping the jail population down, and they are less traumatic and burdensome to citizens compared to a traditional arrest, it appears net-widening may be occurring within Columbia, SC. Based on our assessment, certain groups and areas may be being policed more and overly burdened with field arrest citations. While no definitive conclusion can be provided, based on previous literature, law enforcement could be overpolicing these communities because of proactive policing strategies. These strategies push officers to be more aggressive in controlling and combating crime by handling less interactions informally (Cobbina-Dungy & Jones-Brown, 2021). They are found to disproportionately target and impact marginalized communities (Brunson & Miller, 2006) because police give disproportionate attention to individuals within these communities as real, potential, or perceived perpetrators of crime (Perry, 2006). Looking at where field booking arrests are issued and to which citizens, there is evidence to speculate that this tool that is supposedly aimed at providing more "just" outcomes to citizens is actually widening the net of those entangled in the carceral state, with the burdens felt most by some of the most vulnerable citizens and those too often marginalized and oppressed by society and its institutions.

Yet, while our assessment reveals patterns that suggest this, data limitations do not allow us to determine such assertions conclusively. For instance, we were only provided the case information and no contextual information around each field booking arrest. Thus, we do not know the specific behaviors of the person arrested, what brought the attention of the police, nor the larger situation around the incident. Such information is essential to better parse out the issues of procedural and distributive justice within a given case. Additionally, we do not know if charges were for misdemeanor or felony-level offenses since South Carolina is one of the few states that utilizes field booking arrests for both types of offenses (National Conferences of State Legislatures, 2019). Furthermore, we cannot fully disentangle the complexities of varied identities and social statuses, including sexuality and SES, along with gender identity and racial and ethnic identities, with the data provided – factors known to influence citizen-police interactions (Clair, 2020; Nadal, 2020). While gender, race, and ethnicity are recorded, we do not know if individuals were asked to self-identify, if officers made assumptions about individual's identities, or if the officer recorded identities accurately even if an individual did self-identify. Given the limited categorization of people within all captured classifications, a full assessment of experiences across the gender identity spectrum, range of racial and ethnic identities, and the impacts of other social statuses cannot be conducted. This is particularly important here as it seems many of these field booking arrests may be targeted at Columbia's unhoused population, but this cannot be fully determined with the present data.

Moreover, we do not know how the patterns of field booking arrests compare to traditional arrests. While we do find disparities here, we do not know how the breadth and depth of them compare to arrests for more serious offenses. This is a worthwhile endeavor to assess the impact of field booking

arrests more fully within the larger criminal legal system. We also lack information on arresting officers, including their status identities as well as their record as a police officer. While this information was provided for some cases, it was missing in the vast majority (62%), making it difficult to assess patterns of officer behaviors. This information is needed to better disentangle if something systemic is happening or if these disparities reflect personal biases. It also must be remembered that police are the gatekeepers of the carceral state; they have the discretion to ignore certain behaviors or communities, to issue citations or give informal warnings, or to make traditional arrests. They have significant power and responsibilities as agents of the state, thus empirical attention is also warranted into police decision making and behaviors in field booking arrests contexts (and beyond). Why are police proactively patrolling these areas, and why are they choosing to issue these citations over other types of intervention (or lack thereof)? These questions cannot be addressed with the present data but warrant consideration in the future. Furthermore, our unit of analysis is cases, not individuals. Thus, we cannot say how many of these cases are the same individuals encountering police repeatedly. And finally, our data is limited to a six-month snapshot of field booking arrests; therefore, we do not know if these patterns have always existed nor if they persist presently. Despite these limitations, our results do raise questions that need additional investigation to determine if field booking arrests in Columbia, SC, are being applied fairly.

The City of Columbia's Police Department is consistently trying to improve the ways it serves Columbia's residents. The CPD is highly racially diverse and is dedicated to increasing the representation of women on the force as part of the 30X30 Advancing Women in Policing Initiative. The CPD is committed to serving all the residents of Columbia, with official liaisons for the LGBTQ community, partnerships with local healthcare providers to better serve those facing mental health crises, and collaborations with schools and community programs to strengthen relationships between youth and police (Columbia Police Department, 2021). Through assessments such as the one presented here, CPD may learn where they can continue to refine their policies and procedures to best serve all of Columbia's residents.

Conclusion

Police officers carry a significant portion of the responsibility in determining if just outcomes occur for those that encounter the criminal legal system. What this specific assessment reminds us is that even policies and procedures that appear to be just and a "better" option than traditional alternatives, may still cause potentially unnecessary harm, particularly for the most vulnerable. We must keep this fact in mind and assess all criminal legal practices through a lens that broadly looks at impacts and consequences for *all* people. Being in positions of power and influence, police are responsible for serving *all* citizens, not antagonizing those that may be in need of assistance over arrests (even if it is only a citation). Additional research is warranted to fully unpack the potential harms of all criminal legal policies, including the utilization of field booking arrests, not only in Columbia, SC, but everywhere in the U.S. The impacts of mass incarceration (Alexander, 2011) and the ever evolving and expanding reach of the carceral state (e.g., Butler, 2017; Crump, 2019; Davis, 2018; Schenwar et al., 2016; Tonry, 2011) remind us that we must critically assess all policies, procedures, and their varied and extensive impacts. Far too often, new procedures are implemented and touted as "good" and "just," particularly if such keep people out of jail. Yet, while folks may not be locked up, it does not mean they escape the gaze and grasp of the carceral state. Policies such as field booking arrests often entrap more folks within the snares of the system than if no such policy existed. Such implications and consequences warrant closer attention. We hope this analysis inspires such efforts, as we are all responsible for minimizing harm, particularly for the most vulnerable.

Notes

[1] All monetary amounts are in US dollars.
[2] In the present work, "Latine" refers to those who classify themselves as a person of Cuban, Mexican, Puerto Rican, Central American, South American, or other Spanish cultural origin. See Ochoa (2022) for a discussion of the use of this inclusive terminology over "Latinx."
[3] Detailed information about the distribution by income, political leanings, education, and other factors may be found at https://statisticalatlas.com/place/South-Carolina/Columbia/Race-and-Ethnicity and https://datausa.io/profile/geo/columbia-sc/.
[4] According to the National Conference of State Legislatures (2019), South Carolina permits field booking arrests for misdemeanor and felony offenses. Unfortunately, information about when and why the use of field booking arrests began in Columbia, SC, is unavailable to the best of the authors' knowledge. This information would have further contextualized the present work, but instead is an additional limitation.
[5] Specific coding available upon request.

About the authors

Deena A. Isom is an Associate Professor of African American Studies and Criminology and Criminal Justice at the University of South Carolina. Her research aims to bring marginalized voices and lived experiences center to the understandings of the causes and consequences of negative and harmful behaviors and entanglement with the justice system through the advancement of criminological theory, critical perspective, and intersectional methodologies.

Kaitlen Hubbard is a Criminology and Criminal Justice PhD candidate at the University of South Carolina. Her research interests include initial entanglement in the criminal justice system, sentencing, violent crimes with a special focus on domestic violence and the death penalty.

Huixuan Li is a Research Assistant Professor at the Arnold School of Public Health, University of South Carolina. Her research primarily focuses on using advanced GIS and RS technologies to monitor different infectious diseases caused by ticks and mosquitos, as well as other social issues (e.g., violent crimes, early child development, environmental pollution) to provide a better living environment for the public.

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Prosecutorial Actus Reus: Appellate Review of Prosecutorial Misconduct and the Diminishment of Responsibility

Elizabeth Griffiths[1]
Heather L. Scheuerman[2]
Sandy Xie[3]

Abstract

The socio-historical concept of criminal responsibility links the action (*actus reus*) and mental state (*mens rea*), or intention, of the actor (i.e., the defendant) to determine legal and moral liability for his or her behavior and to apportion punishment. When the actor responsible for immoral conduct is the prosecutor in pursuit of a conviction, the courts respond very differently. More specifically, because prosecutors are presumed to be moral and ethical system actors, assumptions about their good character likely influence the ways in which they are held to account. This study explores the content and arguments made by appellate judges in their review of prosecutorial misconduct when the higher courts concede that misconduct occurred at trial. Borrowing a systems theory framework, we evaluate how Texas appellate courts responded to prosecutorial misconduct in 35 criminal convictions considered on appeal between 2010 and 2015. Systematic content analyses of the courts' opinions demonstrate that closed systems, like the American legal system, both diffuse responsibility for misconduct across other criminal justice actors and prioritize procedural elements above substantively just outcomes. This latter approach is inconsistent with how other systems—civil society, scholars outside of the legal arena, and the media—interpret their decisions. In this way, the misconduct of prosecutors is rendered opaque, and a tenuous confidence in the process of criminal prosecution is maintained.

Keywords: prosecutorial misconduct, harmless error, character theory, systems theory, appellate courts

Introduction

> According to character theories [of criminal responsibility], an individual is responsible for his action only if that action is reflective of the character of the agent. And character persists over time…. [Yet] action is the appropriate focus of the criminal law, in the sense that defendants are held criminally responsible *for their actions*, but an agent is not responsible for his actions if that action is not reflective of him *qua* agent. Character is not the target of responsibility, but the relationship between action and character is a condition of holding an individual responsible for an action. (Tadros, 2005, p. 9)

The term "responsibility" has been defined in several ways but generally encompasses agentic and intended decisions for which accountability, obligation, and/or liability ensue (Giddens, 1999; Mikula, 2003). Responsibility for one's intentional conduct is a central feature justifying criminal punishment for

[1 3] Rutgers University, Newark, NJ, USA
[2]James Madison University, Harrisonburg, VA, USA

Corresponding Author: Elizabeth Griffiths, Rutgers University, School of Criminal Justice, 123 Washington Street, Newark, NJ, 07102, USA; Telephone: 973-353-3303; Email: elizabeth.griffiths@rutgers.edu

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a select range of activities that violate legal codes (Morse, 2004). Yet the *character theory* of criminal responsibility recognizes that, beyond the action, the character of the actor influences the nature of the legal system's response (Tadros, 2005). When examining misconduct on the part of criminal justice agents who are tasked with making moral and legal decisions that hold criminal defendants accountable to the rule of law, *character theory* advantages these agents by minimizing their responsibility. This may explain why the serious misconduct of prosecutors in pursuit of a criminal conviction is often overlooked, rendered harmless, and treated as "not reflective" of the agent by higher courts.

American prosecutors wield the most power of all system actors; they unilaterally decide whom to charge, what charges to lay, whether to offer a plea or pre-trial intervention, whether to decline to prosecute, whether to proceed with a trial, what material must be disclosed to the defense, how to effectively argue the state's case, and which sentencing recommendations they will provide judges upon conviction (Davis, 2007). Prosecutors likewise experience very little oversight or accountability at any of these stages, allowing them to make their decisions in highly non-transparent settings prior to, during, and post-trial (Lawless, 2008; Medwed, 2012; Scheuerman et al., 2022; Schoenfeld, 2005; Wright & Miller, 2010).

As representatives of the "People" of the jurisdiction, what prosecutors say and do carries the imprimatur of government approval (Medwed, 2012), and prosecutors are keenly aware that they are given considerable (even if unearned) trust simply by virtue of their role status. It is for this reason that vouching for the credibility of witnesses, which trades on the prosecutor's standing and character rather than the truthfulness of the proffered testimony (Shaffer, 1993), is recognized as misconduct. If the character of prosecutors were in question or was not assumptively positive, their vouching would fail to add undue weight to the value of the testimony. Indeed, strategic courtroom tactics made by prosecutors, such as the drafting of opening and closing arguments, are routinely motivated by an active effort to maintain and strengthen the existing trust jurors and the public have in these "agents of justice" (Offit, 2021). In short, a prosecutor's character is rarely in question.

In this study, we evaluate the manner in which appellate courts in Texas opine about substantiated prosecutorial misconduct in 35 criminal cases decided between 2010 and 2015. We focus on the state of Texas for a number of reasons, including the state's leadership in criminal justice reform efforts (Herman, 2018), the punitiveness of their criminal legal system (Kutateladze, 2009), their election of state prosecutors (Green & Roiphe, 2020), and their illustrious position of being the first (and only to-date) state in the country to have jailed a prosecutor (who served 5 days of a 9-day sentence) for his involvement in prosecutorial misconduct (Ura, 2013).

In the remainder of the paper, we first consider how blame and responsibility may be dependent on the character of actors and then review the literature on the court's evaluation of the harms associated with prosecutorial misconduct. This is followed by a brief discussion of the larger implications of rendering the misconduct of system actors harmless. We then systematically analyze the narrative content of 35 appellate court decisions to reveal that the legal system conceptualizes the harm associated with prosecutorial misconduct in a manner that trivializes serious violations of defendants' due process rights. Two major themes emerging from these data show that: first, higher courts both diffuse and dilute the responsibility for prosecutorial misconduct across an array of courtroom actors, including the defense attorney and the trial judge; and second, the focus of higher courts in evaluating and remedying misconduct rests largely on procedural grounds, consistent with the meaning of communications internal to the legal system, rather than substantive grounds, which are commonsensically assumed by external systems (Nobles & Schiff, 2004).

The Character of "Bad" Actors & the Attribution of Blame

Criminal law's communicative function speaks to and for the public by morally condemning certain acts and, by extension, the actors who are viewed as criminally responsible (Tadros, 2005; Tannenbaum, 1938). Legal philosophers have delineated a series of theories on criminal responsibility based upon three characteristics: capacity, choice, and character. Capacity theories view actors as legally responsible for their actions when they have the "capacity to do otherwise, or the capacity to recognize the wrongfulness of what [they have] done" (Tadros, 2005, p. 22). Choice theories attribute responsibility to those who exercise choice in behaving amongst a range of potential options (Tadros, 2005). Lastly, character theories "contend that an individual is responsible for his action only insofar as his action was reflective of his character" (Tadros, 2005, p. 22). The distinctions between the three are not stark, as even capacity and choice theories, to some extent, assign the actor moral culpability for his or her actions.[1] How, then, might the character of prosecutors help to explain whether and how appellate courts hold them accountable for transgressions?

The State has a venerable position in the criminal justice system as the People's representative. Prosecutors are the front line in criminal justice processing and, as such, hold positions of considerable public trust. According to Schoenfeld (2005, p. 253-4),

> principals (in this case the public) transfer power and delegate resources to agents (prosecutors), so that the agents may perform specialized services or complex projects…. The public then trusts prosecutors to use their skills, knowledge, and power to prosecute people who break the law.

Irrespective of whether prosecutors feel like white knights or assembly-line workers (Baker, 1999), many see themselves as public servants who act as "rule enforcers or defenders of the good guys" (Wright & Levine, 2018, p. 1710). In reviewing prosecutor memoirs, for example, Wright and Levine (2018) distinguish a "core absolutist identity" wherein former prosecutors report moral and righteous indignation at those who violate societal rules. They claim, effectively, a moral virtue or high ground. This is true despite longstanding systemic disparities in criminal justice processing that implicate prosecutorial discretion (Cox & Gripp, 2022).

While there is a large body of research on the role of character evidence,[2] related to both the accused and the victim(s), for criminal trials (Cicchini, 2021; Schrag & Scotchmer, 1994), very little attention has been directed at the character of prosecutors when they engage in actions that violate the ethical and legal requirements of their position. This imbalance likely reflects the stereotypical view of prosecutors as moral authorities in the courtroom. Even in the wake of the recent crises of legitimacy around prosecutors' involvement in wrongful convictions, Cox and Gripp (2022, p. 657) report that "progressive" prosecutors both displace blame for past prosecutorial practices on their less progressive counterparts and differentiate themselves from other system actors by way of their "positional and moral authority." In short, both traditional and progressive prosecutors assume a highly moral character that permeates into the public consciousness.

Defendants in criminal court, on the other hand, are tainted merely by accusation and maligned once convicted. Thus, in a battle of character, the prosecutor wears the "white hat" (Wright & Levine, 2018, p. 1689), and the convicted defendant sits somewhere near the other end of the spectrum. To the extent that attributions of blame align with a *character theory* of responsibility, misconduct by the "good guys" will most likely be brushed aside as minor, non-problematic, or out-of-character. When misconduct

by the prosecution is acknowledged at all, it might be expected to be, and often is treated as, harmless (Ridolfi & Possley, 2010; Scheuerman et al., 2022; West, 2010).

The Harmless Error of Prosecutorial Misconduct

Appellate courts make decisions about whether to reverse convictions based on some error at trial. Generally, there are two kinds of errors that may mar a criminal case and that will be subject to a harm analysis: constitutional errors[3] and non-constitutional errors that violate the rules of procedure in criminal case processing. With courts granting wide latitude in treating many types of prosecutorial misconduct as warranting a harm analysis, much of the misbehavior of prosecutors that comes to the attention of the higher courts is subject to review and a judicial determination of its impact on the case.

In Texas, appellate courts conduct harm analyses under two sets of guidelines. For constitutional errors, the courts ask "whether there is a 'reasonable possibility' that the improper argument might have contributed to conviction" (Tex.R.App. P. 81(b)(2); Tex.R.App. P. 44.2(a); *Mosley v. State*, 1998) and, consistent with the federal rules of criminal procedure, Texas appellate courts are free to disregard any error that does not affect a defendant's substantial rights (Tex.R.App. P. 44.2(b); Fed.R. 52(a)). The appropriate harm analysis to be used by Texas courts considers three factors outlined in *Mosley*:

> (1) severity of the misconduct (the magnitude of the prejudicial effect of the prosecutor's remarks), (2) measures adopted to cure the misconduct (the efficacy of any cautionary instruction by the [trial] judge), and (3) the certainty of conviction absent the misconduct (the strength of the evidence supporting the conviction). (*Mosley v. State*, 1998)

Thus, appeals courts will take the position that the prosecutorial misconduct is harmless when: the misconduct is minor, brief, or not egregious; the jury should have been swayed by cautionary instructions to disregard made by the trial judge; and/or the weight of the evidence leans in support of the defendant's guilt.[4] Appellate courts may also decide that misconduct was not preserved for review if the defense counsel failed to object to it during trial.

The harm analysis used by the higher courts to evaluate the responsibility of prosecutors who engage in misconduct, and the consequences for doing so, has no obvious analogy in the way that the criminal law is applied to defendants. For example, where assisted suicide is prohibited by law, the person aiding and abetting a suicide may be charged accordingly (Tex. Health & Safety §166.45-51). This is because the accused factually brought about a death unlawfully; it is not a defense that the terminally ill person would have died anyway. Yet this logic is not applied by the courts in the case of prosecutorial misconduct. Rather than holding the prosecutor accountable, the courts opine on whether the defendant-*qua*-victim's conviction would have happened anyway. Harm analyses effectively diminish the State's responsibility for ensuring fair trials and enable prosecutors to breach their legal and ethical duties without consequence (Goldberg, 1980; Jonakait, 1987; Medwed, 2012).

Misreading Legal Communications

The public may not appreciate the nature of prosecutorial misconduct or properly attribute responsibility for this type of wrongdoing because of the way in which various systems, i.e., the law and media, communicate with each other. Borrowing on Niklas Luhman's systems theory of communications, Nobles and Schiff (2004) argue that the meaning of communications of one system cannot be faithfully or

accurately reproduced in another. This is because various systems of communication, such as the law or medicine or the media, are functionally differentiated from one another and become, effectively, "autopoietic"[5] (Nobles & Schiff, 2004, p. 223). If any system were able to completely reproduce the meaning of communications in another, the system would fail to differentiate and become redundant. Thus, the law, medicine, and the media all represent closed systems of communication that encode the meaning of the same content differently, according to their own internal logic. For example, the media applies an "information/non-information code" or lens to communications in other systems, such as medicine or the law, whereas the law uses a "legal/illegal" dichotomy to encode communications (Nobles & Schiff, 2004). Consistent with Luhman's logic then, "if what was legal was automatically 'news,' the media would simply reproduce the legal system…No system can have an independent existence if it adopts the same basis of selection as another system" (Nobles & Schiff, 2004, p. 226).

Judicial opinions are legal communications. They are written explanations of legal decisions that clarify the basis on which the court resolves a legal dispute. Appellate decisions, in particular, describe the facts of the case, briefly outline the arguments on appeal, and make determinations on those arguments to reach a final and binding decision. Importantly, appellate opinions are crafted as legal communications that respond to other legal communications – the appellant's brief. Within this closed system of communication, the rules and procedures of the law dictate judicial rationales in resolving legal disputes. In some cases, those rationales may be procedurally appropriate but fail to convey the substantive justice that defendants and the public presume is being arbitrated. A classic example of such a disconnect is the distinction between "factual innocence" and "legal innocence" in the law (Aglialoro, 2014; *Shinn v. Martinez Ramirez*, 2022). The rules of criminal procedure prioritize legal guilt over factual guilt, wherein defendants who are found guilty within the American legal system are those persons whom the prosecutor can prove guilt beyond a reasonable doubt based on sufficiency of evidence (Bowers, 2010; Givelber, 2001). The burden of proof is not absolute or beyond all doubt, and as such some doubt about the actual guilt of the accused may exist, even in those instances in which a conviction is secured (Whitman, 2008). Yet legal communications that affirm a lower court's guilty verdict are misread by the public as reaffirming the conclusion that the defendant is faculty guilty and deserving of the original verdict (Nobles & Schiff, 2004).

In this study, we analyze the content of appellate decisions—or legal communications—in which the higher courts acknowledge that prosecutorial misconduct marred trials in which guilty verdicts were reached. In doing so, we assess the extent to which the court treats that misconduct as harmless (or not), with an eye toward evaluating the courts' attributions of responsibility. That is, we conduct a systematic analysis of the content of appellate opinions to clarify who the court believes is accountable for the State's misconduct. Ultimately, these decisions tend to exonerate prosecutorial misbehavior and apportion legal responsibility to other court actors for failing to temper or inadequately address prosecutors' misconduct at trial.

Data & Methods

This study examines 35 written opinions from Texas appellate courts between 2010 and 2015 in which prosecutorial misconduct is alleged by convicted defendants on appeal, and the higher court concedes that, indeed, the prosecutor engaged in misconduct in securing the conviction.[6] These opinions were collected by the Center for Prosecutor Integrity (CPI) as part of a data collection effort to locate legal system cases wherein prosecutorial misconduct was substantiated by the trial court or higher courts.[7] According to the CPI, cases were collected for inclusion from individual submissions, media reports, and LexisNexis legal database searches using the following terms: *Brady* violation, ethical, *ex*

parte communication, failure to disclose, false evidence, improper argument, inadmissible evidence, inflammatory statement, lack of candor, mischaracterizing evidence, perjury, professional conduct, professional responsibility, prosecutor improp!, and prosecutor! misconduct. Table 1 provides definitions of distinct types of prosecutorial misconduct identified in our sample of Texas appeals cases collected via these search terms. The CPI then confirmed case eligibility by locating and analyzing the court (trial, appellate, supreme) or bar disciplinary committee decision. All cases selected for inclusion in the database were subsequently reviewed by the CPI Registry Director and supplemented by additional bar disciplinary records, defense counsel reports, and media accounts where possible.

Table 1. Types, Definitions, and Examples of Prosecutorial Misconduct[a]

Type	Definition [b]	Case Example
Brady violation ($n = 2$)	Withholding evidence that is material and favorable to the guilt or punishment of the defendant.	"Appellant contends that because the statement was not disclosed until several years after it was taken and after the victim had died, he was unable to present the exculpatory evidence in any other admissible form." (*Ex parte Mares*, 2010)
Impugning ($n = 6$)	Mocking or disparaging the defense.	"The witness, Gonzalez's son, testified that Gonzalez was a loving, caring parent [...]. On cross-examination, the State improperly impeached Gonzalez's son with several misdemeanor marijuana convictions." (*Gonzalez v. State*, 2014)
Vouching (n = 3)	Inserting personal opinion regarding the credibility of a witness.	"Appellant complains of the [...] following remark by the prosecutor during jury argument: 'So, if you believe Amy, which I don't see any reason not to believe Amy –.' Appellant contends that, with this argument, the prosecutor was attempting to interject his personal feelings into the case. [...] It is axiomatic that a prosecutor has a duty to keep his view of the evidence to himself." (*Scott v. State*, 2013)
Misstating the law ($n = 8$)	Shifting the burden of proof. Referencing the defendant's failure to testify.	"After detailing this evidence during closing summation, the prosecutor concluded her argument with a final discussion on the presumption of innocence. The argument proceeded as follows: 'It's true, everybody is presumed innocent. But as soon as the witnesses take the stand, soon as they tell their story, soon as evidence is introduced, they are no longer presumed innocent.' Appellant timely objected to this argument as a misapplication of the law." (*Garcia v. State*, 2013)
Inadmissible/false evidence/lack of candor ($n = 20$)	Arguing facts excluded at trial or misrepresenting the nature of the evidence.	"[Prosecutor:] And you got a small glimpse into their marriage. You got a small glimpse, because, see, Belinda's not here to tell you, is she? And the rules of evidence prohibit Belinda's girlfriends from telling you anything Belinda ever told them. That's the way…". The defense immediately objected at trial and the appellate court "agree[d] with appellant that this argument improperly referred the jury to evidence outside the record, namely, that Belinda's friends had information about appellant and Belinda's marriage. Argument that attempts to introduce matters not in the record is clearly improper." (*Temple v. State*, 2010)

(Continues)

Table 1 (Continued)

Inflammatory statement (n = 3)	Statements that inflame the passions or prejudices of the jury (e.g., encouraging the jury to maintain public safety via conviction).	"Here, we find that asking the jury to 'fight for those little girls' constituted 'a plea for abandonment of objectivity,' which does not fall within the four categories of permissible jury argument." (*Franklin v. State*, 2015)

Note: The total number of types of misconduct exceeds 35 as more than one type of misconduct may be substantiated in any given case.

[a] Two instances of misconduct were coded as "other" wherein the prosecutor: 1) read juror notes during recess, and 2) made an inappropriate statement to the *venire* during *voir dire*.

[b] Definitions of misconduct are drawn from the CPI (2016) and Medwed (2012).

In total, the CPI identified 37 appellate court decisions in Texas, between 2010 and 2015, in which the court admitted that defendants who identified prosecutorial misconduct[8] as at least one basis of appeal were correct.[9] Of these 37, we excluded two cases that were resolved by plea, which left a total of 35 opinions in which the appeals court conceded that prosecutorial misconduct had marred the criminal trial of the defendant. Among these, there were only five[10] cases (14%; *n*=5) in which the court considered the prosecutors' actions "not harmless," and the appeals court took some action, typically reversing the conviction and remanding the case for retrial. It was far more common for the appellate courts to hold that, while prosecutorial misconduct occurred, it was effectively harmless (86%; *n*=30).

We used NVivo 1.6.1 to inductively code the Texas appellate court opinions. After an initial review of the cases, we developed an open coding scheme that reflected the way the courts justify their decisions around the harm associated with prosecutorial misconduct and the concept of responsibility (Charmaz, 2014). In our first round of coding, we anticipated that we would be primarily coding words, sentences, or paragraphs under a parent node entitled "'prosecutor responsibility," with child nodes like "State concedes," "State concedes but views the misconduct as harmless," and "State does not concede." Upon closer inspection of the opinions in the first round of coding, however, it became clear that we would need focused axial codes that captured how the appellate judges apportioned blame or responsibility to other system actors. This led to a final coding scheme as follows: appellate decision, harmless, prosecutor responsibility, defense responsibility, trial court responsibility, and appellate court responsibility. To enhance interrater reliability, we coded a series of opinions jointly, recoded those opinions once the final coding scheme had been established, and discussed any discrepancies in coding to reach an agreement.

We use an analytic coding strategy based on grounded theory (Charmaz, 2014; Corbin & Strauss, 1990; Glaser & Strauss, 1967). By systematically analyzing the content of these judicial opinions, we establish a series of findings, derived directly from the data, that elucidate how the responsibility for prosecutorial misconduct is conceptualized by the higher courts. In doing so, we unpack how the courts discuss, justify, and evaluate the actors responsible for engaging in, controlling, and responding to prosecutorial misconduct.

Findings

Two central themes emerge from these analyses of Texas appellate court opinions. First, the court routinely diffuses the responsibility for prosecutorial misconduct among an array of courtroom actors; more specifically, the responsibility for prosecutorial misconduct is shifted onto other court officials, such as the defense (in preserving the issue by offering an immediate objection to misconduct) and the trial court judge (in sustaining the objection and providing a curative instruction to the jury to disregard). Second, due to their focus on whether *legal* innocence has been proved or disproved, these higher courts

use legal and procedural grounds for evaluating and remedying the misconduct that they concede to have occurred during trial. Recall that, in most of the cases in which the appellate court acknowledged that prosecutorial misconduct tainted the original trials, the court took the position that the prosecution's misconduct was "harmless" (86%; *n*=30). In reaching these conclusions, their opinions negate the damaging consequences of prosecutorial overreach for the victims of misconduct, and the court's legal communications are misread by the media and the public as confirming both the factual guilt of the defendant and the virtuous moral character of the prosecution. Our study thus confronts social scientists with a legal logic that leads to a "misreading" (Nobles & Schiff, 2004) of the role of the appellate courts as providing a mechanism of substantial oversight of system actors to correct for errors in favor of one that prioritizes perceptions of legal legitimacy.

Blame-Shifting Prosecutorial Misconduct

Even though onus should be placed on the actor who engaged in misconduct, this logic does not appear to apply to justice agents who represent the state. Rather than attributing responsibility to prosecutors, it is the other court actors whom the appellate courts tend to hold accountable for the prosecutor's behavior. Indeed, far more of the content in the appellate court decisions focused on *responses* to prosecutorial misconduct by both the defense and, especially, trial court judges than on the prosecutors themselves. We can see this diffusion of responsibility for prosecutorial misconduct simply in the number of items coded within the 35 appellate opinions across the four courtroom actors: prosecutors, the defense, the trial court, and the appellate court. Only 33 (12%) of the textual references in these data relate to prosecutor responsibility. By contrast, there were considerably more references to each of the remaining actors in these data (i.e., 43 to appellate court responsibility [16%], 78 to defense responsibility [28%], and 121 to trial court responsibility [44%]).

As we describe in more detail below, the defense was noted to have either invited the misconduct or failed to adequately preserve it for appellate review. Trial court judges were responsible for sustaining the defense's objection and issuing a curative instruction to the jury; provided they did so, the misconduct is treated as if it did not even happen. In focusing so fully on the actions of other criminal justice actors in response to prosecutorial misbehavior, the appellate courts diminish the substantive harm of prosecutorial misconduct.

Holding the Defense Accountable. There are two ways in which the higher courts assign responsibility for addressing prosecutorial misconduct to the defense. The most prevalent, and in some ways the most problematic, way the defense is held to account is in preserving an objection to the prosecutor's conduct so that it remains reviewable on appeal. Technically, the appeals court may review allegations of prosecutorial misconduct when they believe that the substantial rights of the defendant have been violated, yet appellate courts often maintain that, for example, "the argument raised on appeal must comport with the specific objection made at trial, or error is waived" (*Richardson v. State*, 2012). In effect, despite the higher courts acknowledging that the prosecutor overstepped or was overzealous in their prosecution of the defendant, a review of the prosecutor's behavior is unwarranted if the defense fails to make that point at trial. This is akin to arguing that a criminal defendant should not be held accountable if the victim of a crime fails to immediately inform law enforcement of the event.

A second way in which the appellate courts hold the defense responsible for prosecutorial misconduct is by invoking the invited error (also known as the invited response or invited reply) doctrine (Balske, 1986). According to this legal argument, the defendant may not raise on appeal a concern about the actions of the prosecutor or the trial court that was "invited" by his or her own actions. For example,

in *Raborn v. State* (2011), the prosecutor stated, "'I'm the prosecution. I took an oath to see that justice is done [...].' As part of his speaking objection defense counsel stated[,] 'Your Honor, I object, I took an oath too [...].' The prosecutor responded to the speaking objection by stating[,] 'Not to see that justice is done, Counsel.'" In this case, the Court of Appeals for the Fifth Judicial District of Texas ruled that:

> Because of the interruption of the prosecutor, the prosecutor's argument was incomplete and any interpretation that it was an 'attack' on defense counsel is rank speculation. The prosecutor's unfinished statement never rose to the level of an 'attack' on defense counsel or was so improper that it could have disrupted the factfinder's orderly evaluation of the evidence. Even if it was improper, it constituted 'invited argument.' The State notes that appellant's counsel was the one who commented on his own oath and obligations as an attorney, not the prosecutor. The only statement made about defense counsel was in response to defense counsel's assertion that he took the same oath as the prosecutor. (*Raborn v. State*, 2011)

This case thus illustrates the redirection of responsibility for prosecutorial misconduct from the prosecution to the defense.

