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Criminology, Criminal Justice, Law & Society (***CCJLS***), formerly *Western Criminology Review* (*WCR*), is the official journal of the Western Society of Criminology. This peer-reviewed journal builds on the mission of its predecessor by promoting understanding of the causes of crime; the methods used to prevent and control crime; the institutions, principles, and actors involved in the apprehension, prosecution, punishment, and reintegration of offenders; and the legal and political framework under which the justice system and its primary actors operate. Historical and contemporary perspectives are encouraged, as are diverse theoretical and methodological approaches. ***CCJLS*** publishes theoretical and empirical research on criminology, criminal justice, and criminal law and society; practice-oriented papers (including those addressing teaching/pedagogical issues); essays and commentary on crime, law, and justice policy; replies and comments to articles previously published in ***CCJLS*** or *WCR*; book and film reviews; and scholarly article reviews.

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VOLUME 19, ISSUE 2 – AUGUST 2018

TABLE OF CONTENTS

Feature Articles

VOLUME 19, ISSUE 2, PAGES 1–23 (2018)

Criminology, Criminal Justice, Law & Society

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A Meta-Analysis of Suspect Demographic Characteristics and American Police Officer Search Decisions

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A B S T R A C T A N D A R T I C L E I N F O R M A T I O N

The last summary of the research on police search decisions was completed by the National Research Council in 2004, and the present study uses the meta-analytic method to update the previous summaries of research on police search behavior. In doing so, two objectives are attempted: 1) identify which suspect characteristics impact decisions to search citizens and 2) assess the impact of methodological characteristics on research results. Of the suspect characteristics that have been analyzed, suspect race and gender appear to have the greatest impact on search decisions. However, it also appears that the methodological characteristics of research studies have a strong influence on findings. The findings of this analysis point to a primary concern for future research on search decision-making. Analyses of search behavior must standardize operationalization of the dependent variable before research in this area can be adequately synthesized.

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The decision for a police officer to search citizens during traffic and pedestrian stops has received a considerable amount of attention. This interest has been generated from the significant impact this decision can have on a citizen's life and the possibility that officers search certain types of people more frequently than others. Searching a citizen involves a serious deprivation of that person's liberties. The person's freedom of movement is restricted, and the state infringes upon a person's

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reasonable expectation of privacy in the pursuit of criminal contraband. Particularly considering the severe impacts that a search can have on a person, it is all the more troubling that there has been evidence that certain groups may be more likely to be subject to law enforcement searches than others.

Since the American Bar Foundation's "discovery" of discretion, however, it has long been recognized that legal criteria are not the only possible determinants of an officer's decision to conduct a search (Walker, 1993). In particular, many investigations have been undertaken to determine if racial minorities are more likely to be searched than White citizens (Antonovic & Knight, 2009; Engel & Calnon, 2004; Engel, Klahm, & Tillyer, 2010; Fallik & Novak, 2012; Lundman, 2004; Paoline & Terrill, 2005; Pickerill, Mosher, & Pratt, 2008; Rydberg & Terrill, 2010; Schafer, Carter, Katz-Bannister, & Wells, 2006; Tillyer, Klahm, & Engel, 2012). Police officer decisions are particularly important in this context because discovering that officers target racial minorities at higher rates may help to explain the racial disparities that exist throughout the criminal justice system. As the actors who hold the discretion to decide which people enter the system and which cases are resolved informally, police officer decisions impact the entire system. If certain types of people are treated differently by police officers, then this may be a significant contribution to the racial disparities that exist throughout the rest of the system. Generally, narrative reviews of academic research have reached this very conclusion; minority citizens are more likely to be searched than White citizens (Engel & Johnson, 2006).

The impact of suspect race, sex, and age on officer decision making has been explored in many studies. Narrative literature reviews have examined the research on these relationships (National Research Council, 2004; Riksheim & Chermak, 1993; Sherman, 1980). Most recently, the National Research Council (2004) assembled the foremost scholars to examine police research. As part of this project, these scholars examined the research around the impact of suspect race, sex, and age on police decision making. Regarding the impact of race, they found that "the evidence is mixed.… Results appear to be highly contingent on the measure of police practice, other influences that are taken into account, and the time and location context of the study" (National Research Council, 2004, p. 122-123). These scholars were not able to make a definitive decision on whether race impacts police decision making. Regarding the impact of gender, they found that "the committee is unable to draw firm conclusions about the existence of widespread bias in police practices linked to gender bias" (National Research Council, 2004, p. 121). The committee did not address the impact of suspect age in their discussion of extra-legal factors despite the presence of suspect age as a correlate in police decision making studies (see Lytle, 2014, for example).

In the 14 years since the publishing of the National Research Council's findings, no study has assessed the impact of race, gender, and age on officer search decisions across studies of police decision making. This is a fairly long drought given the previous patterns since 1980. Previously, about every 11 to 13 years, this research has been reexamined. Arrest has been assessed regarding these same correlates (see Kochel, Wilson, & Mastrofski, 2011; Lytle, 2014), and use of force has also been recently examined (see Bolger, 2015). Search decisions, however, have not been examined. Given the crucial position that search decisions pose, as they are often the first formal decision that officers make to begin the criminal justice process for citizens, it is imperative that this research be assessed so that definitive judgements may be made.

The purpose of the present study is to identify the impact of suspect characteristic on search decisions and to assess the impact of methodological characteristics of studies on research findings. To accomplish this, a meta-analysis was conducted on 17 analyses from 25 articles. This method allows for the objective assessment of the magnitude and directionality of each correlate across research studies.

Literature Review

Suspect demographic characteristics were some of the first variables examined as possible extra-legal influences on police officer decision making. A substantial amount of research effort has been placed into discerning whether who a person is impacts his or her chances of receiving different levels of police surveillance and/or coercion. Of these characteristics, race, gender, and age have received the most scholarly attention at this point. Most research that has examined the impact of a suspect's race on the likelihood of being searched has concluded that minority drivers are more likely to be searched (Engel & Calnon, 2004; Engel & Johnson, 2006; Lundman, 2004; Moon & Corley, 2007; Ridgeway, 2006; Roh & Robinson, 2009; Rojek et al., 2004; Withrow, 2004). The research on the relationship between race and likelihood of searches has not been unanimous (e.g., Tillyer and colleagues, 2012), reported that Black and Hispanic drivers were not more likely to be subjected to discretionary searches); however, this significant relationship has been found across numerous data sources and settings. For

example, Engel and Johnson (2006) reported that minority drivers were searched at higher rates by state highway police agencies. Similarly, Moon and Corley (2007) found the same results in a university setting.

Most studies on police search behavior have also included a measurement of suspect gender. Moreover, not only is the empirical evidence for this particular variable prevalent, it is almost universal in agreement. Almost every study has found that male suspects are more likely to be searched than female suspects (Engel & Calnon, 2004; Fallik & Novak, 2012; Farrell, McDevitt, Cronin, & Pierce, 2003; Lovrich, Gaffney, Mosher, Pratt, & Pickerill, 2005; Lundman, 2004; Paoline & Terrill, 2005; Pickerill et al., 2009; Rydberg & Terrill, 2010; Schafer et al., 2006; Tillyer et al., 2012). The sole contrarian is Antonovics & Knight's (2009) analysis of data from the Boston Police department, which produced a null result.

Suspect age is another well researched variable in studies of police search behavior. The predominant conclusion for studies that include this variable is that younger suspects are more likely to be searched than older suspects (Engel & Calnon, 2004; Farrell et al., 2003; Lovrich et al., 2005; Lundman, 2004; Paoline & Terrill, 2005; Pickerill et al., 2009; Rydberg & Terrill, 2010). These findings are not universal, however, as a few authors have reported mixed findings (Antonovics & Knight, 2009; Fallik & Novak, 2012; Tillyer et al., 2012). For example, Tillyer and colleagues (2012) find the negative correlation in only one of four analytic models.

The remaining variables that have been used to describe the suspect in an encounter have received substantially less attention than race, gender, and age, but some meaningful patterns can still be seen with this limited research. For suspect demeanor, the lack of interest may be due to the nonsignificant correlations produced by the few studies that have included demeanor as a predictor variable. None of the three studies that include the variable found a significant correlation between suspect demeanor and search decisions (Paoline & Terrill, 2004; Rydberg & Terrill, 2010; Tillyer et al., 2012). In contrast, the research on the effects of social class and intoxication has produced consistent evidence of the effect of these variables in opposite directions. Lower class citizens are searched more frequently than middle and upper class citizens (Engel & Calnon, 2004; Lundman, 2004; Paoline & Terrill, 2005), and suspects who show signs of intoxication are more likely to be searched (Paoline & Terrill, 2004; Rydberg & Terrill, 2010). Unfortunately, due to the limited number of studies in this area, it is not practical to meta-analyze these relationships. As a result, we restrict our analysis to race, gender, and age. However, if more studies were to become available, it would be a significant contribution to policing research to examine these relationships meta-analytically.

Prior Narrative Reviews

Three major works have attempted to draw conclusions regarding the influence of suspect race and other variables (National Research Council, 2004; Riksheim & Chermak, 1993; Sherman, 1980). These narrative literature reviews have identified four major categories of variables that may impact police officer decisions: encounter, suspect, officer, and community characteristics. Collectively, they have provided updates to the status of the research on police search decision-making; however, the most recent review was conducted over a decade ago. The preceding literature review contained an updated narrative review, and the following meta-analysis attempts to improve upon previous methods of research synthesis. Further, the National Research Council's examination could not definitively claim whether suspect demographics played a role in officer search decisions (National Research Council 2004). The National Research Council found conflicting evidence with regard to the influence of race, gender, and age on search decisions. This most recent review that was conducted by the foremost experts in the field of policing research failed to come to a definitive conclusion regarding the impacts of these potentially discriminatory relationships.

A meta-analysis represents an improvement over the narrative review approach by improving upon three methodological weaknesses. First, narrative literature reviews rely upon the expertise of the authors to adequately synthesize studies so that methodologically stronger studies are given greater weight, and the magnitude of the findings are considered rather than simply counting significant findings against nonsignificant findings. There is no guarantee that when reviewing the same works two different authors would arrive at the same conclusion. When presented with contradictory conclusions, consumers of academic research will be left without the ability to know which conclusion to trust. Additionally, the narrative method does not allow for replication by other researchers.

Second, the previous literature reviews have grouped all investigatory behaviors, such as stops and searches, into a single section. The required legal criteria for the two behaviors are different. An officer must be able to establish probable cause before he or she may search a citizen, but an officer needs only reasonable suspicion to stop a citizen. Combining these two different actions is not appropriate.

Third, previous literature reviews have treated all studies equally. This is problematic as certain studies are methodologically superior to others. For example, the Maryland Scale rates studies on their quality and shows that not all studies are created equally (Sherman et al., 1997). Moreover, Eck (2006) argues that when a number of small-*n* quasi-experimental case studies are taken together, they demonstrate the overall effectiveness of a particular intervention. These studies should not be completely discarded, but these small *n* case studies are not on the same level of methodological rigor as a longitudinal randomized controlled trial. Failing to account for variation in methodological quality could lead to potentially biased results and misjudgments on the part of the researcher.

One approach that improves upon these methodological weaknesses is meta-analysis. While not without its own limitations, a meta-analysis is designed to correct for the previously mentioned problems of subjectivity and study equality. Additionally, there is a growing body of literature that uses meta-analyses to examine criminal justice decision making (Bolger, 2015; Bontrager, Barrick, & Stupi, 2013; Daly & Bordt, 1995; Kochel et al., 2011; Lytle, 2014; Mitchell, 2005; Pratt, 1998; Wu & Spohn, 2009). Meta-analyses have explored the influence of defendant race (see Mitchell, 2005; Pratt, 1998), gender (see Bontrager et al., 2013; Daly & Bordt, 1995), and age on sentencing (Wu & Spohn, 2009). These same issues have been explored at the police stage as well. Bolger (2015) examined correlates of police use of force, Kochel and colleagues (2011) examined the influence of race on arrest, and Lytle (2014) examined the influence of race, gender, age, and ethnicity on the decision to arrest.

Method

The present study uses a meta-analytic method to assess the strength of the correlations between a variety of variables and the decision by a police officer to search a suspect. This particular method was selected because it minimizes the influence of researcher bias in comparison to the narrative review methods, and it also allows studies that analyze larger samples to receive greater weight in the estimation of the influence of the various correlates.

Sample and Selection Criteria

A search of the literature was conducted for every analysis on police search decision-making between 1960 and 2017. This lower bound of the search date range is due to the development of community policing and the general historic developments seen in American policing as a result of the civil rights movement. To ensure that every possible analysis was included, the literature search was conducted in multiple phases. First, multiple online databases were searched using the following key words: (police OR law enforcement OR officer) AND (search). The databases searched included Academic Search Complete, Academic Search Premier, Criminal Justice Abstracts, Proquest Criminal Justice, Proquest Dissertation and Theses, Proquest Research Library, Psychology and Behavioral Sciences Collection, Psyc INFO, Psyc INFO Historic, Soc Index, and Social Sciences Citation Index. The selection of these particular databases follows previous meta-analyses on criminal justice actor decision-making (Bolger, 2015; Kochel et al. 2011; Lytle, 2014; Mitchell, 2005)

These initial search results were reduced by removing duplicate studies and eliminating articles with abstracts that clearly did not describe a study of police search behavior. Articles were removed due to any of the following criteria: 1) the article described a case study, 2) the article did not provide quantitative data, 3) the article described a study on subjects who were not police officers, and/or 4) the article described a study that used an outcome measure other than search.

Second, the reference lists of the narrative literature reviews of search decision making (National Research Council, 2004; Sherman, 1980; Riksheim & Chermak, 1993) were also reviewed for any possible articles that were not identified by the online database search. Furthermore, the reference lists of those studies that were included in the sample through the database search were also reviewed for the possible identification of additional studies.

Third, in an attempt to ensure that all unpublished research on search decision making was included, recent programs from the national conventions of the American Society of Criminology and the Academy of Criminal Justice Sciences were searched for authors who had presented research on search behavior. These authors were contacted with a request for any unpublished research.

Exclusion criteria. Following the collection of every possible study, some studies were filtered out of the analysis if they did not meet additional criteria. This step was taken to ensure that the included studies were as comparable as possible. The first of these criteria was that the sample under study must have only included American local police officers. Law enforcement officials in other organizations, such as military police and federal agents, serve populations and societal roles that are significantly different from local police agencies. Local police of

other countries are also under different legal restrictions that could impact search decisions.

