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SYSTEMIC FAILURE TO APPEAR IN COURT

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This Article aims to reorient the conversation around “failure-to-appear” (FTA) in criminal court. Recent policy and scholarship have addressed FTA mostly as a

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problem of criminal defendants in connection with questions about how bail systems should operate. But ten years of data from Philadelphia reveal a striking fact: it is not defendants who most frequently fail to appear but rather the other parties necessary for a criminal proceeding—witnesses and lawyers. Between 2010 and 2020, an essential witness or private attorney failed to appear for at least one hearing in 53% of all cases, compared to a 19% FTA rate for defendants. Police officers, victims, other witnesses, and private attorneys each failed to appear at rates substantially higher than defendants. In short: FTA is a systemic phenomenon.

The systemic nature of FTA calls into question the extreme asymmetry between the treatment of defendant and non-defendant FTA. Bail reform has generated intense debates about when cash bail, detention, and other pretrial interventions are warranted to ensure defendants' appearance. Given that witnesses and lawyers also have a legal duty to appear, the systemic nature of FTA requires more comprehensive thinking about how best to get people to court and when restrictions on liberty are appropriate.

Systemic FTA also has systemic consequences, because when essential witnesses don't show, cases are dismissed or withdrawn. FTA thus serves a regulatory function by providing a check on the nature and volume of criminal adjudications. Sometimes this function seems beneficial, as when witness FTA carries information about the strength or worth of the case, but other times it seems like a problem. The sheer volume of police officer FTA creates an impression of arbitrariness, dysfunction, and disrespect. Other aspects of this regulatory dynamic are more ambiguous. For instance, victim FTA rates are so persistently high that many appear to be effectively "opting out" of the criminal proceeding. Does this tell us that certain classes of harm are better dealt with outside of the criminal legal process? Or are we, as a society, losing something valuable when cases are dismissed due to victim or witness nonappearance? More generally, when is witness FTA a problem and when is it a healthy check on the system? This Article aims to draw attention to systemic FTA as an important feature of contemporary U.S. criminal legal systems, identify the core questions that it raises, and lay a path for future research.

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INTRODUCTION

Michael was arrested for selling drugs. He was released from jail when he posted a thousand-dollar bond and agreed to submit to pretrial supervision. Over the next six months he called his pretrial supervisor twice a week. He went to court three times. Each time, he sat for hours, only to have his case continued because a witness or lawyer failed to show up for court. At the fourth hearing, the arresting officer called out sick. The case was dismissed.

This story is a stylized version of a common sequence that highlights an incongruity in the criminal legal system. Although we dedicate scrutiny and infrastructure to address the risk of a defendant failing to appear in court, there is little institutional focus on failure-to-appear by police officers, lawyers, victims, or other witnesses.¹ For example, anyone familiar with

¹ In recent years, scholarship and policy on failures to appear in court has been almost entirely focused on the bail reform movement. The issue of nonappearance by actors other than defendants has not been part of the conversation. *See, e.g.*, CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 4-7 (2016) (discussing bail and other methods of ensuring defendants' appearance in court with no mention of appearance rates for other parties); PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, HAMILTON PROJECT, THE

recent bail reform efforts knows that there's been a great deal of attention to the question of whether, or when, cash bail is warranted as an incentive for defendants' appearance.² Opponents of reform argue that, without it, defendants will skip court and failure-to-appear (FTA) rates will soar.³ Proponents of reform answer that there are better ways to get people to show up, like text-message reminders and transportation vouchers.⁴ Both sides seem to assume that defendants have a unique duty to appear and present a unique risk of derailing proceedings if they fail to show. But that premise is dubious. Police officers, alleged victims, civilian witnesses, and lawyers also have a legal duty to appear; they also derail proceedings if they don't show up.⁵

This Article proposes that we start thinking about FTA as a systemic phenomenon. The duty to appear is shared by many legal actors, and based on our research, witnesses and lawyers fail to appear at rates substantially higher than defendants.⁶ If our data is representative, widespread nonappearance is a central, underappreciated feature of contemporary criminal legal process.

The Article presents what we believe to be the first detailed statistical analysis in the academic or policy literature of failure-to-appear rates among all criminal court actors. Drawing on detailed data for criminal proceedings in Philadelphia between 2010 and 2020, we find that the case-level FTA rate

ECONOMICS OF BAIL AND PRETRIAL DETENTION 11 (2018) (discussing methods of preventing defendant failure to appear with no mention of other parties); Lauryn Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 BYU L. REV. 837, 845-46, 849-50 (discussing the risk of nonappearance with a sole focus on defendants); Lauryn P. Gouldin, *Defining Flight Risk*, 85 CHI. L. REV. 677, 683 (2018) [hereinafter Gouldin, *Disentangling Flight Risk*] (same).

² See e.g., Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People from Jail, Explained*, VOX (Oct. 17, 2018, 7:30 AM), <https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality> [[https:// perma.cc/Z3LB-B4TA](https://perma.cc/Z3LB-B4TA)] (detailing how legally innocent individuals remain in jail solely because they cannot afford bail and the movement to address this problem by reforming the bail system); Alex Albright, *No Money Bail No Problems? Trade-offs in a Pretrial Automatic Release Program* 1, 4, 26 (Nov. 2021) https://apalbright.github.io/pdfs/No_Money_No_Problems_July2022.pdf [<https://perma.cc/9W4H-RSS8>] (unpublished manuscript) (describing the desirable and undesirable impacts of money bail on misconduct).

³ See, e.g., Puck Lo & Ethan Corey, *The 'Failure to Appear' Fallacy*, THE APPEAL (Jan. 9, 2019), <https://theappeal.org/the-failure-to-appear-fallacy> [<https://perma.cc/98C2-8YVL>] (collecting criticism of bail reform on this ground).

⁴ Alissa Fishbane, Aurélie Ouss & Anuj Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, 370 SCIENCE 682, 683-84 (2020) (showing that text message reminders and revamping citations greatly reduce failures to appear); Brian Nam-Sonenstein, *High Stakes Mistakes: How Courts Respond to 'Failure to Appear'*, PRISON POLY INITIATIVE (Aug. 15, 2023), <https://www.prisonpolicy.org/blog/2023/08/15/fta/> [[https:// perma.cc/CH9Y-D7YJ](https://perma.cc/CH9Y-D7YJ)] (arguing for interventions "to reduce the barriers people face to attending court").

⁵ See *infra* Section I.A. (describing actors' duty to appear in legal proceedings).

⁶ *Id.*

for non-defendants is more than double the rate of defendant FTA: 53% to 19%.⁷ Police officers fail to appear at least once in 31% of cases for which they are subpoenaed as witnesses. On a per-hearing level, police officers fail to appear on a subpoena almost twice as often as defendants: 13% versus 7%. Victims and other civilian witnesses fail to appear in almost half of cases with which they are associated. Prosecutor and public defender FTA rates are very low; they often work in teams, making it easy to sub in for each other. But private defense attorneys—both court-appointed and privately hired—failed to appear at least once in 36% of their cases.

In addition, we document a type of defendant FTA that scholarship and the policy conversation have all but ignored: FTA by *detained* defendants. Miscommunication or other dysfunction means that jail staff do not always bring defendants to court when they are required to be there. In our dataset, this occurs in 7% of all cases and 10% of cases in which the defendant was detained at least three days after the bail hearing.

These data demonstrate that FTA is a systemic phenomenon, and one with systemic consequences. When essential witnesses fail to appear, cases cannot proceed. The case is either continued (deferred to a future date) or dismissed. In the Philadelphia data, the dismissal rate for cases that involved a witness FTA was 58%, as compared to 25% in the rest of cases. This strong relationship persists even after controlling for a detailed variety of case characteristics. In fact, witness FTA is the single most important predictive factor for case outcomes among measurable case features—more than twice as predictive as charge, demographics, and criminal record combined. Back-of-the-envelope calculations suggest that witness FTA accounts for as many as 32,000 case dismissals in Philadelphia from 2010-2020. It is hard to trace the causal pathways with confidence, but what is clear is that nonappearance is a major feature of the system and intimately entangled with case process and outcomes. Spend a day in a Philadelphia courtroom and this reality will become clear; the conversations you overhear among prosecutors, defense lawyers, judge, and courtroom staff will be almost entirely about who's here, who's not, who's coming, who can't, and how the many cases on the courtroom docket will consequently be resolved. This reality is so basic to the operation of the system that it hardly bears comment by those who work within it; it is the air they breathe. And yet it has escaped sustained attention from academics or policymakers.⁸

⁷ *Infra* Section II.A. For defendants on pretrial release, which we define as release within three days of the bail hearing, the defendant FTA rate is 28%.

⁸ We are unaware of other studies of FTA as a systemic phenomenon. The literature on witness FTA has mostly been siloed and focused on domestic violence or gang-related crime. See, e.g., Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1850, 1892 (1996) (focusing on witness FTA in domestic violence proceedings); Myrna

Recognizing the scope and influence of FTA raises a host of questions. First, it calls into question the extreme asymmetry between the treatment of defendant and non-defendant FTA. Bail reform debates have mostly ignored the issue of nonappearance by other court actors.⁹ But if FTA is a problem because it disrupts the administration of justice, and non-defendants fail to appear more than defendants, then surely those concerned about the smooth administration of justice should be thinking about nonappearance across all parties! Moreover, our supplementary interviews suggest that the sheer difficulty of attending court is a major driver of FTA for non-defendants, just as it is for defendants. People don't know when and where to show up, they have trouble accessing transportation or childcare or taking time off work, or prior court hearings (of which there can be many, depending on the case) have been so pointless that they give up. Insofar as these kinds of logistical problems drive systemic FTA, they are amenable to systemic solutions. Clearer communication and more efficient scheduling might go a long way toward improving appearance rates across the board.

Relatedly, the systemic nature of FTA highlights our inconsistent willingness to restrict liberty to guarantee someone's appearance. In theory and by law, both defendants and witnesses are subject to bail requirements or to pretrial detention if necessary to ensure their appearance in court.¹⁰ In the Founding era, witnesses and accusers were required to post bail just like defendants.¹¹ Today, by contrast, courts bail or detain the majority of defendants but almost no witnesses.¹² It rarely seems justifiable to lock up a witness merely to assure their appearance at trial. Why then is it justifiable to detain a defendant for the same purpose? If the answer pertains to the defendant's probable guilt, the detention treads dangerously close to pretrial

Dawson & Ronit Dinovitzer, *Victim Cooperation and the Prosecution of Domestic Violence in a Specialized Court*, 18 JUST. Q. 593, 594-95 (2001) (same); Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173, 177 (1996) (same); Lisa Goodman, Lauren Bennett & Mary A. Dutton, *Obstacles to Victims' Cooperation with the Criminal Prosecution of Their Abusers: The Role of Social Support*, 14 VIOLENCE & VICTIMS 427, 428 (1999) (same).

⁹ For example, in 2020 the National Association of Criminal Defense Lawyers (NACDL) reviewed state-led efforts to reform pretrial practices. All related to defendants. *See State Pretrial Reforms*, NAT'L ASS'N CRIM. DEF. LAWS. (Jan. 23, 2020), <https://www.nacdl.org/Content/Legislation-and-State-Practices> [<https://perma.cc/D8RK-6LPY>] (analyzing efforts to reform pretrial practices).

¹⁰ *See infra* Section I.A. (describing bail and pretrial detention requirements for both defendants and witnesses).

¹¹ *See infra* notes 33-41 and accompanying text (describing how bail was handled at the founding of the United States).

¹² Cf. Wesley MacNeil Oliver, *The Rise and Fall of Material Witness Detention in Nineteenth Century New York*, 1 N.Y.U. J.L. & LIBERTY 726, 727 (2005) (discussing the history of material witness detention).

punishment, as we have argued elsewhere.¹³ We don't mean to suggest that there are no possible grounds for differential treatment of defendants and witnesses, just that given the prevalence of victim and witness FTA, such vastly differential treatment of defendant FTA risk requires greater scrutiny than it has received thus far.

At a more general level, the Philadelphia example demonstrates that widespread FTA can operate as a check on the nature and volume of criminal adjudications. In other words, it serves a regulatory function. The extremely high rate of victim FTA is a case in point. The overall victim FTA rate in our data is near 50%. In domestic violence cases it approaches 70%.¹⁴ Why are so many people failing to show up at court? Some proportion of victim FTA surely results from coercion, or because they were unaware of when or where they were supposed to appear. But other victims stay home because the ordeal of court appearance is not worth whatever benefit it may produce, or because they don't want the perpetrator convicted. In other words, they effectively opt out of criminal proceedings.¹⁵

This last genre of FTA raises normative questions because when a victim fails to show, the case is typically dismissed. Is it a good or a bad thing for victims to exercise this control? Should we take it as a lesson in the limits of criminal-law responses to interpersonal harm? Or does it compromise the criminal-law enterprise of publicly expressing and enforcing shared norms?¹⁶ Regardless of the answer, it's important to reckon with the fact that many victims reject the criminal legal process as currently constituted.

Police officer FTA raises a separate set of questions. Given that officers are paid to appear in court and testifying is supposed to take precedence over other job responsibilities, it is hard to conceive of the high rates of officer FTA as anything other than a pathology of the system. Each time an officer

13 See Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 497-501 (2017) [hereinafter Mayson, *Dangerous Defendants*] (arguing that there is no clear moral or legal reason why the standard for preventive detention should be different for defendants than non-defendants); Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 761-70 (2022) [hereinafter Mayson & Stevenson, *Pretrial Detention*] (arguing that if judges discount the liberty of defendants based on their potential guilt, then they run the risk of engaging in punishment before trial).

14 The role of victim FTA in domestic violence cases and its relation to case outcomes has received scholarly attention both descriptively and normatively. See generally *supra* note 8 (finding other FTA studies focused only on domestic violence and gang-related crimes).

15 Relatedly, the victimization literature has investigated factors that influence victims' decisions to report crimes to the police. Studies on crime-reporting behavior find that "everywhere the decision to report seems to be dominated by a rational calculus regarding the costs and benefits of such action." Wesley G. Skogan, *Reporting Crimes to the Police: The Status of World Research*, 21 J. RSCH. CRIME DELINQ. 113, 114 (1984).

16 For one prominent account of the criminal legal system as serving this function, see generally R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY xvii (2001).

fails to appear, the case must be postponed to another date, usually at least a month away. That's another month that a detained defendant sits in jail and another hearing for which witnesses must miss work, find childcare, and arrange transportation. And, as with victims and civilian witnesses, cases are much more likely to be dismissed when an officer fails to appear.

What is driving the high officer-FTA rates? In our data, the rates were highest for low-level, officer-initiated charges like drug and DUI offenses and much lower for violent crime. Our interviews suggest several possible explanations for this trend. Some interviewees stated that police officers are more likely to fail to appear when they see the case as less important or expect to be challenged on the legality of a stop or search. At least in some types of cases, officers appear to be operating on a “process-is-the-punishment” logic, where the purpose of arrest is to jail someone for a couple of days rather than to secure a formal conviction and punishment.¹⁷ To the extent this is true, police discretion is determining not only which cases enter the court system, but also how they are adjudicated. This behavior is not the only explanation for the high officer-FTA rates, however. Scheduling conflicts and poor information also appear to play a role.

At the highest level, this Article aims simply to draw attention to systemic FTA as an important feature of contemporary U.S. criminal legal systems. In an era when we are asking deep questions about the purpose and value of criminal law,¹⁸ the fact that police officers, victims and other witnesses so regularly act as though criminal cases are not worth the effort should give us pause. Are we losing an important public good—the value of criminal prosecution—because the private costs for the people involved are too high? If so, how do we tackle the problem? Or do the judgments of inside actors tell us something about how society should assess the value of criminal proceedings? This Article cannot answer these larger questions. But we hope, in raising the issue of systemic FTA, to balance what has been a highly incomplete discussion of appearance rates and to cast some light on an aspect of the criminal legal system that warrants more attention.

¹⁷ See generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979) (analyzing the “process-is-the-punishment” theory of arrest); ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND* (2019) (same).

¹⁸ See, e.g., *Policy Platform*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms> [<https://perma.cc/96G7-ZMTU>] (last visited Feb. 13, 2023) (calling for, *inter alia*, an “[e]nd to all jails, prisons, and immigration detention,” an “end to all pretrial detention and money bail,” and a shift of resources from criminal law enforcement to community-based transformative violence prevention and intervention strategies); Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here And There, Now And Then*, HARV. L. REV. F. 42, 44 (2020) (noting that the rise of the prison abolition movement “is especially timely as communities across the United States are currently discussing how to reimagine public and community safety”).

I. A SYSTEMIC PERSPECTIVE ON FTA

This Part sets the stage for our empirical study of system-wide FTA rates in Philadelphia by discussing its background, setting, data, and methodology.

A. *The Duty to Appear*

The defendant's duty to appear in criminal court is well-known. When the government lodges criminal charges against someone—presuming it has probable cause and has complied with all procedural requirements—it has the right to compel their appearance at future court proceedings.¹⁹ With sufficient grounds to believe that the accused person might flee the jurisdiction or hurt someone if left at liberty, the government can detain the person pending trial.²⁰ Alternately, the accused person may remain at liberty conditional on providing “adequate assurance” of their future appearance.²¹ They will receive a subpoena, and to defy it is to risk contempt charges, as well as criminal bail-jumping charges and the revocation of their conditional freedom.

But there are also a host of other actors who have a duty to participate in court proceedings. Without judges, lawyers, court staff, and prosecutors, hearings could not happen. These actors have a professional duty to appear; it is their job.²² Then there are witnesses, who have a duty to appear that is not a function of their employment (with the exception of law enforcement personnel, who are a hybrid case). The witness's duty to appear is much closer to the defendant's: it is a basic duty of membership in the political community that is enforced through law.²³

¹⁹ See *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (“[T]he Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention . . .”); *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (clarifying that a judicial determination of probable cause within forty-eight hours of arrest is presumptively “timely”); *Stack v. Boyle*, 342 U.S. 1, 4–6 (1951) (addressing statutory and constitutional standards for pretrial bail).

²⁰ See, e.g., 18 U.S.C. § 3142(e)-(g) (West 2003) (permitting pretrial detention on these grounds); *United States v. Salerno*, 481 U.S. 739, 741 (1987) (rejecting a range of constitutional challenges to the detention provisions of 18 U.S.C. § 3142).

²¹ *Stack*, 342 U.S. at 4.

²² Defense lawyers have specific contractual duties to their individual clients, as well as professional and ethical obligations to vindicate their clients' Sixth Amendment right to the effective assistance of counsel. See U.S. CONST. amend. VI (providing a right to counsel); *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (incorporating the Sixth Amendment right to counsel against the states).

²³ See *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (“It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.”); see also Ronald L. Carlson, *Jailing the Innocent: The Plight of the Material Witness*, 55 IOWA L. REV. 1, 16 (1969) (“The practice of confinement has been justified on the ground that the duty to disclose knowledge of crime rests upon all citizens.”).