In yet another example, the court held that while the prosecution should not have discussed plea negotiations in front of the jury, it was the defense who raised the issue of the plea in the first place (*Bassett v. State*, 2014). The court went on to suggest that the misconduct was relatively minor as "the prosecutor may have been able to elicit the same information from [the] appellant using appropriate cross-examination questions." That the prosecutor did not use an "appropriate" mechanism to extract this information is, evidently, excusable because he or she could potentially have done so some other way. This logic, when applied to the criminal responsibility of the defendant for the perpetration of a crime is less compelling. For instance, the fact that one can earn income through legal employment does not excuse forcibly robbing someone else of their money.

The invited error doctrine provides a legitimate rationale for ensuring that the defense cannot create, encourage, or prompt errors at trial that then serve as a basis for an appeal or "ask the court to render a particular ruling and then ask the appellate court to reverse the trial court for that ruling" (Hall, 1998, p. 367). When the defense induces errors, the defense needs to be held responsible for their ineffective trial court strategies. Yet, absolving the prosecution of any responsibility based on invitation fails to hold the State to standards of conduct that are expected of the People's representatives. Behaving unfairly in a trial is no less damaging to due process when it is "invited" than when it is not.

Blame It on the Trial Judge. It is not only the defense that is held to account for identifying and preserving for review the misconduct of prosecutors during legal proceedings. Indeed, the Texas appellate opinions show that the trial court judge is the main party responsible for acknowledging and addressing misconduct before it ever reaches the appellate court. In nearly half of the cases that are ultimately deemed harmless by the appellate court (n=14; 47%), the trial judge sufficiently "cured" the prosecutor's misconduct by sustaining the defendant's objection and instructing the jury to disregard. It is the position of the Texas appellate courts that "only [very] offensive or flagrant error warrants reversal when there has been an instruction to disregard" (*Kibble v. State*, 2010) because "the law generally presumes that instructions to disregard and other cautionary instructions will be duly obeyed by the jury" (*Vega v. State*, 2012). Harm is thus sufficiently ameliorated by a trial judge's cautionary instruction to the jury. This practice enables the higher courts to ignore prosecutors' problematic conduct if a trial court judge notified the original jury that the prosecutor erred. Yet this transfer of responsibility does nothing to address

whether a jury can, in actuality, "unhear" inadmissible evidence or inflammatory remarks, or ignore the power of a prosecutor's vouching for a witness, for example.

In assigning responsibility for controlling prosecutorial misconduct to the defense and the trial court judge, the appeals court effectively dilutes accountability for the prosecutor's actions and diminishes their role obligations. It is, of course, the duty of all court actors to play by the rules to ensure just and fair outcomes for both defendants and the people. Trial judges act as referees to the adversarial process, ensuring that the adversaries behave in accordance with the rules and procedures of criminal trials. The question is whether simply noting that one party failed to adhere to the rules – in front of factfinders – negates the rule-breaking altogether. This sort of oversight fails to hold prosecutors liable for their misconduct in any meaningful or measurable way and further, in the words of Arthurs (2004, p. 1707), prioritizes "procedure over justice."

Misreading the Court's Rulings & Maintaining System Legitimacy

The decisions of appellate courts influence how prosecutorial misconduct will be viewed by those outside of the law. When prosecutors engage in behavior that violates the rules of criminal procedure or the substantial rights of the accused, these powerful system actors unfairly tip the scales of justice in their favor. To the extent that their behavior is downplayed and treated as out-of-character or a one-off, the system perpetuates a narrative that it operates fairly to achieve correct outcomes. When high courts affirm the convictions obtained in lower courts, they effectively endorse a view of the defendant as guilty and deserving of punishment. It could undermine the legitimacy of the system if the checks and balances routinely identified wrongful decisions upon review (Schoenfeld, 2005).

In 14 of the 30 Texas appellate cases (47%) in which prosecutorial misconduct is found to be harmless, the judicial opinions expressly suggest that the magnitude of the prosecutors' misbehavior was relatively minor. For example, the court categorized the misconduct as "not extensive" (*Williams v. State*, 2011), "largely inconsequential" (*Irielle v. State*, 2014), "mild…and not as flagrant as the conduct in other cases" (*Raborn v. State*, 2011), "isolated" (*Arias v. State*, 2010; *Garcia v. State*, 2013; *Snowden v. State*, 2011) or "not particularly offensive or outrageous" (*Garcia v. State*, 2013). The court appears to have fashioned an ambiguous system for determining how significant the misconduct must be to be injurious to the defendant, opining that the State's "objectionable comments consisted of a few sentences" (*Franklin v. State*, 2015), "constitute[ed] only a small portion of the prosecutor's argument" (*Williams v. State*, 2011), or was "brief in the context of the State's entire argument" (*Richardson v. State*, 2012). Thus, even when the court acknowledges that the prosecutor's actions are unacceptable, its estimates of the degree of harm to the defendant lean heavily toward the behavior being a nuisance or innocuous.

In perhaps a most unusual example in which a prosecutor intentionally read the notes of a juror during a trial recess, the appellate court claimed to be concerned and then deemed the action harmless. It described the prosecutor's conduct as "severe in the abstract sense," "egregious," and "totally inappropriate"; yet the court held that "a mistrial is not necessarily required even though a State's attorney should be punished for misconduct" and the appellant's conviction was affirmed (*Benefield v. State*, 2012). These legal communications indicate that the court will tolerate prosecutorial overreaching generally and that even when they acknowledge that the overreaching is "totally unacceptable," it may still be viewed as excusable.

The Texas high courts further dilute the harms associated with prosecutorial misconduct in making implicit claims about the good character of the State. For instance, in *Williams v. State* (2011), the appellate court concluded that "nothing suggests declaring the error harmless will encourage the State to repeat this error." Here, they refer to the improbability of prosecutors repeating their errors in the future

as a basis to avoid holding them accountable for the errors that they have already committed. In suggesting that the misconduct is unlikely to be repeated, the courts treat prosecutorial misconduct as unusual and out-of-character mistakes rather than routine violations deserving of punishment, despite the ostensible theoretical basis for punishment (at least for defendants) being centered on the deterrence of future misconduct.

Appellate courts repeatedly reference repetition in a second way, wherein they praise the State for not repeatedly engaging in the misconduct in the same trial and, in so doing, absolve them of responsibility for engaging in it in the first place. For instance, the Court of Appeals of Texas (Dallas) claimed that "the prosecutor did not repeat the improper argument once the court sustained the objection and instructed the jury to disregard" (*Williams v. State*, 2013) and in another case, the Court of Criminal Appeals of Texas argued that the "error was isolated…[and] the illegitimate inference—that the jury should also hold the appellant's apparent lack of courtroom remorse against him, in derogation of his constitutional right to remain silent—was never repeated or emphasized" (*Snowden v. State*, 2011). Likewise, in *Raborn v. State* (2011), the court found that "after the appellant's objection was overruled, the prosecutor moved on to a discussion of the evidence and did not continue with the improper argument." In these and numerous other instances, the appeals courts seem to laud the prosecution for only committing misconduct once in the course of trying defendants. Yet even the repeated misconduct of the prosecutor in *Alcala v. State* (2014) was thought not to have unduly prejudiced the jury given the trial court's instruction to disregard.

In all, these examples demonstrate a central theme of appellate court opinions on prosecutorial misconduct: the conduct is not severe, it happens only infrequently, and thus it is not worrisome. The message that is then translated to the media and the public is that trials are fair, prosecutors are the "good guys," and the defendant was rightfully convicted.

Causing Harm

Despite the overall "positive" view of the character of prosecutors, which diminishes and transfers their responsibility to other parties for engaging in misconduct, there are a minority of cases in which prosecutors were recognized to be the "bad guys." Texas appellate courts conceded that the prosecutor's behavior at trial was "not harmless" in five of the cases in the sample. The higher courts opted not to diffuse responsibility to the defense in any of these cases and, in *Kelly v. State* (2010), the appellate court expressly disagreed with the prosecutor's contention that the defense "invited" the prosecutor's improper questioning, instead noting that the defense objected (but was erroneously overruled by the trial judge) every time the prosecutor referred to co-defendants having been convicted in earlier trials. The improper comments were made on multiple occasions during trial, and were "clearly inflammatory. The argument occurred late in the State's final closing argument and likely left a strong impression on the jury. Thus, the prejudicial effect of the evidence and the argument was severe" (*Kelly v. State*, 2010).

While the defense was not held to account for controlling the prosecution in the sample of cases resulting in an assessment of harm, the trial court was implicated as primarily responsible for regulating the prosecutor's misbehavior in all five cases. Namely, the courts viewed the misconduct as tainting trials due to the failure of trial judges to adequately correct the misconduct at the time it happened, either by sustaining the defense's objections or by offering curative instructions to the jury. The appellate court went so far as to assign *more* of the responsibility for prosecutors' misbehavior to the trial judges than to the prosecutors themselves when they noted, for example, that "the trial judge erred by *allowing* the prosecutor to engage in improper jury argument" (*Ex parte Mares*, 2010; emphasis added) or that "the trial

court *magnified* this harm by overruling appellant's objections, thereby giving its stamp of approval to the prosecutor's remarks" (*Watts v. State*, 2012; emphasis added).

Despite a heavy focus on the third factor outlined in *Mosley*—the weight of the evidence absent the error—in reaching a decision that prosecutorial misconduct is harmless (as expressed in 16 of the 30 opinions; 53%), the court openly acknowledged the importance of ensuring a fair trial only in *Kelly v. State* (2010). Here, the court opined that…

> A reviewing court in applying the harmless error rule should not focus upon the propriety of the outcome of the trial. Instead, an appellate court should be concerned with the integrity of the process leading to the conviction. Consequently, the court should examine the source of the error, the nature of the error, whether or to what extent it was emphasized by the State, and its probable collateral implications [...]. [T]he reviewing court should focus not on the weight of the other evidence of guilt, but rather on whether the error at issue might possibly have prejudiced the juror's decision-making [...]. In other words, a reviewing court must always examine whether the trial was essentially a fair one. (*Kelly v. State*, 2010)

This case, however, is the exception; ensuring the fairness of trial outcomes and the due process rights of the accused does not appear to be the normative approach to appellate review of prosecutorial misconduct.

Conclusion

How do appellate courts handle prosecutorial misconduct, and who is responsible for ensuring that criminal trials are fair and that prosecutors act within the bounds of rules and procedure? This study has shown that, in Texas, prosecutorial misconduct tends to be regarded by higher courts as mild, infrequent, and ultimately harmless. It is not surprising, then, that Texas appellate courts only occasionally hold prosecutors to account for their misconduct by reversing the convictions that are secured in trials where the prosecutor's "white hat" falls askew. Consistent with Tadros' (2005) theorizing, we argue that the presumptive character of prosecutors—as morally virtuous seekers of justice—helps to explain higher courts' apathetic reaction to misbehavior. The courts seemingly view most prosecutorial misconduct as mere overzealousness, an unfortunate side effect of the adversarial process by otherwise ethical actors (Givelber, 2001; Medwed, 2012).

To the extent that punishment is intended not merely to respond to past behavior but to deter future behavior, the relative leniency of appellate courts in addressing prosecutorial misconduct is instructive. Deterrence theorists maintain that effective punishments are certain, proportional to the offense, and swift (Nagin, 2013). Failure to punish should, theoretically, have the opposite effects both on the actor and on the larger community. It minimizes the harm of the act and signals to those responsible that the behavior is, if not acceptable, at least tolerable. Said differently,

> the moral justification for punishment lies in its effects—in its contribution to the prevention of crime and the social readjustment of the criminal. [...] [W]e cannot know by looking only at what the criminal has done, what should be done to him. His act, lying in the past, is important merely as *a symptom—one symptom among others—of his character, mind and disposition*; it helps us to diagnose what he is like and predict the effects of our action on him and on society. (Hart, 2008, p. 159-160, emphasis added)

Texas appellate court judges, in viewing most misconduct as harmless, treat the misbehavior of prosecutors as anomalous, inconsequential, and, in many ways, out-of-character. In this way, prosecutorial misconduct is not viewed as deserving of punishment because it is not *reflective* of the prosecutor as a person or as a representative of the state (Tadros, 2005).

Our research shows that a central mechanism by which the appellate courts diminish prosecutorial accountability for their misconduct is by shifting the responsibility to other courtroom actors, including the defense and the trial judge. Indeed, far more of the references to "responsibility" in these appellate judicial opinions focused on the actions (or inactions) of defense attorneys and trial judges when confronted with prosecutorial misbehavior. Rather than holding the prosecutors—who have an obligation to seek justice and ensure fair trials—to account, the courts tend to absolve them of the misconduct and place the blame squarely at the feet of others to regulate and respond to prosecutorial overreach. It is largely in reaction to the *defense* or *trial judge's* apparent dereliction of duty that the appellate court attends to prosecutorial misconduct.

Part of the explanation for why this is the case may lie in the legal system's need to maintain legitimacy and the confidence of the public in the integrity of its rulings (Duff, 2010; Tyler & Sevier, 2014). If prosecutors are the moral authorities in the courtroom, then they must be seen to be steering the system to reach the right outcomes—conviction of the guilty through just procedures. When it is prosecutors who are guilty of stepping outside the bounds of their duty and obligations, the system must downplay the severity of the misbehavior, emphasize its rarity, and minimize the potential reputational harm in response. This becomes easier to accomplish when the higher courts can use procedural bases on which to ignore misconduct that is not preserved for review, or summarily assume that the misconduct was cured by the actions of the lower court judge. While the reversal of a conviction may not reflect much about the factual guilt or innocence of the defendant, neither does the affirmation of a conviction. And yet, the media and the public misread appellate decisions to affirm convictions as proof that the system got it right the first time. In this way, the character of prosecutors as the "good guys" and criminal defendants as the "bad guys" is consistently reaffirmed.

These findings illustrate how determinations in the criminal justice system regarding responsibility do not readily translate to parties in other systems (Nobles & Schiff, 2004). It is the responsibility of state appellate courts to review the procedures and decisions of lower courts and, in so doing, ensure that criminal trials are fair, and laws are properly and objectively applied. Appellate courts are not responsible for retrying cases or reestablishing the guilt of the defendant. Appellate courts are, effectively, overseers of the trial process. It is in this role that they should operate as the first line of defense against errant prosecutors, and yet they routinely skirt this duty by justifying or diminishing the harms associated with procedural injustices that take place in lower courts (Ridolfi & Possley, 2010; Scheuerman et al., 2022). This is despite the "sound principle of a liberal criminal law that we should be liable to conviction and punishment only for what we do, not for what we are" (Duff, 2010, p. 135). However, in truly fulfilling the responsibilities of their role as overseers, higher courts could jeopardize the efficiency of the legal system if the character of prosecutors is too often brought into question. Moreover, as public perceptions about the legitimacy of the legal system are tied to notions of procedural justice (Cann & Yates, 2016; Tyler & Sevier, 2014), routine admonishment of prosecutors' behaviors could weaken public support for, and confidence in, the courts.

We expect that our findings would apply to the determination of responsibility for prosecutorial misconduct in other contexts. Although harm analyses may be crafted differently in different states, most incorporate some version of the *Mosley* factors, including the contribution of the misconduct to the conviction, the application of existing remedies at the trial level, and/or the weight of the evidence absent the error (*Chapman v. California*, 1967; *Harrington v. California*, 1969; *Delaware v. Van Arsdall*, 1986).

Nevertheless, future studies should explore whether our findings are generalizable to jurisdictions other than Texas and to other periods of time.

Two additional limitations are also worthy of consideration. First, not all the appellate court decisions provide enough detail about the specific behavior of the prosecutor to generate a continuum of severity; this makes it hard to evaluate how trivial or severe the misconduct was in the context of the trial. Second, the opinions examined in this study include only those decisions in which the appellate court concedes that prosecutorial misconduct marred the trial. It does not include a larger group of cases in which the appellant claims that the prosecutor engaged in misconduct, but the higher courts disagree. Nonetheless, because a harm analysis is only appropriate to address acknowledged errors, and our interest is in evaluating how higher courts hold prosecutors responsible for misconduct that they believe to have occurred, a fitting subset of cases is examined here.

Despite these limitations, this study offers insight into the circumstances in which prosecutors are subject to oversight, the diffusion of responsibility for their bad actions, and the ways in which the courts work to protect and defend their legitimacy in producing just outcomes. How appellate courts and the public view the "character" of prosecutors may contribute to a minimization of the attribution of responsibility when these agents of the state engage in misconduct. It is in this instance that these two systems, the public and the legal system, appear to agree.

Notes

1. However, Tadros (2005) suggests that a strict reading of both choice and capacity theories fails to capture the necessary and sufficient conditions of criminal responsibility specifically, which hinge on morality or wrongfulness of actions.
2. The Federal Rules of Evidence (and most state jurisdictions) forbid the use of character evidence as indicative of propensity (effectively, guilt) in a specific instance, with the exception of cases of rape and child molestation (Colb, 2001). We submit, however, that the role-status of prosecutors and defendants, respectively, carries with it an insinuation of good (prosecutor)/bad (defendant) character in criminal cases writ large (see also Cooney, 1994).
3. Under *Chapman v. California* (1967), the Supreme Court held that prosecutorial errors could be disregarded if the state could prove that the errors were "harmless beyond a reasonable doubt." In a later case, the court attempted to clarify the harmless error rule by distinguishing two types of constitutional errors: (a) structural errors, which require the finding of a mistrial by the trial court or an overturning of the verdict by an appellate court provided that a timely objection was raised by the defense at trial; and (b) trial errors, which require harmless error review (*Arizona v. Fulminante*, 1991; Tisdale, 2016).
4. Although states are free to fashion their own criteria for harm analyses, most draw on some combination of the weight of evidence in support of the defendant's guilt (either the quantity of evidence, i.e., New York, or the nature of the evidence, i.e., Texas), the extent to which the misconduct was addressed or remedied at trial, and/or an estimation of the contribution of the misconduct to the defendant's conviction (Scheuerman et al., 2022).
5. According to Nobles and Schiff (2004, p. 223), the term "autopoietic" originates "in theories of the role played by cells in biological evolution, [and] refers to the idea that communication takes place only within separate systems. Like cells, which must reproduce themselves out of their own elements, legal communications can only be created by reference to prior legal communications, medical communications by reference to prior medical communications, and so on."
6. We restrict our analysis to cases in which the appellate court substantiates the prosecutor's misconduct – rather than including cases in which misconduct is alleged by the defendant but not conceded by the appellate courts – because it is only those cases in which the appellate court agrees that prosecutorial misconduct occurred that

are: (a) eligible to be subject to harm analysis, and (b) allow for an analysis of attributions of responsibility and blame. When the higher court fails to acknowledge or concede that the prosecutor engaged in misconduct at all, the court is effectively saying that misconduct did not happen. Because our interest is in how the courts hold prosecutors responsible (or not) for their misbehavior, we examine only those cases in which higher courts acknowledge that some behavior occurred outside the bounds of standard trial and case processing rules.

7. The Center for Prosecutor Integrity database is publicly available and can be found here: http://www.prosecutorintegrity.org/registry/database/
8. It is not possible to effectively differentiate between prosecutorial misconduct that is intentional and prosecutorial error that is accidental. In part, this is because the observable behavior and its effect on securing a fair trial for the accused is, for all intents and purposes, identical. Higher courts generally refrain from attempting to discern whether the prosecutor simply got "carried away" in an adversarial zeal or deliberately set out to taint the trial in the state's favor. Prior to *Berger v. U.S.* (1935), the Supreme Court held in *Dunlop v. U.S.* (1897) that "there is no doubt that, in the heat of the argument, counsel do occasionally make remarks that are not justified by the testimony, and which are, or may be prejudicial to the accused….If every remark made by counsel outside the testimony were ground for a reversal, comparatively few verdicts would stand, since in the order of advocacy, and in the excitement of the trial, even the most experienced counsel are occasionally carried away by this temptation." By 1935, the court established a balance in which, for strong evidentiary cases, prosecutorial misconduct could be safely disregarded as having substantially affected the rights of the accused and, for weak evidentiary cases, any misstep of the prosecutor out of bounds should carry more weight irrespective of intention (*Berger v. U.S.*, 1935). Some scholars implicitly suggest that intentionality may be detected by the number of times a prosecutor errs in a single trial (wherein more misconduct suggests greater egregiousness and, perhaps, intentionality) (Landes & Posner, 2001; Scheuerman et al., 2022), but even this standard is merely an assumption absent any information on the internal thoughts and decision processes of prosecutors.
9. Of these opinions, five were decided by the Court of Criminal Appeals, Texas' court of last resort for criminal cases, and the remainder were decided by state intermediate appellate courts.
10. In two of these five cases, the appeals courts found that prosecutors had engaged in perhaps the most serious and insidious form of misconduct possible in criminal cases, *Brady* violations. *Brady* violations take their name from the Supreme Court case, *Brady v Maryland* (1963), which held that prosecutors must disclose all exculpatory evidence to the defense in a timely fashion. Failure to disclose violates the central principles undergirding fair trials in that, in the American system, case investigators (e.g., police) are members of a law enforcement community that includes prosecutors. As such, the defense is dependent on prosecutors to gather evidence from the police and, when that evidence is exculpatory, share that information with the defense. These were the only two cases in which a *Brady* violation was found to have occurred by the Texas appellate courts in these data. In the three remaining cases where prosecutorial misconduct was viewed as not harmless, prosecutors introduced inadmissible evidence (either during opening or summation, or in questioning a witness), with one case noting that this inadmissible evidence was also inflammatory. It is noteworthy, however, that most cases involving inadmissible evidence (80%) were deemed to involve harmless error.

About the authors

Elizabeth Griffiths is an Associate Professor in the School of Criminal Justice at *Rutgers University-Newark*. Her recent research focuses on gun violence, drug markets, and the courts.

Heather L. Scheuerman is an Associate Professor of Justice Studies at *James Madison University*. Her recent work examines restorative justice, hate crimes, and general strain theory.

Sandy Xie is a graduate student in the School of Criminal Justice at *Rutgers University-Newark*.

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The Influence of Prior Legal Background on Judicial Sentencing Considerations

Esther Nir[1]
Siyu Liu[2]

Abstract

State court judges are influenced by a myriad of factors during criminal case processing. To study the influence of prior legal background on judicial decision-making at sentencing, we performed in-depth qualitative interviews of 39 trial court judges presiding over criminal cases in a Northeastern U.S. state. We find that judges are influenced by their former legal experiences and most judges are cognizant of this influence. While certain sentencing considerations are prioritized for almost all judges (e.g., criminal history, seriousness of the offense), prioritization and processing of many other sentencing criteria are correlated with prior legal background. Former defense attorneys tend to focus on defendants' mental health, social upbringing, and family support, while prosecutors focus on victim impact and violence, among other considerations. Our results highlight the need for diversity on the bench in criminal courts coupled with increased training and inter-courtroom communications.

Keywords: judicial discretion, sentencing, judicial diversity, prosecutors, defense attorneys

Introduction

> "Every conclusion is expressive of a dominant personal motive and is a resultant of the evolutionary status of the individual's mind." – Haines (1922)

Judicial diversity inspires public confidence and legitimacy in the justice system and preserves the quality of judicial decision making (Ifill, 2000, 2009; Shepard, 2021). With the swearing in of Justice Ketanji Brown Jackson in 2022, the U.S. Supreme Court acquired its first female Black jurist on the bench. Justice Jackson previously served as a public defender. Prior to her appointment, the only Justice with criminal defense experience was Justice Thurgood Marshall, who retired in 1991 from the Court (Serino, 2022). In her tribute to Justice Marshall, Justice Sandra Day O'Connor (1992, p. 10) described the profound influence of his professional work on her perspectives of law and the world:

> Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection.

Other professional experiences that provide diversity of perspectives include legal scholarship and social

[1] Department of Criminal Justice, New Jersey City University, Jersey City, USA
[2] School of Public Affairs, Penn State Harrisburg, Harrisburg, USA

Corresponding author: Esther Nir, Department of Criminal Justice, New Jersey City University, Professional Studies Building, Room 224, 2039 John F. Kennedy Boulevard, Jersey City, NJ 07305; enir@njcu.edu

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advocacy. Justice Ruth Bader Ginsberg worked in academia and was the director of the Women's Rights Project at the American Civil Liberties Union before becoming a Supreme Court Justice (Valentine, 2004).

Respecting these unique contributions to the bench, a rejuvenated conversation on the importance of professional diversity is heard among the media (Cineas, 2022; Gass & Bruinius, 2022; Savage, 2022; Serino, 2022), advocacy groups (AFJ, 2022; Friedrich, 2022; Stroud, 2022), and the scholarly circle (Berryessa et al., 2022; Harris & Sen, 2022; Teichman et al., *forthcoming*). While most are focused on the federal bench, prior legal background of state court judges may have greater impact on ordinary people's lives. According to the Bureau of Justice Statistics (BJS), one million people are held in state correctional facilities (Carson, 2022) and four million people are placed in community supervision (Kaeble, 2021). Yet, scant scholarship exists regarding the legal backgrounds of state trial court judges, and how these experiences contribute to judicial priorities in decision making.

The current study intends to fill this void by analyzing in-depth interviews with state court judges – of various legal backgrounds – regarding their considerations in sentencing. Instead of focusing on the causal impact of sentencing factors on individual cases, this study approaches the process by unpacking what judges perceive as important factors in the sentencing process, as well as exploring judges' perceptions regarding the influence of their own prior legal experiences on their judicial decisions. We underline patterns of prioritized sentencing factors among judges with similar backgrounds and explore the importance of having trial level judges from diverse professional backgrounds adjudicate criminal cases.

Professional Diversity Among State Court Judges

In general, the U.S. judiciary at the state level lacks professional diversity. Compared to federal cases, judicial diversity for criminal cases at the state level is even more important for two reasons: the volume of criminal cases on the docket, and the way decisions are made. Among new filings during the 12-month period ending in March 2023, there are four times the number of civil cases compared to criminal cases in U.S. District Courts (FJCS, 2023). By contrast, state trial courts handle proportionally more criminal cases. In Pennsylvania, Courts of Common Pleas – the court of general jurisdiction in the state – processed 138,077 criminal cases and 123,335 civil cases in 2021 (AOPC, 2023). Overall, judicial considerations in criminal sentencing have more significant implications at the state level.

Yet, unlike the federal process dictated by Senate confirmations and the considerable amount of information required to be disclosed to the public (Acquaviva & Castiglione, 2009), little is known regarding the professional diversity of trial court judges at the state level. The most relevant study was conducted by Acquaviva and Castiglione (2009), where the authors utilized a comprehensive survey-based study on judges of courts of last resort in all fifty states. They found that 63.5% of the surveyed state supreme court judges have previously served on the bench in lower-level courts. With regard to prior legal experience, 33% of them worked as government prosecutors, while only 15% had experience in public defense, and 28% served as private criminal defense attorneys. The majority of the respondents (83%) worked in private practice, followed by civil litigation (65%).

More importantly, federal court judges are appointed for a life term. By contrast, trial and appellate state court judges serve terms followed by re-election or re-appointment. This signifies the public pressure on state court judges to be "popular" to preserve their seat while federal court judges face less constraint in their decision-making process (Nir & Liu, 2022). Notably, appellate court judges generally make decisions as a panel, while state trial court judges are alone in their decision-making. Arguably, professional diversity may offset some of the biases of individual members in appellate courts, while this balance does not exist on a state trial court level.

Judicial Discretion in Decision-Making

In the United States, criminal court judges contribute to decisions on convictions and sentencing that impact multiple facets of defendants and their families' lives (Clear, 2008; Ewald & Smith, 2008). Within legally sanctioned ranges established by the legislature, trial judges have some level of discretion to determine criminal sentences (Bushway & Forst, 2013). This discretion has resulted in disparities in sentencing for similar offenses (Frankel, 1972; Lynch, 2009). In *Law without Order* (1972), Judge Marvin Frankel (1972, p.7) suggested that differences in judicial backgrounds, personalities, and life experiences interfere with the equitable imposition of criminal sentences. He stated:

> …judges vary widely in their explicit views and "principles" affecting sentencing; they vary, too, in the accidents of birth and biography generating the guilts, the fears, and the rages that affect almost all of us at times and in ways we often cannot know.

The sentencing literature differentiates formally rational standards and substantively rational standards. The former refers to the legislative rules by which judges must abide in issuing a sentence, while the latter refers to the considerations due to the defendant or circumstances of an individual case (Johnson, 2005; Ulmer & Kramer, 1996). It is the substantively rational standards that allow judges to practice discretion based on a variety of factors. The original focal concerns perspective provides three main considerations including blameworthiness of the defendant, protection of the community, and other practical concerns (Kaiser & Spohn, 2018; Kramer & Ulmer, 1996; Steffensmeier & Demuth, 2006; Steffensmeier et al., 1998; Ulmer & Johnson, 2004). The first two concerns are related to the nature and seriousness of the offense, the criminal history of the defendant, and specific details of the offense. Lastly, practical concerns entail those that are related to organizational factors and defendant-specific factors, such as the defendant's family situation.

Additionally, characteristics of individual judges could be relevant to sentencing as well. Studies exist with mixed results on the investigation of whether the gender of the judge and defendant interact and impact sentencing decisions (Farrell et al., 2010; Gruhl et al., 1981; Johnson, 2006; Kritzer & Uhlman, 1977; Lim et al., 2016; Schanzenbach, 2005; Steffensmeier & Hebert, 1999). Unlike gender studies, only a small number of studies focus on professional background and judicial discretion.

Professional Diversity & Socialization

In contrast to "surface-level diversity" which refers to the representation of demographic composition like gender and race, Iuliano and Stewart (2018) categorize professional diversity under the umbrella of "deep-level diversity," where "it includes characteristics such as work experience, values, attitudes, and educational background" (p. 247). A judge may have worked as a prosecutor, a private civil or criminal attorney, a public defender, a legal advocate in civil rights cases, or a mix of these experiences prior to joining the bench.

Within the criminal justice courtroom workgroup, the prosecutor has the most discretionary power and plays a critical role in determining the trajectory of the defendant's life (Spohn, 2018). Through professional socialization, they learn about the localized application of criminal law, criminal procedure, trial procedure, and other administrative related tasks (Winfree, 1984). More importantly, prosecutors establish professional priorities and practice sanctioned problem-solving skills to best manage the "uncertainty" that is abundant in their line of work (Albonetti, 1987). The priorities for prosecutorial work, albeit set as "to seek justice within the bounds of the law, not merely to convict" by the American Bar

Association (ABA, 2023), have a heavy emphasis on conviction rates and closing cases (Godsey, 2019; Wright & Levine, 2017). The mindset is established early on among many young prosecutors to focus on the guilt of the defendant and seek convictions to protect the community, which Felkenes (1975) coined "conviction psychology" (p. 99). With such a role, oriented daily by supervisors and colleagues, prosecutors generally socialize into the norms, attitudes, and values held commonly in their office. Upholding the law with a strong sense of right and wrong, protecting the community, and honing one's skills at trial become the three most widely expressed motivations of a prosecutor (Wright & Levine, 2017).

Additionally, prosecutors' frequent interactions with police officers are also part of their socialization (Liu & Nir, 2022; McIntyre, 1975; Trivedi & Van Cleve, 2020). The police proactively select the types of cases to initiate, and the prosecutor's office is a "reactive institution" that receives cases and decides whether or not to prosecute (McIntyre, 1975, p. 210-211). It is routine for prosecutors to incorporate police values into their work (Liu & Nir, 2022; Nir & Liu, 2021; Trivedi & Van Cleve, 2020). In the process, some compromises are made to prosecutors' own values. A rich set of literature documents prosecutors' tolerance for officers lying on the stand to allow cases to proceed to conviction (Chin & Wells, 1998; Dorfman, 1998; Liu & Nir, 2022; Moran, 2018; Trivedi & Van Cleve, 2020; Zeidman, 2005). Just as prosecutors possess a "conviction psychology" in order to effectively perform their work (Godsey, 2019), police officers hold norms and values that dehumanize criminal defendants. Such an "assembly-line mentality" facilitates their daily tasks and becomes a useful tool to move along the countless "faceless and anonymous" cases on a regular basis (Godsey, 2019, p. 39). The working relationship between police and prosecutors contributes to the reinforcement of such a priority due to professional necessity.

On the other hand, for defense attorneys, understanding the situations and needs of individual clients is central to the protection of their interests in a case; they are expected to be "a learned friend," engaging in (often without success) "emotional detachment" (Lefcourt, 1996, p. 61-62). At times, the burden of caring leads to compassion fatigue (Norton et al., 2016). While defense attorneys are expected to serve as needed counsel to the defendant, they are also members of the courtroom workgroup (Ulmer, 2019) and their goals of protecting clients' rights and pursuing the best outcome of the case may not always be fulfilled concurrently (Nir & Liu, 2021).

Regardless of the professional background that a judge holds, it could be theorized that there is a level of inertia, and that previously established values and attitudes developed through professional socialization carry over to their work on the bench. In the context of sentencing considerations, enhancing professional diversity inside state trial courts is a needed first step to promote fairness and justice. Iuliano and Stewart (2018) argued, "deep-level diversity" or professional diversity "enhances the decision-making process" (p. 249).