Second, the dependent variable had to be the search decision only. Other behaviors that could fall into the broader category of detection behaviors, such as the decision to stop a citizen, were not included. A more thorough discussion of this can be found in the description of the dependent variable. Third, only multivariate tests were included in the analysis. The findings of bivariate analyses of the search decision are far too likely to be misspecified. Research on police decision making generally, and the search decision specifically, now use much more robust research methods. Fourth, and related, the study had to include at least six covariates and needed to include all primary variables of interest, race, sex, and age of the suspect. There is not a set number of covariates required. However, one benefit of using logged odds ratios as an effect size measure is that they can be used with the presence of covariates (Fleiss & Berlin, 2009). We felt that if the study had at least six control variables, then the analysis would have controlled for the majority of potential factors that could possibly confound the relationship between our key independent variables and officer search decisions. It should also be noted that only one study had fewer than 10 covariates.[1]

Fifth, sufficient statistical information must have been reported by each study to allow for an effect size to be calculated. The specific methods used for these transformations were dependent upon the specific information present, but every effort was made to transform the reported data into a useable effect size whenever possible. Still, there were instances when the reported information was not adequate. Sixth, the study must have analyzed data from the micro police-citizen encounter level. Studies that were conducted using other research methods, such as hypothetical vignettes or surveys, were judged to not be comparable. Their inclusion would have contributed to further heterogeneity.

The full list of every study that was collected through the selection criteria is included in the index. Also included in this table is the reason for an article's exclusion, if it was excluded, or the number of analyses of different datasets that a manuscript contributed to this analysis. Overall, 68 manuscripts were identified through the selection criteria, and 17 were deemed eligible for this analysis. From these 17 different manuscripts, 23 analyses of independent effect sizes were included in the final analysis.

Multiple effect sizes from one study. A final consideration regarding the inclusion of studies into this analysis regards the inclusion of multiple analyses of the same dataset. If multiple effect sizes are included from the same dataset, this violates the independence assumption of meta-analysis. In essence, if two effect sizes are included from the same dataset, this is tantamount to counting the same effect size twice. To address this issue, the "best" effect size was selected for this analysis (e.g., see Kochel et al., 2011; Lytle, 2014; Mitchell, 2005). The decision criteria for these selections were as follows: First, the effect size produced from the study with the highest methodological quality index was selected. Second, the effect size created from the larger sample size was selected. Third, the effect size with a greater inverse of variance was selected. Fourth, the effect size produced from an analysis with a greater number of control variables was selected. In a few instances, pairs of effects sizes produced from analyses of the same dataset were identical in all four of these criteria. In these instances, analyses were run using both effect sizes, but the differences between the results of these analyses were not meaningful.

Missing data. Not all studies include all of the necessary information to be included in a meta-analysis. This is an unfortunate but an all too common occurrence when trying to conduct a meta-analysis. In particular, a handful of studies that were included in the present analysis did not report standard errors. There is no uniform method for handling missing data, but options for addressing missing standard errors include excluding studies with missing standard errors or multiple imputation (Pigott, 2009). Given that our sample size for any particular analysis was 23, and five of those did not report standard errors, we felt that excluding studies would shrink the sample size and was not appropriate. Therefore, we opted to use multiple imputation to estimate the value of standard errors. It should also be noted that we attempted to contact the authors of studies that had missing standard errors to retrieve those missing values.

Dependent Variable

Previous literature reviews have included the decision to search a suspect under the broader category of detection behaviors. Any behaviors that officers engage in to detect criminal activity and establish a rationale to intervene with a citizen would be included in this category (Riksheim & Chermak, 1993). This method treats the decision to stop a citizen for questioning the same as the decision to search a person or his or her vehicle. While the two decisions typically have the same goal, to detect criminal conduct, they are conceptually distinct due to a greater amount of coercion used against a citizen in a search. Since the officer must be able to justify a search under a greater amount of scrutiny should his or her decision be questioned, it is possible that legal factors may play a larger role in the decision to

search than the decision to stop a citizen. If these behaviors are not kept separate, then the analysis would wander dangerously close to the apples and oranges critique, and the criticism of combining different outcome measures would be valid. To avoid such a pitfall, only the decision to search a suspect was included in this analysis.

A second type of "search" study was also not included in the present study because it is dissimilar from the behavior of interest. Hit rate studies investigate whether certain groups are searched at higher rates than others and examine whether those searches of different groups result in different rates of successful searches. In particular, these studies have primarily focused on investigating whether citizens of different racial classifications are more likely to be found with criminal contraband. While certainly an important contribution to the policing literature, the purpose of this research is not the same, so these studies were not included.

The studies of interest for this analysis do not, however, measure search in a uniform way. Some studies measure search by differentiating between discretionary searches and mandatory searches. A mandatory search involves the search of a citizen that is mandated by agency policy. A search incident to arrest, for example, requires that an officer search a person during a lawful arrest to protect all other personnel from weapons, needles, and so forth when they come in contact with that citizen during further processing (such as during the booking process). On the other hand, a discretionary search is the search of a citizen when the officer has probable cause to conduct a search.

There have been multiple approaches to operationalizing these distinct search decisions into a measure of search behavior. One approach is to code mandatory searches as "no search" (Tillyer, 2014; Tillyer et al., 2012). Another approach is to code mandatory searches as a separate outcome (Fallik & Novak, 2012; Lovrich et al., 2005; Pickerill et al., 2008). Other studies, however, do not recognize the difference between these types of searches, and it must be assumed that mandatory searches are coded the same as discretionary searches (Antonovics & Knight, 2009; Briggs, 2009; Engel & Calnon, 2004; Farrell et al., 2003; Lundman, 2004; Paoline & Terrill, 2005; Rydberg & Terrill, 2010; Schafer et al., 2006). To attempt to learn whether variation in measurement impacts research findings, a moderating variable is included in this analysis.

Independent Variables

The predictor variables that were included in this analysis were those that were identified by previous narrative literature reviews and outlined in the literature review of this paper. These include suspect race, gender, and age. Because measures of race have traditionally been focused on Black individuals, this is also how we focused our operationalization of race. Studies needed to operationalize the race variable to either focus exclusively on Black individuals, or Black individuals needed to be reasonably included. A common variation on this is to dichotomize race as White and non-White. This was the case with two effect sizes in our analysis. We included these effect sizes because the authors made mention that Black individuals were included in this measure. The other variation was that race was operationalized as Black/Hispanic. We also included this effect size because Hispanic individuals are often treated similarly to Black individuals in the criminal justice system (Lytle, 2014). In both variations, the intent is to capture a concept that is similar to a Black versus White comparison.

Gender was measured as male and female across all effect sizes. Age had the most variation, but all of the operationalizations were tapping into the same construct. Age was operationalized primarily as a continuous variable. A number of studies coded age as a dichotomy of young and all other ages or used a series of dichotomies relative to a reference category. Finally, one study coded age as an ordinal variable. In each case, studies were coded so that positive values were associated with older individuals. This approach is similar to how Mitchell (2005) used multiple operationalizations for sentencing. In his meta-analysis of sentencing decisions, he had five different measures of sentencing, and they were coded in such a way that higher values indicated more punitive sanctions. We have applied the same principle to fit our age variable.

Moderating Variables

To identify the influence of methodological characteristics, a number of methodological variables are included in a moderating variable analysis. These variables include the presence of other variables in the analyses and the methods of operationalization of the independent and dependent variables. Understanding how methodological features of studies impact research findings informs future research about what concerns should be considered during primary research collection to allow for future research synthesis to be enhanced.

Variables were included in the analysis to determine whether characteristics describing the author of the study, qualities of the data collection and analysis, the inclusion of different control variables, and measurement of the independent and dependent variables impacted research findings. The variables that describe the author and study

characteristics include the discipline of the primary author, when the data for the study was initially collected, when the article was originally published, the sponsoring organization and funding, the publication outlet, where the study was conducted, the type of statistical analysis, and the total sample size. Methodological characteristics included the type of measurement used for the independent variable, whether the searches were of drivers and/or pedestrians, whether the searches included were discretionary and/or nondiscretionary, and measures of methodological quality. These moderating variables are consistent with other recent meta-analyses of criminal justice decision making (see Bolger, 2015; Kochel et al. 2011; Lytle, 2014; Mitchell, 2005).

Data Analysis

Inter-rater reliability. To assess the consistency of the coding used during data collection, inter-rater reliability statistics were calculated. This process was conducted in two stages. First, the accept/reject decisions were evaluated. Both coders reported perfect agreement on the subset of analyses chosen for the analysis. Second, for studies that were included in the analysis, the number of agreements was divided by the number of comparisons, which produced an agreement rate of 0.92. This level of agreement indicates that the coding procedures were valid and that there was a high amount of agreement between the interrater coder and the primary coder. This level of agreement is consistent with recent meta-analyses (e.g., see Bolger, 2015; Kochel et al., 2011; Lytle, 2014).

Effect size calculation. The particular effect size chosen for this analysis was a logged odds ratio. This measure has a number of advantages over other alternative effect size estimates (Lytle, 2014). First, no other effect size estimate is reported as frequently by search studies. Second, logged odds ratios can be interpreted in terms of significance and direction (Hanushek & Jackson, 1977). Third, the estimate can be transformed from other test statistics (Lipsey & Wilson, 2001). Fourth, the presence or absence of covariates does not impact the ability to make inferences about logged odds ratios (Fleiss & Berlin, 2009). Fifth, interpretation can be eased through transforming the logged odds ratio into an odds ratio. This estimate represents an increase in the dependent variable given an increase in the independent variable (Bolger, 2015).

Following the calculation of each logged odds ratio, each estimate was weighted to give greater influence to estimates generated from larger samples. Since estimates drawn from larger samples are assumed to be more representative of the population, the effect sizes were weighted by taking the product of the effect size and the inverse of the variance (Lipsey & Wilson, 2001).

These weighted estimates were then combined into mean effect sizes for each proposed correlate of search decisions. These estimates were derived from taking the quotient of the sum of the weighted effect sizes and the sum of the inverse variance for each weighted effect size estimate (Lipsey & Wilson, 2001). Effect sizes were calculated using random effects modeling. Differences between studies were assumed, a priori, to be because of genuine study differences (Lytle, 2014).[2] A 95% confidence interval was then created around each mean effect size to determine whether the estimate was significantly different from zero. The mean effect size is significantly different from zero at the .05 level if the confidence interval does not contain zero.

Effect size homogeneity. A potential limitation with a meta-analysis is that the studies analyzed are drawn from different populations. When the population is homogenous, the only variation of effect sizes is due to sampling error (Lipsey & Wilson, 2001). However, when the population is heterogeneous, characteristics of the studies could also contribute to variation in effect sizes. To estimate this possibility, the Q statistic was calculated. A significant Q statistic indicates that the population from which the studies were drawn is heterogeneous. In this case, Lipsey and Wilson (2001) recommend the use of random effects modeling when generating weighted mean effect sizes.

Publication bias. Since many of the mean effect sizes were produced from a relatively small number of effect sizes, it is necessary to assess the potential influence of publication bias. There are multiple methods to assess publication bias. Two that are commonly used are the fail-safe N and the trim and fill method (Lipsey & Wilson, 2001; Sutton, 2009). Recently, Peters, Sutton, Jones, Abrams, and Rushton (2007) found that the trim and fill method can produce inaccurate estimates of the publication bias when there is a great amount of between study heterogeneity. In other words, significant Q statistic values can cause the trim and fill method to be less accurate. Therefore, we estimate the influence of the publication bias with both the trim and fill method and the fail-safe N.

The trim and fill method imputes effect sizes of possible missing studies under a funnel plot of the standard errors and effect sizes estimates of the included studies and uses these imputed effect sizes to calculate an adjusted mean effect size (Duval & Tweedie, 2000). The trim and fill macros in STATA were used to run random effects models for these

analyses. The fail-safe *N* estimates the number of studies with opposite findings needed to render the significant effect size non-significant (Lipsey & Wilson, 2001). Higher values of the fail-safe *N* indicate a larger number of studies are needed to render the effect size non-significant.

Moderating variable analyses. Following the mean effect size calculations, those mean effect sizes based on the largest number of effect sizes were dissected through moderating variable analyses. In particular, these analyses were conducted to determine whether the methodological characteristics of studies impacted findings. They were limited, however, to those variables that were found to be correlated with search in the main effect size analysis and had a sufficient number of effects sizes to allow those effect sizes to adequately vary across the categories of the moderating variables.[3] Dissecting a mean effect size based on a handful of studies is not informative. Additionally, moderating variables were excluded if the effect sizes did not adequately fall into the different categories of the variable.

Results

Publication Characteristics

The final sample included 16 unique datasets on police officer search decisions that analyzed 25 independent effect sizes.[4] All of these studies were produced by authors affiliated with an academic institution, and the majority of analyses resulted from studies that were published in academic journals (68%). These investigations were also relatively recent endeavors; all of the studies were published since the turn of the century, and the majority of analyses were based upon data that had been collected during the same timeframe. The sample is more diverse, however, in terms of geographic region. Data based upon police departments located in the Northeast, Midwest, Southwest, the Pacific/Northwest, and multisite locations all constituted a sizable portion of the sample.

Table 1: Descriptive Statistics of Study Characteristics

Variable	Percent/Mean
Document Type	
Journal Article	68%
Professional Report	28%
Dissertation	4%
Year of Data Collection	
1990's	16%
2000's	84%
Year of Publication	
2000's	72%
2010's	28%
Discipline of Primary Author	
Criminal Justice	76%
Sociology	4%
Political Science	16%
Other	4%
Geographic Region	
Northeast	20%
Midwest	20%
Southwest	16%
Pacific/Northwest	16%
Mixed	16%

Not Reported	12%
Sample Size	1016388.96
Search Measure	
Dichotomy	92%
Ordinal Scale	8%
Type of Discretion of Searches	
Discretionary	16%
Nondiscretionary	16%
Mixed	40%
Not reported	28%
Methodological Assessment	
Theoretical rationale for variables	44%
Description of sample	100%
Representative sample	88%
Description of methods	100%
Adequate response rate	52%
Reliability reported for primary outcome	0%
Adequate reliability for primary outcome	0%
Systematic social observation	8%
Total Methodological Index	4.12

Sample Characteristics

The studies that were included in the analysis were measured for methodological quality, and most of the included studies ranked toward the lower end of the methodology index. Of the methodological characteristics used to create this index, an adequate description of the sample (100%), an adequate description of the methods (100%), and a representative sample (88%) were the most common. A theoretical explanation for the included variables (44%) and a reporting of an adequate response rates (52%) were also occasionally present. Only a small portion of the analyses (8%), however, were conducted using the systematic social observation method. Of the methodological designs used to capture police decision making behavior, systematic social observation is generally considered one of the most sound. Furthermore, no studies reported the reliability of the included search measure, and as such did not report whether the measure of the dependent variable was adequately reliable.

Table 2: Descriptive Statistics of Included Variables

Variable	Percent/Mean
Offense Seriousness	20%
Presence of Evidence	12%
Weapon	8%
Suspect Resistance	12%
Arrest	20%
Conflict at the Scene	4%
Number of Officers	4%
Number of Citizens	20%

Type of Police Intervention	16%
Location of the Incident	4%
Vehicle Condition	8%
Officer Suspicion	8%
Suspect Race	100%
Suspect Gender	100%
Suspect Age	100%
Suspect Demeanor	16%
Suspect Social Class	12%
Suspect Intoxication	4%
Officer Race	40%
Officer Gender	32%
Officer Experience	24%
Officer Education	12%
Community Economics	12%
Community Crime Rate	4%
Community Racial Demographics	16%

Q Statistic

The Q statistic assesses whether the effect sizes produced are from a homogeneous population. This statistic was calculated for each variable, and each analysis was found to have a heterogeneous population. This finding is not surprising given that our analyses encompassed police departments from across the United States. However, because of this result, when determining our weighted mean effect size for each relationship, we used random effects modeling.