As a legal matter, the witness has a duty to appear when a party summons them. Both the defense and the prosecution in a criminal case have a right to compulsory process—that is, the right to subpoena witnesses to testify in court.²⁴ That right creates a legal obligation for the witness who is summoned.²⁵ A subpoena is a court order; to defy a subpoena is to violate a court order. If you don't show up, the court that issued the subpoena can hold you in contempt.²⁶

The witness's duty to appear, like the defendant's, can be onerous. It often requires showing up to court on multiple dates and generally early in the morning. A person might sit for hours, perhaps all day, waiting for the case to be called. And testifying is stressful. For crime victims, it can be re-traumatizing. In some cases, testifying means putting yourself or your loved ones in danger of reprisal.²⁷ In sum: discharging the duty of a witness in a criminal case can entail costs that range from the costs of transit, parking, lost wages, and childcare to profound emotional harm and life-threatening danger. And all of this is assuming that the witness is deemed sufficiently trustworthy to answer the subpoena. If a "material" witness is unlikely to show up, the court can order that they be detained pending trial just as it may an accused person—in the same jail, in the same conditions.²⁸

24 The federal Constitution guarantees criminal defendants the right to compulsory process. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."). See also *Washington v. Texas*, 388 U.S. 14, 19 (1967) (holding that the right to compulsory process "is a fundamental element of due process of law" incorporated against the states); 98 C.J.S. *Witnesses* § 4 ("Just as accused persons have the right to confront the prosecution's witnesses for the purpose of challenging their testimony, they also have the right to present witnesses to establish a defense, and this right is a fundamental element of the due process of law."). State constitutions likewise guarantee this right. See, e.g., PA. CONST. art. I, § 9 ("In all criminal prosecutions the accused hath a right . . . to have compulsory process for obtaining witnesses in his favor.") The prosecution has a similar right. As the Georgia Supreme Court has put it: "In aid of the right to prosecute, the state has the corresponding right to compel the attendance of witnesses, including the victim, and to call those witnesses to testify about their knowledge of the crime." *Ambles v. State*, 259 Ga. 406, 407 (1989); see also 98 C.J.S. *Witnesses* § 4 (same). In each jurisdiction, a statute governs subpoena form and process. E.g., FED. R. CRIM. P. 17; VA. SUP. CT. R. 3A:12; CAL. CIV. PROC. CODE § 1985 (West 2023); MASS. R. CIV. P. 45.

25 Comment, *Pretrial Detention of Witnesses*, 117 U. PA. L. REV. 700, 704–05 (1969) [hereinafter *Pretrial Detention*] ("The duty of an individual to appear as a witness and testify to matters within his knowledge when summoned by a judicial or legislative tribunal is clearly established in our law.")

26 E.g., Pa. R. Civ. P. 234.5 ("If a witness fails to comply with a subpoena, the court may issue a bench warrant and if the failure to comply is willful may adjudge the witness to be in contempt."); *Blackmer v. United States*, 284 U.S. 421, 443 (1932) (upholding the contempt conviction for an American citizen's failure to appear in court after receiving suitable notice).

27 See, e.g., ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 131 (2011) ("The problem of witness intimidation is an old and pressing one.")

28 E.g., 18 U.S.C. § 3144; LA. STAT. ANN. § 15:257 (2019); N.Y. CRIM. PROC. LAW §§ 620.20, 620.50 (McKinney 1970); N.C. GEN. STAT. ANN. § 15A–803 (West 2001). For modern criticism of material witness detention process, see, e.g., Matt Sledge, *Court Watchers Demand New Orleans DA*

To recap, the witness's duty to appear mirrors the defendant's in important ways.²⁹ Like defendants, subpoenaed witnesses must show up to enable "the administration of justice," whatever the private costs.³⁰ Failure to appear disrupts the administration of justice. Willful failure to appear also violates the subpoena, which the court can enforce by issuing a warrant, holding the violator in contempt, or imposing any condition on the liberty of the subpoenaed person that is necessary to ensure their appearance, up to and including detention.

Current practice, however, does not treat the witness's and defendant's duty to appear in the same way. As noted above, courts, lawyers, policymakers, media, and the public treat the defendant's duty to appear as a serious legal obligation and treat high defendant FTA rates as a significant legal and social problem. Every jurisdiction in the United States dedicates considerable resources to preventing, tracking, and sanctioning defendant FTAs.³¹ Money bail, bail bondsmen, FTA risk assessment, pretrial services, and conditions of release geared toward ensuring appearance, *capias* warrants,

Stop Arresting Accusers in Rape Cases as Material Witnesses, NOLA.COM (Apr. 11, 2017), https://www.nola.com/court-watchers-demand-new-orleans-da-stop-arresting-accusers-in-rape-cases-as-material-witnesses/article_bbo2baf7-d779-590a-aafi-dc4a7247d175.html [<https://perma.cc/54YL-RNAH>] (detailing how an advocacy group argued against material witness detention); Lauryn P. Gouldin, *When Deference Is Dangerous: The Judicial Role in Material-Witness Detentions*, 49 AM. CRIM. L. REV. 1333, 1338 (2012) ("In authorizing the material witness arrests, judges significantly discounted the importance of cooperation and the witnesses' ties to the jurisdiction . . . [and] ignored their statutory and constitutional obligation to impose the least restrictive set of conditions that would have ensured the witnesses' appearance before the grand jury."); Carolyn B. Ramsey, *In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses*, 6 OHIO ST. J. CRIM. L. 681, 683-86 (2009) (detailing how material witness detention was particularly harmful in the post September-11 era).

²⁹ Whether they are meaningfully different is a difficult question that we take up in Part III.

³⁰ *Pretrial Detention*, *supra* note 25, at 704-05 (recognizing that the duty to appear "undoubtedly imposes a burden on individual freedom that may require a sacrifice of time or privacy, but such a burden is inevitable in a system of law requiring direct testimony of witnesses"). One might think that there are additional grounds for defendants' duty to appear: perhaps defendants have a special duty to submit to trial, or perhaps a defendant who has committed a bad act has forfeited liberty and privacy rights. On the other hand, it's not clear that either of these really marks a significant difference vis-à-vis witnesses. If defendants have a special duty to submit to trial, witnesses may have a corresponding duty to participate in trial. Some defendants have committed bad acts, but others haven't, and in the pretrial phase all are presumed innocent. In sum, if there are conceptual differences between the defendant and witness duties to appear, it is not clear how meaningful the differences are. The basic justification for compelled appearance—to enable the administration of justice—is shared.

³¹ See, e.g., Brian Nam-Sonenstein, *High Stakes Mistakes: How Courts Respond to "Failure to Appear"*, PRISON POL'Y INITIATIVE (Aug. 15, 2023), <https://www.prisonpolicy.org/blog/2023/08/15/fta/> [<https://perma.cc/EMW6-2A2F>] (detailing the ways that different state courts punish and accommodate FTA).

prosecutions for “bail jumping”—all of these institutions are dedicated to preventing or sanctioning defendant FTAs.³²

On the other hand, the institutional infrastructure dedicated to preventing and sanctioning witness FTA is highly informal. Material witness detention does happen but is exceedingly rare.³³ To get witnesses to court, prosecutors and defense lawyers subpoena the witnesses they want and follow up by phone. Witnesses show up if the lawyers are persistent and persuasive or if the witness has sufficient incentives. Some witnesses have economic incentives for appearing. Police officers, for instance, often get paid overtime for the time they spend in court.³⁴ Other witnesses have personal incentives. For example, the victim of a crime has a personal stake in telling their story and seeing the perpetrator convicted. But witness incentives are uneven, and the criminal legal system does not typically augment them with bail requirements or other pretrial interventions. When a witness fails to appear, the case is continued, just as it is if a defendant fails to appear, but (with the rarest exceptions) judges do not issue *capias* warrants for witnesses. Holding a witness in contempt for willfully ignoring the subpoena is likewise very rare. Nor has there been any large-scale scholarly or policy effort to track witness FTA rates, let alone design interventions to reduce them.³⁵

32 A *capias* warrant, or writ of *capias*, is a court order directing that a person be taken into custody. Courts frequently order *capias* warrants when a defendant fails to appear for a required court appearance. *Capias*, BLACK'S LAW DICTIONARY (11th ed. 2019).

33 In Philadelphia, we find just 232 cases over ten years that suggest a material witness was detained or that there was a motion to detain. The existing scholarship on material witness detention suggests that, in practice, it may serve primarily as a tool to skirt the probable-cause standard for arrest and to coerce people to serve as informants. See, e.g., Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 ST. JOHN'S L. REV. 483, 485-86 (2002) (“[T]he September 11, 2001 terrorist attacks . . . have brought material witness laws to the forefront as the government seeks to use the laws as investigatory tools to detain individuals while determining whether a crime has been committed by the detainee or perhaps by an acquaintance of the detainee.”); Gouldin, *supra* note 28, at 1338 (discussing material witness detentions); Bradley A. Parker, *Abuse of the Material Witness: Suspects Detained as Witnesses in Violation of the Fourth Amendment*, 36 RUTGERS L. REC. 22, 23 (2009) (“I argue that the Department of Justice . . . acted unconstitutionally by using the material witness statute as a tool to investigate and preventively detain suspected terrorists in the aftermath of the September 11 attacks.”).

34 PHILA. POLICE DEP'T, DIRECTIVE NO. 11.10: OVERTIME PAY & COMPENSATORY TIME § 5 (May 24, 2022), <https://www.phillypolice.com/assets/directives/D11.10-OvertimePayAndCompensatoryTime.pdf> [<https://perma.cc/LPR4-M3J5>] (“Any sworn employee who, in the performance of their official duties, is required by the City to appear before designated Civil or Judicial Bodies . . . shall be eligible for overtime/compensatory time.”). At least in theory, showing up to court is also supposed to take precedence over any other duty a police officer may have in Philadelphia. PHILA. POLICE DEP'T, DIRECTIVE NO 6.2: COURT NOTICES AND SUBPOENAS § 1 (November 4, 2022), <https://www.phillypolice.com/assets/directives/D6.2-CourtNoticesAndSubpoenas.pdf> [<https://perma.cc/Ry9L-KEWG>] (“Notices to attend court will take precedence over all other responsibilities on that date.”).

35 There has been some attention to the reluctance of witnesses to testify in the context of domestic violence cases and cases involving gang-related violence, but these policy and academic

There was not always such a sharp divide between how the system handled defendants' and witnesses' duty to appear in court. Today we think of bail as applying only to criminal defendants. But at the nation's founding, everyone was required to give security for their appearance in court—defendants *and* witnesses, including the alleged victim of the crime.³⁶ For example, the record book kept by a Philadelphia magistrate during 1799–1800 documents a bond requirement for every accuser and witness listed,³⁷ and the Judiciary Act of 1789 authorized federal magistrates to require appearance bonds from witnesses, “on pain of imprisonment.”³⁸ It is not clear when and why the practice of bailing witnesses fell into disuse. Courts across the nation still have the power to bail witnesses; laws governing “witness bail” are still on the books.³⁹ And as a matter of logic, it stands to reason that if a court has the power to order a witness detained, it also has the power to order less dramatic restraints on their liberty.⁴⁰ Yet, to our knowledge, this simply does not happen.⁴¹

The historical practice highlights the asymmetry of current policy debates about FTA. Defendants, alleged victims, and witnesses share a duty to appear. That duty is legally enforceable through bail or, if no less-restrictive measure is sufficient, by detention. Yet ongoing policy debates about bail

discussions have been framed as problems specific to the subject matter and not in terms of the more general obligation of witnesses to appear. *See infra* note 39 (discussing witness testimony in these difficult circumstances).

³⁶ Unlike in contemporary cash bail systems, however, no one was required to transfer anything of value up front. Rather, each party (and any sureties) had to sign a pledge guaranteeing their appearance on pain of forfeiting a specified sum if they failed to show. *See generally* Kellen Funk & Sandra G. Mayson, *Bail at the Founding*, 137 HARV. L. REV. (forthcoming 2024) (describing the law and practice of criminal pretrial bail in the founding era).

³⁷ *Id.* (manuscript at 38). It also includes one instance in which the magistrate committed the alleged victim to jail “for want of bail.”

³⁸ Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 73, 91 (“And copies of the process shall be returned as speedily as may be into the clerks office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate . . . may require on pain of imprisonment.”).

³⁹ *E.g.*, TEX. CODE CRIM. PROC. ANN. art. 24.24 (West 2023) (“Witnesses on behalf of the State or defendant may, at the request of either party, be required to enter into bail in an amount to be fixed by the court to appear and testify in a criminal action . . .”); W. VA. CODE ANN. § 62-1C-15 (West 2023) (“The bail for a witness for or against the accused shall be conditioned upon his appearance at such time and place as the court or justice shall direct.”); N.M. STAT. ANN. § 31-3-7 (West 2023); 18 U.S.C. § 3144 (authorizing bail for material witness if subpoena is inadequate).

⁴⁰ *Pretrial Detention*, *supra* note 25, at 700 (noting that a material witness “may be subject to restrictions ranging from a duty to appear in answer to a subpoena to the posting of bond to assure his appearance or imprisonment for failure to do so,” and that “the witness’s freedom of travel may be limited to a certain community or jurisdiction.”).

⁴¹ The exception suggests the rule: in a case that ultimately led to a civil rights suit, the judge who had authorized the arrest of a resistant material witness “expressed distaste for ‘setting bail on people who are not accused of a crime,’ but nevertheless ordered [the witness] imprisoned when she could not put up a \$300,000 surety.” *Schneyder v. Smith*, 653 F.3d 313, 316 (3d Cir. 2011).

reform, in which court appearance has been one of the main themes, focus exclusively on defendants. The existing literature on non-defendant FTA is mostly restricted to discussion of victim and witness reluctance to testify in cases of domestic or gang-related violence.⁴² At least in the United States, there has been no conversation about the broader phenomenon of non-defendant FTA. The rest of this Article aspires to help remedy the gap by charting non-defendant FTA rates in a major city.

B. Data and Setting

Our empirical analysis uses data from Philadelphia courts and covers cases filed after January 2010 and resolved before March 2020. Philadelphia is the fifth-largest city in the United States, with a population of 1.5 million. Its population is 43% Black, 34% non-Hispanic White, and 12% of another race or of two or more races; 16% of residents are Hispanic or Latino.⁴³ This Section provides an overview of the court system in Philadelphia and then explains our sample and variable construction.

1. The Court Process in Philadelphia

After a person is arrested, prosecutors determine whether and how to charge the case.⁴⁴ Our data found that in Philadelphia, roughly 95% of arrests

⁴² Within these two areas, the literature is deep. For a discussion of victim (non-)cooperation in domestic violence cases, see e.g., sources cited in *supra* note 8, and see also, e.g., Margret E. Bell, Sara Perez, Lisa A. Goodman & Mary Ann Dutton, *Battered Women's Perceptions of Civil and Criminal Court Helpfulness: The Role of Court Outcome and Process*, 17 VIOLENCE AGAINST WOMEN 71, 72 (2011) (noting that “emotional or tangible barriers” cause many women who experience intimate partner violence to drop out of legal proceedings); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. LAW J. 515, 517-19 (1982) (discussing how victims have lost faith in the legal system); Eugene Emeka Dim & Alexandra Lysova, *Male Victims' Experiences With and Perceptions of the Criminal Justice Response to Intimate Partner Abuse*, 37 J. INTERPERSONAL VIOLENCE NP13067, NP12076-77 (2022) (detailing how men who experience intimate partner violence have a negative perception of the police because they expect to be shamed or ignored, and therefore do not call them when experiencing abuse); David A. Ford, *Prosecution as a Victim Power Resource: A Note on Empowering Women in Violent Conjugal Relationships*, 25 LAW & SOC'Y. REV. 313, 326-37 (1991) (“Some [women who experience intimate partner violence] may purposefully bargain for security using the threat of prosecution as a power resource. When they achieved success they abandoned the prosecution process.”). For information on witness intimidation in gang cases, see generally FRANK J. CANNAVALE, JR., U.S. DEP'T JUST., IMPROVING WITNESS COOPERATION (1976), John Anderson, *Gang-Related Witness Intimidation*, NAT'L GANG CTR. BULL. (U.S. Dep't Just., D.C.) Feb. 2007, and Brendan O'Flaherty & Rajiv Sethi, *Witness Intimidation*, 39 J. LEGAL STUD. 399 (2010).

⁴³ *Quick Facts : Philadelphia County, Pennsylvania*, U.S. CENSUS BUREAU (last visited Oct. 14, 2023), <https://www.census.gov/quickfacts/philadelphiacountypennsylvania> [https://perma.cc/9C4R-T4Y7].

⁴⁴ *The Criminal Justice Process*, PHILA. DIST. ATT'Y OFF. (last visited Oct. 15, 2023), <https://phillyda.org/safety-and-justice/criminal-justice-process> [https://perma.cc/U3EE-R2EE].

lead to formal charges. Cases are then assigned to Assistant District Attorneys (ADAs) in the Municipal Court unit.⁴⁵ For felony charges, the first hearing for which witnesses are required is the preliminary hearing in Municipal Court.⁴⁶ Here, the prosecution has to make out a prima facie case to the judge, meaning a judge must find that there is sufficient evidence of the crime for the prosecution to proceed. If the prosecution meets its burden, the case will proceed to the Court of Common Pleas for trial, where witnesses will again be necessary. Plea negotiation is common for felonies, but cases do not plead out until after they have been transferred to the Court of Common Pleas – in other words, cases do not plead out until after witnesses are called. Misdemeanors are adjudicated in Municipal Court and do not have a preliminary hearing. Instead, witnesses in misdemeanor cases will be called at the first trial date, which is usually the first hearing in Municipal Court.⁴⁷ Our data found that plea deals are less common for misdemeanor cases (even conditional on conviction), and generally only occur at a trial setting in Municipal Court.⁴⁸

For the first hearing in Municipal Court—typically either a preliminary hearing for felonies or a trial setting for misdemeanors—a subpoena is automatically generated for the arresting officers. For subsequent hearings, the ADA must manually subpoena police-officer witnesses through the District Attorney’s case management system.⁴⁹ ADAs may also subpoena

⁴⁵ *Supra* note 43. This description is a simplified version of the court process. For some cases, there are a few steps in between charging and Municipal Court. First, most misdemeanor cases will have a hearing in a status room, which is staffed by a magistrate, ADAs, and public defenders. In the status room, ADAs can make “status offers” where they ask the defendant to undergo some sort of treatment, community service, or restitution in exchange for dropping charges. If the defendant meets the terms of the agreement, their case is dismissed in the status room without ever proceeding to Municipal Court. Misdemeanor domestic violence cases are the exception to this status-room process—they are sent directly to Municipal Court. Other cases may be sent from charging directly to diversion, so they will not have a hearing in Municipal Court unless the defendant fails diversion.

⁴⁶ *Id.* There are some exceptions to this process. Most notably, the requirement applies only to the adult system and not to the juvenile system. In addition, some cases are vertically prosecuted, meaning that an ADA is specially assigned to the case and takes the case through all hearings after charging to disposition. For felony cases, this means that an ADA from the Court of Common Pleas may cross over to the Municipal Court to run the preliminary hearing.