In any professional role, a socialization process is necessary to orient the individual with the expectations and motivations for the line of work. Van Maanen (1977) likens one's new role in an organization to an actor portraying a new character on stage. A new identity is constructed following the learning of plot lines, objectives, and intentions. As Parsons (1951) defined, socialization is "the acquisition of the requisite orientations for satisfactory functioning in a job" (p. 205). According to social learning theory, reinforcement based on rewards and loss will be part of the learning experience (e.g., on a job) to practice new skills and increase efficiency (Bandura, 1971). However, different from acting, professional experiences impact individuals even after stepping out of the role and entering a new role. This is partly because we use heuristics (mental shortcuts) for thought processes, and experiences contribute to the heuristics because it has worked before (Tversky & Kahneman, 1974).

Previous professional experience also contributes to the ease of familiar information recall and the completeness of such information recall. More frequently encountered information increases the

accessibility and the influence of that information (Miler, 2009). Applying these concepts to the context of criminal courts, it is logical to postulate that judges with prosecutorial backgrounds may cognitively access pro-victim case facts more easily and have these facts more heavily impact their sentencing considerations, while judges with defense backgrounds may access pro-defendant aspects of the case in a similar fashion. When these mental shortcuts are not sufficiently adaptive to new information and situations, it contributes to cognitive bias (Bilalić, McLeod, & Gobet, 2010; Navarre et al., 2022; Tversky & Kahneman, 1974).

It follows that trial judges with differing professional backgrounds may possess different cognitive biases manifested by their new role where they are expected to be impartial (Berryessa et al., 2022). Indeed, in legal realism, social background theory hypothesizes that judges' attributes and backgrounds will affect their rulings (George & Weaver, 2017). Neitz (2013) extended the focus of professional background to the socioeconomic status of judges and their similar social positions to prosecutors. Using family court cases, he argued that such a wealth divide and lack of amelioration (e.g., training, more understanding of implicit bias) fosters bias against parents of lower socioeconomic status. Shepard (2021) used employment case data from U. S. District Courts from 2015 to 2019 and found that judges with corporate and prosecutorial backgrounds are less likely to decide in favor of the claimants, controlling for other relevant variables including case characteristics and political ideology.

More specifically, a few studies focus on the influence of professional background on sentencing decisions by trial judges (either federal or state).[1] Using a sample from Georgia, Myers (1988) examined the professional background of judges and found that former prosecutors are more punitive toward female and violent offenders. Worden (1995) examined the acceptance of plea recommendations among judges in Georgia and found that former prosecutors are mildly less likely to accept plea recommendations compared to those without a prosecutorial background. Sisk and his colleagues (1988) found that judges with criminal defense backgrounds consistently displayed resistance to the new Sentencing Guidelines: "The attitudes developed in a criminal defense practice appear to have persisted beyond ascension to the federal bench, at least in the context of the Sentencing Guidelines" (p. 1471).[2] Harris and Sen (2022) used federal sentencing data from 2010 to 2019 and found that defendants, in a case decided by a judge with a public defender background, are on average less likely to be incarcerated. Further, in some cases, the defendants are also more likely to receive shorter sentences, highlighting the impact of professional background on judicial decision making. Yet, a few earlier studies on judicial decision making found that background characteristics of the judge (e.g., age, years of experience, prior career history, region of the country) are not significant in explaining sentencing disparities in cases (Clancy et al., 1981 on federal sentencing; see also Frazier & Bock, 1982 using data from Florida).

In sum, our understanding of the influence of prior professional background on judicial decision-making is still limited. Judges who work alone (e.g., most state court trial judges) may work differently compared to those working in a panel (i.e., practicing comity or collegiality) (Robinson, 2011). Judges who work at the federal level may also have different considerations compared to state trial court judges due to the volume of criminal cases they encounter and the tenure they serve. More surprisingly, none of the existing studies on the topic of professional background and sentencing considerations utilize qualitative methods. Our study makes a unique contribution to the existing scholarship in this respect.

Data & Methods

Data for this study were drawn from in-depth qualitative interviews with 39 state court judges.[3] All judges in our study preside in a Northeastern U.S. state with a complex sentencing structure. The sentencing statutes employ both determinate and indeterminate sentences, depending on the type of

offense. Distinctions in criminal history and offense type (e.g., violent vs. non-violent) are associated with differences in sentence severity and mandatory minimums. At the time of data collection, mandatory minimum sentences were in place for many crimes and sentencing departures were largely not permitted.[4]

To provide additional information on the state we studied, a graduate student assisted the authors in collecting data from the public domain regarding professional background information of all current trial court judges in the jurisdiction. We first compiled a list of judges' names using the state's official court system website. The graduate student then collected any reliable information available (e.g., news reports, Ballotpedia, law firm biographies, etc.) to categorize the judges' previous legal experience. Results are shown in Table 1. In total, there are 264 judges presiding over trial level courts in our respondents' state. Among them, 23% are former prosecutors, 3% worked as public defenders, and about 3% had some experience as private criminal defense attorneys. Almost half (48%) of these judges have a mixed background in prosecution and defense, but only about 19% specialized in criminal defense. In total, about 23% of all judges have some criminal defense experience.[5] Overall, the studied state employs judges of varying professional backgrounds and seems to demonstrate some level of diversity.

Table 1. Professional Background Among Judges in the Studied State

Categories	Number	Percentage
Prosecution	**60**	**22.7%**
Private defense	55	20.8%
Civil defense	*19*	*7.2%*
Criminal defense	***3***	***1.1%***
Both criminal and civil defense	***4***	***1.5%***
Unclear criminal or civil defense	*29*	*11.0%*
Public defense	**7**	**2.7%**
Hybrid (with prosecution)	127	48.1%
Civil defense	*20*	*7.6%*
Criminal defense	***15***	***5.7%***
Both criminal and civil defense	***36***	***13.6%***
Unclear criminal or civil defense	*56*	*21.2%*
Other	*2*	0.8%
Unclear	13	4.9%
Total	**264**	**100.0%**

Note: The two judges in "Other" category have backgrounds in social service and clerking.

We limited our sample to a single jurisdiction to ensure that all judges were operating under the same penal laws and sentencing statutes. Our respondents all handle criminal felony cases, including all pre-trial matters, hearings, bench and jury trials, and sentencing proceedings. Over 60% of our respondents were elected to their positions and the remainder were appointed. Thirty-two judges in our sample are male and the remaining judges are female. Judicial tenure on the bench ranges from less than two years to over 33 years. Regarding their experiences practicing criminal law prior to taking the bench, 16 of our judges are former prosecutors, 10 are former defense attorneys, and 13 have both defense and prosecutorial experience.[6] Table 2 reflects years of prior legal experience, tenure on the bench, road to judgeship (i.e., elected or appointed), and county type (urban, suburban, or rural).[7]

Table 2. Professional Background Among Judges in Study Sample

Judge (#)		# of years on bench	# of years in prosecution	# of years in defense	Elected or appointed	County Type
Prosecution background	1	16	4	-	Elected	Suburban
	4	18 months	16	-	Elected	Urban
	5	9	20	-	Elected	Urban
	7	18	11	-	Elected	Urban
	9	27	3	-	Elected	Urban
	10	9	7	-	Elected	Suburban
	13	27	12	-	Appointed	Urban
	14	14	8	-	Appointed	Urban
	17	24	13	-	Appointed	Urban
	24	28	16	-	Appointed	Urban
	25	9	11	-	Appointed	Urban
	27	6	33	-	Elected	Urban
	31	18	7	-	Elected	Rural
	35	20	18	-	Elected	Rural
	39	30	12	-	Elected	Rural
	41	23	7	-	Elected	Urban
Defense background	2	28	-	20	Appointed	Urban
	11	11	-	6	Appointed	Urban
	15	3	-	20	Elected	Suburban
	20	19	-	10	Appointed	Rural
	21	25	-	8	Appointed	Suburban
	23	33	-	17	Elected	Urban
	26	28	-	12	Appointed	Urban
	29	18	-	16	Elected	Urban
	33	20	-	19	Appointed	Rural
	37	25	-	2	Elected	Rural
Hybrid background	3	25	3	8	Appointed	Urban
	12	14	5	20	Elected	Suburban
	16	9	3	10	Elected	Suburban
	18	19	6	8	Appointed	Suburban
	19	16	14	2	Elected	Urban
	22	26	4	7	Elected	Suburban
	28	17	14	5	Elected	Urban
	30	12	8	6	Elected	Rural
	32	21	10	2	Appointed	Rural
	34	7	5	20	Elected	Rural
	36	19	12	7	Elected	Rural
	38	17	3	4	Elected	Urban
	40	2	6	10	Elected	Rural

Data for this study was collected in 2014 and 2015. Judges were included from 18 counties throughout the state, including urban, suburban, and rural locations. A combination of personal contacts, referrals from other judges, and cold calling methods were used to recruit our respondents (Nir, 2018). Names of judges were gathered through online research and direct outreach to judges' chambers. All of our interviews were conducted in-person and the average interview had a duration of 90 minutes. We used an in-depth semi-structured interview design to "ensure that the basic lines of inquiry [were] pursued with each person" (Patton, 2002, p. 343). We explored factors that judges consider in sentencing determinations, judicial rationales for their consideration, as well as the order of their importance for each judge. We further explored judges' perceptions of the influence of their prior legal experiences on their sentencing decisions. To explore this issue, judges were asked the following questions: "To your knowledge, do your prior legal experiences influence your sentencing decisions?" Of the 39 judges in our sample, 37 judges responded yes to this question. Following an affirmative response, the following prompt was given: "How do your prior legal experiences influence your sentencing decisions?"

Interview data were coded by hand by two researchers. An inductive grounded theory approach was utilized to develop themes that "place the data into a more general or abstract framework" (Maxwell, 2005, p. 97). We used an iterative process to develop our theoretical categories. We compared each new interview with prior interviews and continuously refined our themes to accurately capture the complete body of collected data. Regarding factors considered at sentencing, themes emerged revealing differences in priorities among judges, relating partially to their former legal experiences and backgrounds. In the results section, we highlight these refined themes.

Findings

In this section, we report on our respondents' perceptions of how their prior legal experiences in criminal law influence their decision making. We further review the factors that judges consider at sentencing, their shared thought processes on the issue, as well as the order of priority they place on different sentencing criteria. We provide the legal background of the judges for all quotes in the citation. "P" indicates prosecution judges, "D" indicates defense judges, and "H" indicates hybrid judges. We further include additional background information on each judge, via footnote, the first time they are quoted in the article.

Judicial Perceptions of the Influence of Prior Legal Experience

Prior scholarship has established that judges are influenced by a myriad of experiences that impact their considerations and decision-making at sentencing, including their professional backgrounds, personalities, and life experiences (Frankel, 1972; Sisk et al., 1988; Worden, 1995). Further, prior scholarship has established that prosecutors and defense attorneys are socialized in the norms of their work environments (Lefcourt, 1996; Liu & Nir, 2022; McIntyre, 1975; Trivedi & Van Cleve, 2020), and that their professional experiences impact them even after they leave the position (Tversky & Kahneman, 1974).

Former Prosecutor Responses. A handful of judges openly acknowledged that they conduct themselves in a similar fashion to the way they conducted themselves as prosecutors:

> In sentencing, I do what I did as a prosecutor. What I did as a prosecutor that I tend to bring to the table here also is that I look at the last sentence served by the individual before me. In my

> view, as long as a large time has not elapsed between criminal acts, I would require that individual to do at least six months more than the last minimum they served. You got to go up if you are not getting it (Judge 4, P).[8]

Another judge spoke about how he looked at issues from a prosecutorial perspective during the first few years that he was transitioning to his judgeship:

> I think early on when I was a judge – the first three or four years, I would rely more on my history as a prosecutor to access when I had discretion as to what I thought was appropriate. It takes a little transition from the role of prosecutor to judge. If the prosecutor does his or her job right, they are supposed to be quasi-judicial anyway. It should be less of a transition. When I looked at a case, I would look at it more, "If I were a DA, would I offer this or would I offer that" (Judge 31, P).[9]

A third former prosecutor acknowledged the influence of his former experiences, including his prosecutorial ones:

> I look to everything at sentencing. I look to every job I ever had growing up and the interrelationships with people and the things that are said in the reports. The effect that crime has had on the victims and families and the damage that has been done. That is what I use to decide what the punishment should be. Should it be on the far end, or should it be on the low end? Is there any hope for this person? Is he so lost that he just needs to be put away for as long as possible or is there hope for this person? (Judge 39, P).[10]

Former Defense Responses. Similar to former prosecutors, several of our former defense attorneys spoke about the influence of their prior legal defense experiences on their sentencing considerations:

> As a new judge, I received no training. I drew on my history as a defense attorney. And I was in the courtroom with some of the meanest and harshest judges in history. My experiences as a kid – needless to say, I was not the model kid. And my experiences as a defense attorney made me feel balanced and comfortable (Judge 33, D).[11]

A few defense attorneys commented on how they were labeled "defense" judges and were criticized for delivering sentences that were too light:

> I had done hundreds of trials as a defense attorney when I took the bench. I used my gut. That is what I did. When I started there were really a lot of people with prosecutorial backgrounds on the bench. I was probably considered a much lighter kind of sentencer. There was a lot of criticism for judges like myself, but that's a good thing to have that kind of discretion where we each have different views (Judge 3, H).[12]

Procedural justice concerns guided the decisions of most of our defense attorney respondents. Specifically, the majority of former defense attorneys commented on the need to ensure that defendants and their families understand the process and are treated fairly and respectfully.

A prominent theme among prior defense attorneys is the need to focus on the human predicament and the importance of treating people like human beings:

> I want to think that when I leave here, I got a little humanity out there on the bench . . . As a judge, you should not lose sight of the fact that everyone is living in the human predicament. Everybody brings their own unique issues with them. Don't get me wrong – I am definitely not well liked in jail. I am sure of that. But I think you have to stop and make sure that you have looked at everything. Never think that you are better than someone else. I truly mean that because once you go there – game over (Judge 37, D).[13]

A second judge focused on the importance of clearly relaying information to avoid perceptions and incidences of procedural injustices:

> When you are a defense attorney, you realize how generally uneducated the public is, your client is, and your client's family is about the system and why things are done the way they are done. They do not even understand the words we use – the lingo. What I find is that as a result of the public not knowing what is going on it creates the perception that something is improper. They don't trust the system. There are judges out there who just rattle things off and throw offers at people and they look back like deers in the headlights. They do not know what they are agreeing to. Later they feel like they got the shaft. As a defense attorney I told my clients to bring their whole families in. I sat down and explained to them how it works, the prosecutor's position. They understand, and as lousy as it may be, they do not feel like the system screwed them over. I use these experiences as a judge (Judge 20, D).[14]

A couple of judges discussed how their legal experiences as defense attorneys helped them understand the frailty of the human condition and the need for compassion at sentencing:

> I represented people who I recognized to be people. You develop relationships with your clients. Even clients who have done bad things. You get a sense of who they are as people and also to some degree about the frailty of the human condition. I know examples of my clients who have done terrible things but then their lives changed. Over a period of time. I know that change can happen. I consider that in sentencing too (Judge 29, D).[15]

Hybrid Judges' Responses. A prominent theme among judges with both prosecutorial and defense experience is their perspective that they are able to see things from different viewpoints. A few judges commented on how these different perspectives help them be better judges:

> My experience on both sides helps me be a better judge. I have never taken a poll but I know that many judges come from a completely prosecutorial background. It is kind of a natural thing for people. . .I did both defense and prosecution work so I guess you would say that I am well rounded. No one would ever accuse me of being super liberal and thinking that everybody deserves 400 chances which is always the fear when you get a former defense attorney as judge. But I am also not the guy who thinks that everybody ought to get the max because all I had was the prosecutorial background. I think that the two help balance each other (Judge 40, H).[16]

Another judge discussed how the confluence of his prosecutorial and defense experiences made him realize that life is not black and white and helped him see importance nuances:

> When I was a young prosecutor, I believed that life was black and white. If you convicted a guy, he should go away for the rest of his natural life. I used to argue with my father about that. It wasn't until I became a judge and had to voice my sentences and not advocate a position that I realized how very difficult it is to be fair. And I think that the biggest influence I had or the things that stick in my mind the most were all of those arguments with my father. In fact, one of the first calls I made after my first week on the bench was to my father apologizing for all of the times that I called him an idiot and all of the times I walked out of the courtroom thinking "that stupid judge." Because now I am that stupid judge and I realize that life is incredibly grey. It is not all black and white (Judge 28, H).[17]

Finally, three of our hybrid judges commented that they were more influenced by their years as a prosecutor than as a defense attorney:

> As a defense attorney I had serious cases and I had to talk to my clients. A sentence was more than a number to me. I had to explain those numbers to people who would be serving them and that made me appreciate those numbers more. Even on a misdemeanor level, convictions can screw up lives. I was more influenced by my experiences as a defense attorney than [as] a prosecutor (Judge 16, H).[18]

Sentencing Factors

We asked judges to state the factors they consider at sentencing in the order of priority they generally employ. In Figure 1, we present judges' top four considerations at sentencing, organized by legal background (i.e., prosecution, defense, and hybrid).[19] As is evident in Figure 1, sentencing priorities vary considerably depending on the legal criminal background of the judge, with former defense attorneys prioritizing defendant circumstances and former prosecutors prioritizing victim impact and violence, among other factors. In the sections that follow, we unpack these priorities and highlight trends based on legal background.

Defendant's Social Upbringing. In determining the appropriate sentence to impose on convicted defendants, some judges consider the situation or social background in which the defendant was raised. Of the judges in our sample, 13 mentioned the defendant's social background as one of their top four sentencing considerations. Of the 13 judges, only one has an exclusively prosecutorial background, seven have defense backgrounds (54%), and five have both prosecutorial and defense backgrounds (38%). The majority of these judges discussed social background as a mitigating factor:

> I look at the chances a person had growing up. A lot of people that you see that are committing felonies, their mother was a drug addict, their father was in prison. They bounced around to different relatives and foster homes and things like that while they were growing up. Those people never really had much of a chance. Some of them had mental health disorders. They have just a tendency to have addictive personalities. Addicted to drugs and alcohol and things. I take into consideration what they started with. Where they started from (Judge 30, H).[20]

Another judge echoed a similar sentiment: "I consider everything. A kid brought up in a home with no role model and only gang bangers. You could have 10 people living in a two- or three-bedroom apartment. I consider development in school. Did they have opportunities that they threw away?" (Judge 33, D).

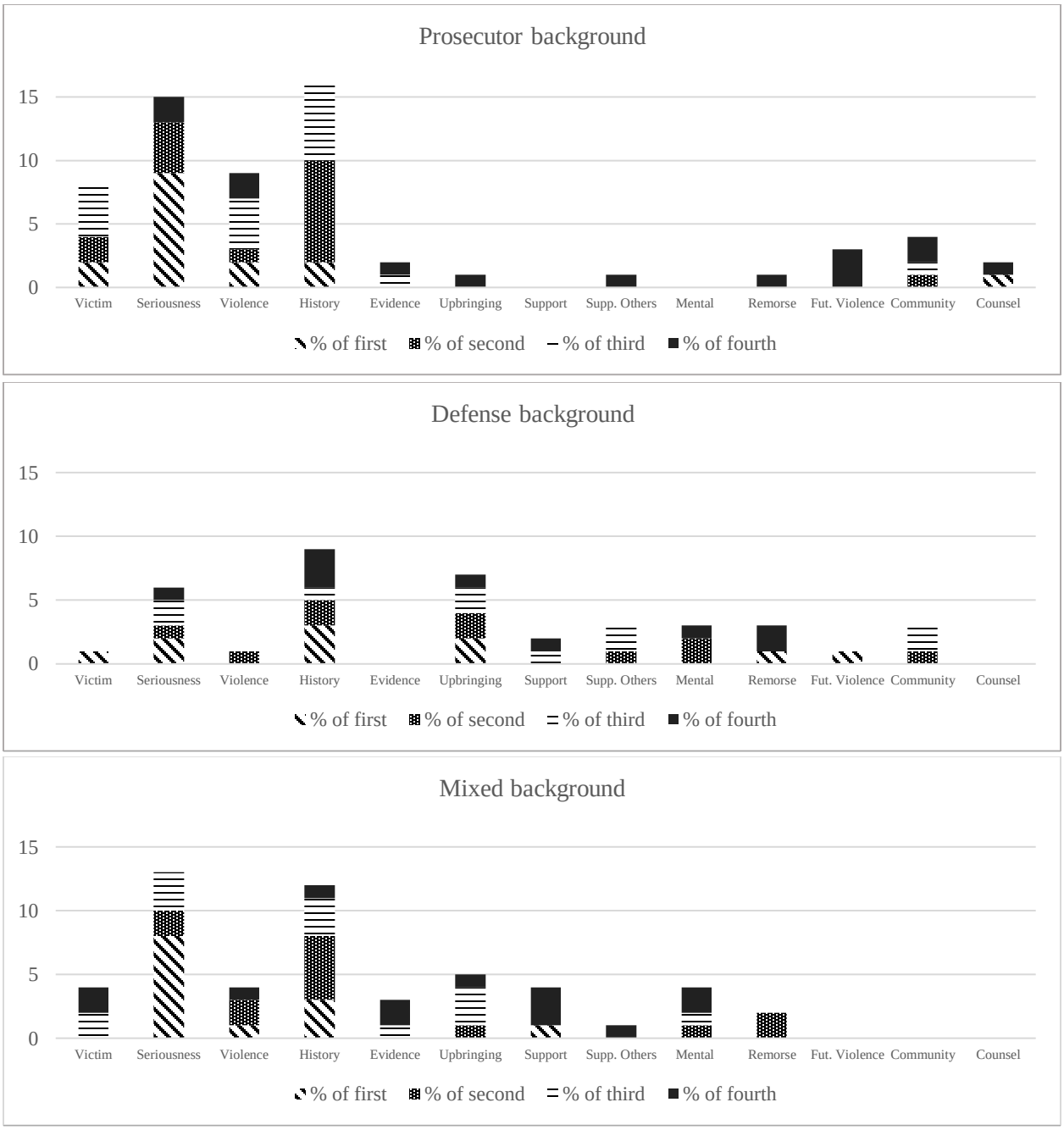

Figure 1. The First Four Factors in Sentencing Considerations by Professional Background

Note: The factors are as follows: **victim** impact and input, **seriousness** of offense, presence of **violence** in current offense, criminal **history**, strength of **evidence,** defendant's social **upbringing, support** system of defendant, defendant **support** of **others**, **mental** illness/disabilities/addiction, defendant **remorse, future violence, community** protection, and **counsel**'s arguments and recommendations.

Two judges discussed being bothered when defendants from "good" backgrounds commit crimes; these judges consider childhood advantages as an aggravating factor at sentencing:

> If a person came from a background where they should have turned out differently – should have turned out well – a good family support system growing up and no mental health issues or serious addiction issues – and have just decided not to be interested in doing anything for anyone else, but just to take advantage of other people – that bothers me (Judge 30, H).

Support System of the Defendant. In evaluating an appropriate sentence to impose on a convicted defendant, some judges consider the social support system that a defendant possesses: "I think that one of the strongest factors is the support a defendant has. The family, friends, a job" (Judge 3, H). For some judges, a defendant's support system is an important indicator of whether or not the defendant will be able to turn things around and live a law-abiding life:

> If I know that they have family support and there is an argument as to whether this should be a probation sentence as opposed to a jail sentence, I might be more inclined to consider probation if I know that there is a strong family support network out there. They are doing what they need to do to keep the defendant on the straight and narrow. If there's no one out there, it is hard to make the argument that that is a possibility (Judge 10, P).[21]

Of the judges in our sample, six judges mentioned the defendant's support network as one of their top four sentencing considerations. None of those judges have an exclusively prosecutorial background. Two of the judges have a defense only background and four have both defense and prosecutorial experience.

Defendant's Support of Others. Five judges noted that they consider whether the defendant supports others as one of their top four sentencing considerations. Three of these judges have an exclusively defense background, two have both defense and prosecutorial experience, and none of the judges have an exclusively prosecutorial background:

> I consider letters from family members. You can be taking a breadwinner away. You can be taking a caregiver away. I listen to the defendant at sentencing or in a letter. I try to read into whether they wrote it and whether they mean it. I sometimes change my mind at sentencing (Judge 33, D).

Two judges noted that they are unsure as to whether they consider a defendant's support for others at sentencing: "On some level, I am sure that I consider if the defendant is needed at home. Does he have small children? I am sure that I do it subconsciously, but not consciously. I can't rule out that it has an effect on me" (Judge 11, D).[22]

> For four prosecution judges, the issue of defendants supporting others is not persuasive:
>
> The defendant may be the sole caregiver but meanwhile they find plenty of time to go out there and steal during the day or use drugs or drive drunk during the day – whatever the case may be without being home to take care of the children so it doesn't sway me (Judge 10, P).

And another judge noted:

> I am not a social worker. I am not your big brother. There is behavior that carries consequences.

> No, you don't get less of a sentence because you want to spend more time with your family. If you want to see your family, stop committing crimes (Judge 7, P).[23]

Mental Illness/Developmental Disabilities/Addiction. While a majority of judges discussed mental illness, disabilities, and addiction as important sentencing considerations, only seven of the judges ranked it as one of their top four sentencing considerations. Of those seven judges, none came from an exclusively prosecutorial background, three were prior defense attorneys, and four had both defense and prosecutorial experience. Some judges consider this factor to be worthy of serious consideration:

> Is there some kind of developmental disability? Is there mental illness? A lot of developmentally disabled people are engaged in criminal activity. Those are the factors that I take into account to determine if the person belongs in jail and, if so, does that person belong in jail for the maximum or is there something else we can do. Judges need to take defendants' developmental disabilities into account more (Judge 3, H).

Another judge explained her process of trying to help defendants with mental health challenges:

> I have never been afraid to get into the real nuances of the case. I have never been afraid to really look at somebody and say "Oh my gosh, I have got a 17-year-old with significant mental health issues. I know what he did was bad but my goodness. He needs help right now." I have been willing to put myself on the line. I drag them in once a week. Once a month. Once every other week to see if I can get them back on track. I have never been afraid to do that (Judge 38, H).[24]

Regarding drug addiction, judicial perceptions vary. All of the defense and hybrid judges that discussed drug addiction issues expressed sympathy and/or understanding: "Drug and substance abuse are major mitigating factors for me" (Judge 15, D).[25] In contrast, four of the judges with a prosecutorial background displayed frustration: "There is such a lack of responsibility out there. It is all ok because even though I burglarized this house or robbed someone, it is all because I take drugs" (Judge 7, P).

Victim Impact & Input. The harm sustained by victims and/or their families is an important consideration in determining the appropriate sentence to impose on convicted defendants (Nadler & Rose, 2003). Indeed, penal laws categorize offense severity based not only on defendants' actions but also by the harm caused by those actions. Since harm is a relevant factor in sentencing determinations, any physical or psychological injury caused to the victim is probative information at sentencing. In fact, in all federal sentencing proceedings and the vast majority of state sentencing proceedings, victims are permitted to give Victim Impact Statements. This practice enables victims or their family members to be "reasonably heard" at sentencing (Cassell, 2009). Advocates of Victim Impact Statements argue that these statements are an integral part of the sentencing process: "It is axiomatic that just punishment cannot be meted out unless the scope and nature of the deed to be punished is before the decision maker" (ABA Guidelines for Fair Treatment of Crime Victims and Witnesses, 1983, p. 21).

As Figure 1 reveals, 17 judges in our sample identified victim impact among their first four important sentencing considerations; as discussed below, this factor was prioritized most by former prosecutors, followed by hybrid judges, and was not prioritized by former defense attorneys. As described by one judge:

> I really do take the effect on the victim to heart very seriously in determining how best to proceed. You find your victim as they are so if you had the misfortune of picking out a victim who has a disproportionate impact, then that is the gamble that you took. If that means that I am going to give you a high sentence because it has a greater impact on their lives, I'm willing to do that (Judge 10, P).

Some judges seek input from the victim to help them determine the appropriate sentence to impose: "What I find too often is that we don't know enough about the victim's feelings. Especially during plea bargaining. When I get to a certain point where I have a question about how to sentence a defendant, I generally ask, 'what is the victim's position.'" (Judge 1, P).[26] Judges vary in how much weight they place on victim impact, and balance it against other case factors:

> These things enter in. If the family shows up at sentencing and says how much the crime hurt them, you are human and it does make it a little different. You are supposed to take these things into account. You are not supposed to ignore them. Obviously, the sentence can be of comfort to the murder victim's family. But I am not going to sentence someone to the maximum just because the victim's family is there (Judge 24, P).[27]

A couple of judges expressed the importance of placing the victim's wishes in the proper context: "I don't believe a victim should control a case. I think that it is important to hear them, and to listen to the damage that has been done to them, but they should not dictate [a] sentence" (Judge 2, D).[28] One judge in our sample delved into the motivations of the victim in evaluating the significance of their position on the sentencing process, and expressed skepticism regarding the victim's motives:

> Not that she didn't deserve a civil redress. A money judgment for what happened to her. She did. I look at this. Do they really want justice as imperfect as that is or do they want a payday? What is the motivation here? She wanted him to be in jail but only for a misdemeanor so he could continue to work. Which was, to me, bizarre (Judge 21, D).[29]

A couple of judges consider leniency in sentencing when the victim's family requests it, and sentence based on a holistic view of the situation. One judge described a particularly emotional and tragic case that required holistic consideration:

> I had a fatal DWI case where I had the victim's mother whose son was driving and killed the daughter. She had a unique perspective. She said, I already lost one child. I don't want to lose my son. Every Christmas, every birthday, every holiday, he's got to see the empty chair at the table and knows he killed his sister. What more can you do to him – every day he's got to look me in the eye and my daughter is not here (Judge 31, P).

Notably, of the 17 judges who mentioned victim impact as one of their top four sentencing priorities, 12 of them came from a prosecutorial background, four had both prosecutorial and defense experience, and only one judge had a defense only background. Further, of the few defense attorneys who discussed victim impact (at any point in the interview), sentiments often revolved around the importance of not overprioritizing victims' requests.

Seriousness of the Offense & Violence. An important factor in sentencing determinations is the seriousness of the offense for which the defendant is convicted. In general, certain crime types are treated as more serious than others. Illegal acts that are more serious in nature generally warrant greater punishment than minor violations of the law. While individual state penal laws provide sentencing ranges based, in part, on the nature and characteristics of the particular offense committed, these guidelines vary from jurisdiction to jurisdiction. Thus, the determination of the amount of punishment that should be meted out for a particular criminal offense is not an exact science. Certain acts, on their face, may appear to justify more serious punishment than others, yet the distinctions between other illegal actions may be much less obvious (see Robinson, 2008).

Of the 39 judges in our sample, 32 indicated that the seriousness of the offense is one of their top four sentencing considerations. Of our 13 hybrid judges, all ranked seriousness of the offense in their top four considerations and eight of the 13 ranked it as their number one consideration. Of the 16 former prosecutors in our sample, all ranked seriousness of the offense as their first or second consideration except for three judges. Notably, those three judges ranked the presence of violence as a top sentencing consideration, and discussed crimes that were violent in nature. Of the 10 former defense attorneys, six ranked seriousness of the offense in their top four considerations. Only two former defense attorneys ranked seriousness of the offense as their first consideration.

Regarding the presence of violence, 14 of the 39 judges identified violence as one of their top four sentencing considerations. Of these judges, nine have a prosecution background, one has a defense background, and four have both prosecutorial and defense experience. One judge expressed the importance of considering violence at sentencing:

> Crimes of violence, where there are victims whose lives are permanently affected, is the single most important thing. There are people you deal with who are just dangerous, who don't belong out in the streets – that is about as aggravating as it gets (Judge 7, P).

Another judge differentiated violent crimes from non-violent acts:

> Guns, violence – if there is anyone who should be segregated from society, these are the people. The drug dealers, drug users, the people who are shoplifting that gets aggravated – those people we should look at differently (Judge 3, H).

In evaluating the seriousness of the offense, judges stressed the importance of considering the full picture and the potential for future violence.

> You get those cases where one kid punches the other kid in the nose and takes his stuff. Even though that's a robbery, I might give probation. I have other cases where there's a wolf pack and they are going out and robbing people and shooting them – then you have to say that the society's interest comes first and then the guy is going to get heavy time (Judge 9, P).[30]

At times, judges discussed their own experiences in analyzing how they consider seriousness of the offense in their sentencing decisions. For example, one judge referenced their own victimization in their analysis:

> Especially with regard to robberies or burglaries, I consider the item that was stolen. Is it something that can be replaced or is it irreplaceable? I don't like when I hear about people who

> broke into someone's car or house and stole heirloom jewelry that cannot be replaced. That bothers me. I had heirlooms stolen and it was devastating (Judge 10, P).