Effect Sizes

Of the independent variables, race and gender were found to be correlated with search decisions. Specifically, minority individuals and males were 1.63 and 2.51 times[5] more likely to be searched respectively. Age of a suspect does not appear to influence officer search decisions.

Table 3: Mean Effect Sizes

Variable	*k*	Mean *ES*	95% *CI* Min	95% *CI* Max	*Q*
Suspect Race*	23	0.49	0.34	.65	735.44*
Suspect Gender*	23	0.82	0.67	.97	1249.04*
Suspect Age	23	-0.004	-0.02	0.01	5824.78*

* sig $p < 0.05$

Publication Bias

The results of the trim-and-fill analysis are presented in table 4. The results from the original analysis are consistent for suspect race and gender. The effect sizes for both race and gender remained significant under the trim and fill analysis as they were under the original analysis. In both cases, the *Q* statistic was significant indicating that random effects modeling should be used when processing results.

Table 4: Summary of Adjusted Significant Correlates using Trim and Fill Method

Variable	*k*	Mean *ES*	95% *CI* Min	95% *CI* Max	*Q*
Suspect Race*	20	0.38	0.20	0.56	550.71*
Suspect Gender*	26	0.483	0.330	0.64	1065.72*

* sig $p < 0.05$

Fail-safe *N* values are presented in Table 5. The fail-safe *N* statistic determines the number of null findings that would be needed to render the significant mean effect size non-significant. Our results indicate that it would take 60 and 137 studies to render our significant effect sizes for race and gender non-significant. While there is not an agreed upon value for what constitutes a satisfactory fail-safe *N* value, it seems unlikely that someone could find 60 or 137 unique studies that all have contrary findings.

Table 5: Fail-Safe *N*

Variable	Fail-Safe *N*
Race	60
Gender	137

Publication Bias

The results of the moderating variable analysis are presented in Tables 6 and 7. This analysis is meant to explore the data in more detail. This analysis dissects the overall mean effect size across various moderating variables such as characteristics of the study, the inclusion of particular variables, methodological quality, or the way in which the dependent variable is operationalized.

The effect sizes of these variables were dissected across those moderating variables with sufficient variation so that investigation of the differences across types of analyses would be informative. When all, or a vast majority, of studies fell within one category of a moderating variable, that moderating variable was not included in the analysis. These decision criteria resulted in a number of moderating variables being included in the analysis. The moderators that were selected were ones in which at least 20% of the sample was dispersed across categories. In other words, at least five effect sizes had to be in a category other than the modal category. The following publication characteristics were included as moderating variables: the type of document, whether the effect size was generated from published or unpublished sources, the decade that the manuscript was published, and the geographic region from which the data were collected. Methodological characteristics were also used as moderating variables: whether the searches were of drivers and/or pedestrians, whether the searches were discretionary and/or nondiscretionary, whether a theoretical framework was used, whether an adequate response rate was reported, whether the reliability of the outcome was adequately assessed by the original authors, and the total methodological score.. A number of potential control variables were also included from the list of encounter, suspect, officer, and community characteristics.

Through this analysis, it becomes apparent that the impact of suspect race on search decisions varies on a number of factors. First, the effect size was much larger in studies that were not published, but the mean effect size was significant in both published and unpublished studies. Second, there is some variation in the impact of race depending on where the study was conducted. Race was not significant in studies conducted in the Midwest or in studies where the region was not identified. The impact of race was strongest in the Southwest and the Northeast. Race was also significantly related to searches in the Pacific Northwest and in multi-region studies. Third, the only correlate that appeared to moderate the impact of race was seriousness of the offense. Studies that included a measure of seriousness produced a mean effect size that was smaller than those that did not include a measure of seriousness. However, seriousness did not mitigate the impact of race. Race remained significant despite the reduction in the effect size.

The relationship between race and search decisions may also be related to the quality of the study. Studies that had a theoretical explanation for the variables that were included produced a larger mean effect size than those that did not. Studies with

higher response rates and those that assessed the reliability of their outcome measure produced larger effect sizes on average. Also, we found that studies that were of the highest methodological quality showed the largest relationship between race and search. Finally, how search was operationalized appears to be related to effect sizes. Studies that included both vehicle and person searches produced the largest effect sizes. Additionally, studies that examined discretionary searches produced the largest effect sizes on average.

Table 6: Race Moderating Variable Analysis

Moderator	*k*	Mean *ES*	95% *CI* Min	95% *CI* Max
Document Type				
Journal	15	0.33	0.11	0.55
Professional Report	7	0.78	0.47	1.09
Thesis/Dissertation	1	0.66	-0.16	1.48
Publishing Format				
Published	17	0.34	0.16	0.53
Not Published	6	0.88	0.59	1.17
Publication Decade				
2000	16	0.66	0.48	0.84
2010	7	0.10	-0.17	0.38
Geographic Region				
Northeast	5	0.77	0.37	0.81
Midwest	5	0.08	-0.33	1.17
Southwest	4	0.77	0.34	0.48
Pacific Northwest	4	0.63	0.18	1.20
Mixed	2	0.22	-0.43	0.87
Unknown	3	0.30	-0.20	0.81
Seriousness Recorded				
No	18	0.52	0.36	0.69
Yes	5	0.39	0.07	0.71
Arrest Recorded				
No	20	0.51	0.34	0.68
Yes	3	0.38	-0.07	0.84
Bystanders Recorded				
No	18	0.45	0.27	0.63
Yes	5	0.64	0.29	0.99
Officer Race Recorded				
No	13	0.48	0.27	0.69
Yes	10	0.51	0.27	0.76
Officer Sex Recorded				
No	15	0.46	0.27	0.66
Yes	8	0.55	0.28	0.82

Officer Experience Recorded				
No	17	0.47	0.28	0.65
Yes	6	0.58	0.26	0.90
Methodological Quality				
Variable Explanation				
No	14	0.33	0.12	0.54
Yes	9	0.73	0.48	0.98
Response Rate Above 60%				
No	11	0.37	0.13	0.60
Yes	12	0.60	0.38	0.82
Outcome Reliability Adequate				
No	18	0.35	0.18	0.52
Yes	5	0.98	0.67	1.29
Methods Assessment Total Score				
3	13	0.33	0.11	0.55
4	2	0.50	-0.07	1.05
5	2	0.40	-0.14	0.94
6	6	0.85	0.54	1.16
Search Operationalization				
Search Type				
Exclusively Vehicle	11	0.33	0.09	0.57
Mixed	12	0.62	0.41	0.84
Discretion Type				
Discretionary	10	0.66	0.43	0.89
Nondiscretionary	5	0.39	0.07	0.71
Mixed	8	0.35	0.09	0.61

With regard to the relationship between sex and search decisions, there were some similarities to the results of the race moderator analysis but also some unique findings. First, the finding regarding differences in published versus unpublished studies is seen in sex moderating analysis. Unpublished studies produced a larger mean effect size than published, but the difference in magnitude of the effect size was smaller. Sex was significantly related to search across all geographic regions, but it was largest in studies that used multiple regions and the Northeast. The presence of a measure of seriousness of the offense appears to mitigate the impact of sex on search decisions. However, again, we find that the impact of sex is not eliminated when factoring in seriousness measures.

Table 7: Sex Moderating Variable Analysis

Moderator	*k*	Mean *ES*	95% *CI* Min	95% *CI* Max
Document Type				
Journal	15	0.86	0.64	1.08
Professional Report	7	0.79	0.50	1.08
Thesis/Dissertation	1	0.65	-0.12	1.42

Publishing Format				
Published	17	0.76	0.61	0.91
Not Published	6	0.95	0.72	1.18
Publication Decade				
2000	16	0.77	0.60	0.95
2010	7	0.95	0.67	1.24
Geographic Region				
Northeast	5	1.02	0.79	1.24
Midwest	5	0.81	0.58	1.05
Southwest	4	0.91	0.70	1.13
Pacific Northwest	4	0.48	0.27	0.69
Mixed	2	0.48	0.26	0.69
Unknown	3	0.77	0.51	1.04
Seriousness Recorded				
No	18	0.89	0.78	1.01
Yes	5	0.51	0.31	0.71
Arrest Recorded				
No	20	0.82	0.65	0.98
Yes	3	0.88	0.45	1.31
Bystanders Recorded				
No	18	0.76	0.60	0.91
Yes	5	1.04	0.75	1.34
Officer Race Recorded				
No	13	0.86	0.69	1.04
Yes	10	0.76	0.54	0.97
Officer Sex Recorded				
No	15	0.89	0.72	1.06
Yes	8	0.70	0.47	0.92
Officer Experience Recorded				
No	17	0.85	0.67	1.04
Yes	6	0.74	0.43	1.06
Methodological Quality				
Variable Explanation				
No	14	0.75	0.58	0.92
Yes	9	0.91	0.71	1.10
Response Rate Above 60%				
No	11	0.67	0.50	0.85
Yes	12	0.93	0.77	1.09
Outcome Reliability Adequate				
No	18	0.79	0.63	0.94

Yes	5	0.91	0.64	1.18
Methods Assessment Total Score				
3	13	0.71	0.53	0.88
4	2	0.95	0.52	1.38
5	2	1.15	0.72	1.59
6	6	0.88	0.65	1.11
Search Operationalization				
Search Type				
Exclusively Vehicle	11	0.74	0.55	0.92
Mixed	12	0.88	0.71	1.04
Discretion Type				
Discretionary	10	0.87	0.75	1.00
Nondiscretionary	5	0.56	0.37	0.75
Mixed	8	0.86	0.70	1.02

The relationship between suspect sex and search decisions may also be related to methodological quality. The relationship between sex and search decisions was larger in studies with a theoretical explanation for why variables were included, those with higher response rates, and those that considered the reliability of their outcome measure. Like the moderator analysis of race, higher methodological scores generally produced larger effect sizes on average compared to lower quality studies (a methods score of 3). Finally, the type of search conducted did not produce as much variation in the sex analysis. Additionally, studies that examined both discretionary and non-discretionary searches produced the largest mean effect size followed closely by studies that examined discretionary searches.

Limitations

This analysis only investigates the impact of main-effects on the search decisions. Researchers in other areas of police decision making have demonstrated that certain independent variables are stronger correlates of arrest decisions when interacting with other independent variables (Engel, Sobol, & Worden, 2000). Unfortunately, because of the nature of meta-analysis, we could not examine interaction effects.

A second limitation is true of all meta-analyses, and that is the garbage-in/garbage-out problem. Since this is a meta-analysis and is based off of other studies, this analysis is only as good as the studies that are considered. To account for this issue, we conducted a moderator analysis to examine variation in studies based on methodological quality. Results indicated that relationships were significant at the most rigorous studies. Despite this limitation, this work contributes to the search decision making literature by demonstrating the improvements that must be made by future primary research projects.

Discussion

Of the three variables, suspect race and gender appear to influence search decisions, while the age of a suspect appears to be of little consequence. However, these findings should be interpreted with caution because of the relatively small sample size of 23 unique effect sizes. Nonetheless, this finding that race and gender have a significant impact on search decisions are important when considered in the context of a Post-Ferguson police landscape. Police departments must be cognizant of potential bias in the decision making of their officers, whether conscious or unconscious and take steps to correct officer behavior and reduce bias and disparities in the criminal justice system.

These findings are bolstered, however, because they are generally in agreement with previous meta-analyses of criminal justice decision making. First, we found that the main effect of gender was significant and consistent with other decision points that have been examined. Men appear to be more likely to be searched, arrested, have force used against them, and to be sentenced more harshly (Bolger, 2015; Bontrager et al., 2013; Daly & Bordt, 1995; Lytle, 2014). This finding is less surprising given that men commit more crime than women.

Second, we found that age was not significantly related to search decisions. This is also consistent

with previous examinations of age on decision making (Bolger, 2015; Lytle, 2014; Wu & Spohn, 2009). While this finding is consistent with previous meta-analyses, it is somewhat surprising. Younger individuals may be less likely to know what rights they are guaranteed, and therefore, they may be more likely to consent to a search. However, that was not what we found in this study. Our findings indicated that younger individuals were not more or less likely to be searched than older individuals.

Third, we found that race was significantly related to search decisions. Our study marks the fourth meta-analysis of police decision making, and the fifth amongst criminal justice meta-analyses, that has indicated that there is potentially inequitable treatment based on race (Bolger, 2015; Kochel et al., 2011; Lytle, 2014; Mitchell, 2005). It appears that when the results of this study are placed in the context of the larger meta-analysis literature, suspect race has a pervasive influence in criminal justice decision making. This seems to be the case especially in policing. Black individuals appear to be more likely to be searched, arrested, and have force used against them based on our available evidence.

We also found that the relationship between race and search decisions may be contingent on several factors. The impact of race appears to be somewhat contingent on geographic region. Minority individuals in the Southwest appear to be more likely to be searched than White individuals. This is important because it is potential evidence that the influence of race on officer search decisions may depend on where the search is being conducted. A related issue is search success rates or hit rates. According to Engel and Calnon (2004), officers may have a perception that minority individuals are more likely to be carrying contraband and are thus searched more often because of the potential presence of contraband. However, when they examined a national survey, they found that minority individuals were not more likely to be carrying contraband. Moreover, Engel, Cherkauskas, Smith, Lytle, and Moore (2009) found that minority individuals who were searched actually produced lower hit rates across the state of Arizona. Hit rates were significantly higher for White individuals, but Black individuals were significantly more likely to be searched. While this study did not examine hit rates, the field of policing research could be improved by examining studies of hit rates meta-analytically.

Another important finding from our moderator analysis is that measures of seriousness mitigated but did not remove the relationships between race and search and sex and search. This is important because it is further evidence of possible bias and discrimination in the criminal justice system, but it also reinforces the strong influence of legal factors in comparison to extra-legal factors. If the criminal justice system was truly solely driven by concerns of public safety where the most serious offenders were the ones that were most likely to be punished, then the impact of race and gender would ideally be eliminated by the presence of measures of seriousness of the offense. However, that is not what we found in this study. Instead, the impact of race and gender on search decisions persisted. There is the possibility, however, that contextual factors similar to seriousness of the offense (i.e., an officer's identification of deception by the suspect) may further mitigate the influence of extra-legal, demographic factors (e.g., suspect race and sex), and further research on search decisions should continue to ensure that any potential contextual factors be identified and evaluated.

Finally, the type of search appears to be relevant to the impact of race and gender on search decisions. We found that studies that examined discretionary searches produced larger effect sizes. This is an unsurprising but important finding. The influence of suspect race upon officer discretion (whether that be from conscious racial prejudice, subconscious cognitive processes, or some other source) appears to only exist when officers exercise their discretion. When departmental policy or legal statute mandates officer behavior, officers appear to obey those regulations for the most part. While it is impossible to create a policy directing appropriate officer responses to every single possible type of scenario because of the many, many different situations in which officers find themselves, this finding indicates that effective direction leadership from administration and legislation can have its intended effect. There is still much work to be done, however, in eliminating demographic disparities in the American criminal justice system.