⁴⁷ As mentioned above, cases that are sent to diversion or given a “status offer” (deferred adjudication) have a slightly different process.

⁴⁸ For misdemeanor cases in the Municipal Court, every hearing is a potential trial. Therefore, all necessary witnesses are subpoenaed unless the judge agreed that they can be “on call” for that hearing, which usually happens after the witness showed up repeatedly but another actor failed to appear. Most misdemeanor plea offers are made last-minute at the bar of court. Only about 14% of misdemeanor cases filed between 2010 and 2020 resolved in a guilty plea.

⁴⁹ The computer system contains information on police officers with the Philadelphia Police Department, so ADAs can easily issue subpoenas with a few clicks for these officers. However, the process for sending subpoenas to officers outside of the Philadelphia Police Department can be quite complex. Law enforcement officers in other departments, such as the public transit police and state

victims and other civilian witnesses, whose contact information is usually collected by police during arrest and entered into the case management system by a Victim/Witness Coordinator in the District Attorney's office (DAO).⁵⁰ About two weeks ahead of a scheduled court date, a Victim/Witness Coordinator calls the victim or witness to inform them of their upcoming court date and provide any needed referrals.⁵¹ Following this initial call, Victim/Witness Coordinators also send a letter to victims and civilian witnesses with the information about their court date.⁵² We learned from observations and conversations with ADAs that a few days before a scheduled hearing, many will email, text, or call people with information and reminders about the upcoming hearing.

If an officer, victim, or other witnesses fails to appear, it is the prosecutor's responsibility to follow up. As part of their "return work" after court, they will issue a subpoena for the next court date. For victims or civilian witnesses, many ADAs will try to call them, and even text or email the subpoena in addition to sending it by mail. Failure to comply with a subpoena can theoretically result in a bench warrant, a contempt charge, or even material witness detention, but these are very rare. Out of the 341,417 cases in our data, we document only 232 instances in which there was some motion for a material witness arrest or detention.⁵³

Philadelphia's criminal legal system is like that of other major cities in some ways. It is a high-volume urban district with a public defender's office handling most cases. Defendant FTA rates are comparable to those in other large urban counties, as are conviction rates.⁵⁴ However, one noteworthy

troopers, are not included in the computer system. To subpoena these officers, ADAs must manually enter the officer's information and prepare the subpoena themselves. Municipal Court ADAs have a reference manual outlining the subpoena process for different types of officers.

⁵⁰ Any victim and witness contact information that is collected at arrest is automatically transferred from the police reporting system (PARS) to the District Attorney's case management system (DAOCMS), but sometimes the information collected at arrest is incomplete or inaccurate. Victim/Witness Coordinators will update the information in DAOCMS as they begin contacting victims and witnesses.

⁵¹ Victim/Witness Coordinators are assigned to specific units in the DAO. Within each unit, individuals are assigned to courtrooms. The Victim/Witness Coordinator for a given courtroom handles all victim and witness contacts for that room. Often these calls are not picked up, so the coordinator will leave a voicemail with the court date information.

⁵² However, many victims and civilian witnesses report not receiving these mailings. This failing may be due in part to incorrect contact information collected at arrest.

⁵³ The docket will contain statements such as "material witness is held in custody," "motion to hold material witness," "material witness bench warrant," etc.

⁵⁴ In the most recent national snapshot of state courts in large urban counties, 83% of felony defendants made all of their court appearances compared to 84% of felony defendants in Philadelphia. COHEN & REAVES, *infra* note 75.

OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 22 tbl.18 (2013),

difference is that Philadelphia adjudicates a higher proportion of cases by bench trial than most other jurisdictions.⁵⁵ We discuss how the higher rate of bench trials may affect the generalizability of our results in Section III.A.

2. Data, Sample, and Variable Construction

To produce the dataset used in our study, we combined information from public court dockets with internal information maintained by the Philadelphia District Attorney's Office Case Management system (DAOCMS). While court data is public and widely available, this research would not have been possible without access to confidential records from the District Attorney's Office.

Our main variable of interest is whether any police officer, victim, other witness, or lawyer missed a court date they were required to attend. We obtained this information from two sources. First, we searched comments entered by the clerks of the court for phrases indicating that a necessary participant failed to appear at a given hearing.⁵⁶ Second, we searched DAOCMS for cases in which failure of a required participant to appear at the hearing was listed as the reason for that particular hearing's disposition.⁵⁷ We also documented a separate type of defendant nonappearance which occurs when the defendant is not brought from jail to court.⁵⁸ We classified this type of nonappearance separately from our defendant FTA measure.

In some of our analyses, we subset cases to those in which a victim, witness, or police officer was expected to appear.⁵⁹ We treated any case which

<https://bjs.ojp.gov/content/pub/pdf/fdluco9.pdf> [<https://perma.cc/U4SP-J263>]. The median time to disposition was 111 days (153 days in Philadelphia), and 26% (compared to 39% in Philadelphia) of felony defendants were acquitted or saw their case dismissed. *Id.* at 23 tbl. 20, 24 tbl. 21.

⁵⁵ Whereas the national trial rate in state criminal courts is currently under 10%, fully one-fifth of all cases are resolved by bench trial in Philadelphia (14% of felony cases and 40% of misdemeanors). *CSP STAT Criminal*, CT. STATS. PROJECT (last visited Sept. 24, 2023), <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal> [<https://perma.cc/F9NP-XPXE>]. Of the twenty-some states that reported to the Court Statistics Project between 2013 and 2021, six reported a nontrivial fraction of bench trials. *Id.* Forthcoming research suggests that the prevalence of bench trials among felony cases varies widely across jurisdictions, including across counties in the same state. Lauren Ouziel, *Fact-Finder Choice in Felony Courts*, 57 *U.C. Davis L. Rev.* (forthcoming 2024) (manuscript at 3), <https://ssrn.com/abstract=4561463> [<https://perma.cc/6WYB-FAFH>].

⁵⁶ For example, phrases like: "complaining witness failed to appear" or "Commonwealth not ready—police officer in training."

⁵⁷ Our analyses encompass all hearings in a case except for bail hearings (in which defendants appear by definition and at which no witnesses are expected) and any hearing that happens after case disposition (i.e., probation revocation hearings or appeals).

⁵⁸ This distinction is delineated in the clerk's notes as "defendant not brought down" or "defendant NBD."

⁵⁹ Defendants and attorneys are expected to appear for all hearings prior to disposition. *Cf.*, e.g., Phila., Pa. R. Crim. P. 536 (detailing requirements for defendants to appear in court).

had victim or civilian witness information entered into DAOCMS as a case in which that party was expected to appear. For police officers, we used subpoena records to identify cases in which an officer was expected to appear. We have police officer subpoena information beginning in 2017. We do not have subpoena information for victims or other witnesses.

These methods are imperfect. On the one hand, our method for identifying cases in which victims or witnesses are expected to appear may be overinclusive, since having a victim or witness associated with the case does not necessarily mean they were subpoenaed for court. Conversely, our subsets may be underinclusive, because in some cases, a victim, witness, or police officer may have been expected notwithstanding the lack of data signaling that fact.⁶⁰ We did find occasional mentions of failures to appear in court even when the relevant actor was not listed among the expected witnesses. A further wrinkle is that the clerks entering the data may have occasionally described a “complaining witness” (i.e., victim) FTA simply as a “witness” FTA. Our data would then falsely describe such an instance as an “other witness” FTA instead of a victim FTA. We made one correction for this: when the notes indicate there was a “witness FTA” in a case with a victim attached but no witness, we classify this as a victim FTA. Nonetheless, the victim FTA rate may still be understated and the other-witness FTA rate overstated—we suggest caution in interpretation. Lastly, it is possible that some clerks do not report all FTAs, in which case we may be underreporting FTA rates across all court actors.

For each case, our dataset also includes information about the initial offense charged, whether the defendant had a prior case in the past year, the case disposition, and the length of the case, which comes from DAOCMS. We obtained defendant socio-demographic characteristics (age, race, sex) from police data because it is most reliably collected at that stage.⁶¹ We classified cases according to their lead charge: drug, DUI, property, domestic violence, other violent, and other.⁶²

Our final sample includes 341,417 cases.⁶³ We removed diversion cases from our sample, since these often lead to expungement and we did not have

⁶⁰ For instance, the Victim/Witness Coordinator may have neglected to enter data for the victim or witness or the police subpoena record system may have failed.

⁶¹ We used police data from the Preliminary Arraignment Reporting System (PARS) from 2008 to 2020, which contains information on all arrests made in Philadelphia since 2008.

⁶² Property cases include larceny/theft (70%), possession of stolen property (14%), and forgery/fraud (10%). The “other violent” category includes aggravated assaults (30%), other assault (11%), robbery (16%), homicide (10%), weapon carry or possession (12%), and sexual assault (5%). We categorized cases as domestic violence as noted by ADAs in the case management system.

⁶³ Cases were defined by linking across Municipal Court (MC) and Court of Common Pleas (CP) dockets using the originating docket number. For CP dockets where the originating MC

the data to estimate FTA rates for expunged cases.⁶⁴ Table 1 presents case and defendant characteristics, overall and separately for felonies and misdemeanors.

Table 1: Summary Statistics

	All	Felonies	Misdemeanors
Male	0.83	0.85	0.80
White	0.20	0.15	0.28
Black	0.65	0.69	0.59
Latino	0.14	0.15	0.11
Mean Age	33	32	35
Drugs	0.32	0.29	0.37
DUI	0.07	0.0	0.18
Property	0.19	0.22	0.15
Domestic Violence	0.16	0.15	0.18
Violent	0.20	0.28	0.05
Other	0.08	0.08	0.09
Dismissed	0.39	0.39	0.40
Number of Cases	341,417	204,393	128,781

Note: This table presents descriptive statistics for cases that were disposed of in Philadelphia between January 2010 and March of 2020 and were not diverted.

3. Qualitative Research

We also collected qualitative data to support our descriptive analyses. Two members of our team are embedded at the District Attorney's Office (DAO), meaning that they work alongside ADAs and data analysts.⁶⁵ This arrangement gave us unique access to observe the inner workings of the office and the courts. Formally, we conducted observations and semi-structured interviews with a range of actors, including police officers, prosecutors, defense attorneys, judges, and Victim/Witness Coordinators. Informally, we built relationships with several ADAs and DAO employees whom we could contact as needed with questions; we leaned on these relationships often. All

docket number was missing, we used the district control (DC) number and the defendant's person identification number (PID) to match dockets.

⁶⁴ The diversion cases represent 12% of all CP and MC dockets.

⁶⁵ Lindsay Graef and Aurelie Ouss are embedded at the DAO through a research partnership funded by Arnold Ventures.

observations and interviews were conducted between June 2021 and October 2022. Findings from our qualitative research helped to inform both our background understanding of the Philadelphia court system and the motivations that various actors may have for failing to appear in court. More details about the qualitative research process can be found in the Appendix.⁶⁶

II. SYSTEMIC FTA IN PHILADELPHIA, 2010-2020

This Part documents the prevalence and patterns of non-defendant FTA and its correlation with case outcomes. We offer some interpretation here but reserve a deeper discussion of the implications of our research for Part III.

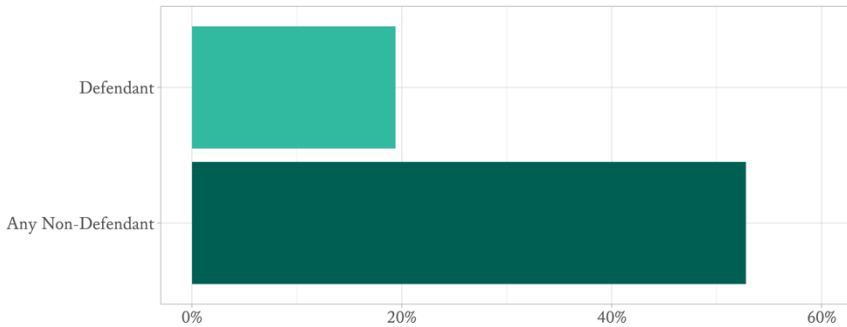
A. Defendant Versus Non-Defendant FTA

We begin with some basic facts about rates of defendant versus non-defendant FTA. As seen in Figure 1 below, defendants fail to appear at least once in 19% of cases.⁶⁷ In contrast, there is at least one non-defendant FTA in 53% of cases—more than double the defendant FTA rate. Of course, the relatively low FTA rate for defendants could be partially explained by bail conditions or the fact that some defendants are detained pretrial, thus ensuring their appearance in court. However, even considering only defendants who were released within three days of their bail hearing, the overall defendant FTA rate is only 28% percent.

⁶⁶ See *infra* App'x pp. 120-21 (discussing qualitative research processes).

⁶⁷ We use the terminology “fail to appear” for convenience and clarity because that terminology is so prevalent. But our use of “failure to appear” should not be taken to denote a moral failure; as discussed throughout the article, there are many legitimate or at least understandable reasons why people miss court. See *e.g.*, Gouldin, *Defining Flight Risk*, *supra* note 1, at 683 (offering a taxonomy of different kinds of nonappearance); NAT'L CONF. COMM'RS ON UNIF. STATE L., UNIFORM PRETRIAL RELEASE AND DETENTION ACT 9 (2023), <https://www.uniformlaws.org/viewdocument/final-act-102?CommunityKey=50f7996c-7919-4662-abb6-c77bcebc688e&tab=librarydocuments> [<https://perma.cc/L35L-QLWD>] (distinguishing between the terms “abscond,” defined as “fail[ing] to appear in court as required with intent to avoid or delay adjudication,” and “not appear,” defined as “fail[ing] to appear in court as required without intent to avoid or delay adjudication”); PRETRIAL JUST. INST., UNPACKING WILLFUL FLIGHT 4 (2023), <https://www.pretrial.org/files/resources/willfulflight5.31.23.pdf> [<https://perma.cc/AAJ7-Z5YP>] (“[M]any jurisdictions treat nonappearance and willful flight as the same behavior, collapsed into the umbrella term of ‘failure to appear’ or FTA.”).

Figure 1: Defendant and Non-defendant FTA Rates

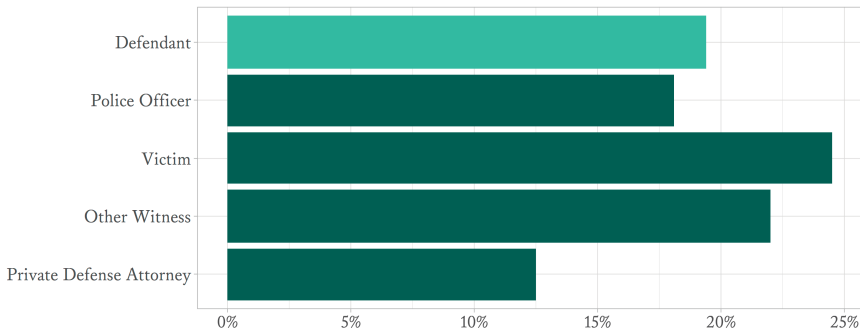


Note: This figure presents the fraction of court cases where a defendant or any non-defendant (victim, police officer, other witness, or defense attorney) failed to appear in court for at least one hearing. The sample for each bar is the complete dataset of 341,417 cases.

“Non-defendants” include a variety of different actors. Our data do not capture instances in which the judge fails to appear, which likely shuts down the entire courtroom. But we can identify when attorneys, police officers, victims, and other civilian witnesses fail to appear. Figure 2 shows FTA rates by actor. We see that FTA is common for victims, officers, other witnesses, and private/court-appointed defense attorneys.⁶⁸

⁶⁸ ADAs and public defenders only failed to appear for 1.3% and 3% of cases respectively and are therefore not included in the graph. FTAs by these actors are rare because they often work in teams and can step in for each other. In jurisdictions that don’t adopt this type of “horizontal” model, FTA rates by these actors might be higher.

Figure 2: FTA Rates by Actor, Regardless of Whether Appearance is Required



Note: This figure presents the fraction of court cases in which an actor failed to appear for at least one hearing. FTA rates are categorized by the identity of which actor failed to appear. The sample for each bar is the complete dataset of 341,417 cases.

Note that our measure of defendant FTA does not include instances in which jailed defendants failed to appear because they were not brought from jail to court, which occurs in 7% of all cases and 10% of cases in which the defendant was detained for at least three days after the bail hearing. This type of FTA has been largely unrecognized in scholarship and policy conversations.⁶⁹ Rather, the assumption has been that detaining defendants automatically ensures their appearance in court. Additionally, we expect that FTA measures for defendants in other jurisdictions may be inflated due to an inability to differentiate between these two types of nonappearance.⁷⁰ Our interviews suggest that the reasons why defendants aren't brought from jail include miscommunication about court dates, staffing issues, and jail lockdowns.

The FTA rates shown in Figure 2 are the rates across all cases. However, not all cases involve each court actor or require the presence of each actor. For instance, there is a victim listed in the large majority of 'victim-involved' crimes (domestic violence, other violent crimes, and property cases), but

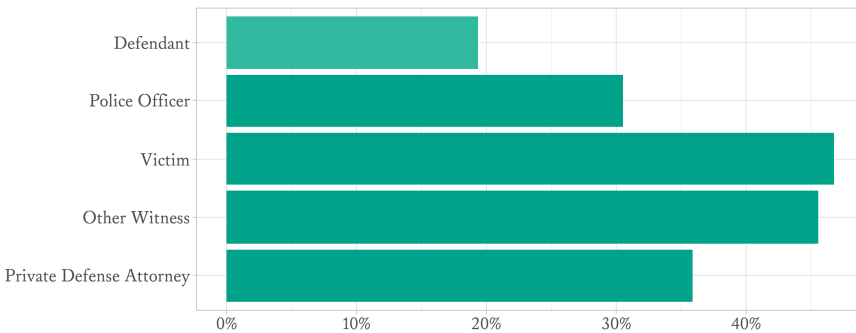
⁶⁹ For an exception, see *1 in 4 People Jailed in NYC are Not Being Brought to Court on Time*, GOTHAMIST (Feb. 20, 2023), <https://gothamist.com/news/1-in-4-people-jailed-in-nyc-are-not-being-brought-to-court-on-time> [<https://perma.cc/BE8C-YKZL>] ("More than a quarter of people locked up in city jails are not getting to court on time for their hearings and trials . . . It's the highest rate of failure since records became publicly available in 1999.")

⁷⁰ We were able to differentiate due to detailed clerk notes, but not all datasets have this advantage.

victims are not usually associated with DUI or drug cases.⁷¹ Officers can be subpoenaed for all crime types, but they are particularly frequent in “officer-initiated” arrest categories—these same DUI or drug cases. Meanwhile, “other witnesses,” or those who aren’t police officers or victims, are less frequent across all crime categories. They are almost never associated with cases where the lead charge is drug or DUI, and even in their most prevalent categories—property and other violent crimes—they are only associated with about 28% of cases. Therefore, the FTA rates represented in Figure 2 are artificially low because they include many cases in which the relevant actor doesn’t exist or isn’t required to show up.