A couple of judges displayed compassion toward defendants who committed certain types of crimes:

> DWI laws are very tough. I realize that it is an epidemic but when I grew up everyone drove drunk, including me. We have good people arrested for DWI with a kid in the car and this DA often requires jail time. I use the limited discretion that I have (Judge 33, H).

Notably, a majority of judges discussed domestic violence cases in describing "seriousness of the offense" considerations. Concerns regarding future violence is a key consideration for judges in domestic violence cases. "Every judge's fear is a domestic violence case where if you let the defendant out, they will do something terrible" (Judge 7, P). Another judge expressed the difficulty in imposing a sentence in domestic violence cases:

> In cases you are always thinking about whether you made the right call. I am always concerned with whether or not I gave a strong enough sentence. A lot of these cases are drug and alcohol related. The defendant needs help but you have to protect the victim as well. . . Strength of the evidence is an especially big deal in sentencing domestic violence cases. It is terrible to be convicted of a crime you did not commit so cases with compelling evidence get longer sentences (Judge 15, D).

Of all of the crime types, conversations about domestic violence cases drew the most consensus from all judges – regardless of background. A majority of judges discussed their fears surrounding sentencing in domestic violence cases due to the uncertainty and potential volatility of the circumstances. In this area, professional legal background did not appear to be influential.

Criminal History. Of the factors that our judges mentioned, the defendant's criminal history has the highest representation in the top four sentencing considerations for all judges, regardless of background. In fact, only two of our 39 judges (one hybrid judge and one defense judge) did not mention criminal history as one of their top four sentencing considerations. As one judge explained his process:

> I look at past convictions. How old is the criminal history? What kind of sentences have they had in the past? Have they been in prison? Have they had probation? Have they had county jail? How many prior cases? The nature of those cases. Have they had opportunity for drug treatment? If they are on probation or parole, did they violate? (Judge 31, P).

Another judge discussed the importance of examining patterns of criminal behavior that warrant a period of incarceration:

> I will look at the defendant's background. I will look at their criminal history. If you show a pattern of blatant disregard for other people and they are committing personally intrusive types of crimes that have a strong effect on other people repeatedly that is a troubling thing where you tend to think: "This person really needs to be put away for a while" (Judge 30, H).

Strength of the Evidence. Prior scholarship has demonstrated that sentencing decisions are influenced by judicial confidence in defendants' guilt, measured by judicial perceptions of evidentiary strength (Nir & Griffith, 2018, 2019). Of the judges in our sample, five judges included the strength of the evidence in their top four sentencing considerations. Of those judges, two were former prosecutors, and three had both prosecutorial and defense experience. Notably, none of the judges with an exclusively defense background included this factor in their top four considerations. A few of these judges noted that evidentiary strength increases their confidence in guilt and eases decision making: "The stronger the evidence, the more calming it is for me to bang them" (Judge 17, P).[31]

Defendant Remorse. At some point in their interviews, a majority of judges discussed the importance of a display of remorse on the part of the defendant:

> There are guys who flat out deny everything and say, "this is all BS and it should be dismissed and the victim is really a bad person and it was not me." Versus the guy who says, "Yeah, I did that. I feel horrible and I know what I did was wrong, and I regret it. And feel bad." That is a major factor for me (Judge 40, H).

Of the 39 judges interviewed, six judges ranked defendant remorse in their top four sentencing considerations. Of those judges, one has a prosecutorial background, three have defense backgrounds, and two have both defense and prosecutorial experience. For a few judges, a defendant's failure to appropriately express his or her remorse impacts their sentencing decisions significantly:

> I remember I was listening to someone the other day and I had a number written down – he had just killed someone but was not found guilty of the murder – only the weapon. He was looking at a maximum of 15 years. The victim's family was there. The father said that every day he thinks of his son who is dead and his mother calls his father every day crying for her son. The defendant gets a chance to speak. He just says, "I thought about it and have decided to move on with my life and to put this behind me." Just a flip statement like that and I immediately changed my number from 12 to 15. I see where this is going. This is not a big deal for him (Judge 5, P).[32]

Ten judges expressed their confidence in being able to tell the difference between sincere remorse and insincere expressions:

> I have lived on this planet x number of years. I look at someone and I could, based on my own human instinct and 25 years of doing this, gain a sense of somebody's attitude towards any remorse for their behavior. Their contempt for the judicial process and whether you could project such things (Judge 7, P).

Another judge echoed a similar sentiment: "Sincere remorse is mitigating. And I can tell the difference" (Judge 12, H).[33] Notably, all judges who expressed concerns about the sincerity of the defendant's expression of remorse were from a prosecutorial background or had both prosecutorial and defense experience.

Future Violence/Community Protection. Of our judges, a total of 10 (seven prosecutors and three defense attorneys) included either community protection or the potential of future dangerousness in their top four sentencing considerations. One of the 10 (a judge with a defense-only background) included both.

Judicial comments regarding these factors focused on judges' fears of potential future violent criminal activity:

> I was all set to have him committed but the DA was very adamant that they thought that he would be able to talk himself through the mental health professionals and get himself discharged. That's one where I don't know if I can ever get enough information, but it's also scary that he is potentially dangerous (Judge 1, P).

Another judge noted:

> You look to future dangerousness. You are looking to future dangerousness and you hear the old line, "you send him to jail and the only thing he is going to learn is how to become a better criminal." Then the answer is, "he is already a criminal" (Judge 24, P).

Discussion & Conclusion

Our analyses reveal stark differences in judicial decision-making processes and priorities among former prosecutors and defense attorneys. Naturally, judges are influenced by their life experiences, and their prior legal backgrounds are critical influences that impact decision-making at various stages of case processing (Frankel, 1972). Indeed, prior scholarship has demonstrated that prosecutors and defense attorneys are socialized to different norms and priorities, and these experiences remain influential even after they leave their positions (Lefcourt, 1996; Liu & Nir, 2022; McIntyre, 1975; Trivedi & Van Cleve, 2020; Tversky & Kahneman, 1974). While prosecutors are focused on upholding the law and protecting the community (Wright & Levine, 2017) and work side-by-side with police officers (Liu & Nir, 2022; McIntyre, 1975; Trivedi & Van Cleve, 2020), defense attorneys are socialized to focus on their clients' needs, circumstances, interests, and rights. Our study demonstrates the influence of this socialization at play.

Our discussions with judges reveal that most judges consider a myriad of sentencing criteria, including seriousness of the offense, criminal history, violence, victim impact, defendants' social upbringing, social support received from family members, defendants' support of others, defendant remorse, mental illness, and future dangerousness, among others (see, for example, Clancy et al., 1981; Ulmer & Johnson, 2004; Ulmer, 2012). While certain factors are prioritized for almost all judges (e.g., criminal history and the dangerousness surrounding domestic violence cases), the level of priority judges ascribe to most factors and their processing of sentencing criteria appears to be correlated with prior legal background (see Berryessa et al., 2022).

Several examples highlight this influence. First, data reveal that judges with prosecutorial experience tend to prioritize victim impact and input at sentencing while defense judges do not. Indeed, only one of the 17 judges who prioritized victim impact and input came from a purely defense background and defense judges are far more concerned with limiting victim input at sentencing, and skeptical of victims' motives.[34] From a socialization perspective, this makes sense. Victims and prosecutors work closely together, and prosecutors are tasked with bringing justice to victims of crimes (see Goodrum, 2013). In contrast, defense attorneys do not share this connection to the victim and are tasked with focusing on the interests of their clients (Kruse, 2011), which are often incongruous with a focus on victim impact. For example, previous work on defense attorneys' decisions to avoid challenging the constitutionality of police conduct by refraining from filing valid suppression motions to protect their clients' interests highlights their focus on client-centered outcomes (Nir & Liu, 2022). Second, only judges

with some form of prosecutorial experience (prosecution or hybrid) prioritized evidentiary strength as a sentencing consideration. Notably, prosecutors carry the burden of proof in criminal cases and determine if there is sufficient evidence to bring charges. They are tuned into the strength of the evidentiary package and are trained to make decisions based on their perceptions of evidentiary strength. While defense attorneys interrogate the evidence and focus on finding a reasonable doubt, they bear no burden of proof and evaluating the evidentiary package is not their primary focus.

In contrast to former prosecutors, our conversations with prior defense attorneys reveal their focus on defendants' social upbringing, family support, and support of others. In fact, only one of 13 judges that prioritized defendants' social upbringing had purely prosecutorial experience, and no judges with purely prosecutorial experience prioritized defendants' social support system, or support of others (e.g., dependent children). Similarly, all judges who prioritized mental health, disabilities, or addiction had some defense attorney experience. While former prosecutors recognized these factors as relevant sentencing criteria, they did not prioritize them. These displayed priorities are in line with the priorities that defense attorneys are acculturated into throughout their defense careers, while these factors are not paramount in prosecutors' offices (Lefcourt, 1996; Norton et al., 2016; Nir & Liu, 2021).

Further, our analyses reveal that the processing of similar facts varies among former prosecutors and defense attorneys. For example, while defense judges generally discussed drug addiction as a mitigating factor at sentencing, some prosecution judges expressed their frustration with using drug addiction as an excuse for criminal behavior. Further, while defense and hybrid judges prioritized defendant remorse as a mitigating factor, some prosecutors spoke about their skepticism regarding defendants' sincerity. Finally, while defense attorneys generally found defendants' roles in the support of others to be mitigating (e.g., defendant cares for dependent children or is the breadwinner), several former prosecutors were not swayed ("I am not a social worker. If you want to see your family, stop committing crimes") (Judge 7, P). This is consistent with the findings of Harris and Sen (2022) regarding defense judges' more salient awareness of the impact of criminal sentences on defendant's lives compared to that of prosecution judges.

Beyond their discussion and prioritization of sentencing criteria, most judges directly expressed their awareness that their prior legal backgrounds play an important role in their sentencing decisions (Berryessa et al., 2022; Harris & Sen, 2022; see also Miller & Curry, 2023). While defense judges discussed how their background focused them on the need for compassion and understanding of defendants' circumstances, former prosecutors were focused on crafting sentences in line with defendants' criminal histories. A majority of judges with both prosecutorial and defense experience emphasized how the combination of all of their experiences assists them in seeing the nuances and shades of grey in cases, helping them to "be better judges" (Judge 40, H).

These findings are particularly relevant within the context of state court trial judges. On a state trial court level, judges generally work alone in their own courtroom silos. These environmental conditions limit judicial interaction, collaboration, and exchange of ideas and can result in increased sentencing disparities. Unlike appellate judges who often work on panels, a trial court's ultimate sentencing decision—while influenced by the parties of the case—is generally made alone. Within the criminal arena, these decisions are highly impactful, not only for convicted defendants but also for their families and communities (Clear, 2008; Ewald & Smith, 2008). From a policy perspective, more communication among judges on their sentencing considerations can inform them of their colleagues' work and practices so that learned experiences of individual judges may penetrate courtroom walls. As Berryessa et al. (2022) argued, judges who share similar backgrounds are likely more successful in correcting the other judges' biases. Having inter-courtroom communications helps unmask and raise awareness about some biases. Organizing advisory groups and best practices training sessions can be

highly impactful (Nir & Liu, 2022). Further, increasing diversity on the state trial court bench can help if it is coupled with systematized and routine inter-courtroom communications.

A couple of limitations of our study warrant attention. First, our analyses are based on judges' perceptions of the factors that they employ at sentencing and general sentencing priorities. Our data cannot discern whether or how these perceptions influence actual sentences that judges impose on convicted defendants. In addition, future studies should explore potential differences among judges with predominantly private defense experience compared to those with predominantly public defense experience on sentencing considerations. Much courtroom workgroup literature has underlined the differing approaches between public and private defense attorneys, and their professional dynamics with other court actors (see Eisenstein, Fleming, & Nardulli, 1987). Finally, as this study is part of a larger sentencing study, we limited our sample to a single jurisdiction to ensure that judges were operating under similar penal law and sentencing statutes. It is not clear how the influence of legal background on the perceptions and decision-making processes of judges in this state are transferable to other states due to local judicial culture, the confines of local laws, the needs of constituents, and other local contexts. Future studies should expand this research to other jurisdictions.

Notes

[1] Some studies have examined professional background and judicial decision making in criminal cases where judges operate on a panel. Using a dataset of state and federal supreme court judges, Nagel (1962) found that former prosecutors are less likely to sympathize with defendants; he postulated that "the correlation between a judge's position on background characteristics and his relative degree of sympathy for lower economic and social groups may account for the difference found concerning party, pressure groups, religion, and liberal-conservative attitudes" (p. 338; see also Tate, 1981). On the other hand, Robinson (2011), using data from the U.S. Courts of Appeals and the U.S. Supreme Court, found that judges' prosecutorial backgrounds are a poor predictor of case outcomes. However, it is difficult to extrapolate Robinson's findings to judges who work alone.

[2] However, despite the strength of this finding, the authors acknowledged that 10 of the 39 judges with criminal defense backgrounds upheld its constitutionality as they "felt bound to rule contrary to their presumptive personal preferences" (Sisk et al., 1988, p. 1473).

[3] This study is part of a larger study in which we interviewed 41 state court judges. We included 39 of the 41 judges in the current study. All 39 judges in our sample have a prosecutorial background, defense background, or had both prosecutorial and defense experience prior to becoming a judge. Two judges, with law clerk experience, were excluded from this sample.

[4] Currently, this jurisdiction still employs mandatory minimums for many offense types under certain circumstances. While judicial departures are still restricted for many offenses, judges have been granted more leeway for certain offenses (e.g., drug cases) in recent years.

[5] Please note that we were not able to obtain reliable data for 5% of the pool.

[6] In this article, we refer to judges with prosecution experience as *prosecution judges*, those with defense experience as *defense judges*, and those with both prosecution and defense experience as *hybrid judges*.

[7] While we provide data about county type and road to judgeship, analyses of these aspects on sentencing considerations are beyond the scope of this paper.

[8] Judge 4 has 16 years of experience as a former prosecutor.

[9] Judge 31 has 7 years of experience as a former prosecutor.

[10] In the criminal arena, Judge 39 comes from a purely prosecutorial background and has 10 years of prosecutorial experience. However, Judge 39 served in a rural county as a part time prosecutor while working as a civil attorney at the same time.

[11] Judge 33 has 19 years of former defense experience.

[12] While Judge 3 has both prosecutorial and defense experience, she served as a prosecutor for three years, followed by eight years as a defense attorney. She repeatedly discussed how she identifies with her prior defense history. While we placed her quote in the defense section, she is a hybrid judge.

[13] Judge 37 has 2 years of private defense experience and 8 years of civil experience.

[14] Judge 20 has 10 years of private practice experience with both criminal and civil components.

[15] Judge 29 served as a private defense attorney for 16 years.
[16] Judge 40 was a county prosecutor in a rural county and prosecuted juveniles in family court for 6 years. He was also a private defense attorney for 10 years.
[17] Judge 28 was a prosecutor for 14 years and handled major organized crime. He also served as a defense attorney for 5 years.
[18] Judge 16 was a prosecutor for 3 years. He then opened a private practice that involved a mix of criminal and civil law.
[19] We tracked judges' top four priorities because they often listed four factors on their own, without further prompting.
[20] Judge 30 served as a prosecutor for 8 years and as a defense attorney for 6 years. She was a part time prosecutor in a rural county while maintaining a civil practice at the same time.
[21] Judge 10 served as a prosecutor for 7 years.
[22] Judge 11 served as a defense attorney for legal aid for 6 years.
[23] Judge 7 has 11 years of prosecutorial experience.
[24] Judge 38 has 3 years of prosecutorial experience and 4 years of defense experience.
[25] Judge 15 has 20 years of defense attorney experience. Seven of those years were in public service and 13 years were in private practice.
[26] Judge 1 has 4 years of prosecutorial experience.
[27] Judge 24 has 16 years of prosecutorial experience.
[28] Judge 2 has 20 years of criminal defense experience. Six of those years were in public service and 14 of those years were as a private defense attorney.
[29] Judge 21 has 8 years of experience as a private defense attorney.
[30] Judge 9 has 3 years of prosecutorial experience.
[31] Judge 17 has 13 years of prosecutorial experience.
[32] Judge 5 has 20 years of prosecutorial experience.
[33] Judge 12 has 5 years of prosecutorial experience and 20 years of private defense experience.
[34] Four hybrid judges, with both prosecutorial and defense experience, mentioned victim impact as their third or fourth priority.

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About the authors

Esther Nir is an Associate Professor of Criminal Justice at New Jersey City University. She received her Juris Doctor from Fordham Law School and her PhD in Criminal Justice from Rutgers University. Her research interests include sentencing disparities, policing, criminal procedure and community engaged learning strategies. Her research can be found in The British Journal of Criminology, Journal of Criminal Law and Criminology, The International Journal of Social Research Methodology, Criminal Justice Policy Review, Journal of Social and Legal Studies, and Journal of Criminal Justice Education, among others.

Siyu Liu is an Associate Professor of Criminal Justice in the School of Public Affairs at Penn State Harrisburg. Her research is currently focusing on police legitimacy, court dynamics, juvenile delinquency and the Chinese death penalty. Her work has appeared in Journal of Quantitative Criminology, Journal of Criminal Law and Criminology, Criminal Justice and Behavior, Psychology and Crime and Law among others. She received her doctorate in 2014 from the School of Criminal Justice, State University of New York at Albany.

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Do Judges Understand Technology? How Attorneys and Advocates View Judicial Responsibility in Cyberstalking and Cyberharassment Cases

Kateryna Kaplun[1]

Abstract

As new technologies emerge and are increasingly used to commit interpersonal cybercrimes like cyberstalking and cyberharassment, the legal system lags in assisting victims in obtaining justice in these types of experiences. This qualitative research study explores how attorney and advocate interviewees from Illinois, New Jersey, and New York view judges' responsibility to the law in cyberstalking and cyberharassment cases. This study finds three themes: judges' lack of understanding of technology and its harms, discretion, and law on the books versus law in action as important factors and frameworks that contribute to why judges do not consider the importance of technology in a case. As a result, attorneys and advocates view judges as a challenge because judges do not fulfill their judicial responsibilities to the law as they are not informed about the unique consequences of technology in cyberstalking and cyberharassment crimes.

Keywords: cyberstalking, cyberharassment, judges, technological harms, law

Introduction

Cyberstalking and cyberharassment are technology-enabled offenses that are designed to cause a victim fear or annoyance. Specifically, cyberstalking involves repeated pursuit behaviors that are designed to elicit fear in a victim (D'Ovidio & Doyle, 2003), while cyberharassment typically involves engaging in a course of conduct that torments, annoys, terrorizes, offends, or threatens an individual via email, instant messages, or other means with the intention of harming that person (Duggan, 2017). Cyberharassment refers to one incident, while cyberstalking, by definition, must include at least two incidents.

Although cyberstalking and cyberharassment prevalence data is scarce, in 2019, there were an estimated 3.4 million stalking victims in the United States (Morgan & Truman, 2022). Over 45% of these victims were stalked through both traditional means and technological means, and over 30% were stalked through technology only. This indicates that the prevalence of technology in stalking is high. Additionally, 15–17-year-olds and 18–29-year-olds are victimized at higher rates among all internet users. This age disparity is evident through multiple harassing behaviors like offensive name calling, embarrassment, physical threats, sexual harassment, physical assault, attempting to harm a victim in person after online harassment, harassment over a long period of time, impersonation, damaging rumors, and many other harassing behaviors (Lenhart et al., 2016). Indeed, the Pew Research Center estimates that 41% of people in the United States experienced some form of online harassment in 2020 (Pew Research Center, 2021).

These estimates already indicate that this phenomenon needs to be addressed by the legal system. However, how technology is viewed by judges in cases of cyberstalking and harassment may problematize victim advocacy by attorneys and victim advocates. The purpose of the study is to explain why attorneys

[1] Johnson and Wales University, 8 Abbott Park Pl, Providence, RI 02903, USA; KKaplun@jwu.edu

and advocates view judges as a barrier in their role as an advocate for their client or the state, in the case of prosecutors. Attorney and advocate participants who view judges as a challenge believe that judges are not fulfilling their duty to be knowledgeable about the law. This is important because it is crucial to ensure that judges are fulfilling their obligation to be educated on the law and other factors that are relevant to their cases. In these types of cases, it is impossible to make a fair ruling without knowledge of the technology, the technological commission of the crime, and the harms the victim has experienced because of the technology. Research is needed to help determine possible ways to guarantee that judges are educated on relevant technologies through possibilities like technological continuing legal education (CLE) courses, required technological trainings, or specialized technological courts.

Below I discuss the effects of cyberstalking and cyberharassment victimization, the specific harms that victims experience, and cyberstalking and cyberharassment behaviors. I then describe practitioners' perspectives of cyberstalking and cyberharassment cases, the challenges they experience with these cases, and their recommendations to victims. I also explain why judges are under-researched in this literature. Throughout, I utilize three frameworks to focus the study: legal realism, new legal realism, and law on the books versus law in action framework. Legal realism and new legal realism demonstrate how judicial decision-making plays a role in this issue, while a law on the books versus law in action framework describes how judges view written law versus case law and the strategies that attorneys and advocates use to present information to judges knowing that different judges produce different decisions. I conclude with a discussion of the implications of my findings.

Cyberstalking & Cyberharassment

In a survey conducted by the Bureau of Justice Statistics, researchers located over 5.8 million people who had been stalked and harassed in the United States and of those, more than 25% were cyberstalked. Of these victims, many reported that the perpetrators committed other crimes including property damage (15.9%), attacking victims (12.3%), and attacking another person or a pet (8.8%). Of all victims, 2.4% were attacked with weapons like knives, handguns, or blunt objects. Additionally, 4.8% sustained minor injuries, serious injuries, and rape/sexual assault injuries (Baum et al., 2009). While this data is not current, as stalking prevalence data are rare and understudied, these numbers are likely even higher today.

Perpetrators who engage in cyberstalking and cyberharassment have found new ways to be dangerous. Several factors have made it easier for perpetrators to commit such crimes: improved technology enables criminals to use technologies to harm victims without having to leave their homes, the relative ease of hiding one's identity online makes it challenging for law enforcement to track the perpetrators, and the ubiquity of technology only makes committing these crimes that much easier. Cyberstalking and cyberharassment can create similar harms for victims as physical stalking and harassment, but the crimes are less apparent with the additional complexity of technology because perpetrators hide their identities and do not have physical, direct contact with victims (Marcum et al., 2017).

Behaviors associated with cyberstalking and cyberharassment include displaying exaggerated affection (Goldberg, 2019), sending excessive/threatening/rude messages (Bennet et al., 2011), monitoring a person's online behavior (Marcum et al., 2017), impersonation, identifying personal information, sabotaging a person's reputation (Goldberg, 2019), posting intimate photos or videos (Hinduja & Patchin, 2011), directing others to threaten a person, taking over someone's electronic identity (Goldberg, 2019), and any other behaviors that cause a person to feel annoyed, threatened, offended, or terrorized. These behaviors can be commissioned through email, instant messaging, social media, dating

applications, cameras, listening devices, computer programs, phone applications, Global Positioning Systems (GPS), spyware, and many other mediums (Goldberg, 2019).

Effects of Victimization

An important category of cyberstalking and cyberharassment literature focuses on victimization. These studies commonly center around effects of cyberstalking and cyberharassment on victims in psychological and sociological ways as well as reporting and help-seeking behaviors of victims. Effects of cyberstalking and cyberharassment affect many aspects of a person's life in addition to mental health including school, work, social life, and physical health. Cyberstalking and cyberharassment harms can include fear (Reyns & Englebrecht, 2013), emotional and physiological harms (Lane et al., 2014), destruction of reputation (Worsley et al., 2017), financial consequences, like identity theft and credit card fraud (Baum et al., 2009), job loss (Fissel & Reyns, 2020), physical health issues like illness, and loss of friendships (Worsley et al., 2017). In many cases, cyberstalking and cyberharassment lead to the perpetrator physically harming the victim and victims experience damaging psychological consequences like depression, anxiety, post-traumatic stress disorder, and suicide (Baum et al., 2009).

Fissel and Reyns (2020) analyze data from 477 cyberstalking victims to examine its negative consequences. The researchers recruited participants who were between the ages of 18 and 25, with a mean age of 22.62 years. Many of their respondents were women (69.4%). Men made up 24.1% of the sample and individuals who do not identify within the gender binary made up the remaining 6.5%. The researchers examined consequences that respondents experience in school, work, and social and health outcomes. Respondents report difficulty concentrating during class or on assignments, missing deadlines or exams, dropping classes, receiving lower grades, considering dropping out of school, and changing living situation as negative school outcomes. Participants describe difficulty concentrating at work, missing work, and quitting or getting fired as negative work outcomes. Cyberstalking victims experience self-isolation, increased fighting with others, and loss of interest in daily life as negative social outcomes. Finally, respondents detail headaches or stomachaches, eating problems or disorders, nightmares or trouble sleeping, and increased alcohol and/or drug use as negative physical health outcomes. Victims were more likely to experience negative consequences when they were an offender's current intimate partner for longer, experienced more online pursuit behaviors, and had also been stalked offline (Fissel & Reyns, 2020).

While a lot of the victim-centered cyberstalking and cyberharassment research focuses on negative outcomes that victims experience and understanding their victimization experiences, a small subset of research focuses on the reporting and help-seeking of cyberstalking and cyberharassment victims. Fissel (2021) examines this issue with the same 477 cyberstalking victims to identify the characteristics associated with reporting to law enforcement, seeking professional help, and seeking informal help. The author examines whether victims had reported to law enforcement, whether they had sought help from a family member or friend, and whether they had sought professional help in at least one of the following ways: crisis hotline counseling, counseling or therapy, medical advocacy, legal or court services, federal or state victim compensation, risk or threat assessment, safety planning, or shelter or safe house services. More than half of victims engaged in some form of reporting or help-seeking behavior (57.4%). The most common was informal help-seeking (43.8%) followed by professional help-seeking (24.3%), and, lastly, reporting to law enforcement (14.5%). Fissel (2021) found that the longer someone's victimization was, the more school consequences, work consequences, and health consequences they experienced, and if they were a current intimate partner of the offender, they were more likely to report their victimization or seek professional or informal help. In conclusion, research on cyberstalking

and cyberharassment victimization primarily spotlights negative consequences that victims experience and a smaller subset addresses reporting and help-seeking.

Cyberstalking & Cyberharassment Practitioner Views

The negative outcomes of cyberstalking and cyberharassment require advocacy for its victims. This advocacy, however, depends on how practitioners, who primarily include police officers and victim services practitioners, view cyberstalking and cyberharassment. Unfortunately, there is a lack of research on how judges view these crimes.

Raphael (2009) examines police officers in Chicago. The author interviewed eighteen patrol officers, six detectives, and sixteen domestic violence liaison officers. Police officers viewed cyberstalking as a barrier because they acknowledge that they do not know how to handle the technological medium. Although officers believe that death threats that came through telephone and email are serious, they do not know how to investigate them, recognize that these cases would not be prosecuted, and frequently advise victims to change their telephone numbers (Raphael, 2009).

Lynch and Logan's (2015) study focuses on understanding differences in perceptions between police officers who had charged stalking and those who had not. They surveyed 163 officers of varying ranks including patrol officers, detectives, and sergeants and asked questions regarding demographics, experience with stalking, attitudes about the process, barriers, and outcomes of charging stalking. Both groups reported similar perceptions regarding barriers related to charging stalking. The most common barriers related to not having enough evidence or proof, the victim not cooperating, prosecutors not taking stalking seriously, victims not reporting stalking, and evidence not meeting elements of the statutes (Lynch & Logan, 2015). While Raphael (2009) found that police officers did not know how to handle cyberstalking cases, Lynch and Logan (2015) discovered that police officers believe that prosecutors do not take stalking cases seriously and, if they do, it is difficult to obtain the evidence or proof that is necessary to continue with prosecution.

In addition to police officers' perspectives, studies surrounding victim services practitioners are also somewhat common. Spence-Diehl and Potocky-Tripodi's (2001) study examines a sample of 191 victim services practitioners in Florida and California from the National Organization of Victims Assistance mailing list. This study focuses on how advocacy practitioners view their job responsibilities, traditional stalking victims' service delivery needs, perceptions about communities' responses to stalking, and suggestions for how to help victims. The researchers find that the most common suggestions for how to best meet the needs of stalking victims were that the community as a whole needs to become more "aware" (n = 59), criminal justice training (n = 42), more direct victim services (n = 41), the need for additional and improved criminal justice services (n = 35), practical tools to enhance victims' safety (n = 28), and changes in state laws and local policies (n = 17). These perceived needs demonstrate that advocacy individuals recognize the lack of knowledge that criminal justice practitioners have and the need to change that to protect victims. This is evident as the two most suggested reasons are believing the whole community would benefit from awareness and that criminal justice practitioners should undergo training related to these issues (Spence-Diehl & Potocky-Tripodi, 2001).

Similarly, Logan and colleagues (2006) interview 152 key informants who are either (1) justice representatives (n = 73), which include judges, law enforcement, court clerks, county attorneys, prosecutors, or (2) victim services representatives (n = 79), which include advocates, shelter staff, mental health professionals, and defense attorneys specializing in victim services. They asked questions relating to perceptions of how women cope with stalking, advice to stalking victims, and perceptions surrounding barriers to obtaining protective orders for stalking victims. The researchers particularly focus on

differences between what justice representatives and victim service representatives advise. Although not significant, more victim services representatives (23.8%) advise using the criminal court system than victim justice system representatives (18.2%), while more justice system representatives (24.2%) suggest calling the police than victim services representatives (11.9%) as it relates to strategies that are unique to stalking victims rather than just a violent ex-partner. Interestingly, advice given to a married woman compared to a dating woman who was being stalked differed as well, although slightly. More justice system representatives (52.1%) recommend contacting law enforcement than victim services representatives (45.6%) and more justice system representatives (49.3%) advise filing criminal charges and using the criminal court than victim services representatives (38%) for a married woman. On the other hand, justice representatives and victim representatives feel very differently when the case involves a dating partner. Significantly more justice system representatives (93.1%) recommend using the criminal court system than victim services representatives (63.3%). Conversely, more victim service representatives (34.2%) suggest contacting law enforcement than justice system representatives (25%) (Logan et al., 2006). Although justice system representatives include judges, there is no delineation between how judges compare to other justice system representative participants.

Factors Affecting Judicial Decision Making

This research demonstrates a significant gap in the literature because while there is some literature on police officers' and, to a smaller extent on, prosecutors' lack of understanding of cyberstalking and cyberharassment, there is virtually none for judges' roles in these types of cases. This may be due to the fact that by the time a case makes its way to a judge, multiple criminal justice professionals have utilized discretion to determine that the case should continue through the criminal justice system. The uniqueness of judges' roles makes judges approach cyberstalking and cyberharassment cases in a different way than police, attorneys, or advocates. Attorneys and advocates have a duty to their clients and, in the case of prosecutors, a duty to the state, while police focus on ensuring public safety. Instead, judges have a duty to be knowledgeable about the law and remain impartial. Since they must remain impartial, they cannot be swayed by victims' emotional pleas and are taught to rely on evidence. As a result of their duty to remain impartial and encountering a case later in the criminal justice process, the factors they may consider, which may be informed by legal realism and new legal realism, can be very different from police, attorneys, and advocates. Moreover, how attorneys and advocates perceive judges' rulings on case law and how they can create strategies to get judges to take their cases seriously may be informed by a law on the books versus law in action framework.

Legal Realism

Legal realism is a legal theory that all law derives from prevailing social interests and public policy. The emergence of legal realism began when Holmes (1881) described how the law has not been about logic, but rather experience. Legal realism was commonly thought of as functionalism, which was seen as a way to understand law in terms of factual context and social consequences. Legal realists do not view legal rules as completely useless and understand that legal concepts are useful in predicting judicial decisions. They also, though, believe that other factors are equally important for predicting judicial decisions such as a judge's own views, feelings, and hunches (Kalman, 1986). In particular, Holmes and Frank debated the factors that affect judicial decisions. Holmes believed the factors reflect political, economic, and moral biases, while Frank criticized this viewpoint and thought uniquely individual factors were to blame (Frank, 1930). Most legal realists fell on Holmes' side of the debate as they felt that

according to Frank's viewpoint, any small individual factor could be to blame, like a bad breakfast, making it impossible to find evidence to actually attribute a factor to a decision (Kalman, 1986). As a result, the larger categories of political, economic, and moral factors were generally agreed upon and could demonstrate variation from judge to judge as to their decision-making process.