While it is important to identify the cause of the racial disparities that are present throughout the criminal justice system, effective policy responses can only be designed once the source(s) of these disparities has/have been identified. Policies that target racial disparities in police searches based upon the evidence of studies with weaker methodological designs may be ineffective simply because few search decisions may be impacted by the race of the suspect. If the true root cause of racial disparities originates earlier in the criminal justice system (or from societal causes outside of the system), then these policies may be targeting the symptom of the problem, not the cause, a failure that academics have bemoaned when discussing the failings of traditional police crime-control tactics and the promise of

community policing, problem-oriented policing, and intelligence-led policing.

Conclusion

The primary conclusion of this article is not, however, that more research is necessary. Instead, future research that continues to build upon this body of literature needs to be aware of a potential pitfall that has been identified by this analysis that will prevent adequate research synthesis in the future. The second interpretation of the presence of heterogeneity is that the combined effect sizes are based on analyses that use dissimilar measures of the dependent variable (Pratt, 2002), and there is also evidence that this may be an issue for the search literature. The significance of both suspect race and suspect gender are dependent upon the measure of search used in the analysis. When measures of search fail to account for the difference between mandatory and discretionary searches, males and minority citizens are more likely to be searched, but not when these different searches are kept separate. Again, this demonstrates that research studies that include more robust methods appear to report a lack of an impact of suspect race.

More robust measures of search make the distinction between mandatory and discretionary searches because the two situations represent two different scenarios that should be influenced by different factors. A search incident to arrest, for example, represents a nondiscretionary search that should be heavily influenced by encounter characteristics, such as the arrest variable, and organizational policies. Conversely, a consent search is presumed to be more likely prompted by lesser evidence, such as an officer's hunch. In these situations, extra-legal factors, such as suspect race, may have greater influence. As researchers continue to build upon the police officer search decision making body of literature, it is important to standardize measures of the dependent variable. If this is not resolved, the literature on search decision making will quickly find itself in the same situation as the research on use of force, where the behaviors included in a measure of force vary from one study to the next.

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Appendix A

Studies Included in the Meta-Analysis

Article	Number of Analyses Included in the Meta-Analysis
Antonovics & Knight (2009)	1
Briggs (2007)	1
Carroll & Gonzalez (2014)	1
Engel & Calnon (2004)	1
Engel, Calnon, Liu, & Johnson (2004)	1
Engel et al. (2005)	1
Engel, Tillyer, Cherkauskas (2007)	1
Engel, Chekauskas, & Smith (2008)	1
Engel et al. (2009)	1
Fallik & Novak (2012)	3
Farrell et al. (2003)	1
Lovrich et al. (2005)	2
Lundman (2004)	1
Paoline & Terrill (2005)	1
Pickerill et al. (2009)	2
Rydberg & Terrill (2010)	1
Schafer et al. (2006)	3
Tillyer (2014)	1
Tillyer et al. (2012)	1

Appendix B

Studies Excluded from the Meta-Analysis

Article	Reason for Exclusion
Anonymous (1971)	3
Anwar & Fang (2006)	2
Bateman (2008)	3
Becker (2004)	2
Bland, Miller, & Quinton (2000a)	3
Bland, Miller, & Quinton (2000b)	3
Boorah (2001)	2
Boorah (2011)	2
Bowling & Phillips (2007)	3
Dominitz & Knowles (2007)	3
Ellis (2010)	3
Engel & Johnson (2006)	3
Engel & Tillyer (2008)	3
Farrell et al. (2004)	3
Gizzi (2011)	3
Gould & Mastrofski (2004)	2
Greenleaf, Skogan, & Lurigio (2008)	2
Havis & Best (2001)	2
Hernandez-Murillo & Knowles (2004)	2
Iowa Division of Criminal & Juvenile Justice Planning (2003)	3
Johnson (2006)	3
Kagehiro (1999)	1
Knowles, Persico, & Todd (1999)	2
Knowles, Persico, & Todd (2001)	2
Lichtenberg (2004)	1
Miller (2000)	3
Miller et al. (2000)	3
Miller, Quinton, & Bland (2002)	3
MP Authority (2004)	3
OÇonnor (2014)	3
Persico & Todd (2004)	2
Petrocelli, Piquero, & Smith (2003)	5
Qureshi (2010)	3
Reid Howie Associates, Ltd. (2001)	3
Ridgeway (2007)	3
Sanga (2014)	2

Schaub, Lyons, & Wagers (2000)	2
Smith & Hester (2010)	3
Smith & Petrocelli (2001)	2
Sollund (2006)	3
Souris (1966)	1
Smith et al. (2003)	3
Steward & Totman (2005)	3
Stone & Pettigrew (2000)	1
Texas Department of Public Safety (2011)	3
Tillyer & Klahm (2011)	2
Verniero & Zoubek (1999)	3
Warren & Tomaskovic-Devey (2009)	2
Wortley & Owusu-Bempah (2011)	1
Reason for Exclusion: 1: Research not conducted between 1960 and 2013 2: Sample under study not patrol officers 3: Search decision was not the dependent variable 4: Does not report data to compute ES (r) 5: Bivariate analysis 6: Not micro-level data	

Endnotes

[1] Analyses were performed with and without this one low number of covariates study. The results were not changed.

[2] All calculations for main effects and moderating variables were conducted using macros from David Wilson using STATA 13 and publically available at http://mason.gmu.edu/~dwilsonb/ma.html.

[3] Additionally, a moderator analysis was only performed on race and sex. Age could not be included in the moderator analysis because of the very small standard errors, which transformed into inverse variances became too large for STATA to handle, and elimination of particular cases would have resulted in shrinking the sample size to the point where it would not be effective to perform the moderator analysis.

[4] Each of the manuscripts that contributed an analysis for the present analysis is included in the reference list and is indicated with an asterisk.

[5] These values are the natural antilog of the effect size values presented in Table 3. Taking the natural antilog transforms the logged odds ratio into the more interpretable odds ratio.

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Pretrial Detention and the Decision to Impose Bail in Southern California

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ABSTRACT AND ARTICLE INFORMATION

This paper examines pretrial judicial decision making, specifically the decision to impose bail. At the bail hearing, judges must decide whether defendants should be detained, released on their own recognizance, or granted bail. In California, judges make this decision largely by relying on County Bail Schedules, which are similar to sentencing guidelines and prioritize the seriousness of the charged offense when determining bail. Being detained pretrial, either due to the denial of bail or the inability to afford the bail that was set has negative implications, including the fact that defendants who are denied bail are more likely to plead guilty, and upon conviction are more likely to be sentenced to incarceration. They also face longer sentences than defendants who are released pending trial. Despite the significant impact of the bail decision, there is limited research on the decision, including on the factors judges consider in making the bail decision and how judges make the decision. This paper presents the results of a qualitative study of bail hearings in two California counties. Relying on court observations and interviews, it finds that bail schedules are the most important factor considered by judges and that bail is usually set without regard to the ability of the defendant to pay.

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The judicial decision to detain the defendant, grant bail, or release the defendant on his or her own recognizance while awaiting trial is one of the earliest and most important decision points in the criminal justice system. In 2016, an estimated 740,700 people were confined within county and city jails (Zeng, 2018), though only 35% of these individuals were serving a sentence of incarceration following a criminal conviction. The remaining two-thirds of jail inmates were detained while awaiting trial, typically because they were unable to pay the bail that was set in their case (Reaves, 2013). Early on, usually at the defendant's first court appearance, a judge must decide whether the defendant will be detained, and if not, whether he or she will be released on his or her own recognizance (i.e., an unconditional form of pretrial release based on a promise to return to court) or released conditionally, subject to certain conditions, generally financial. This is commonly referred to as release on bail (Cohen & Reaves, 2007). The pretrial release decision has two main purposes: to ensure that the defendant appears at trial, and to protect public safety (Howe, 2015).

Pretrial detention has serious consequences, which negatively impact defendants and society. By hindering a defendant's ability to produce evidence and identify witnesses, pretrial incarceration limits the degree to which a defendant may contribute to his or her defense (Allan, Allan, Giles, Drake, & Froyland, 2005; Sacks, Sainato, & Ackerman, 2014). Defendants held in pretrial detention spend less time with their attorneys than defendants who are released within the community. Among those who enter a guilty plea, defendants held in pretrial detention plead earlier than defendants who are released pending trial (Sacks & Ackerman, 2012). In fact, pretrial detention may incentivize early pleading, as plea bargaining is the quickest way to secure release for defendants who are unable to make bail. In a recent study of pretrial detention in Harris County, Texas, Heaton, Mayson, and Stevenson (2017) found that defendants held in pretrial detention were 25% more likely to plead guilty than similarly situated defendants who were released pretrial. Further, several studies have found that individuals held in pretrial detention face higher conviction rates and receive longer sentences than defendants who are released from custody (Free, 2004; Heaton et al., 2017; Oleson, Lowenkamp, Cadigan, VanNostrand, & Wooldridge, 2014; Stevenson, 2017; Tartaro & Sedelmeier, 2009).

The detrimental effects of pretrial detention extend beyond case outcomes, as incarcerated defendants experience damaged familial bonds, diminished employment prospects, and a variety of physical and psychological ailments. Pretrial detention may compound existing financial hardships by limiting eligibility for public benefits and child support and by compromising stable housing due to loss of wages and inability to pay rent (Neal, 2012). As a consequence of their overrepresentation among individuals held in pretrial detention, these adverse consequences disproportionately impact racial and ethnic minorities, as well as the economically disadvantaged (Sacks et al., 2014). Compared to White defendants, people of color are more likely to be denied bail, have bail set higher, and be held in pretrial detention (Demuth, 2003; Demuth & Steffensmeier, 2004). In 2015, the average income of defendants between the ages of 23 and 39 who were unable to pay bail was $15,598 for males and $11,071 for females (Rabuy & Kopf, 2016). Thus, the poor and people of color are particularly vulnerable to the adverse consequences of pretrial detention.

In addition to producing hardships for individual defendants and their families, pretrial detention contributes to the costs and inefficiency of the justice system. Pretrial detention costs taxpayers $38 million per day, or $14 billion per year – an amount that could support the employment of 250,000 elementary school teachers, the provision of free or reduced lunch for 31 million children, or the provision of shelter and services for the country's 50,000 homeless veterans and homelessness prevention services for the 1.4 million veterans who are at risk of becoming homeless (Pretrial Justice Institute, 2017). The costs of pretrial detention far exceed the costs of alternatives to incarceration, including pretrial supervision. For example, in the federal system, it costs only $7.24 per day to keep a defendant under pretrial supervision, whereas, in contrast, it costs $73.03 per day to detain a defendant in jail (Administrative Office of the United States Courts, 2013). Pretrial detention further contributes to the costs and inefficiency of the justice system, as pretrial detention can raise defendants' risk of recidivism (Gupta, Hansman, & Frenchman, 2016; Heaton et al., 2017).

Overreliance on pretrial detention to ensure the appearance of defendants in court is especially evident in the state of California (Tafoya, 2015). Large urban counties in California rely more heavily on pretrial detention than comparably sized counties throughout the rest of the United States. Though the number of defendants who are denied bail in California is similar to the number of defendants who are denied bail throughout the country, only 41% of felony defendants in California's large urban counties actually obtained pretrial release between 2000 and 2009, compared to 68% in the remaining states (Tafoya, 2015). Of the 41% of felony defendants in

California's large urban counties who did obtain pretrial release, nearly all depended upon the financial assistance of a bail bondsman. California's high pretrial detention rates may be attributed to several factors, including the imposition of higher bail amounts in California and the prevalence of defendants whose criminal histories include probation, parole, prior convictions, and failure to appear (Tafoya, 2015). In 2015, the median bail amount in California was $50,000, an amount five times larger than the median bail amount for the rest of the country; not surprisingly, higher bail amounts are associated with lower pretrial release rates (Cohen & Reaves, 2007).

California's relatively high rates of pretrial detention are not associated with lower failure-to-appear rates or non-violent felony arrest rates, compared to the rest of the United States. Moreover, California's rate of multiple failures to appear is 6.6%, compared to 2.9% in the remaining states (Tafoya, 2015). This rate is particularly high among defendants who secure non-financial conditions of release. Though the purpose of pretrial detention is to ensure defendants' appearances in court and preserve the safety of the public, California's pretrial practices have not achieved these ends (Lester, 2005; Tafoya, 2013).

Despite the consequences and prevalence of pretrial detention, both in the state of California and throughout the country, the process by which judges make pretrial decisions remains largely unexplored. The disproportionate impact of pretrial detention on economically disadvantaged, low-risk defendants is well documented, yet little is known about how or whether defendants' ability to pay influences pretrial decision-making. Further, although bail schedules have been criticized by many, it is unclear what role they play in the decision to impose bail. To address this gap in the empirical record, the present study applies a predominantly qualitative methodology to the study of pretrial decision-making in two large California counties. Drawing on observations of arraignment hearings, as well as interviews with selected judges and attorneys, this study seeks to examine how judges make decisions about pretrial release and to identify the factors that influence the imposition of bail in a jurisdiction that utilizes bail schedules.

This article consists of four components. Part I reviews the existing literature and describes the components of pretrial decisions, the manner in which pretrial decisions are made, the structure of the California bail system, and prior research on pretrial decision-making. Part II describes the methodology of this study. It explains how using qualitative methods overcomes some of the limitations of prior research. Drawing on courtroom observations and interviews with judges and attorneys, Part III presents the study's findings. It highlights the rarity of arguments at bail hearings, judges' tendency to defer to the bail schedules, and the consequent lack of consideration given to defendants' financial resources. Part IV addresses the policy implications of these findings and calls into question the fairness of a system that fails to consider a defendant's ability to pay in setting bail.

Literature Review

Pretrial Processing

Pretrial processing consists of two components: the pretrial release decision itself and the pretrial release outcome (e.g., Demuth & Steffensmeier, 2004; Free, 2001; Sacks et al., 2014). Pretrial release decisions are determinations made directly by judges, and pretrial release outcomes are the consequences of such decisions (Demuth, 2003). Examinations of pretrial decision-making must address both elements, as failure to differentiate decisions from outcomes produces a distortion of judicial decision-making and an inaccurate depiction of disparities (Free, 2001).

Pretrial release decisions. Demuth and Steffensmeier (2004) conceptualize pretrial release decisions as consisting of three distinct elements: whether the defendant receives a release option or is denied bail, whether the defendant receives a financial or non-financial condition of pretrial release (i.e., bail type), and the specific amount of money that the defendant must pay as a condition of pretrial release (i.e., bail amount). Defendants charged with a non-homicide crime are generally eligible for some form of pretrial release (Petee, 1994). The most favorable option, release on recognizance, permits defendants to be released unconditionally, without posting a cash bond. Individuals granted release on recognizance must appear at designated court hearings, and failure to appear results in remand into custody for the duration of the pretrial period. Another non-financial condition of release is pretrial supervision, which requires defendants to be monitored by pretrial service agencies. Defendants under pretrial supervision may be required to wear an electronic monitor or submit to testing for drug and alcohol use (Cohen & Reaves, 2007). Bail, which is a conditional promise to return to court, is more common. Bail release is generally conditioned on payment of a cash bond, requiring defendants to pay a specified amount of money as a condition of pretrial release (Turner & Johnson, 2007). There are three types of bail – cash bail, property bail, and surety bonds – and the latter usually requires

defendants to seek assistance from bail bondsmen. Failure to appear in court typically results in forfeiture of the bond and may result in remand into custody. Both financial and non-financial terms of release may be revoked due to non-compliance.