To address this concern, we also calculated FTA rates by actor in *only* the subset of cases in which that actor was expected to appear. Figure 3 shows FTA rate by actor, conditional on that actor being associated with the case. In other words, each bar shows the FTA rate for a slightly different group of cases. The bar for defendants includes all cases, as all cases require defendants. The bar for victims includes only those cases with a victim listed, and likewise for officers and other witnesses. The bar for privately hired or court appointed private attorneys includes all cases with one such attorney attached.

Figure 3: FTA Rate by Actor, Conditional on That Actor Being Associated with the Case



Note: This figure presents the fraction of court cases in which each actor failed to appear at least once, among those cases associated with the actor. For example, the third bar shows the proportion of victim-involved cases in which the victim failed to appear at least once, and likewise for each other actor.

⁷¹ See *infra* App’x fig.A1 (describing the frequency with which each actor is associated with cases by crime category).

Again, just because an actor is associated with a case doesn't automatically mean that they are expected to appear in court. Sometimes victims, officers, or other witnesses are not necessary because other evidence is sufficient. Sometimes they wind up not being necessary because the defendant accepts an offer of deferred adjudication⁷² before the case proceeds to a stage in which witness testimony is required.⁷³ For these reasons, these FTA rates are still lower bounds on the true FTA rate for victims, officers, and witnesses.

Even as lower bounds, these FTA rates are very high. Police officers fail to appear at least once in 31% of the cases that involve police officers, compared to defendants' 19% FTA rate. Victims fail to appear in 47% of victim-involved cases. And other witnesses fail to appear in 46% of cases involving civilian witnesses.

Even defense counsel, whose role is to zealously defend their client, fail to appear very frequently. For cases where a private attorney represented the defendant for at least some of the hearings, either as a court-appointed attorney or privately retained counsel, the defense attorney failed to appear for at least one hearing in 36% of cases. The FTA rate is basically identical for privately hired and court-appointed private attorneys.

We have been using the phrase "FTA rate" here to describe the percent of *cases* where the relevant actor failed to appear. An alternative way of defining the FTA rate is the percent of *people* (e.g. defendants) who failed to appear. When a person has multiple cases, these two metrics can differ. A person-level analysis would not be possible with our data, since we don't have good individual identifiers for victims or other witnesses.

Note that it can sometimes be challenging for a reader to ascertain which metric is being used. Researchers frequently say "X percent of defendants failed to appear" as an imprecise shorthand for "defendants failed to appear

⁷² In Philadelphia, these are called "status offers." Status offers are made for some misdemeanor cases after charging and before proceeding to the Municipal Courts for trial. Domestic violence cases proceed directly to the Municipal Courts and do not receive status offers right away. ADAs explained that they are less likely to make initial status offers in cases that involve victims because they want an opportunity to speak with the victim first. Additionally, there is an informal policy in Municipal Court that ADAs should not make status offers on domestic violence cases—rather, they should try to get a conviction. If a domestic violence case comes back to Municipal Court (for example, after the defendant violates a protective order), then the case is sent to a family court. In family court, it is very common for ADAs to make status offers.

⁷³ In Philadelphia, it is unlikely that a defendant would plead guilty before any witness is subpoenaed. For misdemeanors, the defendant's first opportunity to plead guilty is at a Municipal Court trial listing, but any witnesses would have also been subpoenaed for that listing. For felonies, the case must first pass the preliminary hearing stage before any plea offers are made. ADAs described preliminary hearings in Philadelphia as "mini trials"—they often subpoena all witnesses to testify at preliminary hearings.

in X percent of cases.”⁷⁴ The Bureau of Justice Statistics did this in its report on pretrial release, for example.⁷⁵ To add further confusion, the national standard for defining the “appearance rate” is the fraction of *supervised* defendants who appear at all hearings, as opposed to the fraction of *all* defendants.⁷⁶ Finally, many studies use bench warrants as a proxy for nonappearance.⁷⁷ Since not all nonappearances lead to a bench warrant, these will tend to yield a lower rate. When comparing across studies it’s important to look closely to see what metrics are being used.

The fact of high non-defendant FTA rates has received prior attention in Philadelphia, although not quantitative analysis. A 2009 Philadelphia Inquirer series—*Justice: Delayed, Dismissed, Denied*—highlighted court nonappearance and prompted the creation of a state committee to investigate the operation of the Philadelphia criminal justice system.⁷⁸ The Committee concluded that “[t]he most common reason why a seemingly solid case falls apart is that witnesses fail to come to court and testify against the accused.”⁷⁹

⁷⁴ See, e.g., Will Dobbie, Jacob Goldin & Crystal Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 212-213 (2018) (using the language “percent of defendants” rather than the “percent of cases”).

⁷⁵ The only national statistics on FTA comes from a Bureau of Justice report that purports to document the percent of *defendants* with an FTA. THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEP’T JUST., PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 7 (2007). The data used for this analysis comes from U.S. DEP’T JUST., STATE COURT PROCESSING STATISTICS, 1990-2009: FELONY DEFENDANTS IN LARGE URBAN COUNTIES (2009). However, the codebook makes it clear that the unit of analysis is a *case*. *Id.* at 5-6. The sampling methodology involves extracting all cases on a randomly selected group of days in May. *Id.* In the detailed notes there is no mention of collapsing the data to the defendant level, making us presume that a defendant who has multiple cases filed against them in this sample will show up in the data multiple times.

⁷⁶ See U.S. DEP’T JUST., NAT. INST. CORRECTIONS, MEASURING WHAT MATTERS: OUTCOME AND PERFORMANCE MEASURES FOR THE PRETRIAL SERVICES FIELD at v (2021) (defining the appearance rate as “the percentage of supervised defendants who make all scheduled court appearances”).

⁷⁷ For example, the report cited above uses bench warrants as a proxy for FTAs. Cohen, *supra* note 75, at 7. (“A bench warrant for failure to appear in court was issued for 23% of released defendants.”); see also Dobbie, *supra* note 74, at 210 (using bench warrants as a proxy for FTA). Commonly used pretrial risk assessment instruments like the Public Safety Assessment (PSA) use bench warrants. See *How the PSA Works*, ADVANCING PRETRIAL POL’Y & RSCH. (last visited Oct. 15, 2023), <https://advancingpretrial.org/psa/factors/> [<https://perma.cc/S7XH-9PUR>].

⁷⁸ Nancy Phillips, Craig R. McCoy & Dylan Purcell, *Justice: Delayed, Dismissed, Denied*, PHILA. INQUIRER (Dec. 13, 2009, 3:01 AM), https://www.inquirer.com/philly/news/20091213_Justice_Delayed_Dismissed_Denied.html [<https://perma.cc/6BXV-N957>].

⁷⁹ JOINT STATE GOV’ COMM’N, GEN. ASSEMBLY COMMONWEALTH PA., REPORT OF THE ADVISORY COMMITTEE ON THE CRIMINAL JUSTICE SYSTEM IN PHILADELPHIA 22 (2013). The report added: “Besides facing fear of retaliation, many witnesses become frustrated with the process. They may repeatedly take time off from work to attend a preliminary hearing only to find out that the hearing is postponed. The ‘crowded and chaotic’ conditions of the City courtrooms make each appearance an ordeal.” *Id.*

Just last year, a report on gun violence produced by a Philadelphia inter-agency committee reported that, over the period studied, “[a]pproximately half of illegal gun possession cases were dismissed because of the failure of the victim, witness, or police officer to appear for court proceedings.”⁸⁰ The quantitative results reported here thus put numbers to a phenomenon that is already familiar to many with experience of Philadelphia’s criminal legal system.

B. *Police Officer FTA*

Of all the non-defendant actors considered, one group has a particularly important obligation to appear: police officers. Testifying is an essential part of their job and is supposed to take precedence over their other activities.⁸¹ A police officer is subpoenaed to appear in court in 61% of cases; often, police officers are the *sole* witnesses associated with a case.⁸² This is particularly true for the types of cases that tend to result from traffic stops and/or street searches, such as DUI and drug cases. Without an officer’s testimony, these cases cannot proceed.

Moreover, police officers are visible representatives of the criminal legal system. When they fail to appear, it reflects on the entire system. If a hearing results in a continuance because the police officer didn’t appear, the defendant, victim, and other witnesses take note. The hearing is postponed for another date, and once again everyone must take time off work and make the other necessary life arrangements to come back. All FTAs create hassle for the other people required at the hearing, but police officer FTA is a hassle created by the people who are paid to protect and serve.

We’ve already shown that police officers fail to appear for 31% of cases with which they are associated. However, the case-level metric omits some nuance. If a case was dropped or adjudicated before the officer’s required appearance, it will show up as a “no-officer-FTA” case in our data even though it is really a “no-possibility-of-officer-FTA” case. Furthermore, defendants

80 COUNCIL CITY PHILA., 100 SHOOTING REVIEW COMMITTEE REPORT 8 (2022), <http://phlcouncil.com/wp-content/uploads/2022/01/100-Shooting-Review-complete.pdf> [<https://perma.cc/5PZV-BFNR>].

81 PHILA. POLICE DEP’T, DIRECTIVE NO. 6.2: COURT NOTICES & SUBPOENAS § 2 (Nov. 4, 2022), <https://www.phillypolice.com/assets/directives/D6.2-CourtNoticesAndSubpoenas.pdf> [<https://perma.cc/Ry9L-KEWG>] (mandating that officers come to scheduled court appearances even when court appearances conflict with their regular duties, “sick” status, or disciplinary suspension).

82 Police officers are not needed to testify in cases that end in deferred adjudication (which accounts for 4% of all misdemeanor lead-charge cases) or warrant cases where there was no officer responding to the underlying crime and there is no issue identifying the defendant. Officers are also not needed for certain cases where they did not witness the arrest or alleged crime. The 61% figure is derived from years for which we have subpoena data available: 2017-2019.

are expected to appear at more hearings than witnesses, so for any given case there are more chances for defendants to FTA than witnesses. These two facts mean that defendant and officer case-level FTA rates are not directly comparable; the comparison is unfair to defendants.

We therefore also calculate defendant and officer FTA rates at the hearing level. Switching to a hearing-level analysis ensures that we are focusing only on instances in which the officer was expected to appear, and likewise for the defendant.⁸³ As a reminder, officers and defendants are the only two groups for which a hearing-level analysis is possible, since we do not have case-level subpoena information for other actors.

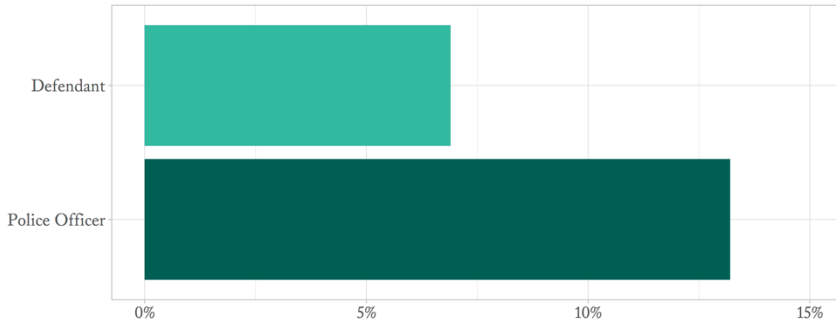
Figure 4 shows the results. At a per-hearing level, the officer FTA rate is nearly twice that of defendants: 13% versus 7% of hearings.⁸⁴ To put this in perspective, it's helpful to understand how frequently officers are called to court. Among officers at the Philadelphia Police Department, the median officer was subpoenaed for thirteen days per year. The mean, however, was nearly triple that: thirty-six days per year.⁸⁵ The reason the mean is so much higher than the median is because some officers receive hundreds of subpoenas per year. Certain jobs within the police department require frequent court appearances, and others do not. We did not identify a strong relationship between the number of subpoenas received and the individual-officer FTA rate.

⁸³ For officers, this includes all hearings for which we have a record of a subpoena being sent to the officer. For defendants, this includes all hearings except bail hearings (which, if included, would artificially lower the FTA rate because defendants are in jail during the initial bail hearing) and hearings after the case's initial disposition (payment plan conferences, probation status hearings, etc.).

⁸⁴ A reader might wonder if this metric is distorted by the fact that multiple officers may be subpoenaed for each hearing. For the first listing, the DAO case management system automatically subpoenas all officers associated with a case. For future listings, ADAs explained that, when in doubt, they prefer to subpoena more officers because the arrest report does not always provide a complete picture of an incident and a seemingly peripheral officer may turn out to be a critical witness. To address this concern and compare individual-officer FTA rates to defendant FTA rates, we can subset to cases where only one officer is asked to appear in court. This happens in 25% of cases; within this group, drug cases are overrepresented, while DUIs, property and violent-offense cases are under-represented. The results are very similar to the broader pool of cases: officers are twice as likely to fail to appear as defendants (14% versus 7% of hearings).

⁸⁵ These figures align with estimates of the mean and median number of arrests made per year by the Philadelphia Police Department. In 2021, for instance, officers had an average of 21.3 arrests with a median of 9. E-mail from Rachel Ryley, Lead Data Scientist, City of Phila., to Aurelie Ouss, Janice & Julian Bers Assistant Professor, U. Pa. Arts & Scis. Dept Criminology (Sept. 28, 2022) (on file with author).

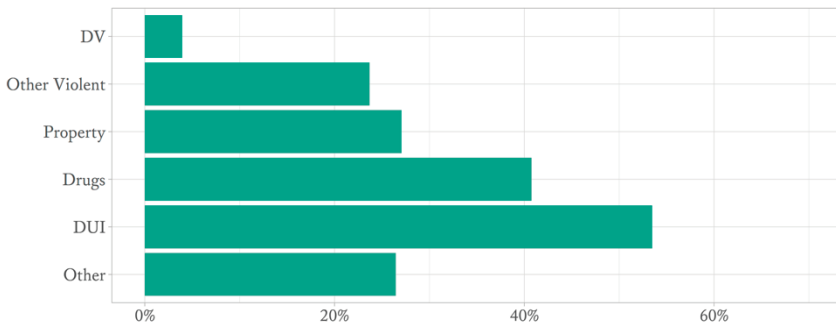
Figure 4: Hearing-level FTA Rates for Officers and Defendants



Note: This figure presents the fraction of *hearings* where a police officer or a defendant missed court, for all hearings where that actor was expected to show up.

We next inquire whether officer FTA is more likely for certain types of offenses. Figure 5 shows the case-level officer FTA rate by offense, among cases with an officer associated. We see that officers frequently fail to appear for DUI and drug cases but are rarely documented as failing to appear in domestic violence cases.

Figure 5: Officer FTA Rate by Crime Type of the Lead Charge



Note: This figure presents the fraction of court cases in which a police officer failed to appear in court for at least one hearing, separated by crime type. All rates are conditional on the officer being expected to appear. For instance, among DUI cases with an officer subpoenaed, the fifth bar shows the proportion in which an officer failed to appear at least once.

Why is the police officer FTA rate so high and why does it vary so much by offense?⁸⁶ To shed some light on these questions, we report insights from our qualitative research.⁸⁷ Both line prosecutors and officers we interviewed said that officers generally like coming to court. When court hearings occur during officers' regularly scheduled shifts, it gives them a break in an air-conditioned building. Officers typically congregate in the hallways of the Criminal Justice Center, where they can talk and catch up with friends while waiting for their case to be called. When hearings occur outside of their regularly scheduled shifts, officers receive overtime pay, which could incentivize appearance.⁸⁸ Officers also feel responsibility for their cases, especially when they have worked on a case extensively or the case involves an injured victim.

On the other hand, not all aspects of court appearances are enjoyable. In some types of cases, officers can expect vigorous cross-examination. Defense counsel will attack their testimony and try to catch them flat-footed. Officers may feel nervous about inadvertently perjuring themselves or being made to look bad. Alternatively, officers may be aware that their stop or search did not follow procedure or that they used excessive force. They may be unwilling to testify because they don't want to be accused of violating a defendant's Fourth Amendment rights or other behaviors that violated protocol. This reality could partially explain the high rates of nonappearance for DUI and drug

⁸⁶ We considered whether the high officer-FTA rate is caused by a few "bad apple" officers or whether the FTAs are distributed widely across subpoenaed officers. To get some traction on this question, we looked at the subset of police officers for whom we have at least twenty subpoenas for hearings where they were the sole officer subpoenaed. We looked at hearings with only one officer subpoenaed so that we could confidently attribute any FTA to that particular officer, since the docket comments will merely state "officer FTA," not the officer's name. We found 156 officers who were subpoenaed frequently enough to meet our inclusion criteria. The officers and hearings in this subset of our data span 46% of officer-involved cases, but only 2.3% of all officers. We then calculated the hearing-level FTA rate for each of those officers. About 40% of the selected group had FTA rates of 5% or less. But there is a long right tail of officers who failed to appear at more than 20% of their hearings. Some officers failed to appear at more than a third of the hearings for which they were the sole officer subpoenaed. Our data do not enable us to assess these officers' FTA rates at hearings for which more than one officer was subpoenaed.

⁸⁷ We interviewed two officers in the Philadelphia Police Department and two prosecutors (one who works primarily in the Municipal Court and one in the Court of Common Pleas) about the reasons for officer FTA. We also spent twelve days observing court proceedings in Municipal courtrooms. During these observations, we talked informally with officers who were waiting to testify. Lastly, we presented this research at the District Attorney's office on May 3, 2023, and received feedback and suggestions from line attorneys.

⁸⁸ Depending on their regular shift time and Injured on Duty (IOD) status, officers typically receive a minimum of two hours at 1.5 times their regular pay when called to testify in court outside of their regular shift. When subpoenaed less than forty-eight hours in advance, officers receive 2.5 times their regular pay. PHILA. POLICE DEP'T, DIRECTIVE NO. 11.10: OVERTIME PAY & COMPENSATORY TIME § 2 (May 24, 2022), <https://www.phillypolice.com/assets/directives/D11.10-OvertimePayAndCompensatoryTime.pdf> [<https://perma.cc/LPR4-M3J5>].

cases; here the evidence largely comes from officers and admissibility of the evidence is more likely to be challenged.

An alternative hypothesis suggested by our interviews is that officers are not always invested in the case. From the officer's perspective, the arrest got someone off the streets and led to a few nights in jail. This consequence may be viewed as sufficient, particularly for low-level charges: that is, the "process is the punishment."⁸⁹ A lack of investment in the criminal process is only exacerbated by its inefficiencies. Officers may sit in court for hours only eventually to be told that their testimony is no longer needed: the defendant accepted a plea deal, or the prosecutor dropped charges.⁹⁰ When this situation occurs, it may feel like a waste of time, particularly for low-level charges.⁹¹

Our interviews also suggested that officers frequently fail to appear because of scheduling conflicts. The District Attorney's office strives to subpoena officers during their shift so they will not require overtime hours and pay, but this sometimes results in individual officers having many notices to appear in different courtrooms on the same day. Since there is no mechanism in place to track or communicate with officers, an officer may wind up failing to appear for one court date even if they are right down the hall in another courtroom.⁹² More broadly, being constantly on call for court is disruptive to officers' lives outside of work. Last-minute subpoenas and hearings outside of their shift require childcare coverage and can interfere with sleep or vacations. Although there is supposed to be an officer liaison in each courtroom who can convey officers' scheduling needs to the courts, staffing issues mean that a liaison is often not present.⁹³

Lastly, officers may not receive subpoenas in time due to technical and administrative glitches. The officer-subpoena system in Philadelphia is

⁸⁹ See Feeley, *supra* note 17, at 30-31 ("In essence, the process itself is the punishment. The time, effort, money, and opportunities lost as a direct result of being caught up in the system can quickly come to outweigh the penalty that issues from adjudication and sentence.").

