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# Calibrating the Justice System

Ashley A. Ulferts  
AshleyUlferts@siu.edu

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# **CALIBRATING THE JUSTICE SYSTEM**

**ASHLEY ULFERTS**



**SOUTHERN ILLINOIS UNIVERSITY  
UNIVERSITY HONORS PROGRAM  
FACULTY ADVISOR: TIMOTHY TING  
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## CALIBRATING THE JUSTICE SYSTEM

### A BRIEF HISTORY OF LAW

According to Greek mythology, the earth and sky conceived *Themis* (the Titaness of divine justice and law). Thereafter, *Themis* became the second wife of Zeus and gave birth to *Dike* (the goddess of moral order and fair judgment). *Dike* was thought to be the means to justice—of fair judgments and rights established by custom and law—whereas *Themis* was divine justice—justice itself.<sup>1</sup> In tribute to the myths, *Dike* is often depicted as holding the scales of justice, the scales based on equal arm beam balances.



Picture 01: Within this archaic mechanism, two pans hang from a beam at points equidistant from the fulcrum (point of support). Objects were weighed by equalizing the weight with standard weights added together. At that moment, equilibrium was reached.

Together, as mother and daughter, the two divine conceptions personified justice in the realms of both humans and gods, weighing the actions of humans in terms of justice.

These two conceptions of justice ruled the archaic period of Ancient Greece's understanding of law in a way incomprehensible to modern man, for justice was

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<sup>1</sup> "Dike." *Greek Mythology Wiki*. Wikia, n.d. Web. 17 Dec. 2015. <http://greekmythology.wikia.com/wiki/Dike>

interwoven into every sphere of life. In Ancient Greece, the fulfillment of one's soul, leading one to a virtuous life, was what every man strived for in existence.

Within the late archaic period of Ancient Greece, laws transformed into *thesmoi*: they were now structured and established as written words, giving permanence and validity to parts of community life reducible to written regulations.<sup>2</sup> At this time, *dikē*, arising from *themis*, became incorporated into the beginnings of a regulatory structure that acted to govern aspects of a community. Though laws were now malleable into text, the lofty conception of justice was still present within them. For example, Lycurgus (the individual who is historically attributed with composing the first written laws) is said to have documented the professions of an oracle from Delphi.<sup>3</sup> The judicial system within Ancient Greece utilized judges in the same sense as the modern day system does. At this time, however, judges were respected and seen as having the presence of the divine within them; individuals believed “the administration of justice rests with persons called *dikaspoloi* (‘handlers of *dikē*’) whom Zeus has entrusted with the guardianship of the *themistes*.<sup>4</sup>” The godly conceptions of justice from Ancient Greece were almost seen as a gift to humans for their use in ordering their societies, analogous to Prometheus’ gift of fire to humankind.

It was not until the classical period of Ancient Greece that written laws, *thesmoi*, became *nomoi*, written statutes influenced by and imparted to the political and social customs. Much like the term “norm” in the modern culture, *nomos* is described as

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<sup>2</sup> Wiener, Philip P. "Law, Ancient Greek Ideas of." *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas*. Vol. II. New York: Scribner, 1973. 680. Print.

<sup>3</sup> Gill, N. S. "Lycurgus Lawgiver of Sparta." *About Education*. About.com, 15 Dec. 2014. Web. 17 Dec. 2015.

<sup>4</sup> Wiener. *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas*. Vol. II. at 675.

consisting of those beliefs widely held but valid only to the extent to which they are believed, not scrutinized.<sup>5</sup> Through precedence, these actions became so entangled in society that they were thought of as its framework; hence, there were no moral principals or even rationale to examine. As a result of the adherence to *nomoi*, laws arising within this period were more surface level, less purposeful, and more difficult to rationalize. The movement away from the overarching principles within *themis* became more evident in that *nomos* arose from the “cohesion from the fact that it is, or ought to be, generally regarded as valid and binding by the members of the group of which it prevails.”<sup>6</sup>

Within the classical period of Ancient Greece, it was as if *dikē* became corrupted by the notions found within *nomoi*. The fulcrum on the scale of justice, ultimately holding the pans equidistantly apart, was beginning to crumble as the emphasis on *themis* was lessened. Without this fulcrum keeping the pans equidistantly apart, the subsequent weights of items cannot accurately be determined. The actions of humans within this period could not be accurately examined through the lens of law without *themis* balancing the methodology of law. Hence, laws within this period became a product of a culture, not the means to justice and harmony within a culture. Since laws became the unscrutinized products of the culture, the end to which they served was left to the determination of those with the power to influence culture.

This detachment from *themis* and adherence to *nomoi* seen in the Classical Period of Ancient Greece influenced Roman law, as evidenced through the Roman Era’s focus on material and public welfare instead of the conceptions of law. At this time, laws focused on contracts, property, easements, corporations, partnerships, and injuries—many

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<sup>5</sup> *Id* at 682.