Pretrial release outcomes. Pretrial release outcomes refer to whether the defendant is ultimately released pretrial or held in pretrial detention. Pretrial detention results from either denial of bail or inability to meet the conditions of release (Free, 2001). In this sense, Demuth (2003) conceptualizes pretrial release outcomes as the result of pretrial release decisions. It is crucial to distinguish pretrial release decisions from pretrial release outcomes, as the opportunity for pretrial release (e.g., receiving financial bail or release on recognizance) is necessary, but not sufficient, in securing the outcome of release.

Pretrial Decision-Making

Pretrial decision-making is broadly constrained by the Eighth Amendment to the United States Constitution. Rather than establish an absolute right to bail, the Eighth Amendment prohibits the imposition of *excessive* bail (Howe, 2015; Verilli, 1982; Woodruff, 2013). In the case of *Stack v. Boyle* (1951), the U.S. Supreme Court clarified that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill [the purpose of ensuring the presence of the accused] is 'excessive' under the Eighth Amendment" (p. 5). However, although it appears that the Excessive Bail Clause has been incorporated against the states through the Fourteenth Amendment, there is little jurisprudence in this area (Wiseman, 2011). Recent constitutional attacks on bail have relied on the Equal Protection Clause of the Fourteenth Amendment. For example, in *O'Donnell v. Harris County* (2017), a class of misdemeanor defendants argued that detaining them "before trial solely because of their inability to pay violates the Equal Protection Clause, because defendants with similar histories and risks but with access to money are able to purchase pretrial release" (p. 21). This claim was upheld by the district court and later by the Fifth Circuit Court of Appeals (*O'Donnell v. Harris County*, 2018). Individual states consequently retain substantial discretion in determining the manner in which bail is calculated and imposed (Howe, 2015; Lester, 2005).

Most states have established additional constraints on pretrial decision-making through their constitutions and statutes (National Conference of State Legislatures, 2015). For example, the Florida Constitution is unique in its assertion that defendants are entitled to pretrial release "on reasonable conditions" (Florida Const. art. I, § 14). Additionally, most states have incorporated a right to bail, unless the defendant is charged with a capital offense, and most states have adopted an excessive bail clause like the federal provision. In all states, judges are responsible for the pretrial release decision; however, their discretion may be formally constrained by two decision-making tools: bail schedules and risk assessments.

Bail schedules. Many jurisdictions employ bail schedules to guide judges' pretrial decision-making. Bail schedules outline money bail amounts for specific offenses. Originally, bail schedules were intended to help people who were arrested to get out of jail without having to wait potentially days before appearing in court (Thomas, 1970). Once a bail schedule is approved, the amounts payable for each offense are made available in the jail, and the jail officer is authorized to release the arrestee upon payment. Then, in theory, when the defendant does appear in court, the judge can review all of the relevant factors and make an individualized assessment as to whether the defendant poses a risk to public safety, and if not, whether conditions, including financial conditions, are necessary to ensure his or her appearance at trial. Despite the widespread reliance on bail schedules, particularly in misdemeanor cases, there are a number of problems with their use.

Bail schedules have been criticized for replacing judicial discretion and individualized pretrial release assessments with automated decisions (Carlson, 2011). If judges consistently fail to exercise their discretion to make bail decisions based on all of the statutory factors, the bail schedules become rules rather than guidelines. Further, bail schedules do not take into account either the risk of the defendant to public safety or the likelihood that the defendant will appear in court, and instead use money as the sole criterion for release. Moreover, bail schedules do not account for the ability of the defendant to pay. Indigent and non-dangerous defendants may consequently be unnecessarily detained due to their inability to afford the bail amount prescribed by the bail schedule, whereas more dangerous defendants are able to purchase release without judicial review of their risk of flight. In addition to producing individual hardships for defendants, including loss of residence, employment, and ties to the community, the detention of low-risk defendants contributes to the costs and inefficiency of the legal system. Thus, Carlson (2011) argues that judicial discretion, rather than excessive deference to bail schedules, is necessary in order to ensure fair and efficient case processing.

Evidence-based risk assessment. In some states, pretrial release agencies also influence bail decisions through the application of evidence-based

risk assessments. Pretrial risk refers to the likelihood that a defendant will fail to appear in court if he or she is released from custody pending trial (Bureau of Justice Assistance, 2010). Evidence-based risk assessments are instruments that have been empirically demonstrated to accurately sort defendants into categories based on their likelihood of making all court appearances without being arrested on new charges. Typically, pretrial release agencies are responsible for collecting and presenting information that will guide judges in making pretrial release determinations, as well as providing monitoring and supervisory services for defendants who receive conditional release (Tafoya, 2015).

Studies have repeatedly identified pending felony charges, prior felony convictions, prior violent felony convictions, prior failures to appear, employment status, residence status, primary charge category, and primary charge type as statistically significant predictors of high pretrial risk (Mamalian, 2011; VanNostrand & Keebler, 2009). However, despite the consistency of these results, fewer than 10% of all state and federal jurisdictions in the United States currently utilize evidence-based risk assessments to inform pretrial decision-making (Milgram et al., 2015). The underutilization of these instruments is attributed to the fact that few jurisdictions have the resources needed to interview each defendant prior to arraignment. Evidence-based risk assessments have traditionally required pretrial service agencies to conduct qualitative interviews and evaluations in order to thoroughly assess defendants' flight risk and threat to the community (Tafoya, 2013). However, less expensive, actuarial pretrial risk assessments offer a viable alternative to interview-based assessments (Bechtel, Holsinger, Lowenkamp, & Warren, 2016; Milgram et al., 2015).

Actuarial pretrial risk assessments assign numerical values to risk factors and appraise risk based on the defendant's total point values (Bureau of Justice Assistance, 2010). Empirical studies indicate that these instruments provide more accurate assessments than qualitative or clinical instruments, as the subjective nature of interview-based tools can impede consistent application across multiple jurisdictions (Bechtel et al., 2016; Bureau of Justice Assistance, 2010; Milgram et al., 2015; VanNostrand & Keebler, 2009). One of the more successful quantitative risk assessment instruments is the Arnold Foundation's Public Safety Assessment (Milgram et al., 2015; Schuppe, 2017). The PSA is unique in that its algorithm operates without information derived from interviews (e.g., defendant's address or employment status). The PSA incorporates the aforementioned evidence-based risk factors and has been shown to accurately predict the risk of additional crime, additional violence, and court appearance (Milgram et al., 2015). Over two dozen jurisdictions have adopted the PSA, though it is most widely used in New Jersey (Schuppe, 2017). By reducing the uncertainty surrounding pretrial decision-making, the PSA and other evidence-based risk assessments allow judges to make pretrial decisions based on more objective information.

However, despite the predictive ability of these instruments, actuarial risk assessment is not a magic bullet. Although risk assessment tools are designed to reduce the uncertainty surrounding pretrial decision-making, diminish the influence of biases, and produce less disparate outcomes, some critics argue that they may perpetuate or even exacerbate existing disparities (Harcourt, 2007). Further, judges may not always follow the recommendation of pretrial services agencies. For example, in Harris County, Texas, hearing officers denied a personal bond in 56.3% of cases in which Pretrial Services recommended release on unsecured personal bond with conditions of supervision (*O'Donnell v. Harris County*, 2017, p. 67).

Pretrial Release in California

In California, the state constitution, penal code, and rules of court address eligibility for pretrial release and the factors that may guide pretrial decision-making. Each county must develop a countywide bail schedule, though pretrial decision-making may also be guided by evidence-based risk assessments. Both the bail amounts prescribed by bail schedules and the availability of risk assessment tools depend on the county in which the case is processed.

Eligibility. Section 12 of Article I of the California Constitution states that a defendant is eligible for release on bail unless he or she is charged with a capital crime, a felony offense involving violence against another person, felony sexual assault, or a felony offense in a case in which the court has clear and convincing evidence that the defendant threatened another person with great bodily harm and that there is a "substantial likelihood that the person would carry out the threat if released." This section also states that the court may not require excessive bail for eligible defendants and authorizes judges to exercise discretion in granting release on recognizance.

Relevant factors. In setting the bail amount, Section 12 of Article I of the California Constitution instructs the court to consider the seriousness of the offense(s), the previous criminal record of the defendant, and the probability that the defendant will appear at the trial or hearing if released. Additionally, Section 28 requires the court to

consider the safety of the public, the victim, and the victim's family (Judicial Council of California, 2013). Rule 4.105 of the California Rules of Court states that the court must consider the "totality of the circumstances," including whether the bail amount would "impose an undue hardship on the defendant."

The California Penal Code provides a more thorough description of the factors that may be considered in granting release on recognizance or setting bail. According to Section 1270, public safety should be the court's primary concern. This section indicates that judges may grant release on recognizance for any defendant charged with a non-capital offense, and defendants charged with misdemeanors are entitled to release on recognizance unless the court finds that release on recognizance will compromise public safety. Section 1275 of the California Penal Code further specifies that in setting, reducing, or denying bail, judges or magistrates must consider the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability that the defendant will appear at trial or at a hearing if released. In cases involving defendants charged with serious or violent felonies, the court must make a finding of unusual circumstances in order to reduce bail below the presumptive amount established by bail schedule.

Section 1270.1 of the California Penal Code lists offenses for which judges must have a hearing in order to assign bail that is higher or lower than the scheduled amount. These offenses include serious felonies, dissuading a witness, and violation of a protective order if the defendant has engaged in violence against, has threatened to kill or harm, or has gone to the residence or workplace of the protected party. At the hearing, subsection c instructs the court to consider evidence of the defendant's past court appearances, the maximum potential sentence that may be imposed upon conviction, and the danger that may be posed to others if the defendant is released. In determining whether to release the defendant on his or her own recognizance, the judge must consider the potential danger to others, including threats that have been made by the defendant and any prior acts of violence. The court must also consider any evidence offered by the defendant regarding his or her ability to post bond and his or her ties to the community. For offenses in Section 1270.1 only, judges must justify any deviations from the bail schedule on the record.

Bail schedules. The California Rules of Court and the California Penal Code explain the purpose of the bail schedules as well as the manner in which these schedules are adopted and employed. Rule 4.102 of the California Rules of Court notes that the Judicial Council of California has developed a policy of utilizing uniform bail and penalty schedules in order to "achieve a standard of uniformity" in handling certain offenses. Section 1269b of the California Penal Code instructs the superior court judges in each county to prepare and adopt a countywide bail schedule for all bailable felony offenses as well as all misdemeanor and infraction offenses, with the exception of infractions contained in the Vehicle Code. This schedule is to be reviewed on an annual basis.

Although other provisions of the Penal Code identify a number of factors that should influence pretrial decisions, bail schedules focus on the seriousness of the offense charged. Subsection e of section 1269b instructs judges who adopt the uniform countywide bail schedule to consider the seriousness of the offense when determining the appropriate bail amount. In considering the seriousness of the offense charged, this subsection further instructs judges to increase the bail amount for each aggravating or enhancing factor charged in the complaint. Subsection f specifies that the countywide bail schedule must include a list of the offenses and the applicable amount of bail for each offense. The schedule must also include a clause addressing the determination of bail for offenses not included in the schedule. Some counties, including Orange County, identify the circumstances in which, pursuant to Penal Code section 1270.5 and Article 1, Section 12(a) of the California Constitution, defendants are not entitled to release on bail. Other counties, including Los Angeles County, do not note these circumstances within their bail schedules. With the exception of cases involving offenses addressed in Section 1270.1 of the California Penal Code, judges may exercise discretion in adhering to or deviating from the bail amount contained in the bail schedule without providing justification on the record.

If a suspect is booked and taken into custody, bail is first set at the county jail in accordance with the bail schedule. At the defendant's first court appearance, judges may exercise discretion in raising or lowering the bail amount following an assessment of the characteristics of the case (Tafoya, 2015). The extent to which judges in California default to presumptive bail amounts remains unclear. Though the Bureau of Justice Statistics' State Court Processing Statistics (SCPS) project has documented bail amounts and offense types throughout the state, the manner in which the offenses were aggregated precludes an accurate analysis of the frequency with which judges in California defer to or deviate from their jurisdiction's bail schedule (Tafoya, 2013).

Risk assessments in California. The use of evidence-based risk assessments varies dramatically

throughout the state of California (Tafoya, 2015). Though the number of counties relying on pretrial services agencies has grown since the state undertook realignment, which shifted much of the state's prison population to county jails, counties differ in terms of degree of compliance with national standards. Most counties provide information based on objective risk assessments, but some have not developed a supervision component. Counties also differ in terms of the courts' willingness to embrace the objectives and goals of pretrial release agencies (Tafoya, 2015). Neither of the counties that are the focus of this study appear to have strong pretrial release agencies.

Marin County oversees one of the state's stronger pretrial service programs. There, an independent agency utilizes an evidence-based risk assessment tool to provide pretrial services to the county's probation department (Tafoya, 2013). The agency's staff assesses defendants according to three dimensions consistent with national standards: employment and residential stability, drug use, and criminal history. The agency also assesses whether defendants pose a danger to themselves or others and provides recommendations to the probation department. The probation department then submits approved Pretrial Release Reports to the courts.

The Role of Extralegal Factors in Pretrial Decision-Making

A substantial body of literature indicates that extralegal factors, including the sex and race of the defendant, influence pretrial decision-making. Several studies have found that, compared to their male counterparts, female defendants receive bail decisions that are more conducive to the outcome of release (Demuth & Steffensmeier, 2004; Katz & Spohn, 1995; Nagel, 1983). Additionally, White defendants, especially White females, are more likely to be granted some form of pretrial release (Demuth & Steffensmeier, 2004), and White defendants ultimately secure pretrial release more often than any other racial or ethnic group (Demuth & Steffensmeier, 2004; Sacks et al., 2014).

Although the potential impact of socioeconomic status also factors prominently in discussions of extralegal influences, few scholars have empirically tested the notion that lower socioeconomic standing unduly influences pretrial decisions. In their study of pretrial detention in Harris County, Texas, Heaton and colleagues (2017) utilized defendant zip codes to assess the impact of wealth on the likelihood of pretrial detention. They found that approximately 30% of defendants from wealthy zip codes were detained compared with 60-70% of defendants from poorer zip codes. This disparity persisted when they controlled for criminal history and offense seriousness.

Limitations of Prior Research

The existing literature is limited by reliance on retrospective, quantitative analyses (Allan et al., 2005). Such analyses utilize data (e.g., court files and public records) from completed cases instead of documenting the pretrial process itself. This approach is problematic, as researchers cannot correct for errors and omissions found within the data sets. These data sets also fail to capture the interactions between judges, prosecutors, and counsel for the defense. Additionally, quantitative, retrospective analyses do not indicate whether the release type or bail amount was contested or whether the defendant paid bail with cash or a bond. The omission of these elements limits the explanatory power of existing studies.