⁹⁰ As a courtesy, some judges try to reorganize their dockets in order to hear cases that involve "last-out" officers first (meaning officers who work the midnight to 8:00 am shift). However, this practice varies widely by judge.

⁹¹ Conversely, officers are rarely documented as failing to appear for domestic violence cases, perhaps because they are more invested in these cases. Another possibility is that the court clerk simply does not note officer FTAs when complaining witnesses (victims) also fail to appear. Victim FTA is a staggering 70% in domestic violence cases.

⁹² As one prosecutor noted, she can track take-out food much more effectively than key officer witnesses: "My Thai food has better oversight than the officers we need to put up our cases!" Lindsay Graef, Sandra G. Mayson & Aurélie Ouss, Presentation at the Philadelphia District Attorney's Office (May. 3, 2023).

⁹³ A failure to coordinate schedules is particularly important when officers are working the "last-out" shift. If an officer is scheduled to testify the day after their midnight-to-8:00 AM shift, they must choose between the appearance and sleep. This scenario is particularly common for DUI cases because the officers who make the most DUI arrests work the night shift.

extremely archaic and subject to frequent failures. Officer contact information in the computer subpoena system is sometimes out of date.⁹⁴ Many police units rely on supervisors to hand out paper court notices, or officers can only access subpoena information on a special computer for their unit.⁹⁵ Even when officers have access to computers to check the city's subpoena system, their access is limited and the system sometimes falters.⁹⁶

In sum, officer FTA runs the gamut between willful nonappearance and poor systems of scheduling, notice and communication—including systems operated by the Police Department itself. Currently, there are no consequences in Philadelphia for an officer failing to appear in court because the Police Department does not track FTAs.⁹⁷

C. *Victim FTAs*

All types of FTAs create hassle and inconvenience for the other court actors who actually show up. From that perspective, all court actors are on the same footing. But victims are unique in several ways. The victim is the principal complainant; it was their rights that were violated by the commission of the crime. Under some theories of justice, victims stand to gain when the perpetrator is convicted and punished—either through the retributive satisfaction of punishment, the pecuniary rewards of restitution,

⁹⁴ One prosecutor reported learning—too late—that an officer whom she had subpoenaed had left the force a year earlier, although he was still listed in the police subpoena database. Graef, Mayson & Ouss, *supra* note 92.

⁹⁵ The extremely high officer FTA rate in DUI cases may be a product of several of these mechanisms. From our observation, most DUI arrests are made at night, which means the officers most likely to be DUI witnesses work the “last-out” shift and need to sleep during the day. DUI cases rely most heavily on officer testimony, which may make testifying unappealing, and officers may also feel that the arrest and short-term detention is more important than an actual conviction. Finally, the subpoena process is especially difficult in these cases because many DUI arrests are made by state troopers, and there is currently no mechanism in place for prosecutors to check state trooper schedules when issuing subpoenas.

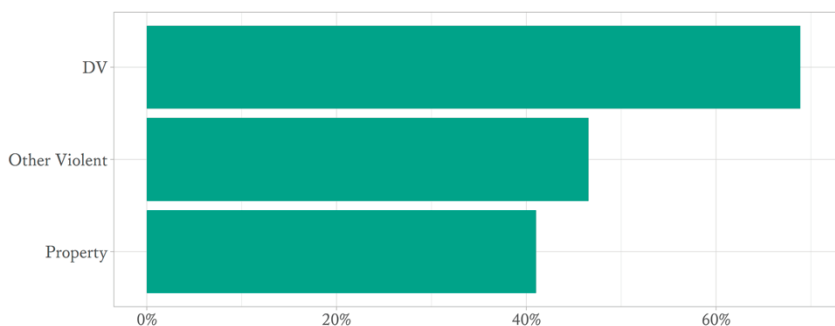
⁹⁶ Glitches in the subpoena system may mean that officers do not receive subpoenas for several days at a time. We witnessed several of these incidents firsthand. An email alert is sent to all DAO staff when the subpoena system is down. Additionally, officers may mistakenly believe they are not needed even if they are served with a subpoena. For the first hearing in a case, which takes place in Municipal Court, the subpoena system automatically sends subpoenas to all officers associated with the case regardless of need for each officer's testimony. Officers know the subpoena system functions this way and may mistakenly believe that they are not needed if they weren't the arresting officer. For subsequent hearings, line ADAs are responsible for manually issuing subpoenas, which also leaves room for error.

⁹⁷ In theory, an individual officer may be disciplined if they have failed to appear so persistently that prosecutors complain about them to the police department. However, our interviews with ADAs and police officers confirmed that there is currently no way for the Philadelphia Police Department (PPD) or other law enforcement agencies to track officer appearance. Over the course of our research, however, there has been growing interest from the PPD in developing a tool to track officer FTAs.

or the restorative process of accountability. Criminal prosecution could also increase safety for the victim if it reduces future offending. However, testifying entails significant costs. It entails describing an unpleasant or even traumatic experience, and it sometimes entails the threat of retaliation. Furthermore, when the victim has close emotional or financial ties with the perpetrator, they may have mixed feelings about the prospect of a conviction and sentence.

Figure 6 presents victim FTA rates for victim-involved crimes: domestic violence, other violent offenses, and property crimes. As previously noted, these are case-level statistics conditional on a victim being associated with the case. The rates are high; victims fail to appear in 69% of DV cases, 47% of other violent cases, and 41% of property cases, and these numbers might be an understatement. To the extent that clerks occasionally write “witness FTA” instead of “complaining witness FTA”, these estimates are a lower bound.

Figure 6: Victim FTA Rates in Victim-involved Crimes



Note: This figure presents the fraction of court cases where a victim failed to appear in court for at least one hearing, separated by crime type. All rates are conditional on a victim being associated with the case. For instance, among domestic violence cases with a victim associated, the top bar shows the proportion of cases in which a victim failed to appear at least once.

The astronomical victim FTA rate for domestic violence cases is likely not to be surprising to those with experience in this realm and is surely a result of complex interrelated factors. Here, we present a few potential explanations, gleaned both from our interviews and from the literature.

As with defendants and police officers, some victim FTAs are likely inadvertent: either the victim forgot or was confused about where or when

they were supposed to appear.⁹⁸ Prosecutors don't always have the correct contact information for victims, making it difficult to notify or remind them of upcoming court dates.⁹⁹

In other instances, victims know (or could find out) when and where the court date is, but they decide not to go. For a variety of reasons, they effectively "opt out" of the criminal proceedings. This might be because there isn't a strong criminal case to be prosecuted; the victim may have called the police out of fear or as a threat but doesn't think a crime actually occurred. Or it might be that the victim feels strongly about the case and wants to testify but faces emotional and physical-safety barriers to getting to court.¹⁰⁰ Such barriers can include fear of being discredited or publicly shamed, resentment over insensitive or dismissive treatment from court actors, and fear of retaliation.¹⁰¹ Alternatively, victims might have repeatedly shown up for court dates that resulted in continuances and finally lost patience with the process.¹⁰² Each time a case is continued, the victim must take time off work, find childcare, arrange transportation, and so on. These continued disruptions

98 See Lauren Bennett, Lisa Goodman & Mary Ann Dutton, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761, 766-67 (1999) [hereinafter Bennett, *Systemic Obstacles*] (naming the lack of regular follow-up with victims and the stress many victims feel on the day of intake as leading causes of victim confusion); CANNAVALE, *supra* note 42, at 7 (describing an instance in which "[a] witness was instructed by police to go to 'the prosecutor's office' to discuss the case. When he arrived, the witness discovered several rooms fitting that description. Confused, he never did meet with the prosecutor.").

99 *Id.* (noting that "often inaccurate witness names and addresses were recorded by police at the crime scene."). Sometimes the underlying crime results in the victim's residence changing. One ADA told us about an arson case where the victim was persistently failing to appear; court staff later realized that subpoenas were being sent to the victim's burned-down house.

100 See Bell, Perez, Goodman & Sutton, *supra* note 42, at 72 (noting that "many women simply drop out midway through the process due to emotional or tangible barriers"); Dim & Lysova, *supra* note 42, at 3076-79 (describing the barriers that often prevent male victims of domestic violence from notifying police of abuse, including shaming and fear of not being believed); Bennett, *Systemic Obstacles*, *supra* note 98, at 768-69 (describing the "paralyzing fear" victims of domestic violence often experience during the prosecution process).

101 See Dim & Lysova, *supra* note 42, at 3077-78 (listing the fear of not being believed by police as one barrier to male victim reporting of domestic violence); Bell, Perez, Goodman & Sutton, *supra* note 42, at 78-79 (noting that a number of victims surveyed found court personnel intimidating and unwelcoming); Bennett, *Systemic Obstacles*, *supra* note 89, at 768 (describing interviews in which victims expressed that "they were 'worried about what [their abuser would] do' after they had had him arrested."); see also Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 403 (2019) ("[T]he justice system and other key institutions of our society systematically discount the credibility of women survivors of domestic violence.").

102 See Bell, Perez, Goodman & Sutton, *supra* note 42, at 74, 79 (noting that in interviews with 290 female victims of domestic violence, the vast majority of respondents described frustration with a lengthy court process where they had to make many appearances due to cases being continued); Bennett, *supra* note 98, at 767-68 (noting the frustration many victims felt at the length of the prosecution process).

are not realistic for many victims, so they drop out before their case is resolved.¹⁰³

Finally, victims may have goals and desires that conflict with the prosecutor's objectives.¹⁰⁴ They might not want the defendant to be convicted, or they might not want the defendant to be sent to prison.¹⁰⁵ For example, victims may rely on the defendant for financial support and can't afford to have the defendant incarcerated, or they may share custody of children with the defendant and be concerned about how a particular sentence will impact their children.¹⁰⁶ Victims in domestic violence cases may be skeptical that incarceration or protective orders will do any good.¹⁰⁷ Or they may use the threat of following through with criminal prosecution to leverage changes in the defendant's behavior, then leave the system when they have achieved their goals.¹⁰⁸ On the whole, victims may be frustrated with court actors and a legal system that doesn't consider their desires or respect their voice in the process.¹⁰⁹

103 Bell, Perez, Goodman & Sutton, *supra* note 42, at 79 (“[R]epeatedly taking time off from work or childcare obligations was not a realistic option for most women, meaning they often dropped out before receiving assistance.”); *see also* Bennett, *Systemic Obstacles*, *supra* note 98, at 764, 768 (describing the “paralyzing fear” some women who experience intimate partner violence experience). Bennett’s interviews revealed that victims who faced more barriers to appearing in court (e.g., lack of childcare, transportation, emergency money) were less likely to follow through with prosecution. One victim described her frustration with the lengthy court process by saying she “felt like she was doing time instead of the defendant.”

104 *See* Eve S. Buzawa & Aaron D. Buzawa, *Evidence-Based Prosecution*, 12 CRIMINOLOGY PUB. & POL’Y 491, 495 (2013) (describing the “evidence-based” approach to domestic violence prosecution under which “a victim’s direct testimony is only one more piece of evidence and her desires with regard to moving forward with prosecution is important only as it affects a prosecutor’s ability to garner a successful conviction”); Goldstein, *supra* note 42, at 519 (“[The victim] is, in a sense, represented by the district attorney, but if his interest in pressing the charge comes into conflict with the prosecutor’s conception of the public interest, the latter will prevail.”).

105 *See* Bennett, *Systemic Obstacles*, *supra* note 98, at 769 (“Some victims . . . say that they feel ‘bad’ about sending their batterer to jail.”); Bell, Perez, Goodman & Sutton, *supra* note 42, at 77 (noting that some victims expressed a desire for alternatives to incarceration, like counseling or anger management, diversion programs, and other treatment services).

106 *See* Bennett, *Systemic Obstacles*, *supra* note 98, at 769 (describing some victims’ concern about losing child support and the child’s distress over the incarceration of a parent).

107 *See* Bell, Perez, Goodman & Sutton, *supra* note 42, at 77-78. A majority of victims that Bell interviewed believed that incarceration doesn’t work. *Id.* at 77. Even for respondents who were supportive of incarceration, they stated that often the jail time is not enough or that things go back to the way they were once the defendant is released. *Id.* Victims also expressed frustration with the court’s failure to enforce interventions like protective orders, saying the lack of follow-through leads defendants to believe “it’s a joke.” *Id.* at 78.

108 Ford, *supra* note 42, at 326-27 (describing the “various instrumental motives” of victims that “seek to use prosecution for leverage in managing conjugal conflict or arranging favorable settlements” before “abandon[ing] the prosecution process” after achieving success).

109 *See* Bell, Perez, Goodman & Sutton, *supra* note 42, at 78 (describing an instance in which the prosecutor scolded the victim when she decided that she didn’t want to press charges).

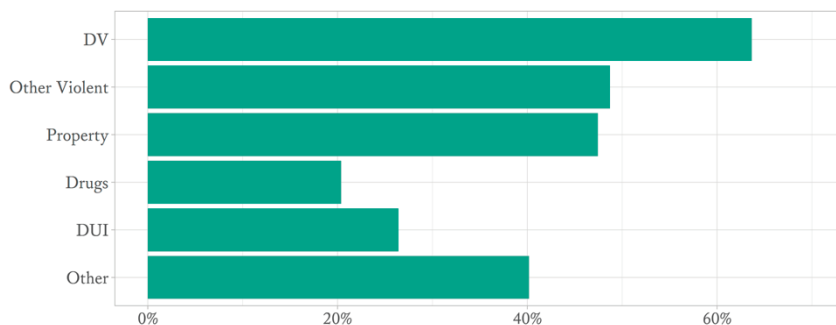
We don't know to what extent victim FTA is due to opt-out rather than inadvertent nonappearance. But given the astronomical rate of victim FTA (two-to-three times that of defendants) we expect that opt-out is relatively common. This observation is further supported by our interviews and other qualitative research on the topic. Whatever the reasons, victims frequently conclude that the costs of court appearance outweigh whatever duty of appearance they might have and whatever benefit to them the legal proceeding might serve.¹¹⁰

D. *Other Witness FTAs*

Lastly, we turn to “other witness” failures to appear. This category consists primarily of bystander witnesses but includes all witnesses who are neither victims nor officers. Figure 7 shows case-level witness FTA rates for cases that had an associated witness. Failures to appear are again high: over 60% for domestic violence and over 40% for other violent crimes, property crimes, and crimes that fall outside of our main five categories. FTA rates are lowest for DUI (26%) and drug (20%) cases.

¹¹⁰ For extended discussion of the costs of criminal prosecution to victims of domestic violence and consideration of alternatives, see generally LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018), which argues that criminal prosecution should not be the first or exclusive response to intimate partner violence. See also Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 *HARV. J.L. & GENDER* 53, 58 (2017) (“[T]he time may be ripe to consider alternatives to the criminalization of intimate partner violence.”).

Figure 7: Other Witness FTA Rates



Note: This figure presents the fraction of court cases where a witness other than a victim or police officer (usually bystander witnesses) failed to appear in court for at least one hearing, by crime type. All rates are conditional on having a witness other than a victim or a police officer associated with the case. For instance, among DUI cases with such a witness subpoenaed, the fifth bar shows the proportion in which that witness failed to appear at least once.

Our interviews and our read of the prior literature reveal a similar set of explanations to those already discussed. As with officers and victims, a major reason that other witnesses fail to appear at such high rates is poor communication about when and where they are supposed to show up.¹¹¹ Prosecutors often don't have good contact information for civilian witnesses, either because it was inaccurately recorded or because a witness gave false contact information.¹¹² Even if the information is correct, witnesses may have unstable housing situations and/or phone numbers that change frequently. The message doesn't always arrive.

But inadvertent nonappearance due to poor communication is unlikely to explain all failures to appear by witnesses. Like victims, bystanders may skip court to avoid the trauma of testifying (often repeatedly). They may fear

¹¹¹ See CANNAVALE, *supra* note 42, at vii (concluding based on a survey of 1,000 civilian witnesses that poor communication from court actors caused witnesses to fail to appear, either because they did not receive any information about when and where to appear or because confusing or insensitive communication from prosecutors and other court actors caused them to disengage from the process); see also Robert C. Davis, *Victim/Witness Noncooperation: A Second Look at a Persistent Phenomenon*, 11 J. CRIM. JUST. 287, 293 (1983) ("First, in spite of their ostensible reliance upon victim/witnesses, court officials have shown little concern for them. Second, many victim/witnesses fail to cooperate with officials. Third, programs aimed at reducing the costs of victim/witnesses' involvement in the court system have done little to increase their willingness to cooperate.").

¹¹² See CANNAVALE, *supra* note 42, at 7 (discussing failures to contact witnesses as a result of inaccurate recording of contact information by responding officers).

retaliation or may not trust the criminal legal system. They may have lost patience after attending multiple hearings that result in continuances. Or they simply may not care about the crime.

E. *FTA and Defendant Race*

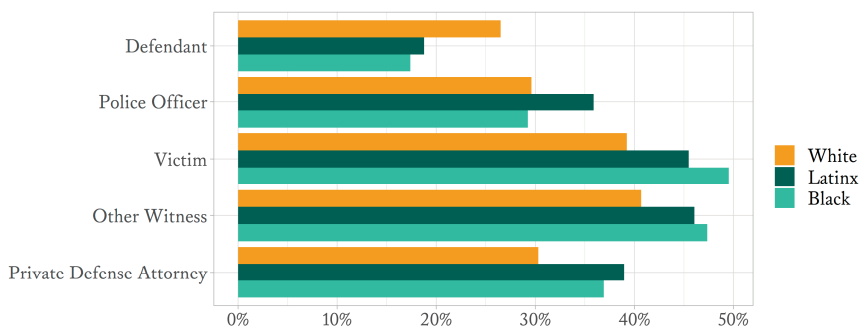
Our data provide comprehensive race and ethnicity information for only one group: defendants.¹¹³ Figure 8 shows FTA rates by actor, shown separately by the race/ethnicity of the defendant. The top bars just show FTA rates by defendants of various races/ethnicities. The next bars show FTA rates of all police officers for cases where the defendant is Black, Latinx, or white, and so forth for the remaining rows. As previously, we limit to cases in which the actor is expected to appear.

We see that white defendants are more likely to fail to appear than Black or Latinx—perhaps because they are less likely to be detained pretrial.¹¹⁴ Other court actors are generally *less* likely to FTA when the defendant is White. Such patterns are difficult to interpret, however, given that they may reflect differences in crime type or differences in the race of the court actor, which may be correlated with the race of the defendant. For instance, the raw data suggests that officers are much more likely to fail to appear when the defendant is Latinx versus when they are white. However, when we regress officer FTA on the ethnicity of the defendant, controlling for charge, gender, age, and criminal record, we see only trivial differences in police FTA rate. Given the many factors that could account for the patterns shown below, we suggest caution in trying to interpret these results.