<sup>6</sup> *Id* at 684.

concepts evident in the Western legal system today.<sup>7</sup> It is important to note that the focus on public welfare was only to a superficial level: for example, “there was no theory that it was the duty of the state to furnish social security or to establish a system of socialized medicine...the state did not provide education for children.<sup>8</sup>” Furthermore, though the law was focused to an extent on human rights and protecting the freedom of men, such was validated under unarticulated Hobbesian notions that humans cannot live peacefully together under natural law. The justification of law became a self-defense, a caveat of humans living with one another, instead of something that flourishes from the human existence. It was in this mistrust of human nature that Roman law was created by the state, and, in accordance with the Christian emphasis, it was said to be “the powers that are ordained of God,” that were needed to mitigate and “protect good men from the wicked.<sup>9</sup>”

Even though the conception of the purpose of law changed within these times, judges acting as overseers of law within the judicial system were still seen and revered as the only individuals who “should always be aware of their high duty; they should be impartial, never acting as judges in matters that concerned their own interests, always following the rules of reason and equity rather than the letter of law.<sup>10</sup>” Though the backdrop upon which law was set in the Roman Era differed from the Ancient Greeks, the role of Roman judges was similar to the *dikaspoloi*, carrying the notions of *dikē*’ with them, with an emphasis on reason and equity instead of the morality quality in *themis*.

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<sup>7</sup> "Law in Ancient Rome." *Law in Ancient Rome, The Twelve Tables - Crystalinks*. Crystalinks, n.d. Web. 17 Dec. 2015. <<http://www.crystalinks.com/romelaw.html>>.

<sup>8</sup> Wiener. *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas*. Vol. II. at 687.

<sup>9</sup> *Id* at 687-8.

<sup>10</sup> *Id*.

The Roman perspective on law has largely remained prevalent in the Western world, with the separation of church and state further separating the use of morality within judgments of law (though many laws still followed today were influenced by this perspective). In modern times, the perspective and studies in law largely shifted to isolated parts of *dikē*, to the nature of law within the legal system itself, instead of within a broader context, and how one should interpret written law. Philosophers studying law began to interpret law as a relationship between commands, sanctions and duties within society.

An English Jurist named John Austin in the 1930's posited the Hobbesian notions that law arises from the sovereign of society and that the sovereign's law was almost non-debatable: "The existence of law is one thing; its merit or demerit is another. Whether it be or not be is one inquiry; whether it be or not be conformable to an assumed standard is a different inquiry."<sup>11</sup> Law is then seen as something severed from morality, from *themis*, and only explainable to the end (the sovereign, group in power, or fundamental principles) to which the law ultimately serves. Hence, the scales of justice became so torn apart that the scale that was used to measure one side against the other vanished. The only part left within the scale of justice was the pan for the object to be weighed—which was now not under the discretion of *themis* at all, but under a specific portion of *dikē*. It could only weigh itself against itself.

The origin of prior laws was of no concern to philosophers during this period – laws were simply valid from the strength of their precedence in jurisprudence. It became a self-sufficient and self-explaining system whose fault and existence was weighed against

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<sup>11</sup> Bix, Brian. "John Austin." *Stanford University*. Stanford University, 24 Feb. 2001. Web. 17 Dec. 2015.

itself, with coercion and duty propagating such. The system of law defended itself through fear of punishment and through the notions that it is one's duty to follow laws to maintain social order. Thus, a heightened focus on the interpretation of law, on the text of such, reasonably arose. For, if the existence and purpose of law was something to take for granted, the only debatable ground within law is the text composing such—here the types of judicial interpretation of original intent, literalism, and doctrinal approach arose.<sup>12</sup>

The perspective that arose during the modern age in opposition to the more textual based version of law cried to revive the concept of morality—of *themis*—within law. Theorists took the previous principles arising from the ages and recognized that law is largely a social phenomenon, that, without the populous' internal adherence to the principles of such, diminishes the aim of law to keep society under control.<sup>13</sup> They recognized that the scales of justice cannot perform its duty without a fulcrum—a principle—to hold the pans in which objects are weighted. In using such rational as a guise to focus on the existence of morality in law, theorists began postulating the “certain conditions which a legal system must fulfill if it is to be minimally efficient in achieving the orderly regulation of social life.<sup>14</sup>” When such was attempted, it became understood that there was an “internal morality of law” (coined by Lon Fuller)—an overarching principle—which must be connected with minimal notions of justice to determine the principal conditions for a legal system.

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<sup>12</sup> Senat, Joey. "Methods of Judicial Interpretation." *Methods of Judicial Interpretation*. Oklahoma State University, 21 June 2013. Web. 17 Dec. 2015.

<sup>13</sup> Wiener. *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas*. Vol. III. at 2.

<sup>14</sup> *Id.*



In this perspective, law became a means with a purpose for a greater end. The relationship between *dikē* and *themis* in constructing the scales of justice emerged once more. Law was not viewed as merely text and expensive rhetoric in courtrooms – it became purposeful for the betterment and alignment of society with justice and morals. For example, Myers McDougal posits that law is a means to social change –laden with justice and morality – to an end supported by morality and justice.<sup>16</sup> Just as the opposing perspective within modern times coined judicial perspectives of interpretations, this type of perspective did as well. One such perspective highlighted by Justice Oliver Wendell Holmes was to interpret the “findings of a case, and [have] the further creative role in choosing between competing rules and principles for application.<sup>17</sup>” Judicial decisions were not meant to arise from just legal text but also from the moral and social contexts of society. Several other types of interpretations that arose from this train of thought were balancing competing interests (or eventualities) and a structuralist point of view that magnified decisions to the context of society.<sup>18</sup>

As evidenced, the perspective of law has oscillated drastically to and from morality and justice. The relationship of *dikē* and *themis* that characterizing the beginning of law, slowly dissipated into the pieces of the scales of justice, hyper-focusing on these parts of *dikē*. Now, it appears that the “contemporary studies of legal reasoning hold...some

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<sup>15</sup> Paton, Stephanie. "The 'Inner Morality of Law': An Analysis of Lon L. Fuller's Theory." *The 'Inner Morality of Law': An Analysis of Lon L. Fuller's Theory*. The GULS Law Review, 29 Oct. 2014. Web. 17 Dec. 2015.