Tamanaha (2009) demonstrated that legal realism has had enormous influence on American law and brought about a revolutionary shift in views about the law, which was previously assumed to be objective and not related to social ideas and politics. Instead, legal realists began to recognize that judicial discretion was broad and that the law did not create the same specific result in all similar cases (Hettinger et al., 2006). Tamanaha (2009) defines realism as "an awareness of the flaws, limitations, and openness of the law – an awareness that judges must sometimes make choices, that they can manipulate legal rules and precedents, and that they can be influenced by their political and moral views and by their personal biases" (p. 6). This shows that legal realism is not just skeptical but also rule-bound. It acknowledges that judges have discretion, and therefore, can consider their own views when making decisions because their discretion and the non-exactness of law allows them to do so. It also recognizes that judges can abide by and apply the law as written to make generally predictable, law-based decisions (Tamanaha, 2009). While these two ideas seem at odds with each other, both are frequently true – sometimes even at the same time.

New Legal Realism

Within new legal realism, scholars who focus on behavioral studies research judicial decision making. For example, Miles and Sunstein (2008) attribute judicial decision-making to political influences. Behavioral economists, like Farber (2001), argue that rational choice theories did not describe an accurate view of human behavior, where new legal realism did. This position was similarly taken on by political scientists like Cross (1997) in research of attitudinal models. Some of the more extreme proponents argued that legal reasons are irrelevant, and judges make decisions solely based on ideological variables and political affiliations. Cross (1997), a revered political science and new legal realism scholar, doubted this view, instead opting for a view where this could be combined with doctrine and rule of law. This produced a large body of work that centered around large-scale quantitative studies that demonstrated that religious bias, political party bias, and many other types of biases informed judicial decision-making (Ashenfelter et al., 1995; Schanzenbach & Tiller, 2008).

Law on the Books & Law in Action

Law on the books is crucial to the understanding of law because the law does not always function as it is written. Instead, law on the books functions as an historical statement or a "law of the past" (Halperin, 2012, p. 60). This is because what is written into law can only focus on what has already happened and by the time the law is effective, there could be changes in how the crime is adjudicated. While law on the books has been characterized as musty and dry, law in action represents social life (Harper, 1930). Law in action demonstrates how laws have been used, typically through oral history or tradition rather than what is written in legal books (Pound, 1910). While people commonly view law as protecting individual interests, it only goes so far in representing wider social interests. These social interests come from actual observation of legal phenomena in society. Judicial experience relies on experience that comes from precedent and analogy, which are partially from written law but are not the only factors considered. This is because even slight variation in facts or circumstances of a case can associate with a different social interest and create an exception to the general rule of law or a fallacy that

allows for the protection of the new social interest (Harper, 1930). Therefore, law in action serves beyond what is in written law.

Law on the books and in action are crucial together because society cannot have one without the other (Pound, 1910). Law is one of the most important agencies for social control so that society can fit humans into complex social surroundings and have uniform guidelines on how to proceed (Harper, 1930). This demonstrates the necessary pairing of social "law in action" elements with rule of law and procedure "law on the books" elements. Pound (1910) urged a social science approach that attempted to shift research from appellate to trial courts and from dry legalese studies to legal concepts that acknowledge social arguments, therefore moving from "law on the books" to "law in action." If the law on the books is ignored, legal scholarship becomes a general sociology because there is no distinction between legal phenomena and social phenomena (Halperin, 2012). In other words, if only "law in action" exists without written laws, law effectively becomes a study of sociology and human behavior regarding how laws are put into practice. Written law is the crucial piece that allows for legal scholarship. Law deals with the most complicated aspects of human relations and therefore must be fluid and flexible.

Law on the books versus law in action is crucial to this study as participants indicate their knowledge regarding the statutes in their states and the written elements in those statutes. Participants also discuss how law in action differs from written statutes as they must utilize case law and their knowledge of how particular judges operate in order to obtain a beneficial legal outcome for their client. Ultimately, participants describe the necessity of law on the books and law in action working in conjunction with one another to further the legal solutions in cyberstalking and cyberharassment cases.

Methodology

This study used one-on-one phone interviews with 43 attorneys and victim advocates to understand the challenges that participants feel that they encounter with judges in cyberstalking and cyberharassment cases. Targeted recruitment and snowball sampling were used to select participants who work in Illinois, New Jersey, and New York. First, I created a list of all the advocacy organizations in the three states that work with victims of stalking and harassment, as well as related crimes such as domestic violence and revenge pornography. To find organizations, I employed search terms in Google like "stalking organization" and "domestic violence organization" with "New Jersey," "New York," and "Illinois" added to the end of those phrases. Second, I produced a list of every county prosecutor/district attorney/state's attorney in New Jersey (n = 21), New York (n = 62), and Illinois (n = 102). Third, I created a list of criminal defense and civil attorneys who have taken on these types of cases by searching for appellate cases in Westlaw with the search terms "stalking," "cyberstalking," "harassment," and "cyberharassment." Finally, after those strategies were exhausted, I searched for criminal defense and civil attorneys through Google whose law firms stated specialization in stalking, harassment, domestic violence, family law, and divorce issues, and who had not already been contacted through earlier recruitment methods.

A recruitment email was sent to each person or organization on the final list whose email was provided by Westlaw or publicly available on their law firm's website, the county agency's website, or the company's website, which explained the research study and gauged their interest in participation. Once participants were interviewed, the author asked them to recommend someone who they thought might be interested in participating. Two participants were referred by other participants.

Participants

Forty-three interviewees participated in the study. The author collected demographic information, including the state they are employed in, their occupation and gender, the area they work in (urban, suburban, or rural), the length of time in their current or relevant role, and the length of their career. Participants' real names were not used in the study and instead, pseudonyms were employed. Participants worked either as advocates, prosecutors, criminal defense attorneys, civil attorneys, advocate/civil attorneys, civil/criminal defense attorneys, and prosecutor/criminal defense attorneys. Prosecutors/criminal defense attorneys are individuals who used to be prosecutors but at the time of the interview were defense attorneys. Therefore, due to their expertise, they were asked questions from both sides of the process. Forty-seven percent (n = 20) work in New Jersey, 23% (n = 10) work in New York, and 30% (n = 13) work in Illinois. Table 1 displays the frequency of occupations, gender, and work location for all three states and in total. Table 2 shows the means and standard deviations across the three states and in total for length of current/relevant role and length of career in years.

Table 1. Counts of Categorical Variables by State

Variable	New Jersey	New York	Illinois	Total
Occupation				
Advocates	4	1	3	8
Prosecutors	1	3	1	5
Criminal Defense Attorneys	3	0	1	4
Civil Attorneys	9	4	5	18
Advocate/Civil Attorneys	0	0	1	1
Civil/Criminal Defense Attorneys	0	2	2	4
Prosecutor/Criminal Defense Attorneys	3	0	0	3
Gender				
Male	7	5	5	17
Female	13	5	8	26
Area Served				
Urban	3	5	8	16
Suburban	15	4	5	24
Rural	2	1	0	3

Table 2. Means and Standard Deviations of Continuous Variables by State

Variable	New Jersey	New York	Illinois	Total
Length of Current/Relevant Role (in years)	13.6 (10.00)	13.75 (13.02)	14.62 (12.13)	13.94 (11.30)
Length of Career (in years)	19.1 (11.14)	22.75 (11.73)	20.54 (12.79)	20.38 (11.60)

Note: Standard deviations are in parentheses.

Data Collection

Interviews occurred on the phone and averaged 28.44 minutes. The interviews were audio recorded and transcribed through an artificial intelligence (AI) transcription service, Otter.ai. They were then manually edited for accuracy. The interview questions were semi-structured and flexible, leaving room to probe and ask follow-up questions depending on participants' answers. Questions related to a

person's professional role and responsibilities, knowledge regarding state stalking and harassment laws, technologies utilized for stalking and harassment, negative consequences for victims, organizational assistance provided to victims, and challenges of handling stalking and harassment cases.

The questions surrounding a person's professional role and responsibilities included how long they had been in the role, describing a typical day on the job, and if they had any previous relevant roles. In terms of knowledge regarding laws and technologies for stalking and harassment, respondents were asked to describe what they know about the law and which technologies they are aware of being used to victimize individuals. Participants were also asked whether they believe technological elements should be included in these statutes, how they discuss technology with their coworkers, how often they deal with technology, and whether they distinguish a case by the type of technology that is used. Interviewees were asked what kinds of negative consequences they had witnessed victims experience and the challenges that they face with cyberstalking and cyberharassment cases. Additionally, there were some specific questions asked based on an individual's professional role. Advocacy participants were asked what they believed their state's laws captured well and not well and what their organizations helped with, if anything, in terms of the law/legal services and technology. Finally, legal professionals, including prosecutors, civil attorneys, and criminal defense attorneys were asked what elements they looked for that they believed would make a case successful and whether they believed their state's statutes allowed for a broad or narrow reading. Since the author was not aware of any studies that interviewed criminal justice professionals on the laws surrounding these offenses, these questions were created without the use of additional sources. Demographic questions and questions that asked about practitioners' challenges were created using other practitioners' viewpoints studies (Spence-Diehl & Potocky-Tripodi, 2001; Logan et al., 2006).

Analysis & Coding

After transcription, the author coded the interviews in Dedoose according to an open coding schematic. Then, connections between codes were made to combine and expand the initial list of codes as needed to create broader themes. These broader themes were benefits of technology, challenges of cyberstalking and cyberharassment cases, what elements attorneys look for when they take on these cases, the language of the law, a law on the books versus law in action theoretical framework, and negative consequences that victims experience because of this type of victimization. This study focuses on one of the challenges in cyberstalking and cyberharassment cases that attorneys and advocates feel that they encounter, which are judges.

Findings

Interviewees were asked about any challenges they face in cyberstalking and cyberharassment cases and, therefore, were not prompted specifically regarding judges. Out of 43 interviewees, 16 mention judges in neutral or positive ways and 17 mentioned judges as a challenge, while 10 do not mention judges at all.

Positive or Neutral Evaluations of Judges

Of the 16 interviewees that mention judges in positive or neutral ways, they discuss judicial duties and general or specific situations where judges ruled in favor of an attorney or advocate's client. Five participants discuss a positive viewpoint of judges by mentioning that they believe domestic violence

judges are informed about stalking laws, know that judges will grant temporary restraining orders relatively easily, and recognize that judges apply stalking laws broadly. Three of these interviewees describe a specific case where a judge understood that the behavior was stalking and/or harassment. However, most of this group (n = 8) simply described judges in a neutral way focusing on their judicial duties. As such, they mentioned judges looking at proof, detaining dangerous individuals, erring on the side of caution if the prosecution does not meet their burden of proof, handling negotiations with attorneys who try to obtain a reduction in charge for their client, being focused on conduct, and whether they would take a risk to strike down a statute. Three interviewees discuss both positive and neutral viewpoints that also encompass these themes surrounding judicial duties.

Judges as a Barrier

The participants who describe judges as a barrier do not share any clear characteristics. None are overwhelmingly from one state as five are from Illinois, four are from New York, and eight are from New Jersey, which mimics the proportions of the overall sample. Individuals' roles also mimic the sample mostly with a lot of civil attorneys describing judges as a barrier as they are most represented in the sample. Most other roles were represented significantly less but proportionally to their representation in the sample. The only exception to this relates to advocates. Despite the sample having eight advocates (the second highest of any role), there are only two advocates who describe judges as a barrier, and both are from Illinois. This may indicate that Illinois advocates experience specific challenges with judges that New York and New Jersey advocates do not. This may be due to the instability of cyberstalking laws in Illinois, where they were struck down, brought back, and heavily revised in a short amount of time. Participants that explain how judges are a barrier do not seem to differ in their experience on the job either. The average time in their current/relevant role is 12.79 years and the average time in their career is 19.74 years indicating that they differ by less than 14 months in their current role and less than eight months across their whole career.

Finally, the gender of the interviewee may influence how they perceive judges as a barrier. In the overall sample, 60.47% are female and 39.53% are male, while in this subset 70.59% are female and 29.41% are male. This indicates that females seem to be more likely to perceive judges as a barrier. This may be attributed to the fact that most criminal defense attorneys are male, and they indicated less challenges with judges because having a judge who is not knowledgeable about technology benefits a defense attorney's case. This is due to the ability to argue that the speech constituting harassment should be protected under free speech, which is a frequent argument made by defense attorneys, and judges who are not familiar with how technology enables harmful speech may rule in favor of a free speech argument.

Among those who viewed judges as a barrier, three themes emerged from participants' interviews. Particularly, these themes demonstrate how attorneys and advocates believe that judicial responsibility is deficient. The themes include: 1) judges' lack of understanding of harms that come from technological abuse, which some interviewees attribute to judges' age; 2) judges' discretion; and 3) a law on the books versus law in action framework. These three themes demonstrate reasons as to why attorneys and advocates believe that judges interpret laws in ways that do not depict judges' responsibility to the law, ultimately harming victims in the process. As a result, the interviewees call for more judicial responsibility to the law by becoming more informed about technologies that are used for cyberstalking and cyberharassment.

Lack of Understanding of the Harms of Technology. Many advocate and attorney interviewees describe judges as a barrier in their work because they perceive judges as not understanding how

technologically based crimes produce real harms for victims. Ashley illustrates the harm that can come from technological crimes through two examples, image based sexual abuse and an abuser maintaining access to a victim's accounts.

> [Image based sexual abuse] are probably the cases that we get commonly and that are just extremely damaging, and that judges have the hardest time understanding really is the deep and terrible impact of that kind of thing. Other cases I have, cyber harassment and cyber stalking, although we try really hard not to use the word "cyberstalk," we just say "stalking," we don't say "cyberharassment," we just say "harassment," because people outside of our specialty of work don't understand. As soon as you say "cyber," people sort of minimize it, and say "oh, well, if it's just happening online, then it's not real." We see through our work every single day that there's no such thing as offline. Our lives are intrinsically linked to what happens online and how we live with our devices and the technology platforms we use all the time to just live in the modern world. [...] Explaining to a judge who doesn't get it that the abuser is maintaining access to her Amazon account, to her Seamless account, which shows where her food is being delivered exactly and when. Those are ones that it's a little bit harder to explain why that's so nefarious and so dangerous and is stalking (Ashley, civil attorney).

She describes how difficult it is to explain to judges and law enforcement why these online activities are detrimental to victims, though research and interviewee experience clearly demonstrate the harms of these crimes. Ashley particularly demonstrates how experts in the field will not utilize "cyber" language because the public and other practitioners minimize the harm for victims if the detrimental behavior is occurring online. As a result, she witnesses judges dismiss the notion that victims suffer major consequences of only online victimization because our online and offline worlds are heavily linked today. Ashley experiences difficulties in explaining to a judge how a perpetrator maintaining access to a victim's accounts including her purchases and when her food will be delivered is harmful to a victim. Since a judge may not have experience with this situation, they will not understand the harm that can come from this, which includes a perpetrator knowing a victim's address and their habits, which can be used to scare a victim by sending food or other items to their residence. As a result, some interviewees express that when they take on a case they have to consider "whether a judge even cares and wants to hear about it," (Denise, advocate/civil attorney) and whether judges "take online harassment and stalking seriously" (Joseph, civil/criminal defense attorney), demonstrating that judges may believe that other cases are more important because the victimization is only occurring online. These qualifying statements are made by other interviewees demonstrating that judges may not be interested in hearing these cases, despite their duty to uphold the law and be impartial.

Ashley continues by describing how suggesting to victims that they go offline is detrimental to victims. While this recommendation seems to be well placed to protect victims, it places the burden on victims to recuse themselves from online life, which is strongly tied to their offline life through economic and educational opportunities as well as their support systems.

> When judges say, "well just turn off your phone or just get a different phone number, just don't go online." [...] "If you just go offline, then you won't be a target of tech abuse," and that's totally false. It doesn't fit the model of the insidious tech abuse that we're witnessing our clients going through. We live in a world now, where if you don't have a social media presence, and if you don't have a presence online, where people can look you up and find you, then you're suspect. The tides have turned in that way, where you really do need to exist in some form online and be findable in

> some way. Otherwise, people will think you're up to something. And when you tell people "to go offline, shut off your social media, he won't be able to find you if you just disappear." We call it the invisible victim tax so you're putting all of the onus and the burden on the victim to fix the problem, when really the onus and stigma and everything should be put on the abuser. Also, you're denying them an opportunity to take part in society as just a whole human. You're denying them economic opportunities, and probably educational opportunities and connection to communities and to their own support communities. That's probably my biggest advocacy talking point that I try and highlight anytime I get in front of a group of people is just dispelling this myth that a person can just go offline, that if a person can go offline, it will stop and that we shouldn't even be suggesting that because it's just silencing and erasing people from existence, when they really should be getting support to be safe (Ashley, civil attorney).

Ashley demonstrates how blocking someone, getting a different phone number, deleting social media, and a whole host of other recommendations are not sufficient as they place the victim at a disadvantage in terms of opportunities and communication when the perpetrator is at fault. These suggestions, which are frequently made by judges, according to Ashley, show that judges do not understand the scope of these types of crimes and how following those suggestions will not protect victims. In many cases, these suggestions will instead further alienate a victim.

Lynn addresses how, despite training, judges are still unable to keep up with technology. While this may be due to the speed at which technology changes, interviewees, like Ashley, Lynn, Kristin (prosecutor/criminal defense attorney), and Nadine (civil attorney), describe how judges are not aware of most technologies, even ones that have existed for a few years. Lynn demonstrates how not only do judges not understand the technology, they also do not understand the proof.

> It's trying to get the best proof that you can, knowing that they may not exist. And knowing that the judge may also not understand how it exists. I know there's been training for it. But I don't know that they're as up to speed as perhaps they should be. [...] And the challenge is that knowing that you might not be able to have definitive proof of something, and that's why you really have to convince the judge that it's more than that, and that there's a history here that supports that (Lynn, civil attorney).

She explains that convincing a judge, especially when proof is lacking, is extremely difficult because they do not understand the technology or the proof. Lynn shows that she usually falls back on a defendant's history to demonstrate that they have a pattern of abuse. If attorneys are forced to rely on a pattern abuse, this can be detrimental to victims. Many defendants have not been previously caught and therefore judges may not have the whole picture if they focus only on criminal or restraining order history. Lynn herself acknowledges that her husband, who was a former judge and handled some domestic violence cases is "not necessarily tech savvy." Another interviewee, Kristin (prosecutor/criminal defense attorney), when asked about her familiarity with technology, qualifies her statement by mentioning that she is "certainly more [aware] than many of the judges out there." These comments indicate first-hand experience of judges who are not as informed about technology as they should be given that their cases involve technology.

Age of Judge. Some interviewees attribute this lack of understanding to a judge's age like Melissa (advocate) and Ashley (civil attorney). Melissa describes how individuals who are 45 are not familiar with the technology that younger generations use and that judges are typically much older than 45. She

believes "it's just so far out of their understanding that they can't properly interpret the law." While this comment has an ageist connotation, Melissa acknowledges that she does not believe that judges are intentionally out to hurt victims. She simply believes they need to work harder to ensure that they are educated on relevant technology. Similarly, Ashley describes judges as "so old" because "the average age of a judge in New York is 68 or 72 or something." Again, her comment has an ageist connotation, but she mentions this to demonstrate why they might not "understand how tech works." She states that she conducts trainings for judges and soon these will be required for state judges in New York. While the author does not condone their ageist remarks, they experience frustrations because judges simply do not understand the technology.

Other participants, who believe age may affect judicial understanding of cybercrimes, simply give examples of what they have had to explain to a judge. As a result, they are frustrated with the judge's lack of understanding, which they mostly attribute to age. For example, Donald (civil/criminal defense attorney) discusses struggles with judges understanding Snapchat. He mentions that they have "heard the term, but they don't know how it works." Donald describes this as contributing to helping a perpetrator get away with committing cyberstalking and cyberharassment acts because judges do not see how the technology is assisting in victimizing an individual. Nadine (civil attorney) describes this in terms of having to "explain what a DM is" to judges who do not understand or use social media indicating that she has to "break these things down" for a judge to understand what it is, why it is harmful, and the consequences that victims experience as a result of the technology being used in this way.

Finally, Crystal describes a situation that was very hard to prove and convince a judge that the perpetrator had violated an order of protection because of the nature of the technology.

> This is not something that I frequently see. It is something I saw recently, and I'm hoping I don't ever again, because it was very hard to prove and try to sway a judge. I don't even know what you would call it but every once in a while, you'll notice, if you have a Google account or Snapchat or Facebook, sometimes there will be these generated recommendations. So how I saw it in a specific case was somebody got an email and it said, "would you like to share these photos or memories from one year ago?" There was an order of protection in place. This person was not supposed to be contacting the protected party in any way, shape, or form, including online, texting, anything like that. This individual's defense is that he gets an email, and it says, "would you like to share?" It was just memories off of Google Photos. He did so on his Facebook, and one of the photos was not only a private photo of the victim, but it also had tagged her in it. Of course, here, I am prosecuting that case. But it does make it hard when the argument is oh, there's so many devices now that prompt these alerts and these notifications and these sharing things. Could I necessarily prove that you had an intent to violate that order of protection? Nothing is easy when it comes to technology (Crystal, prosecutor).

Crystal describes a major barrier in persuading a judge that this would be harmful to a victim, given the uniqueness of the situation. The judge did not understand how this type of behavior could be construed as contacting a victim since they shared a photo based on a reminder of memories. However, this photo was also a private photo of the victim and the post had tagged her in it. Since judges may not be on social media, they might be unaware of the intricacies of how these types of suggestions work. As a result, it is important for judges to understand the harm of the technology and the specifics of the current case, as there may not be any other cases of record. The lack of understanding in how technology causes harm to victims shows how judges are not exercising judicial responsibility to adjudicate cases fairly as they are not informed about the crucial elements of these cases.

Discretion. Due to judges not understanding the harms of cyber victimization technology, they use their discretion in an inaccurate interpretation of the law. Interviewees express their disdain with how judges utilize discretion because they believe judges make decisions based on factors that may not be as important to the case. Ashley describes her frustration with judges who are not aware of how harmful technology is. She indicates that judges then use their discretion to rule in favor of the perpetrator and do not protect the person who has been attacked because of the lack of knowledge.

> What continues to be frustrating for any legal advocate in this space is much of what we get depends on which judge we end up in front of. So much of it is just still up to the discretion of the person, the gatekeeper, and whether they think it's a problem. In the issue of the criminal justice side, I think in general, the laws are adequate because if you read the New York statutes for stalking and harassment, there's all sorts of room in the language to include cyberharassment and cyberstalking. And it's rare for us to not be able to show that we're meeting elements, but what you'll find all the time is a precinct investigator, or whatever, who's just like, "we don't do internet shit. We don't know where it's coming from, I might not have jurisdiction. I don't have the resources for this. Let us know, if it turns violent, we'll help then, but otherwise, I'm not dealing with it." That is not an issue of a law being bad. It's an issue of the prosecutorial discretion and then in the courtroom it's judicial discretion. [...] The issue is getting the gatekeepers to understand that what's happening is actually harmful and a crime and they need to protect the person who's being attacked (Ashley, civil attorney)

Since Ashley is a civil attorney, she witnesses judges have the sole decision-making power on a case because she does not practice in criminal court where a case would be decided by a jury. This is due to the quasi-criminal nature of these proceedings as they are typically in a domestic violence context. As a result, there are no jury trials in these types of proceedings and judges who may not understand the harms have sole decision-making power. Since judges have sole discretion and are not familiar with technology and its harms, they may utilize other factors in their decision-making, such as their own personal beliefs or political influences, thereby reflecting the influence of legal and new legal realism.

Many other interviewees like Stephanie (civil attorney) describe the difficulties of obtaining a restraining order "without a physical component" demonstrating that judges do not take a petition for a restraining order seriously unless there is physical violence or a physical crime. This indicates that they are still unwilling to understand how harmful cyberstalking and cyberharassment are. Kristin expands upon Ashley's (civil attorney) argument by describing a specific example where she witnessed a judge's discretion be extremely harmful and dangerous for a victim. Unlike in Stephanie's case, Kristin was unable to secure a restraining order, even though the crime committed against the victim was physical and in-person.

> I have a case pending certification in the New Jersey Supreme Court. I have a victim who was clearly victimized. The judge said because they met through an online dating source that they didn't have a sufficient relationship or risk of future danger for her to receive a restraining order against the guy who sexually assaulted her (Kristin, prosecutor/criminal defense attorney).

This situation is particularly concerning as the victimization was physical and in person rather than solely online. This continues to depict judges' lack of knowledge regarding how the online and offline world coalesce together. This circumstance also shows judges' lack of knowledge regarding how many people meet their significant others online today. This is information that a domestic violence judge should have

intimate knowledge of as they are likely to preside over many cases where individuals have met online. This once again demonstrates that judges are using their personal experiences in their decision-making as they are unlikely to have met their significant other online. Furthermore, the crime that triggered the victim filing for a restraining order was a physical, in-person, and serious crime. Given the nature of the crime, it is reasonable to assume that a victim would live in fear of future danger to herself after being sexually assaulted. In this case, a victim was not able to receive a restraining order because a judge felt that her relationship beginning online made it less legitimate and her sexual assault was not taken seriously. This display of discretion demonstrates how crucial it is for judges to educate themselves on technology as it relates to these types of offenses so that they are using accurate information that informs their experiences.

Melissa discusses discretion in terms of interpretation, where judges are not considering how technology has advanced since the statutes were created.

> If you're getting this many messages from this person, but they're not taking into consideration how far technology has come since those laws were put into place and how much it changes almost daily. They could definitely capture a lot more, especially for the younger crowds, kids can get harassed a lot harder. The courts don't see that because of the way that they are interpreting the law (Melissa, advocate).

Melissa demonstrates her frustration by explaining how the technology that is in some of these statutes is very outdated. Some interviewees discuss examples that show how behind law is compared to technology like Laura (prosecutor) who explains that she wishes "that our legislature would catch up quicker than they do" because it took until 2019 for New York to have a revenge porn statute. This is despite attorneys and advocates having clients for years prior who were victims of revenge porn. Kelly (civil attorney) also illustrates her frustration by describing how some laws are so antiquated that they state, "no stalking by facsimile." She indicates that no one is stalking by facsimile anymore and that it occurs through platforms like TikTok or Instagram. Due to the ubiquity of technology and constant innovations, there are very frequent changes in how people can use technology for beneficial purposes, but also for harmful purposes. Even states that have a cyberstalking or cyberharassment law, like Illinois, are unable to keep up with technology as their law was created in 2001. Even with changes in 2009, 2013, and 2018, Illinois' legislation cannot keep pace with technology. As a result, Melissa (advocate) calls for judges to interpret the law more broadly so that technology that could not even be conceived of at the time of law enactment can be included. While many participants agree with Melissa, some participants, like Katherine (civil attorney), witness some "judges broadly interpret [laws]" and some "judges very narrowly interpret" laws.

Law on the Books vs. Law in Action. Participants frame their responses in ways that describe how law on the books or written law, differs from law in action, or case law. Since interviewees perceive judges as not understanding technology or its harms, they believe that the way statutes are read is lacking. Kristin demonstrates that they could consider victims' experiences more, but they are currently defendant-oriented.

> The laws can be read broadly, but they're frequently not. I think, at least for judges, that it comes out of the whole idea that they'd like to err on the side of protecting defendants' civil rights. So, if it's not specifically delineated in the statute, they err on the side of exclusion from the law. But there are some judges who see that there is broad language within the statutes that can be used

> to apply in situations that were not foreseen at the time the statute was written. I guess it goes both ways. The potential is there, if you have a judge who's willing to be open- minded, who's willing to be thoughtful, but a lot of judges are too afraid of being reversed to make a brave ruling (Kristin, prosecutor/criminal defense attorney).

Like Katherine (civil attorney), Kristin has experienced some judges who apply the broad language of statutes to current situations. However, she explains how judges use the law in its most literal form, which can exclude important elements like technology, as those elements are frequently discussed in a very broad sense. Kristin demonstrates that it is possible to have judges ensure victims receive justice but characterizes it as a brave ruling that many judges are not willing to make. This demonstrates how attorneys feel that judges are not acting responsibly towards victims. This also portrays that some interviewees, like Kristin, view judicial decision-making as most heavily relying on the written law.

Like Kristin, Sandra describes how judges utilize the written law. While she believes the law itself is strong, she has witnessed it remain unenforced or be applied incorrectly.

> My impression is that the laws on the books are strong. But I don't know that they are enforced effectively. In fact, I know they are not enforced effectively at all times. We've had judges who've completely misunderstood how to apply the law, and then they've been appealed. And it's had to be changed. [...] You can have the best laws in the country but if they aren't supported by prosecution and law enforcement and understood and applied appropriately by judges, they only have so much value (Sandra, advocate).

Sandra describes how judges misunderstand how to apply the law, which leads to their rulings being appealed, and then ultimately, law changes. She explains how the best laws in the country can be moot if they are not supported by criminal justice actors, particular judges, who must apply them appropriately in the final stages of the court process. The law being applied incorrectly is likely to stem from judges' lack of understanding of technology and its harms. Laura (prosecutor) also portrays this by describing how the phrase "other electronic means" was "drafted with well intentions, but once judges started interpreting them, they've narrowed them down a lot." This illustrates how even though these statutes include a technological element that should be broad enough to encompass any technology that is used to harass someone, judges have been selective about which technologies the law will actually cover in their case law interpretations. As a result, judicial interpretation of the statute creates a blueprint for the type of mediums that would be covered under stalking and harassment conduct since written law does not address it. While states' laws are broad, judges narrowly interpret them making it more challenging to fit the perpetrator's conduct within the law. Judges claim that their narrow interpretations fit with the legislative intent. However, it has been documented that legislatures may intentionally write their laws broadly to garner a majority vote, rather than to create strong written law (Nourse & Schacter, 2002).

As a result, attorneys and advocates describe strategies that align with a law on the books versus law in action framework to do their best in assisting their clients. Antonio describes the barriers that domestic violence judges, who see multiple cases a day, every day, create for attorneys.

> The hardest thing about [judges] is really trying to convince them. It's the definition, "you kind of know it when you see it." These judges, that's all they do, usually, every county has one judge that does domestic violence. When you're doing 40 cases a day or 30 cases a day, every day, you kind of get numb to it. You know it when you see it, and you get jaded a little bit, and you form your own opinion as a judge, you're human. It's hard sometimes, when they've come up with their

> own ideas of what in their minds is harassment or stalking. You're working with the definition and the statute and working around that because you have to build a record. At the same time, you're trying to fit in what the judges' personal perceptions are of that. After you do enough of this, you kind of know, this judge likes this, and that judge likes that, and this judge is very difficult to get a restraining order out of and this one's very easy. You kind of have to shift a lot, a lot of shifting, and presenting things in different ways to different people (Antonio, civil attorney).

He explains how judges have become numb to these behaviors, get jaded, and he must present cases in different ways depending on his audience. This notion of presenting cases in different ways portrays the strategies that attorneys and advocates employ to attempt to get judges to understand the importance of a particular case and specifically how it relates to technology. While judges' experience is important, Antonio acknowledges how judges are using other factors like their personal perceptions and jadedness with these cases, thus highlighting the operation of legal and new legal realism. This leads to his frustration as he believes that they value their personal perceptions more and are affected by jadedness due to large amounts of experience with these cases. He argues that it is important for judges to hear the facts of each case individually and consider elements that are specific to each case. In many cases, the distinguishing factor among cases is the technology and how it is being used to harm the victim. As a result, it is crucial for judges to stay up to date so that they complete their judicial responsibility to the law by being knowledgeable about how these crimes are committed. This will allow them to use their discretion more efficiently and equitably as they will be more informed about technology and its harms. Denise (advocate/civil attorney) echoes these ideas by illustrating how "judges have just come up with their own definition of what [stalking] should be." This is very frustrating for advocates and attorneys who are utilizing the written statute, and even case law, to present the case to the judge. Instead, judges create a barrier for these participants to prove a case by utilizing their own perceptions, which can be due to a lack of knowledge and understanding of technology and its harms.

Summary of Findings

The findings demonstrate three main points that describe why attorneys and advocates view judges as a barrier and subsequently, why they believe that judges are deficient in their duty to be knowledgeable about the law. First, judges' lack of understanding of technology contributes to their lack of understanding of the harms that technology will cause to a victim who is victimized through online mediums. Some interviewees attribute this lack of understanding to judges' age, while others describe other factors like being numb or jaded, not utilizing these technologies in their personal lives, or the lack of training in these areas. Second, due to their lack of understanding, judges use their discretion in ways that resemble their experiences, which typically does not involve many technologies. Legal and new legal realism is highlighted as the lack of understanding of technology and its harms and the subsequent use of discretion due to the absence of knowledge leads judicial decision-making to be based on personal perceptions, experiences, and being jaded. Third, advocates and attorneys describe how they view judges' inability to deviate from literal interpretations of written law as creating a law on the books versus a law in action framework where they have to shift how they present their cases to various judges based on the likelihood that the judge does not understand technology or is unlikely to grant a restraining order in a case that involves technology. This demonstrates an additional element of judicial decision-making where judges rely heavily on the written law. As a result, all three of these aspects heavily influence how judges interpret cyberstalking and cyberharassment laws. These interpretations frequently lead to poor outcomes for victims as judges do not rule in their favor because they miss the importance of technology

to the case. Therefore, attorneys and advocates believe that judges lack judicial responsibility to the law as they are often not knowledgeable about crucial information.