Recognizing the methodological limitations of prior research, Allan and colleagues (2005) undertook the first observational study of pretrial decision-making in Australia. They concluded that legal factors influenced bail decisions, whereas extralegal factors did not. Though these results contradict the prevailing conclusions of American studies and procedural, legal, cultural, and geographical differences limit the generalizability of the study's results to other jurisdictions, their observational methodology is instructive. By observing court hearings, they were able to document arguments made by attorneys as well as justifications or comments offered by magistrates. This information had not been recorded in quantitative studies in Australia, nor has it been included in quantitative studies within the United States. Without qualitative research, it is impossible to determine what factors, if any, are discussed during pretrial hearings and whether the bail decision is often or infrequently contested. Thus, qualitative, observational studies of pretrial decision-making in the United States are needed to produce additional insights and develop a more nuanced understanding of pretrial decision-making.

Method

Employing an observational, primarily qualitative approach, this study explores questions left unanswered by previous research on pretrial decision-making. Though the existing literature identifies disparities at the pretrial stage of adjudication, the process by which judges render pretrial release decisions remains unclear. Further, the existing literature largely ignores the impact of defendants' ability to pay. The present study seeks to

explain what occurs during pretrial hearings, as well as how, or whether, the reasonableness of the bail amount enters into discussions between the judges and attorneys who attend these hearings. More specifically, this study seeks to answer the following questions:

1) How do judges make the pretrial release decision?
2) To what extent do attorneys contest the release decision and the amount of bail during the hearings?
3) During contested bail hearings, what factors are referenced by attorneys and judges?
4) What factors influence the imposition of bail? In particular, what role is played by the ability of the defendant to pay?

The authors conducted observations and interviews at courthouses in two California counties: Los Angeles and Orange. The largest court in California, the Los Angeles County Superior Court (LACSC) is comprised of over 500 judicial officers at 38 courthouses in 12 districts (LACSC, 2015). In 2014, 2,183,626 cases were filed, including 55,666 felonies. Orange County is a neighboring county with similar demography. Both counties serve diverse populations of more than 3,000,000 people (County of Los Angeles, 2016; County of Orange, 2017). Although Los Angeles County is more populous, Orange County is more densely populated. The third largest court in the state, the Orange County Superior Court (OCSC) is comprised of 144 judicial officers at five justice centers and a separate courthouse at the Santa Ana Jail. In 2014, 511,134 cases were filed, 18,314 of which were felonies (Judicial Council of California, 2015). Observations were limited to felony cases within these counties, as very few bail hearings were held for misdemeanor cases. Misdemeanor cases are commonly resolved through plea bargaining at arraignment, which eliminates the need for a bail hearing. Thus, higher rates of plea bargaining rendered misdemeanor cases unsuitable for inclusion in this study.

The data include observations from 15 different court locations. We conducted observations at one courthouse in each of the 12 Los Angeles districts as well as the Santa Ana Jail and the four Orange County justice centers in which felony cases are heard. We excluded courthouses from the dataset if felony arraignment hearings were not held on the observation dates. We identified the specific courtrooms in which felony arraignment hearings would be heard through the OCSC's public website, by calling the clerk's office at each Los Angeles courthouse, and by speaking with clerks or courtroom bailiffs in person.

The final dataset includes 234 cases, 41.9% of which were observed in Orange County and 58.1% of which were observed in Los Angeles County. The majority of the cases were observed at one of 3 locations: the Santa Ana Jail (35.9%), the Governor George Deukmejian Courthouse in Long Beach (21.4%), and the Clara Shortridge Foltz Justice Center in Los Angeles (29.5%). The courtroom at the Santa Ana Jail is specifically designated for arraignment hearings, and the majority of arraignments in Orange County are assigned to this calendar. More arraignment hearings are scheduled at the Clara Shortridge Foltz Justice Center and the Governor George Deukmejian Courthouse than at the remaining observation sites in Los Angeles County. Though we conducted observations at each of the 15 court locations on at least one occasion, we conducted observations more frequently at the courthouses that handle a greater number of felony arraignments.

To provide context, and to explain the patterns noted during the court observations, we conducted interviews with judges and attorneys who routinely attend arraignment hearings. This study relied on a purposive sample, as we selected judges and attorneys for observations and interviews due to their unique positions within the criminal justice system. We selected judges based on assignment to the felony judicial calendars in Los Angeles County and Orange County. The felony and misdemeanor calendars are the only calendars to which arraignment hearings are assigned. The judges presiding over these calendars consequently possess specialized knowledge of arraignment proceedings and bail-setting requirements. For the purpose of this study, the specialized knowledge of judges assigned to felony and misdemeanor calendars rendered purposive sampling more appropriate than random sampling. It is important to note that this did result in a limited pool of potential interview subjects: In most courthouses, there is typically just one judge assigned to the arraignment calendar at any one time. We requested interviews with the 5 judges who routinely oversee a large number of felony arraignment cases. Three judges agreed to be interviewed and two declined our request.

Attorneys representing the defendants in cases assigned to judges on the felony calendars, as well as the prosecutors assigned to such cases, were also subjects of this study. These individuals possess specialized knowledge of criminal law and procedure, as they are the only attorneys who routinely attend arraignment hearings. As a result of their routine presence at arraignments, these attorneys possess a unique understanding of the process by which pretrial decisions are made and the questions

that may be posed during arraignment. The defendants in these felony cases were not considered subjects of study, as defendants do not actively engage in the arraignment process.

We approached attorneys as they exited the courtroom so as not to disrupt the court's proceedings. Four attorneys agreed to be interviewed; two others provided contact information and expressed interest in participating, but they did not schedule an interview.

Procedure

Observations. Though arraignment hearings are more commonly associated with the entry of the defendant's plea, pleas of not guilty are accompanied by a pretrial release decision. This decision may then be followed by a bail hearing in which the conditions of release are contested. We collected data for all cases in which the defendant entered a plea of not guilty. Two researchers conducted observations and collected data from 234 cases between December 15, 2016 and July 6, 2016. To ensure uniform collection of data, we conducted the first set of observations together. We conducted all subsequent observations independently.

On each observation date, we reviewed the courts' online case calendars and recorded the identification number and the name of the defendant in each felony case for which an arraignment hearing was scheduled. We added additional cases to our list in court, as the online calendars were usually not up to date. We documented all courtroom observations by hand, as use of electronic devices by observers is prohibited. As each case was called, we documented the date, the case identification number, the location, the name of the judicial officer, the sex of the defendant, attorney type (i.e., private or public), a description of the charges, comments from the attorneys or the judge regarding bail, whether bail was granted, what type of bail was granted, and the bail amount. With the exception of sex, we omitted demographic variables, including race, socioeconomic status, and immigration status, due to lack of access to court records. Unlike the sex of the defendant, which we documented according to the pronouns used by the judge and attorneys in addressing the defendant, the race of each defendant was indicated only by visual cues. We determined that it would be inappropriate to make assumptions as to the defendants' race, especially since, in some cases, we were unable to see the defendant. Upon conclusion of the observational component of the study, we used the case identification numbers to extract additional information from the courts' public case access systems. This information included the defendant's release status, whether a preliminary hearing had been held, and whether the defendant had been sentenced. Where possible, we then coded the data in Excel and exported to SPSS for limited quantitative analyses. Both researchers agreed upon the coding scheme, and we discussed any ambiguous cases before assigning a code. We transcribed notes from the courtroom observations and then coded and analyzed the notes thematically. The objective nature of the courtroom data lent itself to consistent documentation, though we also compared and discussed observations at biweekly meetings to maintain inter-rater reliability.

Interviews. We obtained Institutional Review Board approval prior to beginning the interview component of this study. In accordance with the approved protocol, we approached judges and attorneys at the courthouses and presented them with a letter describing the purpose of the study, the voluntary nature of participation, and our contact information. We scheduled the interviews at participants' convenience. Judges and attorneys who wished to participate received and signed an informed consent form before we conducted their interview. According to the participant's preference, we audiotaped each interview or documented the interview by hand. The interviews ranged from 20 to 40 minutes and incorporated questions regarding bail procedures, pretrial decision-making, and attitudes toward the bail schedule. We conducted a total of seven interviews. Participants included three judges, one public defender, two prosecutors, and one alternate defender. In the interest of maintaining confidentiality, the judges are identified only as Judge A, B, and C throughout this paper. We transcribed all audiotaped recordings and stored the recordings and transcriptions in a secure location along with the informed consent forms and written notes. Both researchers reviewed each transcription. We then coded and analyzed the interviews.

Results

Pretrial Release Decision and Outcomes

Judges granted some form of pretrial release in the vast majority of cases. Almost 9% of defendants were released on their own recognizance [OR] while bail was set in 87% of cases observed. In cases where bail was set, the amounts varied significantly (as do the bail schedule amounts) and ranged from $10,000 to $2,065,000.

Table 1: Pretrial Release Decision (*N*=233)

	All Courts	LA County Courts	Orange County Courts
Detained	10 (4.3%)	10 (7.4%)	0 (0.0%)
Bail	203 (87.1%)	108 (80.0%)	95 (96.9%)
OR	20 (8.6%)	17 (12.6%)	3 (3.1%)

We did not find any differences based on sex, though 83.7% of the observed cases involved male defendants, while only 16.3% involved female defendants. However, we did identify differences based on geographic location. A chi-square test examining the relationship between the pretrial release decision and the county proved significant, $\chi^2 = 15.139$, $p<.01(2, N = 233)$: Defendants in Los Angeles County were more likely to be released on recognizance or be denied pretrial release, whereas defendants in Orange County were more likely to receive monetary conditions of release. Similarly, the relationship between the pretrial release decision and the courthouse location also proved significant, $\chi^2 = 37.829$, $p<.01(6, N = 233)$: Defendants at the Governor George Deukmejian Courthouse in Long Beach were least likely to be released on recognizance and most likely to be denied pretrial release. Despite some variation by location, judges granted some form of pretrial release for the vast majority of defendants at each courthouse.

As Table 1 shows, pretrial release was denied outright in just 4.3% of cases. Surprisingly, most (9 of 10) of these cases involved probation or parole violations, in which the policy is to deny bail until additional information is available. In the final case, the defendant was detained pending extradition to Missouri. Although California law allows judges to detain defendants pending trial based on public safety/dangerousness concerns, no such cases were observed in this study.

Although pretrial release was granted in most cases, case records indicate that most defendants remained in custody pending trial. Case observations ended on July 6, 2016, and on July 29, 2016, we documented the release status of all defendants whose arraignments had been observed. As Table 2 shows, 78% of defendants either remained in custody or had been held in custody until their case was resolved.[1] This finding is consistent with state and national patterns of pretrial release (Tafoya, 2015. However, it is not clear that judges are aware of these high numbers. One judge interviewed guessed that approximately three-quarters of defendants "on a regular daily basis are out of custody" and that about 25% of felony defendants are released OR. (Judge C, July 6, 2016) Another judge agreed with this estimate that about one quarter of defendants are released OR but was slightly more accurate in his assessment that between one third and one half of all defendants are out of custody.

Table 2: Pretrial Release Outcomes (*N*=186)

	All Courts	LA County Courts	Orange County Courts
In Custody	145 (78.0%)	98 (79.7%)	47 (74.6%)
Out of Custody	41 (22.0%)	25 (20.3%)	16 (25.4%)

Most Bail "Hearings" are Short and Uncontested

In California, as in most states, the pretrial release decision is made at arraignment, which is a required hearing at which defendants are informed of the charges against them and at which they enter a plea. The vast majority of defendants were in custody for these hearings, and all were represented by an attorney, typically a public defender assigned to the courtroom; just 14 defendants were represented by a private attorney. These hearings are usually very short. In the Long Beach courthouse for example, the judge would call the case by name and number and then ask if the defendant waived further arraignment, full reading of charges, and advisement of rights, and plead not guilty. In no case did we observe a defendant refuse to waive these rights. On one occasion in the downtown LA courthouse, we observed a judge ask for the attention of all the public defenders and alternate public defenders, and then he asked them all, as a group, to waive formal reading of the charges, enter a plea of not guilty, set a

preliminary hearing (based on the statutory time), and submit on the county-wide bail schedule. At the Santa Ana jail courtroom, the judge typically called the case and stated the charges before asking the defendant how he or she plead.

Judges varied in their approach to setting bail. At the Santa Ana jail, the judge typically set bail directly after the defendant entered his or her plea. The judge did not explicitly invite attorneys to present arguments regarding bail; however, when attorneys did make a request regarding bail, they typically did so after the defendant entered a plea and before the judge set bail. One judge in downtown LA simply stated that bail was set at particular amount while another judge at the same courthouse would state: "Bail?" or "Do you wish to be heard on bail?" The swiftness of these hearings was recognized by one of the judges we interviewed, who stated,

> Well, you know, somebody will come through and you know, it's Costco justice. They're doing things really fast. But somebody comes through with a felony, he's he's not really gonna have too much time to consider bail in depth. So more often than not bail gets set at the bail schedule. (Judge C, July 6, 2016)

Regardless of the approach taken by the judge, arguments by attorneys over the amount of bail set were rare. Although the bail schedule is generally the starting point in a particular case, the bail hearing affords the opportunity to challenge the conditions of release and present the judge with additional information that might yield a more individualized assessment. Despite this, and despite the range of factors that judges can consider in imposing bail under California law, attorneys contested bail in just one-third of cases (82 of 234) and explicitly reserved arguments for subsequent hearings in only eight cases. As discussed in more detail below, defense attorneys usually asked for the defendant to be released on his or her own recognizance or for a lower bail amount, while not surprisingly, prosecutors tended to ask for presumptive bail (bail set according to the schedule) or a higher bail amount. In the cases where arguments were made, ensuing discussions were generally brief, and judges usually denied requests for lower bail or OR without comment.

Factors Considered by Judges in the Pretrial Release Decision

Bail schedules. The county bail schedules appeared to be the main factor determining pretrial release decision making. Indeed, in declining to be interviewed for this study, one judge noted: "I don't have much to do with bail. I just follow the schedule." As explained earlier, these schedules assign bail amounts based on the seriousness of the charged offense with increases for prior "strikes." All of the judges interviewed expressed support for the schedules, although one did note that the focus on the charged offense "places an awful lot of discretion in the hands of the police because they can book somebody on a charge that they know will never stick, and that will result in bail being set really high" (Judge C, July 6, 2016).

In the absence of an argument made by an attorney, judges tended to set bail according to the schedule, or above it. Indeed, defense attorneys recognize this. One defense attorney, an alternate public defender, noted that 9 times out of 10, appointed counsel does not fight the schedule because they know that "in 99 out of 100 cases the court will follow the schedule" (July 11, 2016). One judge emphasized the importance of attorneys knowing the practices of a judge so that they can rely on those practices, noting, "So my reputation is 'he follows the bail schedule unless there is some reason to deviate'" (Judge A, June 29, 2016).