<sup>16</sup> McDougal, Myres S., "Law and Power" (1952). Faculty Scholarship Series. Paper 2476. [http://digitalcommons.law.yale.edu/fss\\_papers/2476](http://digitalcommons.law.yale.edu/fss_papers/2476)

<sup>17</sup> Wiener. *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas*. Vol. III. at 3.

<sup>18</sup> See Senat, Joey. "Methods of Judicial Interpretation."

promise of bridging the ancient division between positivist and natural law traditions<sup>19</sup> – this point in history is pivotal to determining whether or not morality and justice can be incorporated back into the law. The mere cold and calculated text of the law has no sensitivity for the human condition when compared to what objective, moral-laden judicial insight can do. It is within analyzing current judicial thought, and determining the qualities of such that are beneficial to heightening the perspectives of justice and morality, that we may be able to rejuvenate our legal system to be a semblance of what its main purpose was – to both better individual and society. Hence, judicial decisions to a hypothetical fact pattern are analyzed to see what trends of thought are prevalent, and what implications this may have on society.

### **THE BASIS**

The hypothetical case utilized in this research is based on two recent Illinois Appellate Court decisions that display dichotomy in legal perspective seen in modern-day thought.

*People v. McDaniel*, 2012 IL App (5th) 100575

The Defendant entered a Wal-Mart store wearing sunglasses, a heavy coat, and a ski cap, though it was not very cold outside.<sup>20</sup> This raised the suspicion of the store's loss prevention agent, who then followed the Defendant through the store, while also informing the store's video surveillance system to monitor him. The agent then witnessed the Defendant pick up three fishing reels, valued at \$181.00, and walk out of the store.<sup>21</sup> The video surveillance shows the Defendant was in the store for six minutes. The

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<sup>19</sup> Wiener. *Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas*. Vol. III. at 6.

<sup>20</sup> *People v. McDaniel*, 2012 IL App (5th) 100575, ¶ 3.

<sup>21</sup> *Id* at ¶4.

Defendant was originally convicted of the more serious crime of burglary instead of the less severe crime of retail theft. However, on appeal, the *McDaniel* court determined through analysis that the Defendant ultimately “did not ‘remain within’ in order to commit a theft.”<sup>22</sup> He entered with authority and did not exceed the physical scope of his authority left immediately after stealing the fishing reels. Defendant was properly convicted of that theft.<sup>23</sup> The court duly noted that the difference in penalties was severe enough to negatively reshape public policy.<sup>24</sup>

*People v. Bradford, 2014 IL App (4th) 130288*

An asset-protection associate was watching the Defendant as he walked into a Wal-Mart store, grabbed two DVDs from the display, and performed a “no receipt return,” for which he received a gift card in the amount of the DVD’s returned.<sup>25</sup> The Defendant then produced a Wal-Mart plastic bag from his person and placed the shoes he selected off the aisle into the bag.<sup>26</sup> The Defendant then paid for an unknown male’s items, did not offer to pay for any of his concealed items, and left the store.<sup>27</sup> He was then charged and convicted with burglary. On appeal, the *Bradford* court rationalized the Defendant’s conviction, noting that a “defendant remaining within a building open to the public is ‘without authority’ if it is accompanied by an intent to steal.”<sup>28</sup> The court further asserted that the once the Defendant conceptualized the intent to steal, any authority to remain within the store was withdrawn.<sup>29</sup>

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<sup>22</sup> *Id* at ¶12.

<sup>23</sup> *Id* at ¶14.

<sup>24</sup> *Id* at ¶19.

<sup>25</sup> *People v. Bradford, 2014 IL App (4th) 130288, ¶ 3.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id* at ¶4.

<sup>28</sup> *Id* at ¶33.

<sup>29</sup> *Id* at ¶28.

### *The Issue at Bar*

When comparing the *Bradford* case to the *McDaniel* case, it is important to note that the *Bradford* decision largely came without judicial precedence—previous court decisions had not interpreted the burglary statute to encompass what was previously defined as a retail theft. The shocking factor within such a decision is not only that an individual would be convicted of burglary for taking items worth less than what would qualify as grand theft, but the charge of burglary necessitates a sentence that can range from three to seven years in length (probation is technically possible in some circumstances but, even if imposed, the defendant would still have a lifelong felony conviction). This implication of such a conviction was a factor the *McDaniel* court acknowledged when they affirmed the Circuit court’s decision to not convict the defendant of burglary.

Given the different perspectives evidenced in the *Bradford* case and the *McDaniel* case, questions about the legal system are sparked—if the man went before a different judge, would the sentence have been different, or would a different legal perspective have been used? Furthermore, what type of system do we have in place if a judge can somewhat arbitrarily sentence an individual of a crime based on their perspective of justice? In extrapolating the situations from the two cases and asking judges to determine whether or not they would convict this individual and why, the impact of a judge’s perspective can be evidenced. It is this perspective, and determining where such is historically derived from, that perhaps jurisprudence can be monitored in a way that can grant individuals equal weight in their opportunities to justice.