¹¹³ We have race and ethnicity data for some victims, but it is missing for more than 80% of them.

¹¹⁴ See Frank McIntyre & Shima Baradaran, *Race, Prediction, and Pretrial Detention*, 10 J. EMPIRICAL L. STUDS. 741, 742 (2013) (noting that 43% of Black defendants are detained pretrial, compared to 34% of white defendants).

Figure 8: FTA Rates by Actor, Shown Separately by Defendant Race/Ethnicity



Note: This figure presents the fraction of court cases where someone failed to appear in court for at least one hearing, by identity of who missed court (shown on the left) and the race/ethnicity of the defendant (indicated by color as described in the legend on the right). The sample for each bar is restricted to the set of cases where we know the actor listed on the left was expected to show up.

F. *FTA and Case Outcomes*

What happens to a case when an essential witness fails to appear? If the witness misses one court date but then cooperates in the future, witness FTA may have no effect on case resolution beyond dragging things out. But if witnesses persistently fail to cooperate, or if their nonappearance brings the case closer to speedy trial deadlines, cases will be more likely to be dismissed. This Section provides evidence on the relationship between non-defendant FTA and case outcomes, both overall and by crime type.

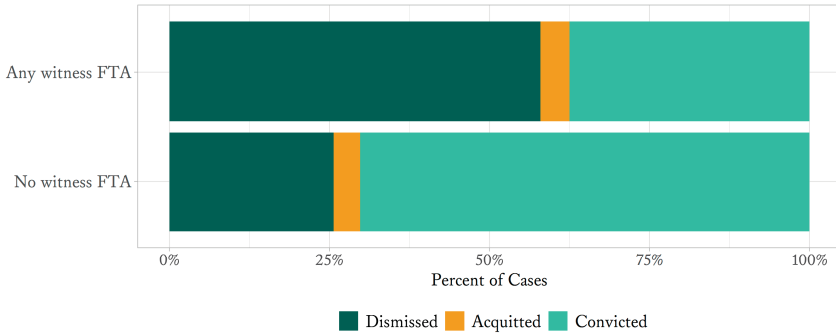
1. Overall Results

We start by showing raw differences in dismissal rates for cases that do or don't have a witness FTA, meaning an FTA by an officer, victim, or other witness.¹¹⁵ We find stark differences. As shown in Figure 9, cases with a

¹¹⁵ The data do not allow us to systematically distinguish whether the charges were dismissed by the judge or prosecutor. We see a case's disposition, which can be recorded as "dismissed," "nolle prossed," "withdrawn in the interest of justice," etc. However, through court observations and interviews with ADAs, we learned that it is common for ADAs to withdraw a case when they know the judge would dismiss it; doing so allows ADAs to potentially refile the case and builds goodwill with the judge (because the ADA takes the "blame" for dropping the case). Given these realities, we do not believe that we can make a meaningful distinction between "dismissed" and "withdrawn" here.

witness FTA are more than twice as likely to be dismissed as those without: 58% versus 25%.

Figure 9: Case Disposition for Cases With/Without a Witness FTA



Note: This figure plots case disposition for cases in which a witness (police officer, victim, or other witness) failed to appear for at least one hearing and cases in which no witness failed to appear. The sample for each bar is the complete dataset of 341,417 cases.

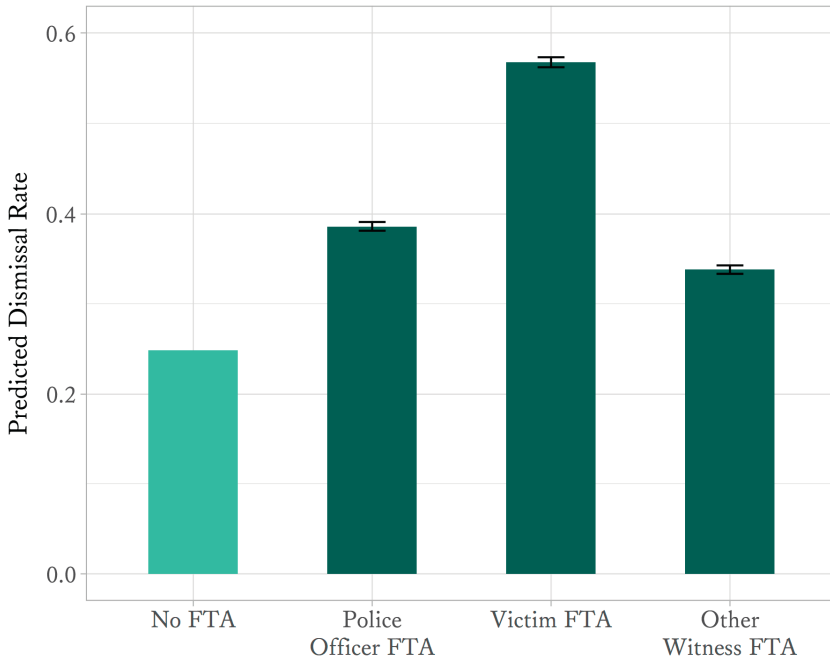
Of course, cases with a witness FTA are likely to vary in a number of ways from those without. Some of these differences were documented in the previous Parts.¹¹⁶ In order to provide more of an apples-to-apples comparison, we present results from a regression analysis that adjusts for charge, criminal record, and demographics. Specifically, we regress case dismissal on indicators for each type of witness FTA—officer, victim, and other witness—controlling for current charge, number of prior charges, race, gender, age, date and time that charges were filed, as well as defendant and defense counsel FTA.¹¹⁷ Results are shown graphically in Figure 10.¹¹⁸ The leftmost bar depicts the average dismissal rate for cases with no FTA. The other bars show, from left to right, the predicted likelihood of dismissal for cases with an officer FTA, victim FTA, or other witness FTA. These results are derived by adding the regression coefficients for each respective type of FTA to the average dismissal rate for cases with no FTA.

¹¹⁶ See *supra* Section II.D.

¹¹⁷ Table A1 presents results from our regression analyses for all cases. Table A2 presents analogous results, but for cases that proceed on to the Court of Common Pleas. Results are similar across samples.

¹¹⁸ Regression tables are shown in Appendix Table A1.

Figure 10: The Relationship Between Witness FTA and Case Outcomes, Adjusting for Charge, Demographics, and Criminal Record



Note: The bar on the left shows the average dismissal rate for cases that had no FTA. The other bars show, from left to right, the predicted likelihood of dismissal for cases with an officer FTA, victim FTA, or other witness FTA. These are derived by regressing dismissal on indicators for each type of FTA, controlling for charge, demographics, criminal record, defendant FTA, and defense counsel FTA and using the complete dataset. The predicted dismissal rates are derived by adding the regression coefficients for each type of FTA to the no-FTA mean. The whiskers show the 95% confidence interval for the regression coefficient. The regression results are shown in Appendix Table A1, Column 1.

We find that even after accounting for basic case and defendant characteristics, there are still striking differences in dismissal rates between cases with no FTA and cases where a witness fails to appear. Cases with a victim FTA are more than twice as likely to be dismissed as cases with no FTA: 57% versus 25%. Cases with an officer FTA are 14 percentage points more likely to be dismissed than cases with no FTA. Additionally, cases with a civilian witness FTA are 9 percentage points more likely to be dismissed than cases with no FTA. Our calculations suggest that as many as 32,000 cases

were dropped between 2010 and 2020 because a police officer, victim, or other witness failed to appear.¹¹⁹

Witness FTA is not just a strong predictor of case outcomes; it is by far the strongest predictor available in the data.¹²⁰ A common method of measuring predictive power is the R^2 , or the fraction of the total variance in dismissal rates that is captured by a predictor. Witness FTA adds 0.11 to the R^2 from the regression described above.¹²¹ In contrast, charges, demographics and criminal record altogether add only 0.04. Witness FTA has more than twice the explanatory power of all other observed characteristics combined.

We expect that the connection between witness FTA and case resolution arises from a variety of sources. Moreover, we expect that explanations differ somewhat when the victim fails to appear versus when an officer fails to appear. Below we discuss the relationship between FTA and case dismissal for victim-involved and officer-initiated cases in turn.

2. Victim-Involved Crimes

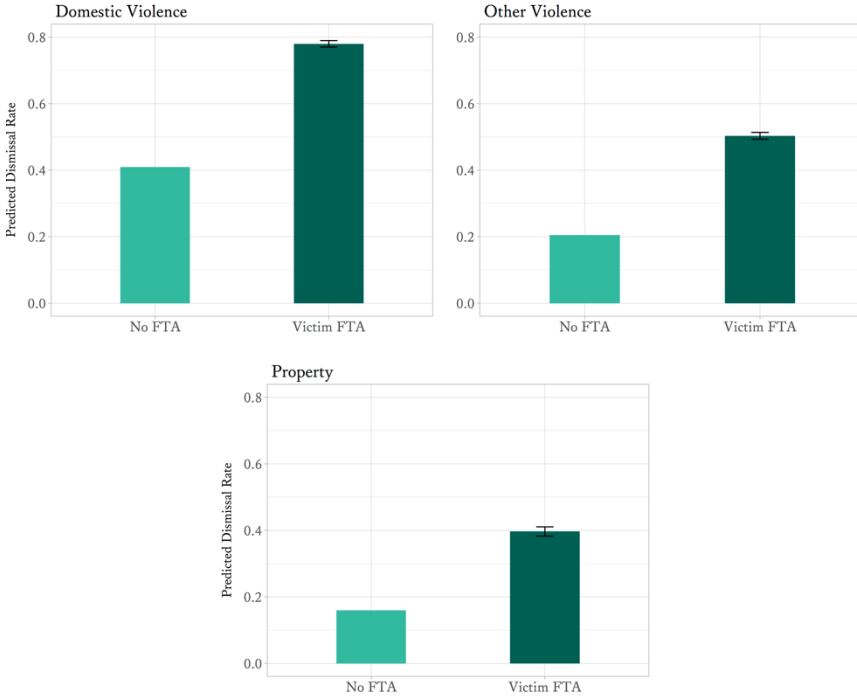
Figure 11 shows a graphical depiction of the relationship between victim FTA and case resolution for victim-involved crimes. Each subfigure presents results for a different kind of case: domestic violence crimes, other violent crimes, and property crimes. The leftmost bars show the average dismissal rate for cases with no FTA, and the bars on the right show the predicted dismissal rate for cases with a victim FTA. As in Figure 10, the predicted dismissal rates are constructed by adding regression coefficients to the average dismissal rates in cases with no FTA. The regression coefficients are estimated using the same procedure described above, but with the sample limited to cases with a domestic violence, other violent, or property charge, respectively.

¹¹⁹ To estimate this number, we run a logistic regression of convictions on witness FTAs, controlling for case and defendant characteristics (defendant age, race, gender, and criminal history, as well as year and the specific charge). We then use this model to predict the probability of conviction for all cases in a synthetic dataset where witness FTAs are set to zero. To get the number of cases dropped due to witness FTAs, we multiply the mean predicted probability of conviction in our synthetic dataset by the total number of cases and subtract the baseline number of convictions from our original dataset.

¹²⁰ See *infra* tbl.A4.

¹²¹ The R^2 for the full regression of case dismissal on all variables (non-defendant FTA, charge, demographics and criminal record) is 0.20. The R^2 for the regression of case dismissal on all variables except for officer, victim, or witness FTA only is 0.09. The R^2 for a regression of case dismissal on all variables except charge, demographics and criminal record is 0.16. See Table A4 in the Appendix for these regressions.

Figure 11: Relationship Between FTA and Case Dismissal for Victim-Involved Crimes



Note: The bars on the left show the average dismissal rate for cases that had no FTA. The bars on the right show the predicted likelihood of dismissal for cases with a victim FTA. These are derived by regressing dismissal on an indicator for victim FTA, controlling for charge, demographics, criminal record, and all other FTA types. The predicted dismissal rates are derived by adding the regression coefficients to the no-FTA mean. Each sub figure shows results for a particular crime type: domestic violence, other violent, and property crimes. The whiskers show the 95% confidence interval for the regression coefficient. The regressions are shown in Appendix Table A1, Columns 2-4.

In all three crime categories, victim FTA is associated with a large increase in the likelihood of dismissal. Domestic violence cases are almost twice as likely to be dropped when the victim fails to appear: 78% versus 41%. Other violent cases are more than twice as likely to be dropped: 50% versus 20%. The result is similar for property cases: 40% versus 16%. These correlations persist after having accounted for many case and defendant

characteristics because the results are derived from regressions with a wide set of controls.¹²²

What accounts for this strong correlation between victim FTA and case dismissal? For one, victims may be more likely to fail to appear when, in fact, no crime occurred. Perhaps the alleged victim called the police because they were afraid of potential violence, or as a way of punishing their partner. In these instances, dropped charges was the “correct” outcome, meaning that there was no conviction because the alleged perpetrator wasn’t guilty. We argue, however, that this is not likely to be the leading factor behind these high dismissals.

We have no direct way of measuring how frequently this occurs, but we can provide some indirect evidence that this is unlikely to explain all of the correlation. Before a felony case proceeds to the Court of Common Pleas (CCP), the Commonwealth must establish a *prima facie* case. This happens at a preliminary hearing in Municipal Court. Since victims are usually the primary witness in these types of cases, they are required at the preliminary hearing.¹²³ Cases will not pass over to CCP without victim testimony. Thus, those that arrive in CCP have been vetted by a judge and have a victim who has shown up at least once. Many spurious cases will have been weeded out already.

We test to see if the relationship between victim FTA and case dismissal persists for cases that have reached CCP. Using a similar regression analysis as above but restricting to FTAs and dismissals that occur at CCP, we find even more striking results. Cases with a victim FTA are *five times as likely* to be dismissed as those with no FTA: 40% versus 8%.¹²⁴

Thus, it’s unlikely that the relationship between victim FTA and case outcomes is explained entirely by weak cases. Even in a setting where cases with weak evidence have mostly been weeded out, we still see a strong correlation between dismissal and victim FTA. Moreover, cases that proceed to CCP are those in which the victim has shown up to court at least once,

¹²² We also run these regressions separately by race and ethnicity of the victim. For all groups, we find a similar relationship between FTA and dismissal.

¹²³ The law governing the use of hearsay evidence at preliminary hearings in Pennsylvania has changed over time. *See* *Buchanan v. Verbonitz*, 581 A.2d 172, 175 (Pa. 1990) (holding in a split opinion with no majority rationale that hearsay was insufficient to make out a *prima facie* case); *Commonwealth v. Ricker*, 120 A.3d 349, 357 (Pa. Super. Ct. 2015) (holding that hearsay *was* sufficient to establish a *prima facie* case); *Commonwealth v. McClelland*, 233 A.3d 717, 736 (Pa. 2020) (holding that the Commonwealth *cannot* rely on hearsay alone to establish a *prima facie* case because doing so violates a defendant’s right to due process). The prosecutors we observed and interviewed did not consider hearsay evidence sufficient for a preliminary hearing and called all witnesses to testify. Although the law was in flux over the years of our study, 2010 to 2020, our data suggest that prosecutors generally erred on the side of calling witnesses to testify.

¹²⁴ Results shown in Appendix Table A2.

thus eliminating cases that are dropped because of an inability to contact the victim.

The relationship between victim FTA and case dismissal could also arise because victims are opting out of the criminal proceedings, even when cases are viable. If someone misses a hearing inadvertently, they will usually have future opportunities to show up in court and testify. The FTA will not necessarily impact case outcomes. However, if the victim has decided that the costs of court appearance outweigh the benefits, nonappearance will be persistent. Unless the prosecutor coerces appearance via bail or material witness detention—which is incredibly rare—the case will be dropped.

However, even inadvertent failures to appear by victims could affect case outcomes. Some victim FTA may reflect discretionary choices by an ADA. ADAs may not always have the bandwidth to locate and communicate with witnesses, so they inevitably triage between cases.¹²⁵ If a case is considered lower priority, the prosecutor may exert less effort to contact witnesses about rescheduled court dates. Inadvertent FTA can also increase dismissals due to formal and informal speedy trial rules. Depending on whether it is a misdemeanor or a felony, the Commonwealth has 180 or 365 days from preliminary arraignment to try the case, and each FTA on the prosecution's side pushes them closer to that limit.¹²⁶

Informal rules are often even more determinative. An informal policy in the Municipal Courts allows the prosecutor three chances to put a case up for trial or preliminary hearing. After the third listing of the case, judges generally become much more likely to dismiss it for lack of prosecution.¹²⁷ If a victim fails to appear on three separate occasions, the case is likely to be dropped regardless of the reason for their absence.

¹²⁵ Communication issues are exacerbated when cases get handed back and forth across multiple ADAs. Prosecutors leave shorthand notes on the front of their case files for the next ADA. A common notation is “CW FTA” for “complaining witness FTA.” Even if a prosecutor learns the reasons for a victim FTA, individual prosecutors vary in how much detail they record in their case notes. Because many cases are passed on to a new prosecutor at each hearing, prosecutors often simply see notes that the victim failed to appear at the past listing without any information about the reasons for the nonappearance.

¹²⁶ See 234 PA. CODE § 1013 (2013) (establishing a 180-day limit for misdemeanor cases); 234 PA. CODE § 600 (2013) (establishing a 365-day limit for felony cases). At each hearing, the hearing outcome and elapsed time are attributed to either the Commonwealth, the defense, or both. When a witness for the Commonwealth fails to appear, the prosecution is deemed “not ready” by the courts, and the days until the next hearing are subtracted from the 180-day total. Due to case backlogs in the courts, hearings may be scheduled a month or more apart, meaning that each failure to appear by an officer, victim, or civilian witness can cost the Commonwealth thirty to sixty days of time or more.

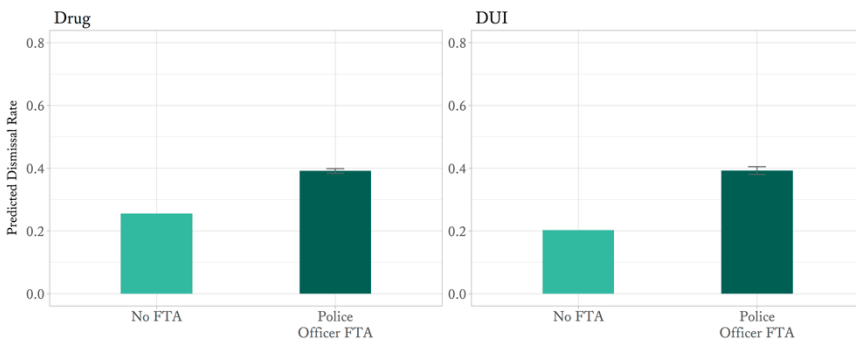
¹²⁷ We were told of the informal “three chances” rule while shadowing ADAs and during our interviews. While observing court, it also was quite common to hear defense counsel make arguments such as “this is the third listing,” even if the case had not yet reached the legal speedy trial limits.