Discussion

Judges have a responsibility to be knowledgeable about facts that might be important to their cases. Attorney and advocate interviewees believe that judges are not maintaining that responsibility due to their lack of understanding of technology and its harms, and discretion, which are demonstrated through the legal realism, new legal realism, and law on the books versus law in action frameworks. These three factors coalesce to create a "perfect storm" in which judges continue to misinterpret the law as it relates to technology and its harms by diminishing someone's victimization if it only occurs online.

There are several instances of cases where judges have demonstrated their lack of understanding of technology and it has affected major rulings. In 2016, Billy Raymond Counterman was convicted of stalking due to hundreds of Facebook messages that he sent to a musician, Coles Whalen, that were objectively threatening and perceived to be a threat by Whalen. He served 4.5 years in prison but appealed his conviction, which made it to the Supreme Court. In a 7-2 decision, the Court ruled in the defendant's favor that the state needed to show that the "defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence" and therefore, the defendant is protected by the First Amendment (Dwyer, 2023). This is a devastating blow to victims and minimizes the harm that stalking and threatening messages cause to victims. The two dissenting judges acknowledged that they believe these were true threats and should not be protected by the First Amendment. They felt that his intent was clear, and this victimization caused the victim to fear for her life and suffer great emotional distress. The dissenting opinion takes a law on the books approach where the judges demonstrate that intent was clear, which is part of the written statute, but the majority opinion utilizes First Amendment considerations, which has been prevalent in the "law in action" or case law when these cases get appealed. However, most of the judges in this case were not informed about how victimization through technology could cause the victim to fear for her life, thereby highlighting legal and new legal realism as factors beyond what is presented in the case can affect decision-making. These judges also neglected to consider that this offense consisted of hundreds of messages, where each one caused the victim more and more fear (Dwyer, 2023).

Legal and new legal realism are also highlighted in other recent cyberstalking and harassment cases. For instance, another case in Maryland also demonstrates a federal judge deciding that stalking behavior is protected by the First Amendment (Reporters Committee for Freedom of the Press, 2011). In this case, the defendant, William Cassidy, became an officer of the organization, Kunzang Odsal Palyou Changchub Choling (KPC). After a falling out with KPC's leader, Cassidy made derogatory comments about the leader through Twitter (now known as X) and was charged with violating the federal anti-stalking statute as he harassed and/or caused emotional distress to a person using "any interactive computer service" as stated in the statute. The judge in this case ruled that because users on Twitter (X) must "follow" someone to receive their tweets and users can block someone whose tweets they find offensive, the victim should have used "her own sensibilities by averting her eyes" (Reporters Committee for Freedom of the Press, 2011). This demonstrates a lack of awareness of how Twitter (X) works causing the judge to misapply the law, which creates a new "law in action." This is also a gross misunderstanding of how harmful this behavior is towards the victim. This also does not mean that the victimization will stop, and the perpetrator will not be held accountable for their actions. This advice given by the judge is premised on his lack of knowledge of the harms of Twitter (X), showing how much his personal experiences are impacting his decision-making, rather than important facts of the case. Finally, there is

no guarantee that by employing this course of action, that the victim will still not be able to view these tweets as they may be sent to her by others in the organization or her family and friends. Additionally, while blocking someone may stop an individual from seeing their tweets, the judge is not informed of how Twitter (X) works and simply not following someone does not guarantee that an individual will not see those tweets as many tweets are public.

While the judges in these cases are more apt to acknowledge and understand the technology but not understand the harms it creates, there are many instances of judges not understanding the technology and platforms that these crimes occur on at all (Lewis, 2023). In a North Carolina case that involved a defendant who groped and beat up a victim because she rejected his unwanted advances, a judge ruled in favor of the defendant after the defense continuously brought up that the victim was an OnlyFans creator. The judge did not know what OnlyFans was and took a five-minute recess to look it up. After doing so, he made a significant legal decision on a snap judgment of the victim's job in online sex work, which was based on his quick personal experience in learning of the platform, and then conflated it with consent. Despite clear physical evidence of the victim's assault, the case was not ruled in her favor because of the judges' quick opinion of a platform that he was unaware of. This shows how the judge focused on protecting the defendant's rights over the victim because of his judgment on her being an OnlyFans creator. Protecting defendant's rights depicts the "law on the books" versus "law in action" framework as the case law has made judges more apt to err on the side of defendant's rights. Similarly, a judge in a California case ruled that a sexual assault must have been consensual because the parties were business associates and the victim had sent the defendant a LinkedIn request before they met. The judge was not aware that LinkedIn is for professional networking and not utilized to arrange hookups, demonstrating his decision-making on inaccurate personal experience (Lewis, 2023).

Another case demonstrated a judge's lack of understanding of Twitter. In 2016, Canada experienced its first Twitter harassment case, and the defendant was acquitted. While the judge felt that the victims felt harassed, he did not believe they should have been fearful, despite the defendant making a reference to one victim's location (Lewis, 2023). A large portion of the trial was spent explaining information about Twitter to the judge like tweeting, retweeting, blocking, hashtags, and handles, which judges should be knowledgeable about if relevant to their cases. In another case, a judge did not understand Snapchat and its auto delete functionality and wondered why there was no proof of messages that were allegedly sent, which detailed that the perpetrator would harm the victim if she reported him to the police. The case went in circles trying to explain that to the judge. Both of these cases demonstrate situations where judges applied the law incorrectly because they misunderstood important technological elements. The written law was misapplied leading to the "law in action," or case law being based in falsehoods about how the platforms work. Many lawyers, like California-based Sam Dordulian, believe that cases are likely to be thrown out or ruled unfavorably if the judge does not understand the platform (Lewis, 2023). These cases demonstrate that judges need to be educated and trained on the technology used in cyberharassment and cyberstalking so that judges are aware of how these crimes are commissioned because their decisions are being made on their experiences with these platforms, which are minimal or non-existent. Even more importantly, they need to be educated on the harms that victims can experience, so that they take these crimes more seriously. This will also result in judges using their discretion to take these cases on, rather than avoiding them as they currently do. Finally, if this occurs when these cases appear before judges, they will be able to make knowledgeable rulings as they will be aware of all of the crucial parts of the offenses, including the technology.

Limitations

As with all research, this study is not without its limitations. Recruitment relied on attorneys and advocates whose contact information was publicly available, and referrals from participants, which limited the scope of the stakeholders that were interviewed. Additionally, those who participated may be biased by having stronger inclinations to assist victims and therefore, may be more willing to be interviewed. Participants may have also been in areas that have more resources and could afford to take time out of their schedule to be interviewed. For all these reasons, the results are not generalizable to a larger population, only to the sample. However, responses did reach saturation, where many interviewees discussed similar accounts and therefore, the interviews seem to capture the landscape of the issue well.

Conclusion

When used properly, phone, email, and social media communications are extremely beneficial. However, when perpetrators use these communications to abuse and control victims, victims experience a wide range of harms. As a result, cyberstalking and cyberharassment have emerged as pressing issues in our society, as traditional domestic violence, stalking, and harassment combine with technology to cause previously unimagined consequences. This study demonstrates how due to these new consequences that victims experience, judges must remain increasingly more vigilant in ensuring that they stay knowledgeable and up to date on which technologies perpetrators use, how they use them, and the harms that they create for victims. Solutions may involve creating technological continuing legal education or technological trainings for judges so that they can properly understand technological harms to adjudicate cases more fairly and beneficially.

About the author

Kateryna Kaplun is an assistant professor in the Department of Criminal Justice at Johnson & Wales University. She received her doctorate in criminal justice from Rutgers University - Newark. Much of her research has examined the legal discourse of cyberstalking and cyberharassment. She has also worked on projects involving police technologies and criminal accusation in the technological sphere, and female inmate isolation.

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Examining Remorse in Attributions of Focal Concerns During Sentencing: A Study of Probation Officers

Colleen M. Berryessa[1]

Abstract

This research, using interviews with probation officers in the United States (n = 151) and a constant comparative method for analysis, draws from the focal concerns framework to qualitatively model a process by which probation officers use a defendant's remorse to attribute focal concerns in order to guide their sentencing recommendations in pre-sentencing reports. The model suggests that officers use expressions of remorse to make attributions about mitigated criminal intention (blameworthiness and notions of responsibility), reduced dangerousness and a high potential for reform (community protection), and organization-level effects for increasing caseload efficiency and using correctional resources (practical effects of sentencing). Then, officers appear to use attributions from two remorse-guided focal concerns (blameworthiness and community protection) to directly advise their recommendations for more lenient sentencing outcomes. Finally, as probation officers also described feeling sincerely responsible for providing critical information to the court about a defendant's background and remorse, contributions and implications of this model for criminal sentencing are discussed.

Keywords: remorse, probation officers, sentencing, focal concerns, qualitative

Introduction

The focal concerns perspective uses microsocial contexts, particularly defendant characteristics, as proxy indicators of blameworthiness, community protection, and practical effects of sentencing to help explain sentencing (Steffensmeier et al., 1998). Despite interest in widely drawing from this approach, research has been most often limited to quantitative research designs that examine the extent to which a defendant's race, gender, and other characteristics collected in official court contexts and case-level data influence judicial sentencing decisions (Wellford, 2007; Lynch, 2019). Wu and DeLone (2012) argue that the larger body of sentencing research that draws from focal concerns has not yet turned its main focus "beyond these boundaries" (p. 215). Indeed, other methodological designs, sentencing stages aside from the final disposition, decision-makers involved in sentencing, and defendant characteristics that may be proxy indicators for focal concerns but are not easily collected in official court data, such as behavior or demeanor, are rarely studied using this approach (Lynch, 2019). One defendant characteristic, remorse, is considered highly relevant to sentencing as a proxy indicator of responsibility, risk, and rehabilitation (Weisman, 2014). However, to date, less attention in the literature has been paid to empirically examining it within focal concerns (Maruna & Copes, 2005; Wermink, 2014).

This study expands existing sentencing literature by applying focal concerns to probation officers in the United States (U.S.) and how they use a defendant's remorse to guide their sentencing recommendations. Ultimately, this research produces a model that shows how officers use remorse to

[1] Colleen Berryessa, Rutgers University, School of Criminal Justice, 123 Washington Street Room 579G, Newark, NJ 07102, USA; Telephone 973-353-3456; colleen.berrryessa@rutgers.edu

make attributions of three common focal concerns and how attributions stemming from blameworthiness and community protection specifically are used by officers to inform and support recommendations for more lenient outcomes in their pre-sentencing reports.

Focal Concerns Approach to Sentencing

The focal concerns approach suggests that decision-makers attempt to "balance" three focal concerns in sentencing: 1) a defendant's blameworthiness; 2) community protection; and 3) the practical effects of sentencing (Steffensmeier et al., 1998; Steffensmeier & Demuth, 2006). Blameworthiness, reflecting the retributivist approach that the punishment should fit the crime, is influenced by factors integral to explaining and attributing a person's responsibility for their bad actions, such as the offense's severity, a defendant's criminal intention, or their role in the crime (Steffensmeier et al., 1998). Community protection, echoing the utilitarian notion that punishment should prevent future offenses, is often motivated by defendant characteristics, such as the likelihood of recidivism or rehabilitation, and case characteristics, such as the use of violence (Steffensmeier et al., 1993; 1998). The third focal concern focuses on practical sentencing implications at both the defendant- (e.g., disruptions to family) and organizational- (e.g., costs for the correctional system) levels (Steffensmeier & Demuth, 2006).

Yet, during sentencing, there is seldom adequate time or satisfactory information regarding a defendant's case and background for decision-makers to make fully informed decisions based on these focal concerns (Albonetti, 1991). In order to deal with uncertainty, sentencing decision-makers are thought to develop schema, based upon their past experiences, normative social or cultural views, courtroom norms, and stereotypes associated with defendant characteristics, as a form of "perceptual shorthand" (Hawkins, 1981). This shorthand allows them to make "imputations about ⌈a⌋ defendant's character" (p. 246) and future behavior when making attributions about their blameworthiness, the risk to the community, and any practical effects of their sentencing (Steffensmeier & Demuth, 2006). In the absence of time or information, this process increases the likelihood that stereotypes based on defendant characteristics will be used to make inferences about focal concerns and influence sentencing (Albonetti, 1991; Klein, 2008). In the last several decades, an expansive body of research has found support for focal concerns as a way to help explain sentencing outcomes for defendants across demographics, with a particular focus on gender, race, age, and ethnicity (see Steffensmeier & Painter-Davis, 2017 for a review).

Assessing focal concerns is thought to be subjective and driven by causal attributions that help decision-makers explain a defendant's past and future behavior in order to make choices during sentencing (Harris, 2009). In this process, decision-makers infer that a defendant's criminality results from internal causes, such as demographic traits, demeanor, or personal values, or external causes, such as environmental influences (Bridges & Steen, 1998). Defendants inferred to exhibit criminality from internal causes may be seen as more responsible for their behaviors, dangerous, and less able to be managed or reformed by corrections, resulting in more severe sentencing outcomes (Huebner & Bynum, 2006). As such, causal attributions are considered the means by which focal concerns may influence sentencing (Koons-Witt, 2002).

Probation Officers in Sentencing Recommendations: Drawing from Focal Concerns?

The focal concerns approach was initially developed to explain judicial decision-making, with most research still focusing on that population (Smith, 2020; Ulmer et al., 2022). However, other decision-makers are heavily involved in sentencing and have significant weight in dictating its outcomes (Leiber et al., 2018). Probation officers are critical figures in sentencing and, during the sentencing process,

provide a wide range of information about defendants to judges through their pre-sentencing reports (Hagan, 1975; Rush & Robertson, 1987). In writing these reports, officers assess a defendant's criminal record, case, social background, demeanor, and other contextual information; then, based on these assessments, they use pre-sentencing reports to implicitly and explicitly communicate their recommendations for sentencing, including any probation conditions or considerations that they believe judges should know when weighing a sentence (Walsh, 1985).

Some studies have found mixed results on whether pre-sentencing reports influence final sentencing dispositions (Hagan et al., 1979; Kingsnorth et al., 2002). However, more research seems to suggest that judges' sentencing decisions are most often in line with officer recommendations in pre-sentencing reports and also utilized by judges to provide insights about defendants and their backgrounds that are potentially unknown to them at sentencing (Frieburger & Hilsinki, 2011; Leiber et al., 2018). Indeed, judges may have little time to interact with defendants, while probation officers likely have more time to observe and evaluate them during sentencing (Hagan, 1975). Based on the focal concerns approach, pre-sentencing reports could help to reduce uncertainty and decrease a judge's need to rely on "perceptual shorthand" (Hagan et al., 1979; Leiber et al., 2018).

However, most often, probation officers also do not have sufficient time or information to make fully-informed sentencing recommendations. Faced with uncertainty in their decision-making, limited research suggests that officers develop their own "perceptual shorthand" and are guided by similar common focal concerns–both in field enforcement decisions and when making sentencing recommendations (Frazier et al., 1983; Freiburger & Hilinski, 2011; Huebner & Bynum, 2006; Leibner et al., 2018; Leifker & Sample, 2011). For example, Harris (2009) found that probation officers in juvenile court used attributions of blameworthiness and community protection to guide fitness reports. Bridges and Steen (1998), also analyzing narrative reports written by juvenile probation officers, found that they were more likely to use community protection concerns to guide sentencing recommendations for Black, versus White, juvenile defendants; they were also more likely to attribute criminality of Black youth to internal causes.

Despite this limited work, as well as the influence that probation officers appear to have in sentencing, more empirical attention needs to be paid to them within the focal concerns approach (Harris, 2009). Most existing work is restricted in scope to juvenile defendants and their probation officers, or has applied focal concerns to specific defendant characteristics (such as race, gender, and age) that are not "beyond the[se] boundaries" of the larger body of focal concerns research (Wu & DeLone, 2012). This is an oversight in existing work, as officers have been found to draw from a range of both legal and extra-legal characteristics related to a defendant's background (e.g., employment, criminal record), demeanor (e.g., remorse, negative attitudes), and crime (e.g., role in the offense) in order to make sentencing recommendations (Freiburger & Hilinski, 2011; Leifker & Sample, 2011). From the focal concerns perspective, Leiber et al. (2018) argue that probation officers are likely to use these defendant characteristics in their "perceptual shorthand" to make attributions of blameworthiness, community protection, and practical implications of sentencing. Therefore, it may be valuable for research to draw from the focal concerns approach to examine how probation officers use different defendant characteristics to guide their sentencing recommendations.

The Role of Remorse in Sentencing Outcomes

One defendant characteristic, remorse, has been thought to strongly inform probation officers in their sentencing recommendations (Berryessa, 2022). Remorse, which can be verbally (i.e., apologies), affectively (i.e., body language), or behaviorally (i.e., giving restitution) shown, indicates that a person

appreciates and condemns their harmful acts–which then reveals their good, or their potential for good, character (Robinson et al., 2012). Literature suggests that, both culturally and in sentencing, remorse signals several normative assumptions about criminality, including that it is not indicative of a defendant's "true self" and that mitigated responsibility for their crimes may be warranted; remorse is also thought to provide insight into a defendant's future conduct, mainly that they may be less likely to pose a future danger and have a high potential for future rehabilitation and reform (e.g., Everett & Nienstedt, 1999; Gold & Weiner, 2000; Robinson et al., 1994; Weisman, 2009; 2014; Zhong et al., 2014).

Spencer (1984) argues that officers use remorse to make suppositions about a defendant and their bad behavior, and recent work also suggests that probation officers believe that it is crucial to incorporate remorse assessments into their pre-sentencing reports for judges to consider during sentencing (Berryessa, 2022). Officers may include information about remorse in sentencing recommendations in order to communicate to judges about any remorse displays a defendant has shown and what these displays might suggest for their sentencing (Berryessa & Balavender, 2021; Drass & Spencer, 1987; Rush & Robertson, 2018; Weisman, 2009). In fact, in prior work, probation officers have suggested that they feel it is tremendously important to communicate information about a defendant's prior expressions of remorse or plans for showing remorse, such as community service or restitution, to judges who may never know or recognize these expressions without such reports (Berryessa, 2023a). Although data are mixed, remorse is often considered an influential factor for judges during sentencing, and they often believe it is mitigating to sentencing and expressive of good character (e.g., Rachlinski et al., 2012; Ulmer et al., 2022; van Oorschot et al., 2017; Weisman, 2009; Zhong, 2015).

To date, little empirical effort has been devoted to studying remorse in sentencing within focal concerns (Maruna & Copes, 2005; Wermink, 2014). Some existing data that draw from this approach have found support for remorse's use in ascriptions of blameworthiness and community protection. However, such studies have only examined it in relation to specific characteristics (such as gender or race) or tangentially noted its relevance alongside broader ranges of factors that may be considered within focal concerns; further, these prior studies have not detailed how attributions related to remorse may actually affect sentencing outcomes (Ulmer & Kramer, 1996; Ulmer, 1997; van Wingerden et al., 2014; Wermink, 2014).

For example, Steffensmeier et al. (1993) found that the remorse of female defendants may guide focal concerns related to mitigated culpability and lead to downward departures. Bridges and Steen (1998) found that remorse of White juvenile defendants was viewed as evidence of rehabilitation potential, but these attributions did not extend to Black youth. Alongside a wide range of other overlapping factors such as criminal record and mental illness, a more recent study by Ulmer et al. (2022) found that trial court judges viewed a defendant's remorse as a compelling consideration for all three focal concerns when determining blameworthiness, community protection, and practical considerations during sentencing. Indeed, Wermink (2014) argues that there remains a stark lack of research that explicitly focuses on drawing from this perspective to more thoroughly understand if and how remorse can actually impact sentencing via attributions of one or all common focal concerns.

Given its potential role in informing their sentencing recommendations in pre-sentencing reports, Leifker and Sample (2011) suggest that applying the focal concerns framework to probation officers and how they use remorse to guide focal concerns in their sentencing recommendations may add value to the larger literature that has shown infrequent empirical attention to probation officers. Further, as interview-based studies on the views and behavior of sentencing decision-makers are thought to be valuable designs to "triangulate on the question of how sentences—and sentencing inequalities—are ⁅actually⁆ produced," Lynch (2019, p. 1167) suggests that a qualitative approach could be the method to optimize the study of these issues.

The Current Study

Stemming from this background, the current study draws from semi-structured interviews with probation officers to examine how they use a defendant's remorse to guide their recommendations in their pre-sentencing reports from a focal-concerns perspective. This work develops a model from the collected data that shows how officers may use remorse to make attributions of blameworthiness, community protection, and practical effects of sentencing–and then if and how they use these remorse-guided focal concerns to inform their sentencing recommendations. Thus, this study's goal is to link these two research questions in order to explain the relationships between them:

1. In what ways do probation officers use a defendant's remorse to make attributions of focal concerns (blameworthiness, community protection, practical effects of sentencing)?
2. In what ways do probation officers employ remorse-based focal concerns to inform their sentencing recommendations in their pre-sentencing reports?

As most sentencing research that draws from focal concerns still utilizes quantitative designs (Wellford, 2007; Wermink, 2014; Lynch, 2019), this study's qualitative design and model should uniquely contribute to this literature. Further, as probation officers are often the communicators of key information about a defendant's remorse to a judge that may then enter it into their sentencing calculus, this study helps illuminate how attributions stemming from remorse may impact later sentencing decisions.

Method

This research uses a qualitative research design, including semi-structured interviews, and a constant comparative method for analysis. The constant comparative method has its roots in classical grounded theory as a way to bridge traditional coding and the generation of new theory, but methodological developments have expanded its use in qualitative research to adapted types of grounded theory and also beyond grounded theory itself (Boeije, 2002; Kolb, 2012; Olson et al., 2016). While most commonly drawing from coding and analytic techniques from forms of grounded theory (Strauss & Corbin, 1998), these more modern and evolved ways of using the constant comparative method can combine positivist (inductive) and interpretive (deductive) frameworks to ensure that all data are systematically analyzed and compared to each other; this allows for structuring the phenomena in the contexts being studied and, commonly based on prior knowledge, developing a thick description and interpretation of the takeaways in the data. Further, while literature reviews or comparisons of data would traditionally occur only at specific stages of analysis or data collection, adapted constant comparative methods of analysis often take place, as well as draw from prior knowledge, at any or all stages of data collection and analysis based on the researcher's understanding of the data (Fram, 2013; O'Conner et al., 2008). This is the type of constant comparative method used in this study, and similar analysis plans using adapted grounded theory and the constant comparative method have been used by Berryessa (2019, 2022, 2023a, 2023b) when building other qualitative sentencing decision-making models.

It is important to note that, in some literature, this use of constant comparative methods has been termed *interpretive grounded theory*–with a literature review and prior knowledge used to shape flexible research questions, strengthen the analysis and data comparisons based on early stages of coding, and to allow the researcher to interpret the data and results within existing knowledge (Sebastian, 2019). However, other literature has preferred to depart from the grounded theory label altogether (as there remains controversy on what constitutes true or appropriate grounded theory methodology; see Goulding, 2017), and it may refer to this same method and its analytic techniques more generally as the constant comparative method (Fram, 2013; O'Conner et al., 2008).

Sample & Data Collection

Purposeful sampling was used for this research (Suri, 2011), targeting probation officer members from the American Probation and Parole Association (APPA). APPA was chosen as a sampling frame because it is the primary professional society for probation officers and other corrections officials in the U.S. (90,000 individuals who work in probation and parole), and APPA staff were willing to send interview invitations to its email list. In September 2019, invitations, which included informed consent and study information sheets, as well as the contact information for the study, were emailed to probation officer members of the APPA. A $20 VISA gift card was used to incentivize participation in the interviews. In total, telephone interviews with 151 probation officers were conducted. All interviews were digitally recorded and fully transcribed. Rutgers University Institutional Review Board approval for the study was received. Data from this sample have also been recently used in three other separate qualitative inquiries (Berryessa, 2022, 2023a, 2023b).

Interviews & Analysis

Interviews lasted anywhere from 30 to 45 minutes. Officers were asked questions in five categories: (1) how they assess remorse in their clients; (2) factors that they feel are important to assessments of remorse; (3) what information they include about remorse in their sentencing recommendations in their pre-sentencing reports; (4) how they use remorse in making their sentencing recommendations in their pre-sentencing reports; and (5) probation officers' basic demographics. These categories of questions were inspired by Patton's (1987) areas of questions to utilize when conducting qualitative interviews and are also detailed in Berryessa (2022).

Dedoose, the qualitative analysis software, was used to arrange and, as described above, analyze interview data via a constant comparative method and three stages of coding (Boeije, 2002; Kolb, 2012). Although the steps of coding are often called by different terms depending on the adaptation of the method (Urica, 2021), this paper uses terms used by Strauss and Corbin (1998) to describe each stage of coding. First, open coding was conducted for a random set of 20 interviews, and an independent coder developed a preliminary set of themes observed by fracturing the interviews into segments and comparing the data in each line of an interview to one another. This involved creating textual memos about comparing the individual data segments within each interview, followed by comparing themes across data segments from the entire subset of interviews.

During this stage, data comparison spoke to an existing theoretical framework observed in reviews of the literature prior to analysis, and the themes that surfaced from the data were found to apply principles and knowledge from the focal concerns approach. Thus, this theoretical approach was used to organize themes from open coding and systematize them into categories during the axial coding stage. The axial coding stage, using conceptual memoing and open codes as criteria for organization, involved deconstructing and comparing data segments across the full set of interviews, reconstructing and organizing these data segments by theme, and then reducing or merging open codes and coding categories that spoke to the study's theoretical framework. This resulted in a coding scheme consisting of four axial coding categories for all 151 interviews. Interrater reliability of the total coding scheme was estimated using Dedoose, with a second individual analyzing a sample of random interview excerpts, establishing 81% agreement between coders (Belur et al., 2021).

Finally, the four axial coding categories were positioned during selective coding to theoretically develop a model that speaks to how officers may use remorse to make attributions of blameworthiness, community protection, and practical effects of sentencing, and then if and how they use these remorse-

guided focal concerns to inform their sentencing recommendations (from the study's two research questions). This process involved theoretical memoing about the meaning and relationships observed between axial coding categories, as well as dialogic engagement with two other researchers on how to conceptually outline and organize the qualitative model. The Standards for Reporting Qualitative Research guidelines were also used for this research (see O'Brien et al., 2014).

Results

Demographics

The interview sample's sample demographics (n = 151), who all currently handle or have previously handled a caseload with clients facing criminal charges, are presented in Table 1 (from Berryessa, 2022). No themes observed in the data appeared to vary due to the sample's demographics.

Table 1. Demographics of 151 probation officers in the interview sample from Berryessa (2022)

Demographics		***n***
Sex	Male	70
	Female	81
Age	21 to 30 years	20
	31 to 40 years	49
	41 to 50 years	52
	51 to 60 years	22
	>61 years	7
	No response	1
U.S. State	Arizona	11
	Arkansas	1
	California	18
	Colorado	1
	Georgia	3
	Hawaii	1
	Idaho	1
	Illinois	9
	Indiana	4
	Kansas	1
	Kentucky	1
	Maryland	1
	Michigan	6
	Minnesota	2
	Mississippi	2
	Missouri	4
	Montana	1
	Nebraska	20
	New Jersey	2
	Ohio	10
	Oregon	3
	Pennsylvania	9
	South Carolina	3

(Continues)

Table 1 (Continued)

Demographics		***n***
U.S. State	Tennessee	2
	Texas	19
	Utah	1
	Virginia	13
	Washington D.C.	2
Racial Identification	White	40
	Black	24
	Asian	6
	Hispanic	21
	Chose not to racially identify	60
Education	High School Degree	3
	Associate's Degree	10
	Bachelor's Degree	91
	Master's Degree	40
	Doctoral Degree	1
	Professional Degree (JD, MBA)	6

Findings & Model

Four primary axial coding categories (*Remorse as "Blameworthiness," Remorse as "Community Protection," Remorse as "Practical Effects of Sentencing," Remorse-Guided Sentencing Recommendations*) arose from the interview data. They were positioned during the three-stage coding process described above. Results suggest the below-described model, which is also shown in Figure 1. Probation officers were found to use observations and evaluations of a defendant's remorse to make attributions of three focal concerns: the extent to which a defendant's remorse indicates less responsibility and less intention for their criminal acts (*Remorse as "Blameworthiness")*; the reduced need for community protection and specifically the defendant's high potential for reform (*Remorse as "Community Protection")*; and organization-level implications of remorse related to increasing officers' overall caseload efficiency and the use of correctional resources (*Remorse as "Practical Effects of Sentencing")*. Then, relying on these attributions, probation officers discussed how two remorse-guided focal concerns–blameworthiness and community protection–inform and guide their sentencing recommendations for more lenient outcomes in their pre-sentencing reports (*Remorse-Guided Sentencing Recommendations*). All findings reported here reached theoretical saturation in the data and were observed across the totality of the interview sample. Further, for transparency, slight amendments to grammar were also made to the interview excerpts below.

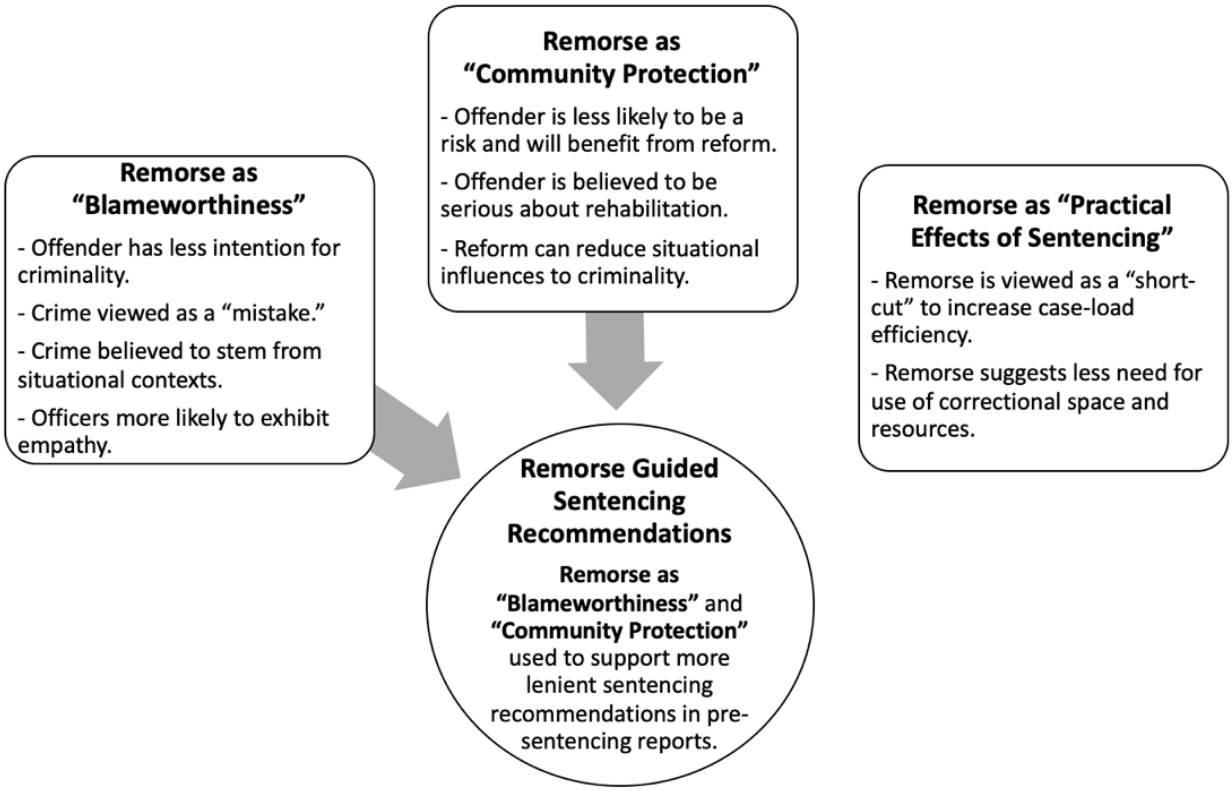

Figure 1. Model by which probation officers use a defendant's remorse to make attributions of blameworthiness, community protection, and practical effects of sentencing, and how attributions stemming from two remorse-guided focal concerns (blameworthiness and community protection) are used to inform sentencing recommendations in their pre-sentencing reports.