### **THE HYPOTHETICAL CASE**

Security cameras show a disheveled, middle-age man entering the Chicago K-Mart store on 18<sup>th</sup> Street during the prime hours of the work day. Skeptical eyes survey him as he walks down the aisles until he stops. Though the children's aisle is small, it appears that he knows where he is going – to the shoes, children's shoes. Cameras focus on him cautiously unfolding what is later confirmed to be a K-Mart bag. He picks up the pink, light-up shoes and puts them in the bag and back into the left pocket of his jacket. Michael Guevara was caught an hour later by the Chicago Police Department with witnesses confirming that this was the man seen in the K-Mart store.

Upon review of his criminal file, it was found that Guevara was convicted of driving under the influence in 2000 when he was twenty-two years old. Eleven years later, he was convicted of possessing cannabis, for which he served 12 months of probation. He then failed his probationary year for a retail theft ordinance violation and for not paying fines. No other significant findings were found within the file; however, given the witnesses, the surveillance video and previous history, the prosecutor decided to charge Mr. Guevara with burglary, a class 2 felony. It is important to note: the repercussions a felony can have on one's record include the following: loss of the right to (1) become an elector, (2) hold/run for public office, (3) perform jury duty, (4) legally own a firearm; and (4) have a professional license.<sup>30</sup>

## **PROCEDURE**

To begin this study, a list of all the circuit judges in the State of Illinois was compiled and approximately fifty judges were randomly selected through an online generator as the study pool. A hypothetical situation was then drafted that incorporated

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<sup>30</sup> Reinhart, Christopher. "Consequences of a Felony Conviction." *Consequences of a Felony Conviction*. CGA, n.d. Web. 17 Dec. 2015. <<https://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-r-0333.htm>>.

the facts of the hypothetical case examined in the previous section. Based on the conflicting rulings of the *Bradford* and *McDaniels* cases, there are disputable points regarding the application of convicting the offender of burglary under a statutory definition of a crime. After reviewing the fact pattern, the judges were then questioned as to whether or not s/he would convict the defendant of burglary. Following the fact pattern and the questions regarding the judge's subsequent decision, a brief background survey was attached which addressed the personal qualities of the judges (i.e. gender, experience, age, relationship status, etc.). The documents were then mailed to the randomly selected judges with directions and a self-addressed, postage-paid envelope for the documents to be returned. A three-week period was allotted for the judges to return the documents.

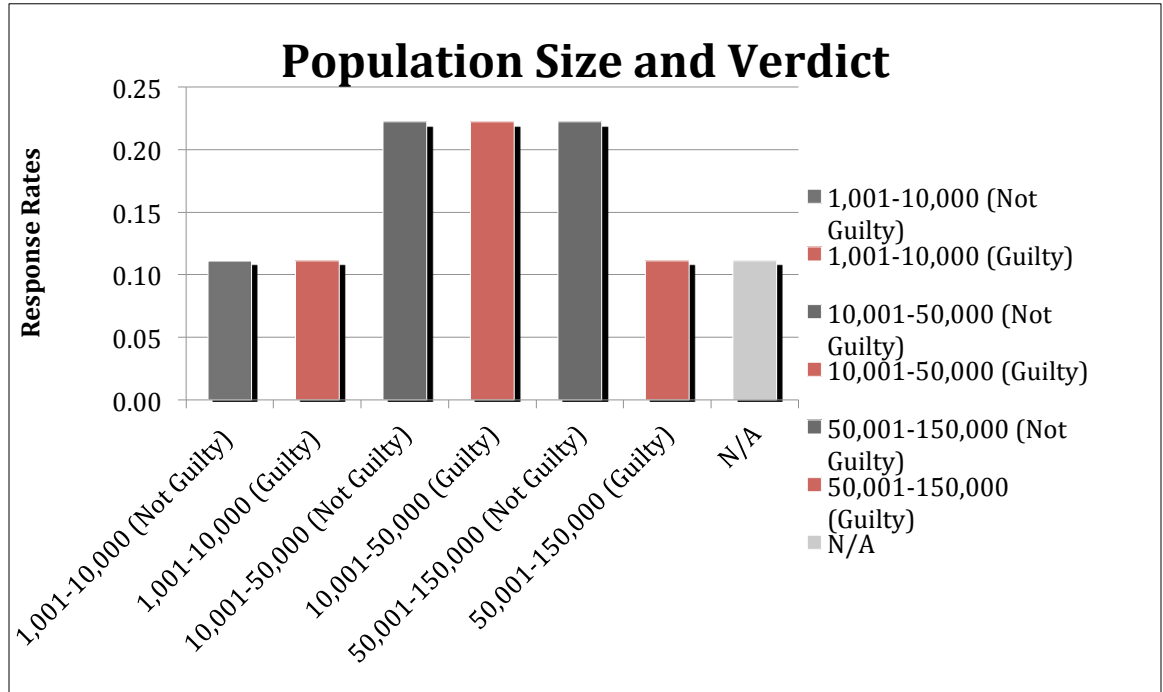
## **RESULTS AND ANALYSIS**

The amount of responses received were approximately 18% of the total amount of individuals contacted, correlating with the expected response rate for a random external survey (on average random external surveys have a response rate of 10-15%<sup>31</sup>). The portion of individuals who responded to the survey were mostly white men, excluding two women and one Hispanic male, with variances in age and experience as a judge. As indicated in the surveys, the ages of the judges fell within two groups: (1) between 41 and 60 years of age, and (2) between 61 and 80 years of age. More variance was present within the amount of judicial experience reported, for the levels of judicial experience were recorded as existing between the following spans of years: 0-5 years, 6-10 years, 11-15 years, 16-20 years, and 26-30 years. All of the responding individuals were