3. Officer-Initiated Arrests

We run similar analyses for officer-initiated arrests—that is, drug and DUI cases. Figure 12 presents analyses analogous to those in Figure 11. The leftmost bars show the average dismissal rate for cases with no FTA and the bars on the right show the predicted dismissal rate for cases with an officer FTA. We constructed this data by adding the regression coefficient to the no-FTA average.

Again, we see a strong relationship between officer FTA and case resolution. Drug cases are fifteen percentage points more likely to be dismissed if an officer fails to appear, compared to a 25% dismissal rate when there are no FTAs. DUI cases are twenty percentage points more likely to be dismissed if an officer fails to appear—double the dismissal rate of cases with no FTA.

Figure 12: Relationship Between FTA and Case Dismissal for Officer-Initiated Arrests



Note: The bars on the left show the average dismissal rate for cases that had no FTA. The bars on the right show the predicted likelihood of dismissal for cases with an officer FTA. These results are derived by regressing dismissal on an indicator for officer FTA, controlling for charge, demographics, criminal record, and all other FTA types. The predicted dismissal rates are derived by adding the regression coefficients to the no-FTA mean. Each sub-figure shows results for a particular crime type: DUI and drug. The whiskers show the 95% confidence interval for the regression coefficient. The regressions are shown in Appendix Table A1, Columns 5 and 6.

Officers may be less likely to appear in cases that would have been dropped anyway, either because the evidence was weak or because the charges were not serious. In such instances, one could argue that the FTA had nothing to do with the dismissal. But note that our regression controls for the exact charge as well as the criminal record. Thus, the different dismissal rates for

cases that do or don't have an officer FTA could not be explained by differences in the charge or in observable characteristics of the defendant. The regression analysis demonstrates that even very similar-looking cases resolved quite differently when an officer fails to appear.

Our interviews suggest that officers sometimes fail to appear because they don't want to face tough cross-examination—particularly if they may have violated law or protocol in the arrest. If an officer is truly unwilling to testify, usually the prosecutor will have no choice but to drop the case.¹²⁸

However, when an officer misses court inadvertently or due to a scheduling conflict, a persistent prosecutor will usually be able to get them in court the next time. That doesn't always mean they will do so; given high caseloads, prosecutors may not have the bandwidth to reach out to the officer and coordinate schedules.¹²⁹ Furthermore, each missed court appearance counts towards the informal “three strikes” policy and will take the case closer to the speedy trial deadline.

G. FTA and Case Length

Lastly, we ask how non-defendant failures to appear relate to case length. We expect there to be at least two reasons why FTA could be associated with time to disposition. First, FTA could reduce the time to disposition if the FTA causes the prosecutor to drop charges. Second, FTA could increase time to disposition if it results in more rescheduled hearings. Both of these patterns are likely to be present in differing degrees. We conduct regressions of case length on non-defendant FTA, with the same set of controls as described above. These data are shown in Appendix Table A3.

The patterns differ by offense and actor type. For domestic violence and other violent crimes, cases resolved more quickly when the victim fails to appear. That could be because prosecutors abandon cases when a victim has shown themselves to be non-cooperative. However, victim FTA is not strongly associated with case length for property crimes.

In contrast, officer FTA led to an increase in the time to disposition for DUI and drug crimes. Cases with an officer FTA took fifty to seventy-five days longer to resolve than cases with no FTA. This reality suggests that officer FTAs create more hassles for cases moving forward—hassles that are primarily borne by defendants, victims, and civilian witnesses. Longer cases mean defendants spend more time in jail pretrial, under pretrial supervision,

¹²⁸ The ADA can report persistent nonappearance to the head of the officer liaison office. However, prosecutors may be unwilling to do this as they rely heavily on their personal relationships with officers and going above their head to report problems might sour them.

¹²⁹ If the officer is not in the Philly Police Department, they may not have received the initial subpoena, and it can be time-consuming to track them down.

or with cash tied up in bail payments. Victims and witnesses must yet again face the ordeal of discussing their experiences with a prosecutor, and there's more scheduling and administrative hurdles for everyone involved.

III. IMPLICATIONS AND OPEN QUESTIONS

A. Generalizability

This Article presents what is, to our knowledge, the first detailed, system-wide analysis of failures to appear in court. For practical reasons, we've focused only on Philadelphia as a case study. Until research in this area expands further, it's hard to know for certain to what extent our results generalize to other jurisdictions. Based on discussion with colleagues and our own experience working in other state courts, we don't think Philadelphia is unique in having high rates of nonappearance among various court actors. But, as with most aspects of the criminal legal process, details are likely to vary.

One aspect of Philadelphia's criminal legal system that sets it apart from many, but not all, jurisdictions is the high rate of bench trials. This frequency could increase the role that witnesses play in court. In some jurisdictions, cases can plead out before witnesses ever have to appear—but this is generally not the case in Philadelphia.¹³⁰ To the extent that there are more hearings that require witnesses, more opportunities exist for those witnesses to miss court. Thus, the FTA rate for non-defendants could be higher in Philadelphia than in other places. However, a similar argument also holds for defendants: with fewer hearings, there are fewer opportunities for the defendant to miss court. Thus, while the overall rates might be higher in Philadelphia than in cities that rely more on pleas, it's not clear that this would distort key takeaways about the prevalence of non-defendant FTA relative to defendant FTA.

It's also possible that Philadelphia has different charging or screening practices than other jurisdictions.¹³¹ If other jurisdictions weed out weak cases

¹³⁰ Cf. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2122 (1998) (“Sometimes this plea follows a fairly extensive course of judicial proceedings—indictment, discovery, motion practice, even evidentiary hearings by the court—but in many cases it occurs at the very outset of the formal process.”). For a discussion of one set of constitutional implications of this trend, see William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 *COLUM. L. REV.* 451, 454-55 (2021) (arguing for application of the Sixth Amendment's guarantee of the right of a criminal defendant to confront witnesses to the plea-bargaining process, given that most defendants plead out before trial and current Confrontation Clause jurisprudence defines “witness” as limited to the use of testimony at trial).

¹³¹ See, e.g., DEASON CTR., SMU DEDMAN SCH. LAW, *SCREENING AND CHARGING CASES IN THREE MID-SIZED JURISDICTIONS* 4-6 (2021) (delineating differences in practice observed empirically across three district attorney's offices); see also Pamela R. Metzger & Janet C. Hoefel, *Charging Time*, 108 *IOWA L. REV.* 1723, 1729 (2023) (“The process of selecting and formalizing

earlier in the process—including those that are weak due to victim or witness noncooperation—the non-defendant FTA rate might be lower. However, to the extent that this is true, this would only affect the bean-counting exercise, not the qualitative takeaways of our Article. The underlying point remains the same: it is difficult to get *all* parties to court, and nonappearance plays a key role in case outcomes. Moreover, charging/screening rates vary quite dramatically from place to place, so it's not obvious that Philadelphia is an anomaly in this regard.¹³²

Throughout the Article, we've emphasized inefficiencies arising from high volumes of cases and limited resources. Philadelphia's high rates of nonappearance are almost certainly due, at least in part, to staffing shortages, crushing caseloads, inefficient scheduling, and technological failures. But again, Philadelphia is not unique in being under-resourced.¹³³ Courts and police departments across the country suffer from overworked staff, tight budgets, and outdated infrastructure.¹³⁴

In sum, it's possible that system-wide FTA rates are higher than average in Philadelphia. We won't know until research in this area develops further. But the data resonates enough with piecemeal data from other places, and with our own and colleagues' experience of state criminal courts, that we wager the basic point holds broadly.¹³⁵

B. *Non-Defendant FTA and Bail Reform*

The first implication of our findings is that recent bail-reform debates have framed the issue of “appearance” in unduly narrow terms as an issue that

criminal charges varies from place to place.”); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1047 (1984) (noting Philadelphia as an exception to the perceived standard of heavy dependence on plea bargains); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 30 STAN. L. REV. 29, 61-66 (2002) (describing New Orleans' exceptional reliance on screening in lieu of plea bargaining).

¹³² See generally *Measuring Justice Dashboard*, UNIV. N.C. SCH. GOV'T, CRIM. JUST. INNOVATION LAB (2023), <https://cjil.shinyapps.io/MeasuringJustice/> [<https://perma.cc/S7PC-BCER>] (cataloging differences in charging and screening rates across jurisdictions).

¹³³ See Reihan Salam & Charles Fain Lehman, *We're Underfunding the Police*, ATLANTIC (Mar. 8, 2023), <https://www.theatlantic.com/ideas/archive/2023/03/underfunding-police-violent-crime/673314/> [<https://perma.cc/6BS6-TRR4>] (chronicling extensive under-funding in state criminal justice systems and recommending increased investment in police officer hiring, funding for criminal adjudication, and incarceration facilities); James Barron, *Why Police Officers Are Leaving: Low Pay, Overwork and High Costs*, N.Y. TIMES: N.Y. TODAY (Dec. 14, 2022), <https://www.nytimes.com/2022/12/14/nyregion/nypd-pay-work-costs.html> [<https://perma.cc/W9KK-5NYV>] (*explaining the difficulty of hiring and retaining police officers with existing salaries*).

¹³⁴ For a discussion of these shortages, see Salam & Lehman, *supra* note 133.

¹³⁵ See generally Donald J. Rebovich, *Prosecution Response to Domestic Violence: Results of a Survey of Large Jurisdictions*, in DO ARRESTS AND RESTRAINING ORDERS WORK? 176, 185-86 (Eve S. Buzawa & Carl G. Buzawa, eds., 1996); Davis, *supra* note 111.

arises uniquely with respect to criminal defendants.¹³⁶ Acknowledging the systemic nature of FTA opens up new doors for thinking systemically about ways to reduce it.

Most obviously, to the extent that defendant and non-defendant FTA alike are driven by bureaucratic dysfunction and logistical obstacles, these issues are amenable to shared solutions. We can improve channels of communication and strive to reduce the burden of court appearance. There are any number of common-sense measures to pursue: text-message reminders about court dates, clear and informative court websites, a hotline with court-date info, more precise scheduling, options for requesting a rescheduled court date (or just for communicating with the court about obstacles), transportation vouchers, and support with childcare, among others.¹³⁷ Interventions along these lines would likely increase appearance rates across all parties.¹³⁸

Taking a systemic perspective on FTA also calls into question the extreme disparity in the approach we take to ensuring appearance for defendants versus other court actors.¹³⁹ As discussed in Section I.A., above, defendants and witnesses share a legal duty to appear. Both may be—and are—subpoenaed for court settings. The law on the books empowers courts to set bail requirements for both defendants and witnesses, to order detention if bail requirements are insufficient, and to sanction failure to appear using all

¹³⁶ See *supra* Section I.A.

¹³⁷ Surveys of new methods used to help ensure appearance are forthcoming. Lauryn P. Gouldin, *New Perspectives on Pretrial Nonappearance*, in AMERICAN SOCIETY OF CRIMINOLOGY DIVISION ON CORRECTIONS AND SENTENCING HANDBOOK ON PRETRIAL JUSTICE (forthcoming 2024); Lauryn P. Gouldin, *Keeping Up Appearances* (unpublished manuscript) (on file with authors).

¹³⁸ The Philadelphia 100 Shootings committee, after reporting that “[a]pproximately half of illegal gun possession cases were dismissed because of the failure of the victim, witness, or police officer to appear for court proceedings,” opined that “[i]mproving victim, witness, and police officer court appearances is within the control of system actors.” PHILA. 100 SHOOTING REV. COMM., COMMITTEE REPORT 8 (2022), <http://phlcouncil.com/wp-content/uploads/2022/01/100-Shooting-Review-complete.pdf> [<https://perma.cc/5PZV-BFNR>]. Specifically, the committee recommended that the city strive to “[r]educ[e] failures of victims and witnesses to appear in criminal cases by providing more support to victims and witnesses,” including “transportation,” “better follow up,” and “technology to allow for both court-reminder texting to victims and witnesses and provision of transportation vouchers.” *Id.* at 10; see also Alissa Fishbane, Aurelie Ouss & Anuj K. Shah, *Behavioral Nudges Reduce Failure to Appear for Court*, 370 SCIENCE 682, 683-84 (2020) (discussing alternative methods of ensuring appearance). The Philadelphia D.A. is taking steps along these lines. See, e.g., OFF. FOR VICTIMS OF CRIME, ADVANCED MOBILE TECHNOLOGY TO ENHANCE VICTIM SERVICES IN THE PHILADELPHIA DISTRICT ATTORNEY’S OFFICE (Sept. 30, 2022), <https://ovc.ojp.gov/funding/awards/15povc-22-gk-03318-nonf> [<https://perma.cc/QAA4-7A2D>] (“The [Advanced Mobile Technology to Enhance Victim Services] smartphone mobile application and two-way text message platform will improve accessibility, facilitate higher engagement, and lower barriers to service access for victims of crime in Philadelphia.”).

¹³⁹ See *supra* Section I.A. (discussing this disparity).

of the same legal tools.¹⁴⁰ In practice, on the other hand, the disparity in the approach to defendant versus witness FTA is extreme. Of course, part of this disparity in treatment arises from concerns about crime versus nonappearance.¹⁴¹ But we posit that there remains a significant disparity in the willingness to jail defendants versus witnesses because of the risk of nonappearance as well. For instance, bench warrants are issued for most defendants who fail to appear, whereas they are virtually never issued when a witness doesn't appear.¹⁴²

Some readers may feel this disparity to be justified because defendants are differently situated than witnesses in both legal and moral terms. When it comes to defendants, a member of the judiciary has decided that there is probable cause to believe that person has committed a crime. Some readers might have the sense that the accused person has a heightened duty to appear because they may have committed a crime or alternatively, that because they may have committed a crime they have less of a right to liberty and the state may more readily detain them to ensure the smooth administration of justice. Their wrongful conduct forfeits their liberty interests or incurs an obligation to submit to judicial proceedings, or both.

On closer analysis, however, it is far from clear that any of these differences justify treating defendant FTA differently. One of the most obvious rationales for preventing FTA is that it creates hassle and inconvenience. But with respect to hassle, defendant and non-defendant FTA is on the same footing.¹⁴³ If an actor essential to the hearing fails to show up, everyone's time is wasted; it's a drain on taxpayer resources and on the budgets of people who took time off work to travel to court. Every time an FTA occurs, it erodes the respect and goodwill of all involved. As to the question of the defendant's potential guilt in committing a crime, as a matter of law, the accused is presumed innocent until proven guilty beyond a reasonable doubt at trial. Is the government really justified in treating defendants as having a lesser right to liberty, or greater duties to appear, by

140 *Id.* We are unaware of any statutes that expressly authorize different standards of bail or detention for defendants and witnesses, at least with respect to bail or detention motivated by a concern for appearance. The law on the books *does* differentiate between defendants and witnesses for purposes of bail/detention motivated by public safety concerns. Many states have laws that recognize the court's authority to restrict a defendant's liberty on the basis of dangerousness. In contrast, there generally aren't special provisions authorizing courts to detain witnesses based on dangerousness beyond the general laws that govern involuntary confinement for all citizens.

141 See Mayson, *Dangerous Defendants*, *supra* note 13, at 493 (observing that the "core concern" of the pretrial detention debate is "public safety"). *But see id.* at 534-35 (arguing that, although a criminal charge may be *evidence* of risk, the degree of risk that justifies preventive restraint is no lower for accused than for non-accused individuals).

142 See *supra* subsection I.B.1.

143 For a thoughtful discussion of the costs of unnecessary and burdensome interaction with the criminal legal system *outside* of court, see Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461 (2015).

virtue of their possible guilt for the very crimes the proceedings are meant to adjudicate?

These deep questions are beyond the scope of this Article (although two of us have addressed them elsewhere).¹⁴⁴ Our point here is just that the most obvious legal and moral grounds for bail or detention to ensure appearance apply equally to defendants and non-defendants. If we find those grounds inadequate for witnesses, we should at least question them with respect to defendants. As a practical matter, the Philadelphia data suggest that non-defendant FTA represents the bigger problem overall—although it is possible that the existing pretrial infrastructure, focused as it is on defendants, partly accounts for that fact.

C. Systemic FTA as a Regulatory Dynamic

Understanding FTA as a systemic phenomenon also illuminates an important—indeed, arguably central—dynamic of contemporary criminal justice. In aggregate, failures to appear operate as a check on the nature and volume of state prosecutions. Witness FTA in particular is the single most predictive factor in the disposition of the case, far more than the charge, race, gender, or criminal record of the defendant.¹⁴⁵ In other words, witness¹⁴⁶ FTA is serving a regulatory function. It limits the number of cases that proceed through adjudication and determines which ones do.

The regulatory role of witness FTAs deserves much more attention than it has yet received because it raises a host of normative questions. It may seem self-evident that the system should aspire to prevent failures to appear. If there are sufficient grounds to initiate criminal proceedings, it is logical to assume that we want the case to proceed and not be derailed by the actions of a private party. An FTA prevents the criminal legal apparatus from achieving its purported goals, whether they are expressive, retributive, consequentialist, or some combination. If the witness fails to appear because of coercion or fear, the FTA also reflects the existence of those additional harms. And there is reason to think that defendants who intimidate witnesses are exactly those whom we should be most eager to prosecute fully, making the consequences of dropping cases because of coercion-induced FTAs especially grave.

But it is too simplistic to say that FTA is always and necessarily a problem. FTA acts as a release valve by reducing conviction rates in a bloated criminal legal system. The set of behaviors that are defined as criminal is vast,

¹⁴⁴ See generally Mayson, *Dangerous Defendants*, *supra* note 13; Stevenson & Mayson, *Pretrial Detention*, *supra* note 13.

¹⁴⁵ See *supra* Section II.F.

¹⁴⁶ Throughout this Section we use “witness” to include any “complaining witness,” or alleged victim, as well as police officers and other civilian witnesses.

giving extraordinary reach to police and prosecutors. The assembly line plea-bargaining system allows rapid processing of cases with little attention paid to evidence or individual circumstances. Not every case where charges are filed merits criminal adjudication—some might even argue that most do not.¹⁴⁷

Witness FTA puts the brakes on the system. This method certainly isn't the ideal way of reducing the scope of criminal prosecutions, but it's the one we currently have. And there are reasons to think that, as a pruning mechanism, it's not entirely bad.

To start, crime victims arguably have a moral prerogative to exert some influence over prosecutions. If they decide to opt out of the proceeding, this choice might be one society should respect.¹⁴⁸ Along more practical lines, witnesses often have valuable private information about the case: they may have experienced or witnessed the crime firsthand, they may know the perpetrator, or they may understand the context and the community. Victims and bystander witnesses often come from the same community as the perpetrator, as well as the community that suffers most when crime is committed. To the extent that witness FTA is driven by witnesses' own judgments about whether the criminal prosecution is warranted, it might be a useful information-sharing mechanism that helps to cull cases from the system that don't belong there. This type of "witness nullification" provides one channel through which the voice of the community can be heard in the criminal process.¹⁴⁹

¹⁴⁷ From abolitionists to criminal justice reformers, many activists argue for reducing the scope of the criminal legal system. See, e.g., Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 7 (2022) ("[T]his Article underscores the necessity of abolishing criminal courts as sites of coercion, violence, and exploitation and replacing them with other social institutions, such as community-based restorative justice and peacemaking programs, while investing in the robust provision of social, political, and economic resources in marginalized communities."); Anna Roberts, *Dismissals as Justice*, 69 ALA. L. REV. 327, 330 (2017) (calling for more attention to statutes that permit judges to dismiss prosecutions "in furtherance of justice," even though the cases are permitted in criminal court).