Remorse as "Blameworthiness." Probation officers viewed verbal (confessions, apologies) and affective (crying, body language) expressions of remorse as equally important in informing them about whether a defendant's level of responsibility and intention for their criminal acts should somehow be mitigated. Officers discussed that when a defendant has shown remorse, they often question whether their criminal behavior should, at least to a degree, be viewed as a "mistake" or a "slip-up" rather than a purposeful act. One officer, describing his experience with a recent client who verbally expressed remorse for a recent burglary offense, said,

> [you can tell he] just made a mistake, I do get [clients] that made a mistake and are not going to ever do it again. You can tell because they are concerned that they have hurt others and feel bad…they did not know what they were doing, they do not want to hurt somebody again (Interview 19).

Particularly, officers were more likely to focus on and describe environmental contributors to a defendant's criminal behavior when they have shown remorse by honing in on situational contexts in a defendant's background and experiences that may have led to their offending, such as involvement with antisocial peers or communities, substance abuse, or unemployment. Officers appeared to believe that

situational contexts can lessen a defendant's full responsibility for their behavior because officers feel that they can *understand* its root causes and *why* it happened. For example, one officer noted how one of his younger clients, who had expressed "deep remorse" for multiple property crimes, had been running with the "wrong crowd." The officer believed that this client now recognized this, describing his criminality as stemming from their bad influence:

> He understands what has happened, the harm that [he has] done…he got caught up in [the wrong crowd]…[he is] recognizing, like, okay, I made a mistake. This is serious. I did not understand it in the beginning, but now that I have had time and this happened, and this is the consequence of that…This is what happens if you hang around this peer group…Now I see that. I feel like those are important items, especially as you get to know [a client]. You are able to point out, like, he gets it…You can feel that deep sense of regret and remorse and his intent to move forward away from that lifestyle (Interview 77).

In the same vein, officers appeared more likely to express empathy toward a defendant who has exhibited remorse to show their understanding of that behavior and its circumstances. Officers described, in some cases, that they even find themselves comparing their personal past experiences in which they made mistakes and had them forgiven by family, friends, and authority figures to a defendant's current situation. One officer said that he knows "the way [it feels] to beg for forgiveness" from his past experiences of making bad choices (Interview 47).

Interestingly, as long as officers used a defendant's remorse to inform them that their criminal behavior may be viewed as a potential "mistake," the type or severity of the crime did not necessarily affect the extent to which they believed remorse could be viewed as a proxy for blameworthiness or mitigated responsibility. Indeed, officers said they had used remorse to inform them about specific clients and cases in which a defendant had severely harmed another person; yet, in all these instances, the harm was not believed to be intended or deliberate. For example, one officer described how her client with past alcohol problems had hit another car in a DUI and injured a child, but that he had made a "terrible mistake" and learned from it. The officer, describing the client's remorse for injuring the child, stated that,

> he is someone who has been a lifelong addict and is now sober… he said to me, I never realized how terrible what I was doing was until I [found out there was] a little kid in that car. And he did not mean to hit him, obviously. He was like, I am never going to do this again. I do believe that is true…he finally reached the point where he is taking it seriously (Interview 149).

Remorse as "Community Protection." Probation officers viewed specifically verbal (confessions, apologies) and, to a lesser extent, behavioral (restitution to victims, community engagement) expressions of remorse to inform them that a defendant is less likely to pose a future risk and has a high potential for reform. For officers, defendants who have shown remorse were described as having overall positive attitudes and the least likely to recidivate or be a danger to the community. As one officer put it, "Remorse is one of the number one thing that we are looking at. It shows the character [of a client] and the risk levels and all kinds of things all by itself" (Interview 89).

Most of all, however, officers described defendants who have shown remorse as those who would and can benefit most from rehabilitation. Mainly, officers viewed remorse as evidence of a defendant's seriousness and dedication to their reform and the desire to reintegrate into society successfully. As one officer said, "I think the criminal justice system usually wants to rehabilitate people, make them positive members of society. So, if I see somebody is remorseful, then I am seeing that they want to change. They

want to fit into the goals of the system" (Interview 80). Similarly, speaking about his clients, another probation officer stated that "if they have remorse, usually they are going to want to participate in trying to change their behavior. This is what we are looking for, somebody putting the work into it to start creating motivation for change" (Interview 31).

Officers also tied the potential benefit from rehabilitation to the perceived nature and source of a defendant's criminality. When a defendant has shown remorse, officers appeared to be more likely to focus on situational contexts to, or sources of, their criminality and believe that it is likely to be successfully reformed by removing or mitigating its situational contexts or influences. For example, one officer talked about a client who had expressed remorse and provided restitution for a property crime he had committed to fuel a substance abuse problem. The officer said, "this guy is addicted, but he can be reached. If we can deal with his drug addiction, we can really prevent a lot of crimes because…[he] is so affected by what he did that he is going to think twice" (Interview 23). Indeed, if they have expressed remorse, officers suggested that a client is more likely to have "motivation for changing that criminal mindset" (Interview 128) that can stem from substance abuse issues, poverty, or antisocial peers.

Remorse as "Practical Effects of Sentencing." Probation officers perceived verbal (confessions, apologies) and affective (crying, body language) expressions of remorse as equally instructive regarding their views on the practical effects of a defendant's sentencing. Rather than focusing on defendant-level implications, remorse appeared to represent two main organization-level implications. First, officers described remorse as a type of "shortcut" to handle their caseloads more efficiently. Officers noted that they have a significant number of clients, with the current average being around 84 at one time. As remorse was viewed as demonstrative of positive attributes and, as mentioned above, mitigated criminal intention and potential for reform, officers felt that they most often do not need to overly scrutinize cases in which defendants have shown remorse. Instead, they felt it is better to focus their time and energy on cases involving their more difficult or complex cases and clients, particularly those who do not have the same potential for reform, representing a starker public safety risk.

Second, officers appeared to view remorse as a proxy for using correctional resources and were very cognizant of the limited capacity and financial resources of jails and prisons in their jurisdictions. In the same way that officers felt that they did not need to overly focus energy on cases in which defendants have shown remorse, they felt that these cases were also those less likely to warrant the use of limited correctional space or more restrictive punishments. As remorse was generally viewed as indicative of a high potential for reform, they also believed that defendants who have shown remorse might be successfully addressed outside incarceration, such as less restrictive probation stipulations or sentencing alternatives. For example, one officer, commenting on overcrowding in his jurisdiction, said that space really should be devoted to defendants whose behavior has shown a pattern of disregard for the community–what she referred to as "frequent flyers"–as compared to defendants who have shown real regret for their actions. She stated that,

> if somebody is obviously more remorseful, [I am all about] not putting them in jail but to use rehabilitation, back in the community…jail, a lot of supervision, accountability, should be used for those frequent flyers … it is tough to trust them with anything (Interview 64).

Remorse-Guided Sentencing Recommendations. Probation officers described that they feel a great responsibility to communicate both factual information on expressions of remorse that a defendant has shown (i.e., in what ways remorse has been observed or seen by officers, such as making apologies to victims or the court, crying, or paying victims a form of restitution) and their evaluations on the perceived

meaning of a defendant's remorse (i.e., what officers believe that a defendant's remorse actually means) to the court in their pre-sentencing reports. Officers said that information on remorse is essential to include in their pre-sentencing reports both because it conveys a lot about a defendant's "stage of change" (Interview 44), meaning the likelihood of them changing their thinking and behavior, and also because judges often only have a short time to observe and interact with a defendant as compared to probation officers. Officers felt that judges might not be fully aware of defendants' feelings or expressions of remorse in their limited exchanges with them. Overall, officers said that they feel they should provide judges with as much information as possible on a defendant's expressions of remorse so they are more informed about its presence and relevance to a defendant's sentencing.

Although cognizant that it can vary from case to case depending on the context, officers said that generally, if a defendant has expressed genuine verbal, affective, or behavioral expressions of remorse, these displays often suggest that they should at least consider recommending "more tempered sentencing" outcomes (Interview 71). These might include suspended sentences, less restrictive probation stipulations, sentencing alternatives like community service, or reduced periods of incarceration in cases involving more severe offenses. When discussing how and why remorse informs them that these outcomes may be appropriate, officers' responses suggested that they primarily rely on two focal concerns, blameworthiness, and community protection, inferred from their evaluations of remorse as evidence for making more lenient sentencing recommendations.

Drawing from their attributions of blameworthiness, probation officers appeared to use remorse to frame a defendant's criminal behavior as "situational" and as a "mistake" in their pre-sentencing reports, suggesting that a defendant's behavior is not necessarily indicative of their "true sense" (Interview 142) and that they may therefore have a mitigated level of responsibility for their actions. Officers said that they often include information about any direct situational influences that they believe may have contributed to criminality, such as those described in the examples above, so that judges can better understand officers' reasons for their sentencing recommendations and also to provide judges with meaningful contexts about a defendant's case, criminal behavior, and potential level of responsibility for them to consider in sentencing. While officers did appear to be more likely to express empathy toward a defendant who has shown remorse, they also said that they do not want their emotions to influence their sentencing recommendations. Yet officers, as seen in this illustrative example, still may use emotionally-charged descriptions when describing how remorse affects their sentencing recommendations:

> What I have seen is if somebody is truly remorseful, I try to get them the appropriate consequence… in my reports, there will be a level of hope and that they will be given a chance that somebody else may not have been given. So I will try to recommend probation versus prison and give them the chance to really excel and show us that they are not going to do it again, and they are willing to go get treatment and all that good stuff…. I think the criminal justice system is looking for that level of humaneness. Because I think with a showing of humanity, everybody can be rehabilitated. And I think that is kind of the way the system is meant to work for those who are truly remorseful (Interview 136).

Drawing from their attributions of community protection, probation officers appeared to use remorse to frame a defendant as having great potential for reform and the desire to transform in their pre-sentencing reports. As one officer said, remorse shows that a "change mentality is going on and [a client] is more prone to be willing to change. I think it is good [for me] to show that to the court" (Interview 125). In their reports, officers said they often describe how a defendant who has shown remorse is serious about their rehabilitation. As officers viewed verbal and behavioral expressions of remorse as

specifically instructive of a defendant's potential for reform, they said that they most often detail these two types of expressions for judges in their pre-sentencing reports; further, they also report if a defendant has fully admitted and confessed to their crimes, openly apologized to victims or the community, and provided restitution when appropriate–all as evidence that a defendant is "taking [their] rehabilitation seriously" (Interview 149).

Officers also said they detail recent positive choices or plans that a defendant has made as evidence of their dedication to rehabilitation. Examples that officers provided that might be incorporated into their reports include cutting off contact with friends or acquaintances that may have contributed to the offending behavior, getting a job or sending out job applications, or making plans to go back to school. They said that they detail this evidence to support their recommendations for more lenient sentencing to the court and so that judges, due to their limited time and information, are fully aware of a defendant's level of seriousness.

Although officers appeared to view remorse as instructive with regard to its effects on caseload efficiency and using correctional resources, there was no express acknowledgment nor discussion in the interviews that organizational-level constraints guide their sentencing recommendations. Data only indicated that officers use remorse to inform recommendations via attributions of a defendant's past (blameworthiness) and future (community protection) behavior.

Discussion

This current study, providing much-needed empirical work that explicitly focuses on applying the focal concerns framework to remorse (Wermink, 2014), presents the first-known qualitative model to suggest how probation officers use remorse to make inferences about focal concerns during sentencing. To better understand defendants and their cases, the model suggests that probation officers use remorse to make meaningful attributions of three common focal concerns supported in the larger sentencing literature over the last several decades (Steffensmeier & Painter-Davis, 2017). For officers, remorse provided vital information on a defendant's responsibility, criminal intention, the potential for recidivism and rehabilitation, and also sentencing's implications for caseload efficiency and correctional resources–all of which are factors that have been previously used to infer blameworthiness, community protection, and practical effects of sentencing, respectively, in earlier work (Steffensmeier et al., 1998; Steffensmeier & Demuth, 2006).

However, officers in this study only appeared to use two of these remorse-guided focal concerns to inform their sentencing recommendations in their pre-sentencing reports: blameworthiness and community protection. This is similar to the findings of Harris (2009), who found that juvenile probation officers drew from attributions of blameworthiness and community protection, but not practical effects of sentencing, in the writing of their juvenile sentencing reports. In making their recommendations, officers in this study described how they use a defendant's remorse–inferring that criminal behavior may have been "situational" and that the defendant has great potential for and seriousness about rehabilitation–as evidence and support for more lenient sentencing outcomes. These attributions made by officers help to illuminate how they use remorse to develop their own "perceptual shorthand" in order to make sense of and better understand a defendant's character and future behavior for sentencing purposes (Hawkins, 1981; Steffensmeier & Demuth, 2006). Indeed, the model suggests that officers may develop a schema, at least in part, by drawing from and relying upon common cultural assumptions about remorse, and its potential significance for sentencing, in order to make ascriptions of blameworthiness and community protection to ultimately guide their recommendations (Bridges & Steen, 1998; Everett & Nienstedt, 1999; Gold & Weiner, 2000; Robinson et al., 1994; Ulmer & Kramer, 1996; Weisman, 2014; Zhong et al., 2014).

Perhaps most prominently in this "perceptual shorthand," officers heavily focused on the importance and influence of situational contexts in understanding criminality. Officers used situational contexts to explain a defendant's criminality as an unintended "mistake" and likely to be reformed through dedication and future positive actions. Officers also used these situational contexts to explain their choices in recommending more lenient sentencing outcomes to judges and when describing the types of information about a defendant they choose to provide to the court to support these more lenient recommendations. This suggests that officers likely utilize causal attributions as a way to infer that a defendant's criminality is the result of external causes, which they then use to rationalize a defendant's past (mitigated responsibility) and future behavior (high potential for rehabilitation) in order to make more lenient sentencing recommendations (Bridges & Steen, 1998; Harris, 2009). As causal attributions are viewed as the means by which focal concerns influence sentencing (Koons-Witt, 2002), these results indicate that remorse's influence on probation officers, at least in part, may stem from their reliance on these situational contexts–and a defendant's perceived lack of immediate control over them–when making sentencing determinations. This would be unsurprising, as scholars have already argued that the controllability of the causes of bad behavior is especially important in making decisions about responding to and evaluating criminality in sentencing, especially when assessing notions of a defendant's responsibility (Crocker et al., 1984; Fiske & Depret, 1996).

Further, officers consistently highlighted that they choose to include information about remorse in their pre-sentencing reports because they believe that judges, compared to probation officers, do not have enough time or information to appropriately recognize the presence and importance of a defendant's remorse for sentencing. This implies that officers may not only view their pre-sentencing reports as a way to decrease judges' reliance on their "perceptual shorthand" that can come with limited time and resources (Hagan, 1975; Hagan et al., 1979; Leiber et al., 2018), but that officers also may feel a strong sense of responsibility in their roles during sentencing as the primary providers and communicators of information about a defendant's remorse to the judge and court.

Even though officers appeared to rely on their own "perceptual shorthand" when making their recommendations, the model here also suggests that officers may not be fully aware of the extent to which they rely on their own "perceptual shorthand" and the influence that attributions from focal concerns are likely to have on their pre-sentencing reports (Klein, 2008). Interestingly, officers' discussions in the interviews about using remorse as a "shortcut" to increase caseload efficiency may indicate some awareness that they do not have sufficient time for each client in their caseload. Even so, they appeared very serious about their roles in sentencing and consistently highlighted their own responsibility for providing key information to judges who cannot possess the same insights about defendants due to their limited time and resources (Frieburger & Hilsinki, 2011; Leiber et al., 2018; Rush & Robertson, 1987).

It is important to mention the limitations of this inquiry. Although generalizability is not the primary goal of qualitative research (Ravitch & Carl, 2016), these results and this model may only apply to some probation officers in the U.S. This research sample is substantial for qualitative research, but responses were overrepresented from some jurisdictions. Probation officers may have also decided to participate in the interview study because of a preexisting interest. Therefore, it is unclear whether their views would have differed from those that did not participate. Future inquiries on the current issues may benefit from using other samples of probation officers and different methodological approaches that can help to provide triangulation to the current results.

This study also does not account for any indirect effects that officers' attributions of remorse, particularly surrounding the practical effects of sentencing, may have on their sentencing recommendations. Previous work drawing from workplace organization perspectives has found that judges, like the officers in this study, are sensitive to and aware of the need for case-flow efficiency and

preserving limited correctional resources in sentencing (Steffensmeier et al., 1993; Ulmer, 1997). However, it has been suggested that decision-makers might mechanically consider "downstream consequences" such as these, but they may not directly realize their true influences on their sentencing decisions and later outcomes (Maddan & Hartley, 2017). Holtfreter (2013) contends that sentencing's practical constraints may also work through other more direct factors, such as those associated with blameworthiness or community protection, to guide sentencing. Given that the officers in this study directly provided the data presented here via discussions about their experiences in detailed interviews about how and why remorse informs their sentencing recommendations, this model likely does not account for whether and in what ways practical effects may indirectly or even subconsciously influence their sentencing recommendations. However, future work should examine the potential indirect effects of practical constraints on officers' recommendations involving clients who express remorse.

Further, this study does not examine or apply the focal concerns framework to how officers use remorselessness to guide sentencing recommendations. Research suggests that negative defendant attitudes, like remorselessness, may be positively associated with longer incarceration-based sentences due to increased blameworthiness and the need for community protection (Ulmer & Kramer, 1996; van Wingerden et al., 2016). Although outside this study's scope, future inquiries should examine how remorse may interact with other defendant characteristics, such as race, gender, or criminal record, and how it may function for specific types of offenses, such as those involving violence, with regard to informing recommendations.

A final limitation that may curb the applicability or implications of these findings is that there is a great deal of practical variability in the independent nature and ultimate impact of sentencing recommendations made by probation officers across states and jurisdictions. Leifker and Sample (2011), in their findings and also in reviewing prior literature (e.g., Petersilia, 1997; Norman & Wadman, 2000), describe how officer recommendations commonly predict judges' final dispositions in upwards of 70% of cases–sometimes as the chief or most significant predictor of their sentencing decisions. Even so, these recommendations are commonly shaped and later considered in many disparate ways across jurisdictions; indeed, in some cases, they may be seen as nothing more than ceremonial or symbolic recommendations (Kingsnorth et al., 2002; Rosecrance, 1988). Rosecrance (1985) suggests that sometimes officer recommendations are not entirely independent and may actually reflect prosecutor or judge arrangements, knowledge of stipulations set by sentencing guidelines or statutes, or shaped by convention and expectations from the courtroom workgroup in their jurisdictions. Similarly, in a study of probation officers in a county in California, Leifker and Sample (2010) found that, while officers said they still exercised a level of independence in writing their recommendations, they were still quite influenced by convention, pressure from other members of the courtroom workgroup, and other external sentencing standards in crafting their recommendations.

Thus, existing work suggests that the actual content and impact of probation officer recommendations on later sentencing outcomes likely varies depending on the jurisdiction, its organizational culture, and those working alongside officers in that courtroom workgroup. As this study relied on interviews with probation officers from a large variety of jurisdictions that probably differ across these factors as well, such differences likely impact how the sentencing recommendations made by those interviewed here are shaped and considered in their jurisdictions. Hence, the jurisdictional differences across the interview sample do limit the applicability of these findings to specific courts or even in anticipating the impact of these findings on final sentencing outcomes in those jurisdictions. Indeed, although the demographic information of the research sample did not appear to affect the model developed here, these findings provide more of a conceptual, rather than practical, understanding of how remorse may affect sentencing recommendations for probation officers. Researchers should look to integrate the

nuances of jurisdictional differences and other potential demographic factors into similar future studies to better anticipate how and why a defendant's remorse may disparately affect sentencing recommendations and final outcomes across states and courts with various organizational standards and cultures.

Ultimately, this work represents a unique addition to sentencing research that has shown infrequent empirical attention to both probation officers and how they use a defendant's characteristics when making sentencing recommendations. Further, it also answers calls for increasing the methodological diversity of this area of literature. As sentencing courts are people-oriented institutions, research on them should benefit from a "bottom-up" approach that deeply studies their decision-makers (Ulmer, 2019). Ulmer (2019) suggests that research should move away from descriptively measuring sentencing *outcomes* and, instead, toward varied research designs and analytic approaches that can deeply examine dynamic factors that influence the sentencing *process* itself. Along these lines, this study represents a valuable qualitative contribution to sentencing literature by illustrating how and the extent to which cognitions of probation officers can appreciably influence the sentencing process when remorse is expressed.

Additionally, the attributions that probation officers may make about remorse during sentencing and how they inform their support for more lenient outcomes could also significantly influence final sentencing dispositions. The results here suggest that probation officers feel a sincere sense of responsibility to relay information about a defendant's remorse to the court in their pre-sentencing reports and that they are likely to include as much information about it, and what it may signify about a defendant's past and future behavior, as they feel needed. Further, pre-sentencing reports are used to make punishment-related decisions at other stages after sentencing, such as assignment to a correctional institution or program eligibility during incarceration (Rush & Robertson, 1987). This may mean that sentencing recommendations shaped by remorse-guided focal concerns could have far-reaching implications for a defendant's trajectory in the criminal-legal system above and beyond their initial sentencing.

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About the author

Colleen M. Berryessa is an Assistant Professor at the Rutgers University, School of Criminal Justice. Her research examines how psychological processes, perceptions, attitudes, and social contexts affect the criminal justice system, mainly related to courts, sentencing, and forms of punishment broadly defined. She received her Ph.D. in Criminology from the University of Pennsylvania, her B.A. from Harvard University and was also a research fellow at the Center for Biomedical Ethics at Stanford University.

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"He's in jail now and I don't feel bad": Analyzing Sureties' Decisions to Report Bail Violations

Rachel Schumann[1]
Carolyn Yule[2]

Abstract

The control, supervision, and rehabilitation of criminalized people often falls on the shoulders of non-state agents and organizations. Surety bail releases are a clear embodiment of this trend, as the courts call upon relatives, friends, and employers to supervise the pre-conviction activity of people accused of a crime. According to the law, sureties must report all bail violations to the police; the resulting diffusion of responsibility is said to increase the penal state's power and control over criminal justice-involved individuals while minimizing reputational risks. Yet how sureties carry out this role in the community remains unexplored. Using data from 36 interviews with sureties in Ontario, Canada, we find that how friends and family assume the role of surety varies considerably and regularly diverges from court expectations. Despite the general commitment sureties show towards supervising the accused, decisions to report an accused vary based on the perceived severity of the act, the fairness of the conditions, the accused's best interests, and their own bias towards the law. In this way, responsibility for carceral control is not just assumed by sureties but also resisted, ignored, and subsequently transformed in the context of their everyday lives. Understanding how the decision-making process of sureties works in practice is important for informing recommendations geared towards offsetting the pains of pre-conviction for the accused and their loved ones.

Keywords: bail, judicial interim release, surety, civilian jailer, pre-conviction punishment, diffusion of responsibility

Introduction

A growing trend in criminal justice policy sees the control, supervision, and rehabilitation of criminalized people being offloaded onto non-state agencies and organizations (Goddard, 2012; Kaufman et al., 2018; Simon, 2007). In Canada, this trend becomes apparent during the pre-trial phase of criminal justice processing when ordinary citizens, called sureties, agree to supervise people accused of crime(s) in the community. Sureties assure the court that the accused will 1) attend court, 2) not reoffend or breach their conditions, and 3) not interfere with the administration of justice by promising a set sum of money to the court if the accused breaks the above three rules (Trotter, 2010). Instead of having legal professionals shoulder these responsibilities, the courts rely on people closest to the accused to do so: their employers, significant others, relatives, and most commonly, their parents. Compared to being held in jail, being released on bail with a surety is often viewed, from a legal perspective, as a more reasonable and less invasive option since the accused can deal with the resolution of their case in the community. When

[1] University of Toronto, ON, Canada
[2] University of Guelph, ON, Canada

Corresponding Author: Rachel Schumann, Department of Sociology, University of Toronto, Kitchener, Ontario, Canada; Email: rachel.schumann@mail.utoronto.ca

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compared to other forms of pre-trial release, however, surety releases can be quite onerous because according to the law, sureties must report *any and all* bail violations to the police (Trotter, 2010). While the lack of official court data in Canada makes it difficult to know the exact number of cases involving sureties, there is widespread agreement among scholars and legal professionals that they are used more than the law requires in some jurisdictions (CCLA, 2014; JHSO, 2013; Lauzon, 2016; Myers, 2009, 2018; *R. v. Antic*, 2017; *R. v. Tunney*, 2018; Schumann & Yule, 2022; Webster et al., 2009).

Given the legal obligations bestowed upon sureties, the question remains: what happens when accused persons fail to comply with court orders? To date, minimal research explores the willingness of sureties to report their loved ones to the police. While the legal and financial pressures placed on sureties to ensure compliance transforms those closest to the accused into de facto prison guards or "civilian jailers" (Myers, 2018; Schumann, 2018), there are reasons to suspect that how sureties assume their role may diverge from court expectations. Specifically, the legal demands to enforce conditions and report noncompliant and criminal behaviour may oppose a surety's role as the accused's friend or family member. While the logic that sureties will disclose all court violations to the police because the financial costs of not doing so are higher than the cost of reporting the accused reflects a purely rational choice perspective, it neglects other important factors that influence reporting decisions, such as offense seriousness (Bachman, 1998; Felson & Pare, 2005; Shah & Pease, 1992), reporter-offender relationship (Black, 1976), and perceptions of the law (Carr et al., 2007; Rosenfeld et al., 2003; Solis et al., 2009).

Using interview data from 36 sureties, this study examines the extent to which the clearly defined legal responsibilities sureties assume align with how this form of release works in practice. In doing so, it lends important insight into the ways penal control is not just assumed by non-state actors, but also how it may be resisted, and ultimately transformed in the context of everyday life and intimate relationships. The results inform broader legal and policy conversations about whether surety releases are overly onerous and whether they accomplish their intended purpose (*Canadian Charter of Rights and Freedoms*, 1982; Canadian Civil Liberties Association [CCLA], 2014; John Howard Society of Ontario [JHSO], 2013).

Literature Review

Surety Bail Releases: By & Beyond the Books

The principle of reasonable bail, which guarantees the right not to be denied "reasonable bail without just cause," has been the law in Canada for generations (*Canadian Bill of Rights 1960* s. 1(e); *Charter of Rights and Freedoms* s. 2(f)). In an effort to keep the accused out of custody while awaiting adjudication, surety releases are one of five types of release outlined in the Canadian Criminal Code (Sec. 515(2)).[1] When determining whether the accused can be released back into the community, and under what conditions, the legislative framework of bail directs justices to use the ladder principle to ensure the fewest and least onerous conditions necessary are imposed (*Criminal Code* s.515(2.01)). The lowest rung of the ladder indicates that the accused should be released without conditions and on their own recognizance. If the Crown[2] feels this is inappropriate, a move up the ladder must be justified in light of why a lesser form of release is not suitable; Crowns can argue for a more restrictive release, which might include release with a surety and/or release with conditions (*Criminal Code* s.515(4)). There are two types of surety releases – residential and non-residential. Under a residential surety, the accused is ordered to live at their surety's residence until the court says otherwise. This release makes direct observation of the accused easier, and not surprisingly constitutes the highest rung up the ladder, falling just short of imprisonment (*R. v. Antic*, 2017; Trotter, 2010).

The courts consider a wide range of factors when determining who are suitable "jailors in the community" (*R. v. Hiscoe* at para 54; *R. v. Rhyno* at para 35). Ideally, sureties will have a close relationship with the accused, be willing to supervise the accused, have assets they are willing to forfeit to the Crown should the accused fail to comply, and, depending on the accused's alleged offence, not have a (recent) criminal record or know anything about the alleged offence (Trotter, 2010). The following individuals are excluded from acting as a surety: accomplices, the accused's counsel, persons in custody or awaiting trial on a criminal offence, children, individuals already acting as sureties for someone else, and people residing outside the province (see Trotter, 2010, p. 7-18).

One of the primary legal responsibilities of a surety is to ensure an accused complies with the court-ordered conditions of their release and report the accused to the police for any illegal and/or non-compliant behaviour. To assist sureties in preventing bail breaches, the courts authorize them to impose their own conditions as part of the routine and discipline of the household. These conditions are up to the surety's discretion and can include conditions such as having to take out the trash, prepare dinner, and follow a non-court ordered curfew. If the accused disobeys these demands, the surety can either *revoke* their position or *report* the accused for failing to comply. In both scenarios, the accused is placed back in custody. If the surety revokes, the accused remains in jail until a new surety is found. If the surety reports the accused to the police, the accused can be charged for breaching bail and put in jail to await another bail hearing.

To keep sureties accountable, the courts make them pledge to forfeit an amount of money (usually between $250-$2000) if the accused misses court, reoffends, or breaches (Trotter, 2010). The monetary amount is based on an analysis of the risk the accused poses while out in the community and the financial assets of those involved. This promise to pay is intended to provide the necessary impetus for friends and families to render non-complying individuals to the police in order to avoid financial forfeiture.[3] The monetary component of surety bail also operates under the assumption that the accused will follow the terms of their release to prevent subjecting their "nearest and dearest" who come forward as surety the "undue pain and discomfort" of having to forfeit the amount of the recognizance (*AG v. Horvath*, 2009 para 40). However, some scholars argue the system is too lenient on sureties and the accused who "are released from custody only to thumb their noses at the conditions they're ordered to abide by" (Powell, 2012: 2). Anecdotal evidence suggests that this may be a function of Crowns only seeking estreatment[4] – or the forfeiture of money or property when the accused breaches their bail conditions – in cases when bail is set at a high amount to avoid wasting court resources pursuing cases with minimal estreatment potential (Powell, 2012). The resulting assumptions are twofold: the financial repercussions of failing to report bail breaches are not strong enough and, when left to their own devices, sureties are negligent at best in upholding the law.

Despite the overuse of surety releases, they remain understudied due to limited available information that details who becomes a surety. With that said, scholars have had success using courtroom observation to document the frequent use of sureties (Myers, 2009) and the quasi-police powers imposed on them via bail conditions (Schumann, 2018). The outcomes of these studies contribute to broader criticism among scholars and legal professionals who argue such releases are a prime example of how the penal state has expanded its net of control around individuals who have been formally charged but not yet convicted of a criminal offence (Myers, 2009; Schumann, 2018).[5] In addition to controlling the actions of the accused, sureties also deflect blame away from the court should the accused breach or commit a new substantive offense (Myers, 2009; *R. v. Tunney*, 2018; Webster et al., 2009). The potential threat of releasing a dangerous accused person has made "risk the modelling ideology of organizations, where a good organisation has come to be equated with being a good risk manager" (Myers, 2009, p. 129). Simply put, sureties provide the courts with an extra level of assurance by subjecting accused persons to more

direct supervision than if they were released on their own recognizance or with a bail supervision program (Trotter, 2010). While the accused themselves typically express relief when they receive any form of bail release instead of jail (Yule et al., 2022), they are also often keenly aware that being released with onerous conditions puts them at risk of accruing additional criminal charges, even for non-criminal behaviour, if they are caught breaching (CCLA, 2014; JHSO, 2013). The legal consequences that result from having a surety revoke or report, such as loss of money, arrest, and detention, blur the boundaries between crime prevention and punishment and violate a legally innocent person's constitutionally protected rights and freedoms (CCLA, 2014; Doob & Webster, 2012; JHSO, 2013; Myers, 2017; Trotter, 2010).

Understanding Surety Decisions to Report Bail Breaches

While having friends and family assume the role of civilian jailer provides the state with greater access into the everyday lives of criminally suspect individuals, offloading responsibility for the accused onto sureties transfers the power to inform how control is dispensed in the community to ordinary citizens. By assigning responsibility to sureties, the courts open the door – perhaps inadvertently – for sureties to influence how to manage the accused. In this way, non-state agents may play an important role in shaping punishment and control agendas. Given that punishment is a site of constant struggle as it morphs and expands within the context of daily life (Goodman et al., 2017), knowing what motivates friends and family to report or revoke an accused's bail is important for understanding their contributions to the assemblage of control (Maurutto & Hannah-Moffat, 2006) in lives of the accused.

Compared to monitoring the accused's behaviour, reporting could present more difficulties for sureties who may express doubt about having to phone the police on a loved one. Although the "pull of bail" is an example of classic rational choice decision-making whereby sureties report bail breaches to avoid financial penalty, theoretical advancements have expanded the theory beyond a simple, economic-based calculation. Feelings of guilt and shame, for example, play an instrumental role in shaping and promoting the belief systems that support a person's actions, including the commission of crime (Svensson et al., 2013). Similar to decisions to offend, decisions to report a loved one to the police are likely rife with emotion because the accused ends up back in custody with additional charges. Moreover, having new charges puts the onus on the accused to show why they should not be detained, which inevitably makes bail more difficult to acquire (Trotter, 2010). To convince the court that they should be released, the accused must present a more restrictive bail plan than their previous release. For many accused, the challenge of putting together a more substantial release plan leads to longer stays in custody (Wyant, 2016). The desire to keep the accused out of custody could affect a surety's intention to seek police intervention for non-compliance. Gottfredson and Gottfredson (1988) posit that victims and non-victims are both more inclined to report a crime if it suits their own objectives, such as obtaining restitution or upholding the social contract (Galvin & Safer-Lichtenstein, 2018). If a surety's goal does not align with their legal role, they may be reluctant to fulfill their responsibility to report the accused to the police.