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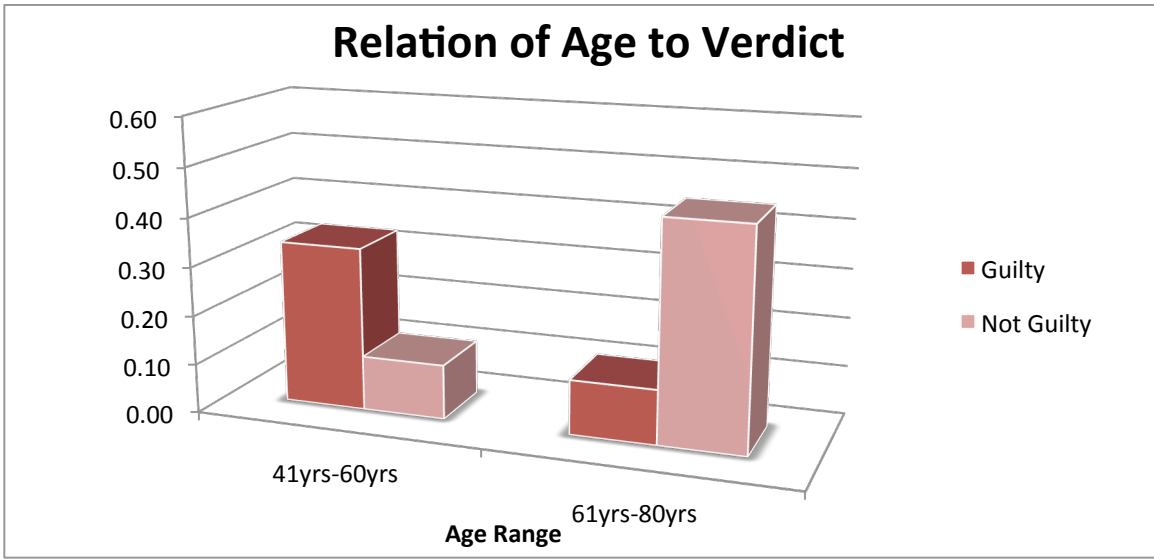
<sup>31</sup> Fryrear, Andrea. "Survey Response Rates." *SurveyGizmo*. N.p., 27 July 2015. Web. 17 Dec. 2015. <<https://www.surveygizmo.com/survey-blog/survey-response-rates/>>.

married, and almost all had children, save one individual. The population sizes of the towns the survey pool was raised in did not appear to correlate with the decision the judges made, as shown in the chart below.



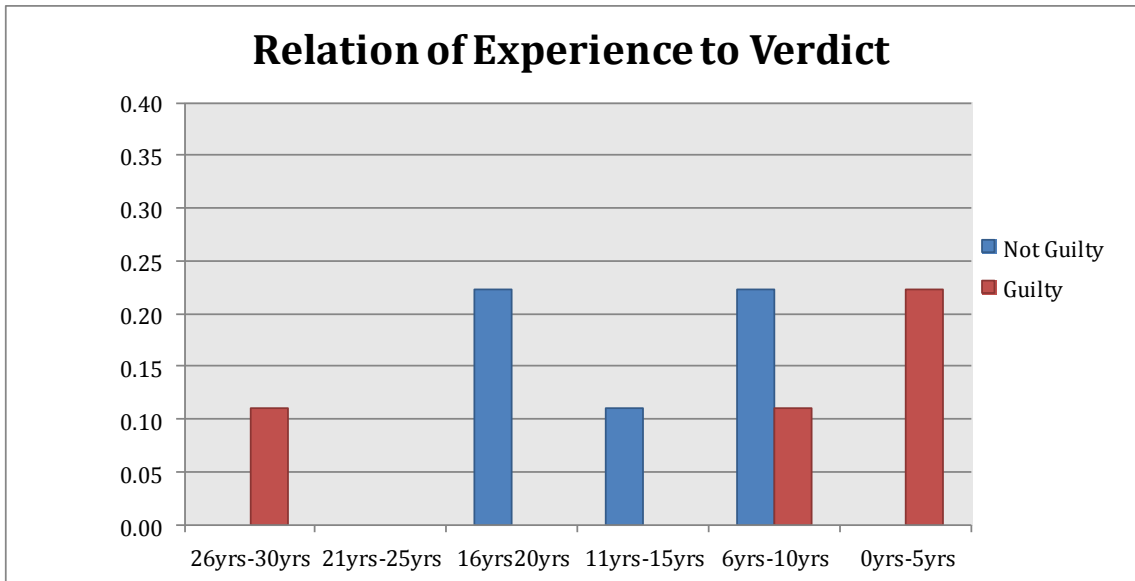
**Figure 1:** As shown, there is no true correlation between the population size and the verdict in the matter.