¹⁴⁸ See, e.g., Gabriel S. Mendlow, *The Moral Ambiguity of Public Prosecution*, 130 YALE L.J. 1146, 1152 (2021) (arguing that victims' moral prerogative to call wrongdoers to account creates "reasons for us to surrender a degree of procedural control to crime victims within a system of public prosecution"); I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1588 (2020) (arguing for "a system where victims have a range of options," including private prosecution, state-assisted prosecution, public prosecution, restorative justice, and "just let[ing] the matter go").

¹⁴⁹ For consideration of other channels of community participation, see, e.g., Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 252 (2019), which explores "the on-the-ground reality of groups who participate in everyday adjudication on behalf of defendants," and Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 585 (2017), which observes that "[c]ommunity bail funds give a voice to populations who rarely have a say in how criminal justice is administered, especially poor people of color."

Secondly, witness FTA likely reflects triaging activity by prosecutors. Getting witnesses to show up in court often requires proactive behavior from prosecutors. They call and email witnesses to make sure they know where and when to show up, to ease their fears, and to remind them as the court date approaches. But this all takes time, and a prosecutor juggling hundreds of cases must choose which ones to invest in. These discretionary choices affect which witnesses show up, and hence which cases proceed. To the extent that witness FTA reflects judgments by prosecutors about which cases are most important, they might be a healthy check on the system rather than a problem.

On the other hand, there are at least two concerns with relying on witness FTA to check the scale of the system. The first is that FTA is likely to have distributional consequences. We surmise, although this would require further research, that members of disadvantaged groups fail to appear at higher rates than those from advantaged groups. The more precarious one's situation, the harder it is to miss work, find childcare, and access transportation. Those living in unstable circumstances may be harder to contact or have less capacity to keep track of appointments. When mental health and substance abuse problems are present, they exacerbate these challenges.

If socioeconomic disadvantage does increase FTA rates, perpetrators are less likely to be held accountable for crimes against disadvantaged victims. By a similar logic, disadvantaged defendants would be less likely to be convicted because they often come from the same socioeconomic class as the victims of and witnesses to their alleged crime. Again, the extent to which this is a problem depends on the extent to which one views criminal prosecution as a societal good. Does the distributional impact of witness FTA help to temper the system's tendency to over-convict and over-incarcerate people from disadvantaged groups? Or does it magnify the system's tendency to let crime in disadvantaged communities go unpunished? We expect that both are true, but whether this is a net benefit or a net harm depends on the value of criminal legal adjudication.

The second concern is that allowing witness's private judgments to dictate the outcomes of criminal proceedings might compromise the public function that criminal law is meant to serve. We intentionally abandoned private prosecution more than a century ago.¹⁵⁰ In theory, criminal prosecution and punishment today is a mechanism of collective, public condemnation meant to express and enforce shared norms.¹⁵¹ Putting too much control of case

¹⁵⁰ See Capers, *supra* note 148, at 1582-83 (describing the history of private prosecution).

¹⁵¹ See R.A. DUFF, *THE REALM OF CRIMINAL LAW* 11-51 (2018) (noting a potential "conception" of criminal law that describes prosecution as a "process of calling [alleged offenders] to account" for "public wrongs"); accord Sandra G. Mayson, *The Concept of Criminal Law*, 14 *CRIM. L.*

outcomes in private hands might undermine that function. A witness or alleged victim may have reasonable grounds for preferring not to testify—but this means that, if the accused person did commit a serious crime, the perpetrator evades public accountability and the system fails to condemn a serious public wrong. A system of prosecution that defers too much to private decision-making might be “intolerably unfair or ineffective.”¹⁵²

Police officer FTA warrants its own discussion, because officers (1) play a unique role in launching the prosecution itself, (2) have a duty to appear pursuant to their employment, and (3) are visible representatives of the criminal legal system whose conduct shapes public perception of it.¹⁵³ Given those facts, it is hard to see the high rates of officer FTA as anything other than a serious problem. Officer FTAs have all the same damaging consequences as FTAs by other actors—wasted time, frustration, expense, delay or dismissal of the case—and also unique expressive consequences. Officer FTAs give the impression of disregard for law enforcement employment responsibilities, for the other actors involved in prosecuting the case, and for the enterprise of criminal adjudication as a whole.

To the extent that scheduling and notice failures drive police FTA, those problems should be relatively straightforward to fix. Here as elsewhere in the criminal justice system, outdated data and communications systems have serious effects on people’s lives and on the administration of justice. We hope that this research will be a spur to stakeholders in Philadelphia and beyond to invest in more effective data management and communications infrastructure.

Other possible drivers of police FTA indicate deeper problems. As discussed briefly above, interviewees suggested that police officers sometimes FTA for low-level cases that they do not think warrant further prosecution, which raises the question of why the arrest was necessary in the first place. Perhaps some of these cases reflect situations where police just thought it necessary to arrest and briefly confine someone who presented a threat to public order because of intoxication, mental illness, or some combination—

& PHIL. 447, 449 (2020) (arguing that criminal law is distinctive as “a mechanism of collective condemnation”).

¹⁵² Mendlow, *supra* note 148, at 1182; *see also id.* at 1171 (noting that if we entrusted prosecution entirely to private individuals, we “would see the criminal process deployed far less often against offenders who prey on the poor, the unsophisticated, the overlenient, the easily intimidated, the readily bought off, the subjugated, the busy, and the distracted, than against offenders whose victims are well-resourced, savvy, unforgiving, implacable, or incorruptible—not to mention racist, oppressive, or sadistic”).

¹⁵³ *Supra* note 34.

punishment was never the goal.¹⁵⁴ Or perhaps officers are simply using their powers of arrest to impose the punishment they think appropriate—a few nights in jail and the hassle of a court appearance. In either case, police are using arrest and pretrial detention for purposes other than those they are meant to serve.¹⁵⁵ Even more concerning is the notion that officers fail to appear because they don't want to face tough cross-examination. The court process has long been considered an important check on Fourth Amendment violations.¹⁵⁶ If officers skip court to avoid being accused of wrongdoing, this check is ineffectual. Cases involving Fourth Amendment violations disappear from court dockets, potentially distorting the narratives that make their way onto transcripts and into the collective consciousness of magistrates and prosecutors.

Whatever the mechanisms, the high officer FTA rates and their consequences demonstrate that police discretion plays a significant role not only in which cases enter the court system but also in how they are adjudicated. When “the process is the punishment,” police officers become judge and jury.¹⁵⁷

The regulatory function that witness FTA plays is so central, at least in Philadelphia, that it suggests a last possibility worth noting: might the system be *reliant* on high rates of witness FTA?¹⁵⁸ Given the volume of cases in busy urban jurisdictions like this one, perhaps criminal legal institutions could not function if all witnesses showed up. In this scenario, high systemic FTA rates are part of the system's structure. We have built a system of criminal law enforcement that prioritizes broad arrest and charging practices but sees relatively few cases through to conviction.¹⁵⁹ This structure places relatively

154 See Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268, 283 (2015) (“The police . . . need tools to police public order (often by making arrests), and criminal law is usually all that they have.”).

155 For discussion of this phenomenon specifically with respect to pretrial detention, see Sandra G. Mayson, *After Money Bail: Lifting the Veil on Pretrial Detention*, LAW & POL. ECON. PROJECT BLOG (Feb. 15, 2020), <https://lpeproject.org/blog/after-money-bail-lifting-the-veil-on-pretrial-detention/> [<https://perma.cc/2D2G-9E5V>].

156 See *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (“Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.”).

157 FEELEY, *supra* note 17, at 30-31 (introducing the idea that the criminal process is often the main punishment for low-level crimes); see also KOHLER-HAUSMANN, *supra* note 17, at 1-2 (discussing the punitive effects of low-level criminal adjudication).

158 Thanks to Colleen Shanahan for articulating this line of thought.

159 *Cf.*, e.g., Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 1004 (citing a range of conviction rates based on jurisdiction, with a low of 27% in Chicago).

greater power and value in front-end arrest and detention practices and relatively less in adjudication and sentencing.

In sum, the study reported here suggests that witness FTA plays a central but extremely complex role in the regulation of criminal process.¹⁶⁰ This dynamic might be viewed as a grievous problem in need of repair, an imperfect but still useful functionality, or a beneficial mechanism for justice. We suggest that the normative import of high witness FTA rates depends on what circumstances drive FTA—a question that will require significant future research.

CONCLUSION

The empirical analyses presented in this paper demonstrate that failure to appear in court is a systemic issue. Police officers, private defense lawyers, victims, and other witnesses all fail to appear in court at rates even higher than defendants. A systemic view on failure-to-appear opens up new conversations on bail reform. It raises questions about the extreme asymmetry in treatment between defendants and non-defendants and points towards system-based methods of increasing appearance rates: improving communication and decreasing inefficiencies.

Our research also demonstrates that witness FTA is a central yet underappreciated factor governing the disposition of cases. When witnesses fail to appear, cases get dismissed. Is this a problem that needs to be fixed? A valuable function in an imperfect system? Or simply a fact that pushes us to reckon with many fundamental tensions in criminal justice? We sketch out some possible answers here but hope that future research will tackle them more thoroughly.

APPENDIX

I. DESCRIPTION OF QUALITATIVE RESEARCH

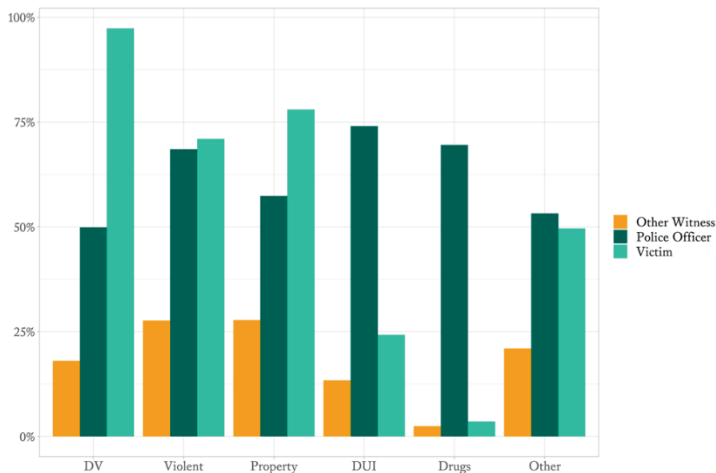
We spent approximately twenty-five days observing court proceedings or shadowing ADAs. We were connected to ADAs for shadowing by the Municipal Court Unit supervisor, with an eye towards shadowing a range of courtrooms and case types. For example, we observed three ADAs in specialty domestic violence courts and family courts, an ADA in a DUI court, and several ADAs in preliminary hearing rooms and misdemeanor trial rooms

¹⁶⁰ A last wrinkle is that defense lawyers may act strategically to maximize the chance of case dismissal, pushing for continuances until prosecution witnesses get frustrated and stop showing up, but calling 'ready for trial' if a key witness is absent. In other words, defense litigation tactics might contribute to FTA rates as well.

with a variety of judges. For most shadowing opportunities, we were able to observe the ADA's prep work two to three days prior to court and their return work following court. These observations helped us understand subpoena behaviors, expectations around court appearance, and potential reasons for FTAs.

In addition to observations and informal conversations, we conducted semi-structured interviews with an ADA, two police officers, a Victim/Witness Coordinator, a judge, and a former public defender. All participants were recruited through personal contacts and coworkers at the DAO. Interviews were conducted either in a private conference room at the DAO or through a video-conferencing platform. Interviews included a mix of open-ended and directed questions to develop our understanding of institutions and the court process from each actor's point of view. Although we approached each interview with a guiding list of questions, we allowed interviews to flow naturally and let participants deviate from our questions when relevant. In order to elicit honest responses and ensure participants' anonymity, especially for police officers, interviews were not recorded. Instead, we took detailed notes during the interviews (all interviews included one interviewer and one notetaker) and reviewed the notes immediately after each interview to fill in details and extract key ideas.

Figure A1: Case Types Requiring the Appearance of a Victim, Officer, or Other Witness



Note: This figure presents the fraction of all court cases where a victim, officer or other witness was expected to show up, broken down by crime type. The sample includes the full dataset.

Table A1: The Relationship Between Witness FTA and Case Dismissal

	(1)	(2)	(3)	(4)	(5)	(6)
Victim FTA	0.32*** (0.00)	0.37*** (0.00)	0.30*** (0.01)	0.24*** (0.01)	0.10*** (0.02)	0.09*** (0.01)
Other Witness FTA	0.14*** (0.00)	0.11*** (0.00)	0.13*** (0.01)	0.27*** (0.01)	0.08*** (0.01)	0.07*** (0.01)
Officer FTA	0.09*** (0.00)	-0.10*** (0.01)	0.03*** (0.01)	0.12*** (0.01)	0.14*** (0.00)	0.19*** (0.01)
Sample	All	DV	Violent	Property	Drugs	DUI
Fixed Effects	Year, Charge	Year, Charge	Year, Charge	Year, Charge	Year, Charge	Year, Charge
No-FTA Mean	0.25	0.41	0.2	0.16	0.26	0.2
Num. Obs.	289559	47371	54979	31091	80142	24141
R2	0.208	0.272	0.191	0.249	0.121	0.107

+ p < 0.1, * p < 0.05, ** p < 0.01, *** p < 0.001

Note: This table shows regressions of case dismissal on FTA, controlling for disposition year, charge, defendant race, defendant age at arrest, defendant gender, whether the defendant had a prior case in the past year, and defendant and lawyer FTA. The first column includes all cases, each subsequent column includes a subset of cases based on the lead charge. The average dismissal rate for cases with no FTA is listed at the bottom of the table. Robust standard errors are in parentheses.

Table A2: Relationship Between Witness FTA and Case Dismissal for Cases in the Court of Common Pleas

	(1)	(2)	(3)	(4)	(5)	(6)
Victim FTA	0.32*** (0.01)	0.46*** (0.02)	0.27*** (0.01)	0.31*** (0.02)	0.13** (0.04)	0.05 (0.06)
Other Witness FTA	0.15*** (0.01)	0.21*** (0.02)	0.13*** (0.01)	0.27*** (0.02)	0.05* (0.02)	0.06 (0.06)
Officer FTA	0.14*** (0.01)	0.05 (0.04)	0.11*** (0.01)	0.17*** (0.03)	0.21*** (0.01)	0.18*** (0.04)
Sample	All	DV	Violent	Property	Drugs	DUI
Fixed Effects	Year, Charge	Year, Charge	Year, Charge	Year, Charge	Year, Charge	Year, Charge
No-FTA Mean	0.08	0.1	0.09	0.06	0.06	0.05
Num. Obs.	98507	6524	34887	10076	28409	926
R2	0.143	0.350	0.110	0.274	0.093	0.140

+ p < 0.1, * p < 0.05, ** p < 0.01, *** p < 0.001

Note: This table shows regressions of case dismissal on FTA for cases that proceeded to the Court of Common Pleas, controlling for disposition year, charge, defendant race, defendant age at arrest, defendant gender, whether the defendant had a prior case in the past year and defendant and lawyer FTA. FTAs are calculated here as any FTA that occurred *after* the case proceeded to the Court of Common Pleas (so FTAs that occurred in Municipal Courts are excluded). The first column includes all cases in the Court of Common Pleas; each subsequent column includes a subset of cases based on the lead charge. The average dismissal rates for cases with no FTAs are listed at the bottom of the table. Robust standard errors are in parentheses.

Table A3: The Relationship Between Witness FTA and Time to Disposition

	(1)	(2)	(3)	(4)	(5)	(6)
Victim FTA	-28.77*** (1.39)	-27.58*** (2.17)	-42.49*** (2.98)	10.49*** (3.01)	-42.84*** (8.25)	0.33 (6.19)
Other Witness FTA	6.23*** (1.40)	-21.81*** (2.03)	7.68* (3.09)	2.31 (3.01)	67.57*** (5.92)	34.89*** (5.26)
Officer FTA	57.07*** (1.34)	58.09*** (6.76)	56.92*** (3.66)	22.80*** (3.78)	50.11*** (2.13)	81.59*** (3.00)
Sample	All	DV	Violent	Property	Drugs	DUI
Fixed Effects	Year, Charge	Year, Charge	Year, Charge	Year, Charge	Year, Charge	Year, Charge
No-FTA Mean	157.04	143.75	236.42	113.11	152.4	145.43
Num. Obs.	289559	47371	54979	31091	80142	24141
R2	0.201	0.201	0.261	0.183	0.169	0.240

+ p < 0.1, * p < 0.05, ** p < 0.01, *** p < 0.001

Note: This table shows regressions of days to disposition on FTA, controlling for disposition year, charge, defendant race, defendant age at arrest, defendant gender, whether the defendant had a prior case in the past year, and defendant and lawyer FTA. The first column includes all cases, each subsequent column includes a subset of cases based on the lead charge. The average dismissal rate for cases with no FTA is listed at the bottom of the table. Robust standard errors are in parentheses.

Table A4: Witness FTA Contribution to R-Squared

	(1)	(2)	(3)
Victim FTA	0.36*** (0.00)		0.32*** (0.00)
Other Witness FTA	0.13*** (0.00)		0.14*** (0.00)
Officer FTA	0.06*** (0.00)		0.08*** (0.00)
Defendant FTA		0.00 (0.00)	-0.02*** (0.00)
Male		0.00+ (0.00)	0.00 (0.00)
Black		0.05*** (0.00)	0.03*** (0.00)
Latinx		0.01*** (0.00)	0.00 (0.00)
Other Race		0.01 (0.01)	0.01+ (0.01)
Age		0.00*** (0.00)	0.00*** (0.00)
Prior in Past Year		-0.05*** (0.00)	-0.04*** (0.00)
Num.Obs.	289559	289559	289559
Fixed Effects	No	Year, Charge	Year, Charge
Control Mean	0.23	0.23	0.23
R2	0.160	0.095	0.204

+ $p < 0.1$, * $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Note: This table shows regressions of case dismissal on FTA. In column 1, we regress dismissal on FTAs without any other controls; this regression has an R-squared of 0.160. In column 2, we regress dismissal on our controls (defendant race, defendant age at arrest, defendant gender, whether the defendant had a prior case in the past year, as well as fixed effects for disposition year and charge) without including FTA. This regression has an R^2 of 0.095. In column 3, we regress dismissal on all FTA variables and our full set of controls. We calculate the contribution of our FTA variables to R^2 by taking the R^2 from column 3 (0.204) and subtracting the contribution to R^2 from our controls (0.095). From this we find that FTAs explain 11 percent of the variation in dismissals, compared to the 4.4 percent explained by the other controls (0.204-0.160).