Extant literature further indicates that offense seriousness is a strong predictor of crime reporting among victims (Bachman, 1998; Felson & Pare, 2005) and non-victims (Galvin & Safer-Lichtenstein, 2018). Baumer (2002) finds that victims of minor offenses use considerably more discretion when cooperating with the police. This is consistent with other studies that show that female victims of intimate partner violence are more likely to cooperate with the police if they have been injured by comparison to those who have no physical injuries (Hare, 2006, 2010; Hirschel & Hutchison, 2003). While less is known about the effect of crime seriousness on third-party reporting, Galvin and Safer-Lichenstein (2018) find that crime seriousness plays a larger role in decisions to report among third-party reporters than victims. When bystanders fail to report, Mayhew et al. (1979) speculate that it has less to do with the perceived

triviality of the offense and more to do with a failure to recognize the behavior as a crime. In this way, decisions to report an accused may be tempered not only by a surety's perception of the severity of the breach, but also by their ability to identify it as problematic.

The determination of breach seriousness may be based on how sureties view the criminal justice system more broadly. Victimology research finds that legal cynicism reduces a victim's willingness to cooperate with the police, sometimes overriding their desire for punishment (Hare, 2006; Kirk & Matsuda, 2011; Koss, 2000). Negative experiences with members of the criminal justice system, both directly and indirectly, also adversely affect perceptions of the law (Hitchens et al., 2018). Communities that face high levels of institutionalized stigma and are consciously aware of the law's role in their subordination may be more inclined to actively resist the law (Bell, 2019). Low confidence in the police minimizes a person's willingness to report crimes, comply with the law, and co-operate with the justice system (Brown & Benedict, 2002; Sunshine & Tyler, 2003). Distrust in the police/courts may lead some sureties to overlook bail breaches because they do not see the "justice" system as overly helpful or fair.

Yet legal cynicism is just one type of cultural frame that shapes how marginalized communities respond to crime and interact with the criminal justice system. Evidence suggests that members of these communities may rely on the police whilst also being highly distrusting of them (Hagan et al., 2018). For example, Bell (2016) used a micro-sociological approach to examine the situational contexts that influence police reliance among African American mothers. She found that women reconciled their cynicism of, and reliance on, the police when they used police selectively in order to help regain control of a situation they deemed threatening, to gain access to social service programming for a loved one, and/or to interrupt behaviour they considered disruptive (i.e., to "save" their child from law-breaking peers). In this way, "even if mothers still generally distrust police, possibilities for situation-specific trust remain" (Bell, 2016, p. 338). In the context of bail, sureties may be skeptical of the criminal justice system more generally, but still be willing to report their loved ones to the police depending on the micro-level situational dynamics at play.

Taken together, the existing research documents *why* court's offload responsibility onto sureties, but it has yet to explain *how* sureties carry-out this role in the community. Though little research has explicitly commented on the reporting decisions of third-party agents, victimology research suggests that crime severity and trust in the criminal justice system can shape a person's willingness to seek police intervention. The remainder of this paper examines the reporting habits of sureties and provides important insight into how they respond to bail breaches of court-ordered conditions.

Data & Methods

Prior field work and personal experiences fundamentally shaped the initial research questions and methodological approach for the current study. The seeds for this study were planted during the field work stage of an earlier project, when the first author spent significant time sitting in the waiting room during bail court recesses. During this time, the first author made informal observations about, and chatted with, people who proposed themselves as surety and who appeared to be emotionally invested in helping the accused get released. These observations and discussions were reminiscent of the researcher's personal experience as a teenager of having a parent on a stringent bail with two family members as sureties. While these experiences prompted the initial research questions for this project, reflexivity challenged us to "explicitly examine how the research agenda and assumptions, subject location(s), personal beliefs and emotions" enter into our research (Hsiung, 2008, p. 212; see also Small & Calarco, 2020). We acknowledged the ways in which one family's circumstances might be different from the people in our study. Specifically, it was the researcher's father's first and only criminal charge, he had steady,

full-time employment, and a supportive family. Understanding how bail affects the lives of sureties and accused differently based on a variety of factors including the accused's willingness to abide, prior relationship ties, and the availability of social support, provided a degree of empathy that was helpful for building rapport with the study participants, thus lessening the divide between "researcher" and "researched."

The data used in this analysis were collected as part of a larger qualitative study on the lived experiences of sureties. The first author recruited and interviewed all participants and conducted the data analysis. Participants were recruited three to five days per week over a six-month period as they waited to become sureties outside of the bail courtrooms in one mid-size courthouse in Southwestern Ontario. Unless otherwise directed, potential sureties are asked to arrive in court at 9:00 am, though they may not be needed or called upon until later in the day. For potential sureties, filling out affidavits, getting a police record check, and meeting with the accused's lawyer can take upwards of a full day depending on several factors including the complexity of the case, length of the daily docket, and availability of court staff. The amount of time waiting provided an excellent opportunity to recruit and build rapport with potential participants.

Data from a follow-up interview that was scheduled anywhere between eight weeks to six months after the initial interview at the courthouse, informed this study. Of the fifty-six people who participated in the original interview, thirty-six were available for a follow-up interview.[6] Follow-up interviews focused on the lived experience as a surety and how relationships with the accused changed since the initial contact at the courthouse. Most interviews occurred at the surety's home or at a public place such as a coffee shop. Five interviews took place over the phone because the sureties resided in another geographical region. While most interviews occurred around the two-month mark, some took place as long as six months after the initial interview. Each interview averaged two hours in length. To maintain rapport, feminist interviewing techniques were used such as exhibiting a warm demeanor, listening to participants, and allowing them to make choices about their participation (Campbell et al., 2009).

To capture the reporting habits of sureties, they were asked about hypothetical bail breaches that emphasized how they would both react and feel *if* their loved one violated the terms of their release.[7] More specifically, they were asked: would you ever report [accused's name] to the police? Why/why not? Describe what the circumstances might look like. How would you feel?

As Table 1 shows, women comprise the majority of the 36 individuals included in the final sample, the majority of whom identify as white/European. The sample is quite diverse in terms of age, though most individuals are older than 40 years. Half of the participants have either full or part-time employment while nearly one-third are either unemployed or retired. As Schumann (2018) finds, contrary to expectations, unemployment is often viewed as an asset by the court when determining surety suitability because the surety can provide more thorough supervision. Most sureties are parents to the accused, followed by friends and other relatives (i.e., siblings, grandparents, cousins, uncles/aunts). Sureties identifying as the accused's romantic partner or employer occur less often. The largest proportion of the sample disclosed that they had served as a surety two or more times prior and one third reported that this was their first time acting as a surety. Based on general observation notes of the waiting area, this sample appears to be representative of the people who come forward as a surety in this jurisdiction.

Table 1. Sample Demographics

Demographic Variables	***n* = 36**	**%**
Gender		
Male	11	31%
Female	23	64%
Couple	2	5%
Race		
White/European	27	75%
Black	4	11%
South Asian	1	3%
West Asian	2	6%
Latin American	1	3%
Indigenous	1	3%
Age		
20-29	2	6%
30-39	6	17%
40-49	8	22%
50-59	8	22%
60+	12	33%
Employment status		
Employed	20	56%
Unemployed	4	11%
Retired	11	31%
Unknown	1	2%
Relationship with Accused		
Parent	16	44%
Relative (i.e., sibling, cousin, uncle, etc.)	8	22%
Friend	9	25%
Romantic Partner	1	3%
Employer	2	6%
Surety History		
First time ever	11	31%
First time for this accused	9	25%
Multiple times for same person	18	44%

Given the nature of this study, data collection and analysis often occurred simultaneously. Using the phronetic iterative approach as described by Tracey (2020, p. 27) offered the necessary flexibility to move back and forth between the data and existing theoretical and empirical research during the coding process (see also Deterding & Waters, 2021). Initial descriptive themes regarding potential motives to report the accused emerged using line-by-line coding. Through the process of data collection, re-reading of transcripts, and initial coding, preliminary themes were identified based on their prevalence within the data and whether they captured something important in relation to the study's main objectives (Brunson & Miller, 2006). By focusing on surety reporting habits, several key themes were identified as being

possibly relevant to the study's overall aims. These themes served as an initial starting point when organizing the data and provided directions on how to proceed with more selective coding (Miles et al., 2020). Unlike the primary codes, the secondary codes were informed more by existing sociological and criminological literature about reporting and the role of the law in everyday life. During this cycle, clear patterns emerged in the data that began to form the study's results. Negative case analysis, notes, and analytic memos were used to strengthen the ongoing analysis and ensure multiple viewpoints were represented in the final codes (Miles et al., 2020). This process revealed five major themes within the data, namely, (1) legal responsibility, (2) deservedness and failed expectations, (3) breach seriousness, (4) fairness, and (5) legal cynicism.

Results

One of the most important legal roles of the surety is to report non-compliant behaviour, yet we know very little about how they define and report bail breaches. Of the 36 participants, 13 were no longer a surety at the time of the interview because they either revoked their position or reported the accused to the police or the police apprehended the accused independently. Three others reported during the interview that they were seriously thinking about revocation. Generally, decisions to report the accused for breaching often depended on how sureties viewed the law and the accused more generally. While some said they would report any and all infractions, others showed more hesitation.

Legal Responsibility

Sureties attributed their tendency to report to their legal obligation to do so. Abigail and Daniel[8,9] explained that they would have to report their son to the police because being a "surety has these laws and we need to take these responsibilities and be responsible. So our house has become a partial prison with conditions." For people like Abigail and Daniel, becoming surety was their first exposure to the criminal justice system. Indeed, this was something that Emily emphasized when she explained why she reported her son for breaching a no contact order. She stated:

> He would say "what are you doing mom?" and I would say that it was my job to protect everybody in question, that's what I agreed to. I was sad when I had to report him to the police. Sad I was handing him over, sad he put me in the position that I had to hand him over. It was very difficult, I could cry now. I had no control, if he wants to contribute to society, he needs to understand there are rules. It's society, there are rules. I wanted to show that there are consequences to not following rules. Sometimes I thought he thought his mental health was an excuse but I told him, it's not an excuse. He's upset because his wife's life is continuing but his isn't. I told him, you can have that but you chose this. This was our very, very first time, we never had much experience [with the criminal justice system]. We lived very straightforward, I only had one ticket, maybe 40 years ago.

Rather than question the law, Emily's unwavering faith in it encouraged her to bring her son to the police so that she could teach him a lesson about the importance of rule following. Kersen also put faith in the power of the law to dictate behaviour. He believed all of his son's conditions were important because "if the court decides that these things will get him into trouble all the time then these are there to prevent him from that." Although he allowed his son to commit minor breaches and took issue with the level of responsibility expected by the court, he was still prepared to call the police if his son broke

the law or disregarded his rules completely. Rod also deferred to the power of the law in his decision to report the accused. Even though he might empathize with his friend for breaching, he said,

> I would have to go to the police station and let them know. It's up to them to decide if they will go after him. Small infractions lead to bigger ones, so I don't want him to take me for granted… If I found he's at his girlfriend's house I would go straight to the cops and tell them. I would take him to the police station with me. If they decide and just talk to him and release him, then okay, at least the police are aware and it's serious.

Rod had minimal interactions with the law prior to becoming a surety. During the interview, he confessed that "just being in here [the courthouse] makes me feel uneasy, I don't like dealing with lawyers or criminals." Wanting to comply with the law was therefore a motivating factor in informing the police about bail breaches.

Sureties like Clayton viewed himself as someone "who lays down the law." When asked about whether he would report a breach, he said,

> [the accused] knows me, I would never give him a warning…I understand that some would because he's a friend and you don't want to see them in trouble. But you do the crime, you do the time. You need to know right from wrong. It's my responsibility to uphold the law.

The obligation and duty that some friends and family felt as surety translated into a zero-tolerance mentality about reporting non-compliant behaviour. For these sureties, the transcendent quality of the law in their daily lives influenced how they enforced court orders.

The financial obligation sureties make to the court also shaped decisions to revoke or report bail violations. For example, Josephine admitted that the financial consequences that would result from not reporting her son forced her to do so to avoid putting the family into financial jeopardy. Camilla also explained that the money she put up was important to her, and consequently she would revoke her surety if the accused refused to abide by her bail conditions. Conversely, Genie said "I wanted to do the right thing [i.e., revoke] regardless of the money. Two thousand dollars is nothing for me. It may matter for some people but it's my job qualifications that are more important." And yet, other sureties reported that the damage that revoking or reporting would cause the accused if they returned to prison was "really the undesirable consequences more so than the financial side of it" (Abigail and Daniel, and Jack). Abigail, Daniel, and Jack reported that their respective sons were extremely fearful of going to jail, which weighed heavily on them. For these sureties, the price placed on the accused's bail was inconsequential to the price of being in jail.

Deservedness & Failed Expectations

Sureties who believed the accused deserved to be in custody or were disappointed in the accused's overall progress appeared more willing to report non-compliant behaviour to the police regardless of the severity of the breach. Although Eileen and Wyatt eased some of their son's conditions, they eventually reported him to the police and charged him with stealing their credit cards when he failed to come home on time for curfew.

> Our biggest fear is that he is going to kill himself or someone else. Public safety is important to us…because he's 18, legally we have no rights to stop him or to keep him away from anything.

> Even as a surety, there's nothing to stop him. As a surety you just have to revoke. Sometimes he's safer in custody.

Ronda similarly felt that her son's behaviour warranted going back to jail because he just could not comply with any of his conditions. She physically drove him to the police station in order to show him the value of complying with the law. Disappointed with Dan's lack of respect for her and her home, Margaret felt that he ought to be in jail. She disclosed that "he's in jail now and I don't feel bad, he needs to learn a lesson and learn to be quiet when he's asked…even his mom said he deserved to be in jail." Suzanne similarly based her decision to report on the accused's deservedness. While Suzanne had minimal issues as surety for her son and did not think she would ever have to report him, she did not rule this out completely, suggesting that "If I ever had to, I would but I don't think it would ever come to that. If I had to, I would feel that he deserved it. I wouldn't feel guilty about it because that knowledge was there for him, you know." Importantly, few sureties second-guessed their decision to involve the police, as many saw this as the only way to discipline the accused for inappropriate behaviour. Friends and family frequently had their own expectations about how the accused should act while on bail. From the perspective of a surety, an accused who failed to live up to these expectations was more deserving of being sent back to custody. If the surety believed the accused was making an effort, they appeared less enthusiastic about reporting or revoking.

The tendency to report bail violations appeared to increase when sureties believed the conditions unfairly interfered with their own lives. For example, Johnny felt like he was "basically…a babysitter" who was "a parent to an adult" and the task was more than he anticipated. Although he attributed some of his supervisee's actions to her declining mental health, he eventually reported her to the police when she failed to return home after being gone for several days. As he explained, "I'm not her dad, I'm not her babysitter, and I'm not her boyfriend." In other words, he did not feel compelled to overlook her breaches because doing so surpassed his responsibilities as her friend. Margaret similarly reported her friend Dan to the police for a series of breaches that began as soon as he was released on bail. When discussing her experiences, she said "I brought him to recovery to celebrate and showed [him] where to get help but he wanted a babysitter. I couldn't take him by the hand everywhere, I'm not that mobile." Although Margaret tried to make good on her promise by encouraging her friend's sobriety, she was ill-prepared to supervise his every move. The aversion sureties like Johnny and Margaret felt towards the process of becoming a surety and the impact the conditions had on their own lives likely prompted them to report the accused to the police.

Breach Seriousness

Decisions to overlook non-compliant behaviour often centered on the insignificance of the alleged breach. For several sureties, the accused needed to commit a violent or egregious offence before they would consider phoning the police. Randy stated that "If I felt like, um, if I felt he was able to emotionally not control himself or do something violent, I guess I would be compelled to, but I really wouldn't want too, he's a friend." If it was a less serious breach, like being within 200 meters of the victim, Randy reasoned:

> I would say you obviously can't do that, you're putting yourself in jeopardy and me. The consequences would be severe and obviously it wouldn't help him in the future, and it would be stupid. I would just talk to him first, as long as anything didn't happen with the neighbour, I

> would talk to him and just make sure he wouldn't do it again even though that could cause him and me a lot of trouble.

Camilla also agreed that the context of the breach would be important in her calculation to report.

> It would depend. [...]. It would really have to depend on the certain term. What it was. If I talked to her at 3:00am and I knew she was driving home with a party still going on in her jeep, I would. She would probably do some time but if there was a possibility of her or someone else getting hurt, then yeah. If it was life or death, then yeah. But if it was something petty, like a missed curfew, I wouldn't.

Relatedly, some sureties even allowed minor breaches to occur. Lydia, for example, acknowledged that her friend Josh failed to follow his curfew condition but had not reported him because "he seems to be staying out of trouble." For her, coming in past curfew did not classify as a serious breach because, at least to her knowledge, he was not doing anything that she considered to be "illegal." She also believed his conditions were unfair, which likely contributed to her reluctance to report him. Kersen, on the other hand, had a comparatively easier time getting his son to comply with his conditions, which he described as more than fair. Still, when asked whether he would know if his son breached, he acknowledged "I wouldn't be able to tell. Sometimes he takes longer, an hour, an hour and [a] half, maybe he's out having a drink with his friends. He didn't get into any harm so it's okay." Kersen gave his son considerable leeway when it came to his conditions. Like Lydia, Kersen defined breaches not by his son's total compliance to his conditions, but by the perceived seriousness of the infraction.

By allowing small breaches in a controlled environment, other sureties felt they avoided more severe violations. To prevent their 18-year-old son Ethan from leaving the house to see friends, Eileen and Wyatt permitted their son to have small social gatherings in their home. Despite his condition to not drink or possess alcohol, Eileen and Wyatt allowed Ethan's friends to bring alcohol into the home because their son "was under our supervision and we could monitor him at least." By allowing and subsequently not reporting the breach, Eileen and Wyatt believed they prevented Ethan from going out past curfew and causing more harm to himself and others.

Fairness

Sureties showed a high degree of skepticism in reporting if they believed the allegations against their loved ones were false or the conditions were unfair. When asked, Shirley, who believed her son's ex-wife was "ruining his life," if she would ever report her son to the police for a breach, she explained:

> That's a tough one. I'm not sure I could. I know I'm supposed to but if it came right down to it, I can't say I would. If he didn't do anything that was really warranted, I couldn't. This whole thing is bullshit. He didn't do it and now they got him for breaking bail. I always believe in innocent until proven guilty, but this system isn't this way. I think if he was, if he was guilty of anything, then it would be different. But if he's innocent, that's the part I'm having a problem with. When he was a teenager, I told him if I caught him doing something, I'd turn him into the police. I know he's innocent…If I knew my son was guilty of something, absolutely, it's the innocence that I have my problems with.

Knowing her son was innocent made it difficult for Shirley to imagine a scenario in which she would report her son. Like Shirley, Star was also less inclined to say she would report the accused because she believed his charges were unwarranted. When she was explaining her thought process behind breaching, she said

> Another thing that's important to know is that the charges that he's charged with have nothing to do with him. So I feel his frustration that he's not even guilty of them so it's a lot to deal with these conditions. I hate to say it but it's true [that I wouldn't report]…I'm taking these conditions in light of this.

For sureties like Star and Shirley, reporting the accused to the police became less likely if they thought the accused was innocent and undeserving of having to abide by restrictive conditions.

The overall fairness of the conditions also factored into decisions to report. Samantha, for example, loosened the conditions on her friend Kendrick. Recognizing the possibility that he might have missed the bus coming home from work, she regularly pushed his curfew limit from 6:00pm to 7:30pm. She also sometimes overlooked his no alcohol condition by taking him to the liquor store and having "a few drinks in the backyard" together. To her, Kendrick's house arrest was unfair. About the conditions, she said "I think he needs to have more freedom – like a curfew so he can see a girl and come back….the house arrest is a negative for him." The discretion showed by friends and family indicates the way sureties modified conditions based on their own perception of what was legally acceptable. Relaxing an accused's terms therefore allowed sureties to employ their own sense of justice by making the release fairer and less constrictive.

Legal Cynicism

Personal biases towards the law further impacted sureties' calculus to report. Those who were more skeptical of the criminal justice system were only willing to phone the police if the accused committed a serious offense. Johnny said that he would only report his friend to the police if he thought "she was going to hurt herself or someone else over dumb shit or be a danger to her kids." He went on to explain that "I don't like cop calling. Personal past – they have just never done anything to help me out." Although Johnny did eventually report Helen to the police due to the constant stress of being her "babysitter," his aversion to the police provides some explanation for why he waited several days before calling her in. Like Johnny, Samantha also avoided the police whenever possible. Thus, despite her annoyance with being a surety, she too stated that aside from coming in late for curfew and using drugs in her home, she would not report Kendrick to the police. Recalling her past experiences with the police, she said:

> It would suck to call the police. i'm not the person to call the police but when it comes to my property I will. [*Interviewer: Why do you describe yourself as someone not to call the police?*] Cause of my past experiences. I've been arrested, I've been harassed by police. I was an addict. I was walking home in the middle of the night and the police pulled me over, I was walking home. He made me come talk to him and he searched me. It was bad – they did not like me so I had to move. Cops don't see any progress where I'm from. Once you're an addict, they always see you as that regardless of improvement.

As an alternative, Samantha confirmed that she "absolutely would" revoke herself as a surety. Miller believed that the police "get cocky and play the game 'guilty by association' and make assumptions and don't care what the implications are," which is why he never called the police on his friend who continually had issues with compliance. In this way, sureties were less willing to report the accused if they held negative beliefs towards the law.

Discussion

Shifting responsibility for crime control from the state onto ordinary citizens raises important questions about the impact on the practice of bail. Yet much research on the diffusion of penal control focuses on what criminal justice policy and/or decisions say rather than what non-state agents do. By speaking with sureties, we learn that friends and family responsible for supervising the accused in the community interpret bail breaches differently than the courts. Despite their general commitment towards supervising accused individuals, sureties' willingness to report non-compliant behavior varied considerably based on the perceived severity of the act, the fairness of the conditions, the accused's best interests and their progress on bail, and their own bias towards the law. Our results thus suggest that sureties both assist and resist the criminal justice system in controlling the actions of accused individuals.

Our findings support the position that surety releases are a coercive form of pre-trial release and thus function as pre-conviction punishment in some circumstances (Myers, 2009, 2017; Yule et al., 2022). The limited legal discretion sureties have to breach the accused likely contributes to why this is often considered "one of the most onerous forms of release" (*R. v. Antic*, 2017 para 67g). Living with someone who is conditioned to identify and report all non-compliant behaviour amplifies the court's ability to control the actions of the accused, increasing the likelihood of breaches. The ability of friends and family to leverage the consequences of non-compliant behaviour to modify the accused's actions reveals the more punitive aspects of surety releases. How well an accused lived up to their surety's expectations was a common factor in reporting decisions; sureties viewed the accused who deliberately broke their conditions and made no effort to get sober, find employment, or contribute to the household as less deserving of leniencies, increasing their odds of either reporting or revoking. Despite being well-intentioned, friends and families risk becoming overly punitive if they threaten to report or revoke an accused for failing to make adequate life changes that align with their own hopes and goals (see Gottfredson & Gottfredson 1988). Some sureties explicitly stressed the value of sending the accused back to jail to teach them a lesson or to uphold public safety. Sureties' willingness to report the accused to the police when they felt they lacked control over the accused supports Rose et al.'s (2004) hypothesis that parents who feel hopeless regarding their child's future will be more inclined to give them up to the authorities. Sureties were more prepared to report when they believed jail was the only option to achieve these goals.

In many respects, surety releases can be described as a hidden sentence, or a punishment that "the law imposes as a direct result of criminal status but not as part of a formally recognized, judge-imposed sentence" (Kaiser, 2016, p. 127). These include the "largely unrecognized and unconsidered deprivation of rights and privileges to which the law subjects criminal offenders," including those that "begin prior to conviction, upon arrest, or pre-trial detention" (Kaiser, 2016, p. 127). Based on this definition, surety releases are a quintessential hidden sentence; not only does very little empirical evidence exist about them (aside from court observations detailing how frequently they are used), but optically they can appear more lenient because court-orders are being enforced by the accused's friends and family. However, release conditions and expectations make this type of release nearly indistinguishable from other forms of post-conviction punishment such as parole and probation, where there are serious legal consequences that

develop from not following the conditions. Unlike probation or parole officers, though, sureties are held to a much higher standard of accountability when the accused fails to comply.

Yet our findings also complicate portrayals of sureties as simply dupes or pawns of the state for whom the law automatically takes on a precedential role. Without doubt, several sureties did view the law in this way, especially those who had limited prior interactions with it. Deferring to the law's power to determine right from wrong, these sureties showed very little hesitation when asked if they would report the accused. Others also expressed fear of experiencing the consequences of the law, including having their bail amount forfeited or their reputations tarnished. In these cases, sureties commonly conceded to the law to provide legitimacy for their actions. While this level of cooperation helps sustain the "autonomy of the law's authority" (Ewick & Silbey, 1998, p. 76), not all sureties used and experienced the law in the same way. In fact, when deciding whether to report bail violations, most sureties employed their own sense of justice based on what they viewed as appropriate.

The role the law plays in the lives of sureties is an important factor in determining how willing they are to report. For example, distrust in the law and the criminal justice system more broadly prohibited several sureties from reporting the accused to the police except for extenuating circumstances (i.e., the accused put themselves or someone else at risk). Although all sureties make a promise to the court, negative past encounters with the law dissuaded some sureties from fulfilling that promise outside the courthouse. Consistent with past research (Rosenfeld et al., 2003; Solis et al., 2009), sureties who demonstrated more legal cynicism were less inclined to report non-compliant behaviour, seeing minor breaches as trivial and not deserving of additional consequences. With that said, even those who reported that they were skeptical of the criminal justice system still gave scenarios in which they would call the police. This supports Bell's (2016, p. 338) conclusion that legal cynicism "is a dynamic strategy that is part of a larger repertoire about legal authorities, and it operates differently depending on the nature of moments of crime and disorder." In the context of bail, sureties appear to be more prepared to adapt some of the court's demands than others in the supervision of their loved one.

Becoming a surety is a transformative process that sees friends and family assuming a new role in the accused's lives, and these ties complicate the reporting process. While the courts believe that both sureties and the accused will comply with court orders to avoid financial reprisal, there is often more at stake in these relationships that prompts further consideration. The monetary threat that is placed upon sureties prompted some to consider reporting or revoking, especially if that amount made it difficult for them or their family to make rent, pay groceries, etc. Yet many sureties spoke of weighing the financial costs against the costs of imprisonment. For them, the price placed on the accused's bail was inconsequential to the price of being in jail. Familial bonds compelled some sureties to turn a blind eye towards minor breaches, as the guilt of putting a family member or friend in jail outweighed the possible financial punishment if the accused got caught. As a surety, family and friends are caught between following their own moral order and that of the law (Elster, 1999). For sureties who valued the law or felt they no longer had control over the accused, reporting was necessary and reflected their own moral code regarding proper behaviour. For others, however, the thought of reporting or revoking violated their own prevailing norms about what a good friend or parent would do. In these cases, the surety was committed to keeping the accused out of custody and on the right path despite potential breaches. In fact, some sureties allowed breaches to occur because they thought it would help keep the accused from committing a more serious offense and ending up back in jail. Avoidance of the law in these cases highlights the productive quality of penal discipline (Foucault, 1977). Rather than strictly following the rules, these sureties sought to transform the actions and behaviours of the accused to be more in line with normative expectations. Encouraging the accused to get clean, be a "better" parent, or to find employment

was therefore more important for some sureties than making good on their promise to report court violations.

There are some limitations to our study that warrant discussion. First, the sample lacks a comparison group, specifically those who are asked to be a surety but decline. Second, it is possible that this study oversampled those who already had strong relationships with the accused and were thus more willing to talk about their experiences than those who had a weaker relationship with the accused from the start. Third, while providing in-depth data, the sample itself is small and taken from one jurisdiction. Future studies could benefit from sampling a larger group across different jurisdictions. Lastly, interviews with those who had been a surety longer suggest that the follow-up period is important when assessing experiences on bail. For example, the longer someone is a surety, the greater the chances that the accused may reoffend or breach. It also subjects the surety to the same set of conditions for longer. Having to enforce a house arrest condition may become more challenging for someone after eight months versus only two months. The short follow-up period may also underreport the long-term challenges that result from being a surety.

Despite these limitations, our study produced a qualitatively rich data set that provides a detailed and intimate look into the often talked about but poorly understood role of being a surety. Our results reveal not all sureties are prepared or want to be the court's "civilian jailers" when it comes to breaching the accused, and thus raise questions about current depictions of surety releases as inherently onerous. While the consequences of a surety release can doubtless be intensely punitive if sureties methodically follow the rules of the court, to what extent does this exercise of discretion make bail more tolerable for the accused? Future research should interview those accused who have been assigned a residential surety condition to better understand the lived experience of this form of bail release. Moreover, comparing an accused's experiences on different bail releases (e.g., surety release versus own recognizance) would allow scholars to understand whether having a surety puts the accused at greater risk of breaching and/or being caught. Socio-legal scholars may be further interested in assessing whether reductions to privacy go beyond constitutional protections to reasonable bail. Another question emerging from the current study involves how the "collateral" or "repercussive" effects of the expanding penal state impact the families and communities of criminalized individuals. Future research should explore how the actions and reporting habits of sureties impact their short and longer-term relationships with the accused. Answers to this question will provide a better understanding of the potential unintended and damaging consequences of penal devolution on the willingness of friends and family to provide social support to criminal justice-involved individuals.

Conclusion

Assessing a surety's willingness to report an accused enhances understanding of how legal responsibility is not just assumed by non-state actors but also transformed in the context of everyday life. Friends and family commonly used the threat of non-compliance to enact their own forms of penal justice based on their personal views of the law, the context of the breach, the fairness of the conditions, and the accused's actions. Although the surety and accused alike are bound by specific rules of the court, the accused are also expected to live up to their surety's hopes and wishes. By entrusting friends and family to become de facto guards, the courts surrender the ability to fully control the pre-conviction experience. Exposing the little known and often hidden world of surety releases reveals that they are both coercive and productive in nature and teeter between leniency and punishment.

Notes

[1] There are a number of release options outlined under sec. 515(2) of the Criminal Code, including (1) releasing an accused on an undertaking, (2) on their own recognizance, (3) with a surety, (4) with a monetary deposit, or (5) with both a surety and monetary deposit.
[2] Crown attorneys or "Crowns" are the prosecutors in the legal system of Canada. Crown attorneys represent the Crown and act as prosecutors in proceedings under the Criminal Code and various other statutes.
[3] Due to a lack of publicly available data, it is unclear how frequently the courts pursue this line of action when the accused breach their bail.
[4] If an accused fails to comply with their recognizance or is charged with a new substantive offense while on bail, the Crown Attorney may pursue estreatment. Estreat court, or estreatment, refers to the process by which the Crown seeks to obtain the original bail amount from the surety and/or accused.
[5] While some evidence suggests the court culture emphasizing the "near-automatic" use of sureties may be subsiding following a stern reminder from the courts (see *R. v. Tunney* (2018) para 45 and *R. v. Antic* (2017)) that justices, Crowns, and defence lawyers must avoid a normative culture that prioritizes risk management over legal principles outlined in the *Criminal Code*, a large number of accused (e.g., roughly one-third in Ontario, Canada) still require a surety to be granted bail (Schumann & Yule, 2022).
[6] Of the twenty sureties who we were unable to conduct a follow-up interview with, seven no longer had a number in service, three were denied the opportunity to become a surety during the bail hearing, eight did not return follow-up messages, and two were no-shows.
[7] Due to ethical concerns, questions about actual bail breaches or criminal activity were not allowed.
[8] Pseudonyms are used to protect the confidentiality of our study participants.
[9] In instances when two people are listed as sureties, they were both interviewed for the study. The courts sometimes name two sureties, typically the parents of the accused, if the accused is a flight risk and/or charged with more serious offences. Dual sureties can offer near-constant supervision of the accused.

About the authors

Rachel Schumann holds a PhD in Sociology from the University of Toronto. Her research investigates how criminal court decisions shape the lives of criminal justice involved individuals and their families.

Carolyn Yule is an Associate Professor in the Department of Sociology and Anthropology at the University of Guelph. Her research uses a combination of quantitative and qualitative methods to examine how life course events and processes shape stability and change in criminal behaviour. She also studies issues around pre-trial release in the adult criminal justice system.

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Dr. Terry Beitzel