Nevertheless, a correlation appeared between the age of the judge and the decision made—the younger judges in the age range of 40 to 60 years were more likely to convict the Defendant of burglary than the older judges in the age range of 61 to 80 years of age:



**Figure 2:** Within the figure above, the correlation between verdict and age is displayed. (Note, however, the outlier response from a judge who did not choose a verdict is not included.)

Similar to the correlation between the ages of the judges and their subsequent verdicts, a correlation existed between the amount (in years) of job experience of the judges and the verdict they chose. The correlation was almost similar in that the more years of experience a judge had, the more likely the judge was going to determine the Defendant not guilty. The correlation is depicted in the chart below:



**Figure 3:** Within the figure above, the correlation between judicial experience and verdict is displayed. (Note, however, the outlier response from a judge who did not choose a verdict is not included.)



As the guilty/non-guilty determination seemed to correlate with the age and experience of the judges, the rationale processes accompanying the verdict seemed to correlate as well with these characteristics. The written responses that affirmed the guilt of the hypothetical perpetrator appeared to be laden with more reasoning than the responses of those who denied that the perpetrator was guilty of burglary. The longer length of reasoning within those that convicted Guevara with burglary did not necessarily mean their arguments were more thorough in the analysis of the fact pattern. In fact, the reasoning appeared to be more indicative of an illogical justification than a description of rationale.

When interpreting the analysis of the judges, regardless if they deemed Guevara guilty or not-guilty, the rules of law—though not the only factors when passing judgment—are important to note and are displayed in the chart below with the corresponding sentence:

<b>RETAIL THEFT (CLASS A MISDEMEANOR)</b>	720 ILCS 5/16-25(a)(1)	A person commits retail theft when he or she knowingly: takes possession of, carries away, transfers or causes to be carried away or transferred any merchandise displayed, held, stored or offered for sale in a retail mercantile establish with the intention of retaining such merchandise or with the intention of depriving the merchant permanently of the possession, use or benefit of such merchandise without paying the full retail value of such merchandise.
SENTENCING	730 ILCS 5/5-4.5-55(a)	For a Class A Misdemeanor: the sentence of imprisonment shall be a determinate sentence of less than one year.
<b>BURGLARY (CLASS 2 FELONY)</b>	720 ILCS 5/19-1(a)	A person commits burglary when without authority he or she knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle, railroad car, or any part thereof, with intent to commit therein a felony or theft.
SENTENCING	730 ILCS 5/5-4.5-35(a)	For a Class 2 felony: The sentence of imprisonment shall be a determinate sentence of not less than 3 years and not more than 7 years.

All of the judges who convicted Guevara stated that, as the *Bradford* court determined, the actions he committed fall into the legal definition of a burglary; some

examples of the rationale include that “the fact pattern is technically a burglary, and the state can charge it as a burglary” and “rules of law say he is guilty of burglary...his conduct fits the burglary definition.” Though the judges state that Guevara committed what they deem to technically have been a burglary, almost all of the judges had some type of contradiction within their rationale. Their reasoning stated that: “I have never seen a prosecutor charge it in such a case...I might think the charge is overkill” and that it is “closer to retail theft than burglary.” Within these assertions, there is a stretch of judgment—as there was within the *Bradford* case. In *Bradford*, the definitions of entry and authority were weighed against residential burglaries—burglary matters in private premises, instead of those in public premises:

“We find further support for our conclusion in *People v. Dillavou*, 2011 IL App (2d) 091194, 958 N.E.2d 1118. In *Dillavou*, the defendant was convicted of residential burglary for stealing a camera from inside a house where he was performing work. The Second District Appellate Court rejected the defendant’s argument that the residential burglary statute requires proof that a defendant’s authority to be in the home of another person was expressly withdrawn before he may be convicted of residential burglary by unlawfully remaining. Id. ¶ 16, 958 N.E.2d 1118. *The court noted the clear and unambiguous language of the residential burglary statute indicated a defendant is guilty of residential burglary if, while inside a house in which he has the authority to be, he forms the intent to commit a theft therein.* Id. ¶ 12, 958 N.E.2d 1118. Thus, according to the court in *Dillavou*, a defendant’s authority to be in another person’s home “is implicitly withdrawn when the defendant forms the intent to commit a crime.” (Emphasis in original.) Id. ¶ 16, 958 N.E.2d 1118. ¶ 30 Burglary is a lesser-included offense of residential burglary (see 720 ILCS 5/19-3(a) (West 2010)). Extending the *Dillavou* court’s analysis vis-à-vis the residential burglary statute to the burglary statute here, a defendant’s authority to be in a public building is implicitly withdrawn once the defendant develops an intent to commit a felony or theft. In other words, the authority to remain in a public building, or any part of the public building, extends only to persons who remain in the building for a purpose consistent with the reason the building is open.<sup>32</sup>” (emphasis added)

However, the court duly noted that the *Weaver* court referenced in their rationale utilizes a statement that undermines their entire conclusion “A criminal intent formulated

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<sup>32</sup> *People v. Bradford* at ¶ 29.

after a lawful entry will not satisfy the [burglary] statute.<sup>33</sup>” In both instances, judges overseeing the matters depend on the text, on a portion of *dikē*’ for their rationale; however, when the text is applied to the instance of the crime, an analytical eye finds fault within the connection. In *Bradford*, the court relied largely on the “clear and unambiguous language” of the *residential burglary* statute to bridge the ambiguity within the burglary statute regarding the authority to enter a building.<sup>34</sup> This text of the unconnected, residential burglary statute seemingly overrides what was said in previous cases, as in *Weaver*, about how intent does not change one’s status of entry.