The importance of the bail schedule to judges was clear in *People v. Farley*[2] in which a defendant, charged with possession of a controlled substance for sale, showed up for his arraignment out of custody having posted bail of $30,000. He asked for a continuance of the arraignment so that he could hire a private attorney, but the hearing focused on the fact that bail had been incorrectly set at the jail and should have been set at $100,000. The judge could not find any record of the defendant having posted bail, despite the fact that the online case record showed that bail had been posted, and that it would have been strange for him to have been released from jail without posting bail. Although the defendant explained that he had posted bail, and even though he had shown up to his scheduled hearing, the judge ordered him taken into custody and set the bail at $100,000 per the schedule. The defendant spent two days in jail before posting the higher amount.

However, judges do not always blindly follow the schedule. In *People v. Edmund*, the prosecutor argued that the bail schedule required the judge to increase the defendant's bail. At the first arraignment, the defendant was believed to have one prior strike, but he actually had two. The judge explained that there is no presumptive bail amount that magistrates must impose; the bail schedule is for law enforcement, and the judge may set or change the bail amount at their own discretion. The defense attorney argued that felony possession of a firearm is not a strike since the firearm was not used in the commission of the offense and that therefore

$100,000 was sufficient. The judge agreed, and denied the prosecutor's request to increase the defendant's bail.

Prior failures to appear. In interviews, judges noted that although not a factor taken into account in the bail schedule, prior failures to appear was an important factor to be considered in determining whether to grant OR. Given the facts of *People v. Hubbert* this appeared warranted. In that case, a defendant showed up for her hearing after having failed to show the previous week. She had originally posted $25,000 bail but the judge noted that bail should have been set at $135,000. Although she argued that she lived locally and had a job, the judge emphasized that she had not been reliable in the past, with three failures to appear. He set bail at the higher amount and ordered her taken into custody until the new bond was posted. The defendant eventually posted this new bond, but just one month later, failed to show up for a hearing and forfeited her bond.

Seriousness of the charged offense. According to the alternate public defender interviewed, the two main questions that relate directly to bail are whether the client is a flight risk and whether they are a threat to the safety of the public. In some cases, when judges denied OR, they noted the seriousness of the offense, which of course is typically reflected in the bail schedule. When interviewed, Judge C focused on the sometimes conflicting reasons for setting bail:

> So Article 1 Section 12 of the constitution says that in setting bail we're supposed to look at the likelihood of the defendant appearing and the risk that they pose to the public. And those two things can be vastly different. You can have somebody who you're very confident is gonna show up, but who is very very dangerous. And you're very worried they're gonna reoffend. So you're gonna go upwards. There's just a myriad of factors.

This conflict is evident in the cases described below, where arguments about likelihood to appear based on ties to the community were rejected because of the seriousness of the offense.

Ties to the community. In requesting OR, defense attorneys often made arguments connecting the defendant's likelihood to appear to his or her ties to the community. In interviews judges indicated that connections were important. For example, Judge A stated, "if I have family members here and it's a non-violent offense, I'm much more like to release them OR" (June 29, 2016). Similarly, Judge C emphasized the importance of stability: "The things that I am gonna be concerned about are prior record, job, kids, how deeply into the soil of the community does this person's roots go? That relates to the probability of appearing" (July 6, 2016). Judge B noted that sometimes a young person would come in with a parent, and he would get the impression that this was a good family and that he would be more likely to grant OR in such a case (July 1, 2016).

However, in the cases we observed, arguments based on ties to the community were not always successful. For example, in *People v. Jameson*, the defendant requested OR, arguing that he had no prior record or failures to appear, that he had lived in LA for 16 years, with two children and a wife, and was fighting foreclosures. The prosecutor objected to this, noting that there was no evidence of employment and that he had ties to New York and overseas. The defendant offered to surrender his passport, but the request for OR was denied based on the serious nature of the charges and the need to protect the community. The defendant did post bail four days after the hearing and, at the time of writing, had attended all scheduled hearings since then. Similarly, in *People v. Ludwig*, the defendant, who had a family member in the courtroom during arraignment, asked for OR, arguing that it was her first offense, that she was employed and that she had lived in the area for four years. The judge rejected her argument and noted that it must have been "something big" for it to have been charged as felony.

Ability to pay was not considered by judges. Notably absent from bail hearings was any discussion of the defendant's financial resources or ability to pay. Defense attorneys referenced their client's inability to pay in only two of the 82 cases in which an argument was made, and those arguments were both rejected. In *People v. Larson*, the public defender stated that the defendant, who was charged with a DUI, did not have the means to post bail. He then requested that the defendant be released on recognizance, but the judge rejected this request and set bail at $100,000. Lopez did ultimately post bond. In *People v. Banks,* the public defender offered an argument that encompassed multiple factors, including ability to pay. She stated that her client had a medical condition and wanted to seek treatment "on the outside," stressing that the defendant's spouse was supportive and had attended all his appearances. She also noted the issue of inability to make high bail. The public defender then asked for a reduction from the prescribed bail amount, noting that the strike on the defendant's record was old. Without the strike, presumptive bail would be set at $20,000; she asked that bail instead be set at $10,000. The judge then asked if the defendant was on probation or parole, to which the prosecutor replied that the defendant was currently on parole after spending 15 years in prison and asked for presumptive bail. The

judge declined the request for a bail reduction without comment, and the defendant remained in custody and was still in custody at the time data collection ended.

The Inequity of the Current Bail System is Widely Acknowledged and Accepted

The inequities of the current bail system are frequently discussed by its critics, and interviews with judges and attorneys for this study revealed both acknowledgement and acceptance of these inequities. As the public defender noted, the tendency to impose financial conditions of release in accordance with the bail schedule incentivizes plea bargaining irrespective of guilt. For both indigent and working class defendants who cannot afford the presumptive bail amount, pleading guilty becomes the less costly and more expedient option. In this sense, she asserted that the bail system is "totally stacked to make people plead guilty" (June 29, 2016). The alternate defender echoed this sentiment, describing the proportion of his clients who could reasonably be expected to post bail as "de-minimis" (July 11, 2016).

Prosecutors expressed satisfaction with the overall system while at the same time acknowledging its injustices. Although Prosecutor A stated that he generally believed the bail amount to be appropriate, he recognized that if "you are indigent in any way, then you could never make bail" (July 6, 2016). Similarly, Prosecutor B noted that "the criminal justice system does not favor the indigent population as a whole" (July 13, 2016). However, of all the problems in the criminal justice system, the matter of bail for indigent defendants did not stand out to him as a "red flag."

Judges also recognized these concerns, with one admitting that bail is "unfair to those in the lower socio-economic strata" (Judge B, July 1, 2016). However, he stated that he cannot just release people on recognizance because they are poor, because too many do not show up. Despite recognizing the inequity inherent in the existing bail system, judges also expressed the belief that the system is as good as it can be without compromising public safety. For instance, Judge B noted that "this is not a process where everyone is treated the same. The solution is not to put everybody in or to let everybody out. It's not a perfect system, but I'm not aware of a better way to do it" (July 1, 2016). His response is emblematic of the attitudes expressed by the judges.

Additionally, despite the empirical evidence supporting the use of actuarial risk-assessment tools, judges universally rejected the notion that such tools could improve the existing system. When considering the use of risk-assessment tools, Judge C expressed the concern

> that there are so many variables that have to go into the decision-making process regarding the setting of bail that there is no way you can sanitize it to the extent that there is no human involved. And if you do, it's gonna – it's just not gonna work. Public safety, I think, is gonna be compromised. (July 6, 2016)

Judge A, agreed, noting,

> those theories [are] not a substitute, in my opinion, for doing the job. In other words, a person who's a plumber for 30 years knows what to look at, versus a guy that's gone to a high-age technology plumbing school that says, "Oh by the way we're doing this." Well I've done that 150 times, you've done it once. That's not how to do it. So I have concerns about that. (June 29, 2016)

Judge C also noted,

> I am aware of the fact that there is this trend to try to objectify, almost computerize, different factors in arriving at the bail decisions. I'm not a fan at all because I don't think there's any objectified, standardized process that can ever substitute for the judgment of somebody who has done this for their whole life. (Judge C, July 6, 2016)

Ironically, these judges appear to be defending a system that they are not practicing. Though they recognize the inequity of the bail system, the judges seemed to believe that discretion and extensive experience allow the existing system to function as effectively and fairly as possible—despite the fact most judges exercise their discretion in a way that turns the bail schedule into a rule from which they rarely deviate.

Limitations and Future Research

The limitations of this study stem from impediments to generalizability and access. The sample of cases was necessarily small (N = 234 cases), as only two researchers conducted observations at multiple locations within a relatively short period of time. The size of the sample limited the generalizability of our findings and precluded a power analysis of the quantitative data. Though the Public Policy Institute of California found that Orange County and Los Angeles County are

representative of California in terms of economic and demographic characteristics, these counties may not be demographically, geographically, or legislatively representative of other states (Tafoya, 2013).

Access to court records and subjects of study was also limited. In California, although only limited case information is available to the public online, the public can review full paper case files in the relevant courthouse. However, before a member of the public or a researcher can review the file, the court clerk will remove all sensitive information, which includes probation department reports that might contain information relevant to the pretrial release decision. After an initial review of a number of case files, we determined that review of the incomplete case files available would not add useful information to the study. Access issues also stemmed from the relatively small proportion of judges and attorneys who were eligible for observation or interview participation. Few judges are assigned to felony arraignment hearings; thus, the pool of potential interview subjects was severely limited, and not all were willing to participate. Although more attorneys routinely handle arraignments, few attorneys had time to participate, or even be asked to participate, in interviews between hearings.

Additional research is needed to further explore the factors influencing the imposition of bail. If possible, researchers should coordinate with court personnel in order to obtain more detailed case records and control for demographic variables, such as age, race, and socioeconomic status. Given the overrepresentation of minorities among defendants held in pretrial detention across the country, controlling for race is particularly important (Bureau of Justice Statistics, 2016). Additionally, future studies should include larger samples from more counties in order to improve the generalizability of their findings. Longitudinal, mixed method studies would provide a more comprehensive account of the pretrial decision-making process. These studies should incorporate qualitative observations and interviews as well as quantitative analyses of relevant variables. These studies should also focus on both judges and attorneys, as the attitudes and practices of each group shape the decision-making process.

Discussion

This study sought to answer four primary questions. Our findings indicate the following:

1) Judges generally make the pretrial release decision by considering the bail schedule.
2) At bail hearings, attorneys infrequently contest the release decision and the amount of bail.
3) During contested bail hearings, attorneys and judges reference factors related to flight risk (e.g., employment and other ties to the community) and threat to the community (e.g., the severity of the offense).
4) The ability of the defendant to pay does not appear to influence the imposition of bail.

More specifically, this study reveals several troubling patterns. State laws allow California judges to consider a wide variety of factors in determining whether to impose bail, and if so, what amount to set; for example, Rule 4.105 of the California Rules of Court instructs the court to consider the "totality of the circumstances," including whether the bail amount would "impose an undue hardship on the defendant."

However, the data indicate that such individualized assessments, though permissible, are rare. Judges routinely deferred to the presumptive bail amounts listed in the bail schedules. Deference to the bail schedule may stem from the need to expeditiously process large caseloads despite limited resources; as the alternate defender pointed out, deviation from the schedule requires "tremendous energy" and risk. Given the time pressures and limited resources faced by judges, interacting flexibly and responsively with each defendant may not be feasible. Indeed, while no other research studies examine the relationship between bail schedules and decision to impose bail, in *O'Donnell v. Harris County, Texas* (2017), the court found credible expert testimony that Hearing Officers there "adhered to the prescheduled bail amount stated on the charging documents in 88.9 percent of all misdemeanor cases" (p. 68).

However, while deferring to the bail schedule might make things simpler for court actors, setting bail based almost entirely on the offense with which a defendant is charged has significant consequences for defendants. This study found a disconnect between pretrial release decisions (i.e., whether pretrial release was granted) and pretrial release outcomes (i.e., whether the defendant was released or held in pretrial detention). Although judges granted some condition of release for most defendants, monetary conditions of release (i.e., bail) were the most common. Given how few defendants had posted bail at the completion of the study, it appears that many defendants could not pay the bail amount that was set. As a result, a large number of defendants, whom judges had not deemed a flight risk or substantial danger to the community, were detained pretrial without being

convicted of a crime. As explained earlier, this detention predicts adverse consequences at later stages of case processing: Defendants who cannot afford to post bail are disadvantaged from the pretrial stage of adjudication onward.

Further, this reliance on bail schedules by judges came without many arguments over bail amounts, in part because attorneys know judges will defer to the bail schedule. As one alternate defender explained in an interview,

> Nine times out of 10, appointed counsel is not fighting the schedule. They know that in 99 out of 100 cases the court will follow the schedule. It is easier for the court to follow the schedule and the attorneys know they will not win that battle. He will fight for the cases that are 'squeaky wheels.' A client may indicate that he needs to get out sooner to go to work, and the first thing they'll talk about is damage control to make sure there isn't a major problem that makes a request for OR unreasonable. On a given day, if he has 5 clients, there will probably be no discussion with 4 of them. One of them might say they need to get out and need a lower bail amount. He will look at the client's background for holds and strikes to make sure a bail pitch won't make things worse.

Prosecutor A, too, acknowledged that attorneys infrequently make arguments because they know how to "choose [their] battles." In addition, a judge who declined to be interviewed insisted that he "[didn't] have much to do with" determining the bail amount. The reluctance of both judges and attorneys to challenge the presumptive bail amounts suggests that they regard bail schedules as rules rather than guidelines.

Finally, even when bail was contested, attorneys rarely provided information pertaining to the defendant's ability to pay, and judges did not solicit this information. When judges requested additional information before making a bail decision, this information typically pertained to flight risk and the safety of the community in the context of whether OR was appropriate. Judges did not seem to ignore or disregard evidence of the defendants' ability to pay; this factor was simply not a part of discussions at most arraignment hearings.

The findings of this study have broad implications both in California and nationwide. They support statistics (Tafoya, 2015) showing that although very few felony defendants in California are *denied* bail, high numbers of those granted bail remain in pretrial detention, apparently because they are unable to pay the amount of bail set by the judge. Further, the study adds to the small, but growing, body of literature showing the extent to which judges and hearing officers defer to bail schedules (*O'Donnell v. Harris County*, *Texas*, 2017). This study clearly demonstrates that while bail schedules may have been developed with the goal of reducing disparity in pretrial decision-making, because judges usually defer to the schedule without considering defendants' ability to pay, bail schedules are increasing disparity between indigent defendants and those who can afford to pay. A recent news report in *The Guardian* highlighted this disparity, comparing a defendant who has been detained while he awaits trial on welfare fraud charges because he cannot pay this bail, which was set at $75,000, and a defendant accused of murder for hire, who is awaiting trial while under house arrest after satisfying the $35 million bail set in her case (Levin, 2017). Further, as we argue in a companion essay, because bail schedules in California appear to be used presumptively in a way that denies defendants any individualized pretrial release determination, they are likely unconstitutional (Scott-Hayward & Ottone, 2018).