Though there was a sense of unnamed doubt within their rationale, it is interesting that the judges in both the *Bradford* case and the hypothetical continue to assert that the defendants should be convicted with class 2 felonies. The question arises as to why a judge would decide to convict someone with a felony, when they themselves admit that such charge is “overkill”?

The textual ineffectual reasoning within the rationale of those convicting the individual is shown—it is to the text that Guevara’s actions are compared to instead of their context within society. Simply put, the focus is on a portion of the scales of justice instead of the whole. As the outlier judge, whose rationale did not pose doubt as the other’s did, stated: “carrying the plastic bags into the store and using them for no other reason but to put the shoes in would indicate an intent to steal prior to entry;” hence, the intent element was hypothetically met. The two elements of burglary ([1]an unauthorized individual entering a store and [2] an individual committing theft with intent) were (what they deem to be) fulfilled. The effect of such a conviction did not seem to be weighed

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<sup>33</sup> *Id* at ¶ 31.

<sup>34</sup> *Id* at ¶ 29.

against the impact such would have in society, against a family, even though the presence of one was acknowledged--“stealing children’s shoes suggests acting out of perceived need.” Though the charge would indeed be an overcharge, as three out of four of the judge’s state, it seems as though said charge did not outweigh the ruling of the text. Why does the authority of the text seemingly outweigh the context of an individual’s life? Wouldn’t these judges have discretion to not convict the defendant of burglary—particularly, when the application of the text itself is somewhat ambiguous?

This type of reasoning relies upon itself as a truth within itself—it is the text of the law that becomes the fundamental truth to which situations are applied and judged. In the case of the burglary matter, the individuals were not presumed innocent of burglary outright. They, along with their actions, were taken separately and put into an equation—the prongs of a test—within which the output would be the crime of burglary if the actions were malleable into filling the criterion of such. The perspective these judges used show that it is not feasible the text could be inapplicable or even vague in terms of applying such to a situation. The irrationality of this perspective is shown in that situations become the malleable ambiguity, the “x” factor, subject to change within an equation.

Just as *dikē*’ was conceived for a purpose, for the means to which its mother—*themis*—serves, society created laws to manage and aid society itself. However, ineffectual textual reading of statutes has led to the value of adhering to the law not for the sake upholding societal values but merely for the sake of upholding a black and white reading of the law. Accordingly, punishment instead of rehabilitation becomes the ultimate outcome of justice. Is it not better to undercharge an individual whose crime was

not to the degree of another's—as “it is better that ten guilty persons escape, than that one innocent suffer.”<sup>35</sup>?

One of the more poignant sentences within the rationale of a judge who convicted Guevara that is in tune with this matter is: “The truth is, the case is overcharged and should be a misdemeanor *but that is not up to the court.*” It is a tactic of prosecutors to overcharge cases to incite individuals to give in to plea bargains that are more in tune with the charge one should realistically be charged with.<sup>36</sup> Regardless, even though a case is “overcharged,” it is up to the discretion and professional opinion of the judge to discern between the facts and decide beyond a reasonable doubt that an individual is guilty of a crime that is charged. The judge acknowledged that the facts of the matter align with the textual *definition* of a burglary, but an element of doubt existed as to whether the text aligned with the *intent* of the law. The callous application of applying the definition of burglary in this hypothetical case is a perfect example of the problem of solely judging cases based a superficial reading of the text without considering the purpose of the law.

As the *McDaniel* court noted:

“The State knows that [defendant] was truly ‘stealing’, rather than committing a burglary. The defense acknowledged at trial that shoplifting was what [defendant] was doing. \*\*\* In reality, the approach taken by the State in this prosecution, and in this appeal, will serve to convert every retail theft into a burglary.

Ordinary burglary is a Class 2 felony punishable by three to seven years in prison. 720 ILCS 5/19-1 (West 2012) [*sic*]; 730 ILCS 5/5-4.5-35(a) (West 2012) [*sic*]. Standard retail theft of the type occurring in this case (theft not from the person, under \$500) is a Class A misdemeanor punishable by up to 364 days in jail. 720 ILCS 5/16-1(b)(1) (West 2012) [*sic*]; 730 ILCS 5/5-4.5-55(a) (West 2012) [*sic*]. The difference in potential penalties is severe. Whether or not it is good public policy to convert potentially all retail theft prosecutions into more serious ones for burglary is a matter of speculation. Whether good or bad though, that decision does not rest with the police, prosecutors, or even the

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<sup>35</sup> "Words of Justice." *Words of Justice*. Harvard Law School Library, n.d. Web. 18 Dec. 2015. <<http://library.law.harvard.edu/justicequotes/explore-the-room/south-4/>>.

<sup>36</sup> "Why Prosecutors Overcharge." National Center for Due Process, 12 July 2015. Web. 17 Dec. 2015. <<https://nationalcdp.org/why-prosecutors-overcharge/>>.

courts of this state. The legislature defines what actions constitute a crime and how the crime should be punished. *People v. Lee*, 167 Ill. 2d 140, 145 (1995). If the police and prosecutors of Illinois believe that harsher penalties should be available to punish retail theft, they should put the issue before the legislature and seek change in the laws through legislative amendment. This [c]ourt should not assist the prosecution in creating a *de facto* amendment to the criminal law by reading ‘remaining within’ so broadly that common shoplifting becomes burglary.<sup>37</sup>”

The judges whose judicial decision was not to convict Guevara with burglary did not have as much rationale besides that the fact pattern did not fit the charge. Most interpreted the matter in that Guevara entered the store with authority. One judge, akin to what was stated in the *McDaniel* case, stated that he has never seen a matter, similar to Guevara’s, that had been charged in this way—implying the absurdity of such a charge in said situation, and the implications it would cause on society if similar situations were charged as felonies. In all, it is vague and unclear whether other factors, such as the amount of the item that was taken, the authority, or intent, were subsequent factors in their end decisions.

One judge in particular outlined the legal reasoning behind why he chose what he did: he used the public as a backdrop within which to judge the case, stating that “the public is invited to enter the store” and further that said “permission was not revoked.” He used the context of society to judge Guevara’s place within society—following a perspective like a Roman Era perspective to influence his decision, for it is from society and for society where laws arise. Just as the *McDaniel* court posited, it is against the backdrop of society that judicial decisions need to be determined—the effect of these decisions needs to be weighed on the greater scale of *thesmos*. The judge did not solely

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<sup>37</sup> *People v. McDaniel* at ¶ 34.

weigh Guevara's decision against the text of the law that applied to the charge, but to the greater picture that encompassed such.

The outlier response was the judge who essentially recused himself, stating that he did not review cases within the scope of the research presented. Not only did said judge take the time to send such response back, but the judge knowingly reported his lack of knowledge toward the subject that would hypothetically be presided over in this matter. The circuit judges were notably chosen at random—the areas of law they regularly overheard was not a factor within the selection. Though their presiding areas of law were not a question within the background survey, such would have been an interesting point to include. When presiding over Guevara's case, did any of the other judges reflect upon their experience and use such within their determinations? The fact that this judge recused himself is impactful because in the interests of the proper administration of justice he morally determined that he was not suited to overhear the matter. That is the moral perspective highlighted and juxtaposed to the text-dependent perspective.

The correlation between age, experience, and the verdict of a judge seems to signify differing types of thought between younger, less experienced judges, and those judges who are superior in age and experience with the law. The facts that those who were more likely to convict Guevara wanted to do so based on the text of the law and that they were also younger, perhaps suggests change in the administration of education in law schools. Another possibility for the noticeable correlation between age/experience and verdict is that with increasing experience and age, judges gain a wizened

perspective composed of *themis* that extends beyond the words of the statute, beyond *dikē*'.



**Figure 4:** Within the figure above, the correlation between age, judicial experience and verdict is displayed. (Note, however, the outlier response from a judge who did not choose a verdict is not included.)

Does it take experience and age in the judicial perspective for judges to have a more moral laden perspective? Does it take such perspective to understand the shortcomings of relying only on text when determining the fate of someone against the law? Though open ended questions, perhaps a larger sample size of a more isolated portion (focusing only on judges who have had experience in criminal court) would bring results more supportive of a definitive answer to such questions. If such were performed, this data could be extrapolated into a perspective that could be used to aid “new” judges from focusing too much on the text of the law (as indicated within this study) equalizing opportunities of those who stand before judges, awaiting their judgment.

## CONCLUSION



In sum, the perspectives shown within the judicial rationale of the judges hypothetically overseeing the case of Guevara displays the divide within the evolution of legal thought. This divide is not only evident through the results collected, but also within recent judicial decisions that display the textual-focused and moralistic dichotomy of perspectives within legal thought. Through analyzing the history of law, it is evident that the moral perspective in applying justice has, to some judges, become secondary to adhering to the textual underpinnings of statutes.

The scales of justice that were once a union between *dikē*' and *themis*, have disintegrated into mutually exclusive pieces for some judges – with their sole focus on the parts that compose *dikē*'. As the law became less focused on the end of improving the individual and society, it became hyper-focused on these means by which the law is carried out – text, punishments, and oversight. . In a matter of time, the means were mistaken for the end for which law served, resulting in the textual-based reasoning evidenced in the hypothetical conviction of Guevara and the actual conviction of the *Bradford* Defendant.

An analysis of the textual-based logic displays outright contradiction to the beginnings of law and the purpose for which law served. As displayed within the hypothetical case and the *Bradford* case, a situation within this perspective becomes something to be manipulated to fit into the rigid definitions of a statute. The context of the situation, the backdrop of society, and the implications of a judgment do not hold weight within the *Bradford* perspective. Within the *McDaniel* perspective, the moral implication of the decision to convict or to not convict is evidenced, accompanied by a critical analysis of the applicability of the burglary statute to the particular fact pattern.

The results wrought from this study, accompanied by the conflicting judicial decisions within Illinois, demand for a recalibration of the justice system in the form of further study and analysis of the perspectives of jurisprudence, for it is truly within the hands of judges that justice plays out as they are the *dikaspoloi* --‘handlers of *dikē*’. In deconstructing the perspectives that have emerged historically within the field of law and applying such to modern-day jurisprudence, perhaps the dichotomy that has emerged may be bridged with a perspective that is more multi-faceted and empathetic to both personhood and the public. The scales of justice can be reassembled yet again be held by *Dike* for the purpose of *Themis*.