It is important to note that the inequality seen in this study has not gone unnoticed. During the state of California's annual State of the Judiciary address on March 9, 2016, Chief Justice Tani Cantil-Sakauye called for reform of the existing bail system, noting that "we need more pretrial release programs to balance safety against the need to post bail. We must not penalize the poor for being poor" (Judicial Branch of California, 2016). In December of 2016, Assemblyman Rob Bonta and Sen. Bob Hertzberg introduced AB-42, a bill "to safely reduce the number of people detained pretrial, while addressing racial and economic disparities in the pretrial system, to ensure that people are not held in pretrial detention simply because of their inability to afford money bail" (AB-42, 2016). Although this bill did not pass, a companion bill passed the Senate and is currently in committee in the Assembly. At the county level, the Los Angeles County Board of Supervisors recently commissioned a study to comprehensively review the county's bail system (KPCC, 2017).

Reform efforts, many aimed at eliminating the use of cash bail, are also underway in numerous other jurisdictions (*O'Donnell v. Harris County, Texas*, 2017; Wiltz, 2017). For example, as a result of a 2014 voter-supported amendment to the state Constitution, New Jersey virtually eliminated cash bail under a new system that went into effect in 2017. Similarly, the Supreme Court of Maryland recently changed its rules to prevent defendants who are neither a flight risk nor a danger to public safety from remaining in jail simply because they are poor. In

other jurisdictions, alternatives to preventative pretrial detention have come from the community through the use of community bail funds (Pretrial Justice Institute, 2016). These funds allow community groups to post bail on behalf of strangers who may otherwise remain in pretrial detention (Simonson, 2017).

Conclusion

The present study sheds light on both the process by which pretrial decisions are made and the consequences of these decisions. Though judges granted some form of pretrial release for all but 10 defendants in the observed cases, over 70% of defendants were ultimately held in pretrial detention. The data indicate that pretrial detention results, primarily, from an apparent inability to comply with the conditions of release, that is, an ability to pay bail. Although judges have the discretion to deviate from their county's bail schedule when determining the financial conditions of release, deference to the bail schedule is the norm. Though eligibility for pretrial release and heavy reliance on financial conditions of release could give way to argument and substantive discussion of the bail amount, this is rarely this case. Moreover, when attorneys challenge the bail amount, the defendant's ability to pay rarely enters into the conversation. The result of these patterns is that discretionary bail schedules become the law in practice, though most defendants cannot afford the prescribed amount. Given the adverse impact of pretrial detention on subsequent stages of case processing, these findings call into question the fairness of the existing bail system. Judges' infrequent exercise of discretion and the ambivalence of both judges and attorneys to the financial resources of the defendant are particularly problematic for the indigent, who are overrepresented among individuals held in pretrial detention. The inequality inherent in the existing bail structure must be addressed as the state of California moves forward in pursuing bail reform.

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Endnotes

[1] For ongoing cases, we considered defendants to be held in custody if the case access system designated his or her release status as "in custody" (Orange County) or bond was not posted (LA County). For cases that already reached a disposition, we considered defendants to have been held in custody if the judge set bail at the arraignment hearing and the defendant did not post bond prior to the disposition.

[2] All case names have been changed in order to protect the identities of the defendants. Although the hearings are public, we do not wish to exacerbate the problem of what Jacobs (2015) has termed "the eternal criminal record."

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Why do Judges Depart? A Review of Reasons for Judicial Departures in Federal Sentencing

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A B S T R A C T A N D A R T I C L E I N F O R M A T I O N

Over the past decade, scholars have produced a fairly large body of research evaluating the factors that predict the use of judicial departures following the Booker/Gall Supreme Court decisions, which transformed the guidelines from presumptive to advisory. With few exceptions, studies reveal that these decisions have not led to an increase in unwarranted disparities. Less is known, however, about the factors that motivate judges to impose sentences that are more punitive or more lenient than those specified by the guidelines. The purpose of this research note is to provide a comprehensive empirical analysis of the reasons federal judges give for downward and upward departures and to identify the themes that animate these decisions. We use 2013 federal sentencing data to identify six themes found in the reasons judges give for departing from the presumptive sentence. We find that judges' explanations reflect their individual philosophies of punishment, their evaluations of the defendant, the victim and the offense, their attempts to correct what they view as problematic guideline issues, and/or their concerns about various court and correctional contexts and constraints. The results of our study provide a deeper and more nuanced understanding of the factors federal judges consider as they attempt to tailor sentences to fit offenders and their crimes. The results of our study enhance understanding of how judges interpret sentencing guideline policies. We discuss the implications of these findings for theory and policy.

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Federal sentencing policies and practices have changed dramatically over the past three decades. Concerns about disparity and disproportionality in sentencing led Congress to enact the Sentencing Reform Act of 1984. This act established the United States Sentencing Commission (USSC) and directed the Commission to develop presumptive sentencing guidelines that would promote certainty, proportionality, and fairness in sentencing, and, thus, would reduce unwarranted disparity (28 U.S.C. § 991 (a)). The federal sentencing guidelines, which went into effect in 1987, are based on the severity of the offense and the offender's criminal history (Stith & Cabranes, 1998). The guidelines also specify the factors that judges are not to take into account in determining the appropriate sentence,[1] as well as the factors that are "not ordinarily relevant" in determining whether the sentence should be outside the applicable guideline range.[2] As a result of these changes, sentencing discretion was tightly constrained and, some have argued, shifted from the judge at sentencing to the prosecutor at charging (Cano & Spohn, 2012; Nagel & Schulhofer, 1992; Schulhofer & Nagel, 1997; Tonry, 1996).

Beginning in 2005,[3] the federal sentencing process was reshaped by a series of decisions handed down by the U.S. Supreme Court. In *U.S. v. Booker* (2005), the Supreme Court invalidated the U.S. Sentencing Guidelines, reasoning that the presumptive sentencing scheme was in violation of defendants' Sixth Amendment right to a jury trial. The Court's ruling in *Booker* rendered the federal guidelines "effectively advisory" and established a "reasonableness" doctrine as the standard of review for legal challenges made to sentences outside of the presumptive guideline range. The interpretation of *Booker*—that is, that judges retained discretion to depart from the guidelines—was confirmed in *Gall v. U.S.* (2007), as the Supreme Court reasoned that judges were not mandated to automatically presume that the guideline range was reasonable. Rather, judges' determination of reasonableness was to be framed by "an individualized assessment based on the facts presented." Lastly, in *Kimbrough v. U.S.* (2007), the Supreme Court further broadened judicial discretion by holding that departing from the guidelines was permissible on grounds of policy disagreement.

It is clear that these landmark rulings have restructured the federal sentencing process. The federal guidelines, which until *Booker* were presumptive, are now advisory, and although judges must consider the guideline range in determining the appropriate sentence, they have discretion to sentence outside the range and are allowed to do so based on disagreement with the policies that undergird the guidelines. In the wake of these decisions, sentencing scholars(Engen, 2009; 2011; Frase, 2007; Hofer, 2007; Spohn, 2011) have called on researchers to "identify and quantify the effects of this change and to learn whatever lessons this natural experiment might tell us about the federal sentencing system" (Hofer, 2007, p. 437). There is now a fairly large body of research evaluating post-*Booker/Gall* sentence outcomes. With few exceptions, these studies reveal that judicial decision making has not changed dramatically and that unwarranted disparity has not increased (Fischman & Schanzenbach, 2012; Scott, 2010; Starr & Rehavi, 2012; Tiede, 2009; Ulmer & Light, 2010, ; Ulmer, Light, & Kramer, 2011a, 2011b; but see U.S. Sentencing Commission, 2010, 2012; Kim, Cano, Kim, & Spohn, 2016).

There also is some evidence that judges, in line with the *Gall* and *Kimbrough* decisions, are using their discretion to depart from the guidelines because of disagreement with sentencing guideline policies (Kaiser & Spohn, 2014). Beyond this finding, however, we know very little about the reasons why judges impose sentences that are more punitive or more lenient than those specified by the guidelines. Understanding how and why judges depart can provide important insights into the decision rules they use in determining the appropriate sentence and the factors that guide judicial departure decisions. Moreover, identifying commonalities in the reasons given by judges for sentencing departures can pinpoint areas of disagreement with current sentencing guidelines and provide a tool for evaluating and revising sentencing policy. As the USSC has noted, "by monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so[,]… the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted" (USSG, §1A1(b)). The fact that sentencing is more discretionary in the post-*Booker* era, coupled with the fact that there is a broad range of guideline-sanctioned reasons for departures and variances,[4] highlights the importance of examining judges' justifications for departing. Downward and upward departures are an important and frequently used component of federal sentencing,[5] and understanding how and why judges depart can provide important insights about the implementation of sentencing policies and practices.

The purpose of this research note is to provide a comprehensive analysis of the reasons that federal judges give for downward and upward departures and to identify the themes that animate these decisions. We systematically review guideline policies and statutes regarding departures, and we employ a grounded theory approach to categorize judges'

justifications for departing from the guidelines. Our overarching goal is to provide a policy-focused evaluation of judicial sentencing decisions.

Theoretical Framework for Understanding Departures

Prior to the 1990s, there were few attempts to develop theoretical explanations about the decisions that affected sentencing outcomes (Blumstein, Cohen, Martin, & Tonry, 1983; Spohn, 2000). Recent decades, however, have seen the emergence of theoretical frameworks to explain judicial decision-making. Although there are a number of complementary and compatible theories (see Ulmer, 2012, for an overview), the focal concerns perspective is currently the leading theoretical model guiding research on and explanations of judicial decision-making in state (e.g., Kramer & Ulmer, 2002; Spohn & Holleran, 2000; Steffensmeier, Kramer, & Streifel, 1993; Steffensmeier, Ulmer, & Kramer, 1998) and federal courts (e.g., Anderson & Spohn, 2010; Brennan & Spohn, 2009; Hartley, Maddan, & Spohn, 2007a; Spohn, 2009; Steffensmeier & Demuth, 2000); it also has been used to explain the decisions of prosecutors (Hartley, Maddan, & Spohn, 2007b; Spohn, Beichner, & Davis-Frenzel, 2001; Spohn & Fornango, 2009).

The roots of the focal concerns perspective can be traced to Steffensmeier's (1980) research on gender differences in sentencing outcomes, which identified perceived dangerousness and future criminality as factors that explained disparity in sentencing outcomes for men and women. Later work by Steffensmeier and his colleagues (Steffensmeier et al., 1993; Steffensmeier et al., 1998) refined the theoretical perspective to include three focal concerns: the blameworthiness of the offender, the dangerousness of the offender and his/her threat to the community, and the practical consequences or social costs of the sentencing decision.

Scholars have long recognized that severity of offense and prior criminal history are the strongest predictors of sentencing outcomes (Spohn, 2000; Zatz, 2000). As noted above, the first focal concern that judges use is the harm done by the crime and the blameworthiness or culpability of the offender. According to the perspective, judges' assessment of the harm done by the crime rests on the nature and seriousness of the crime (Steffensmeier et al., 1998) and reflects the statutory seriousness of the offense, the gravity and consequences of the crime, and the harm to the victim. Additionally, judges' assessments of the blameworthiness or culpability of the offender are based on the offender's criminal history, prior victimization, and role in the offense.

The second focal concern is the judges' desire to protect the community by incapacitating dangerous offenders and deterring dangerous would-be offenders. Doing so requires judges to attempt to predict offenders' future dangerousness (i.e., their risk of future violence). They may consider such things as the offender's past criminal history, educational history, family and work situation, substance abuse history, and conduct since the arrest (Steffensmeier et al., 1998; Ulmer, 1997). Assessing offenders in this way allows judges to differentiate among offenders who might otherwise appear very similar based solely on the crime for which they were convicted. The focal concerns perspective also links assessments of dangerousness and blameworthiness to stereotypes and attributions based on race, gender, and social status (see Albonetti, 1991; Ulmer, 1997).

Finally, the focal concerns perspective suggests that sentencing decisions will be affected by decision makers' concerns about the practical consequences or social costs of their decisions. This reflects the fact that judges are part of a courtroom workgroup (Eisenstein & Jacob, 1977) or courthouse community (Eisenstein, Flemming, & Nardulli, 1988) with common goals and shared expectations about how cases should be handled. Other factors that constrain their decisions include concerns about the "social costs" of punishment; examples include the fairness of incarcerating nonviolent drug offenders for long periods of time, the costs inherent in incarcerating offenders who are responsible for the care of young children, and the overcrowding of jails and prisons that results from locking up large numbers of non-serious offenders.

At its foundation, the focal concerns perspective suggests that judges (and other members of the courtroom workgroup) attempt to tailor outcomes to the facts and circumstances of each case. To do this, judges need detailed information about the crime and the offender. Although convictions that result from a jury trial may produce the necessary information, these cases are not typical. Most convictions—especially those in the federal courts[6]—result from guilty pleas, not trials, and in these cases, the information that judges have about offenders and their crimes may be limited. Because they do not have all of the information needed to fashion sentences to fit crimes and offenders, judges may resort to stereotypes of blameworthiness, dangerousness, and threat that are linked to offender characteristics (for a more detailed discussion, see Bridges & Steen, 1998; Hawkins, 1981; Steffensmeier et al., 1998).

Research on Departures

Research on departures primarily has focused on *when* and *for whom* judges and prosecutors use departures—in particular, whether the use of departures varies by race or gender of the defendant and whether there is variation between districts in the use of departures and reasons for departures However, almost all of this research examines the prosecutor's decision to file a motion for a downward departure for providing substantial assistance rather than the judge's decision to depart from the presumptive sentence. Research on substantial assistance departures provides evidence that race, ethnicity, and gender affect both the likelihood of a substantial assistance departure and the magnitude of the sentence discount (Albonetti 1998; Doerner & Demuth, 2014; Johnson, 2003; Spohn & Fornango, 2009; Ulmer et al., 2011a). There also is evidence that the use of substantial assistance departures varies across districts (Johnson, Ulmer, & Kramer, 2008; Ulmer et al., 2011b), and one study found small, but statistically significant, differences across prosecutors in three district courts (Spohn & Fornango, 2009).

Although the research summarized above addresses prosecutorial discretion in the use of substantial assistance departures, the findings from this body of literature also may be applicable to judges' departure decisions. Like prosecutors, judges may use departures to mitigate the sentences of "salvageable" and "sympathetic" defendants (see, for example, Nagel & Schulhofer, 1992), to enhance the sentences of defendants deemed dangerous and blameworthy, or tailor the sentence to fit the circumstances of the crime (Johnson et al., 2008; Ulmer et al., 2011).

The purpose of this study is to build on and extend prior research by examining the reasons judges provide for departing from the federal sentencing guidelines. These reasons, which judges are required to provide whenever they sentence an offender outside the applicable guidelines range, provide important insights into the focal concerns that guide judges as they attempt to tailor sentences to fit offenders and their crimes. This focus on departures is appropriate, both because departures represent the primary avenue for the exercise of judicial discretion in jurisdictions that use sentencing guidelines and because the decision to depart is highly discretionary in the post-*Booker* era. Examining the reasons that judges provide to justify these discretionary decisions can help elucidate the decision rules they apply at sentencing.

Method

Data

We use federal sentencing data for fiscal year 2013 obtained from the United States Sentencing Commission's (USSC) Standardized Research files, which is a publicly available dataset. These data are a rich source of information relating to sentencing outcomes and draw information from several court documents, including the judgment and commitment order, presentence reports, statement of reasons, and plea agreements, among others. Of particular interest for this study, this dataset includes the reasons given by judges for departures from the sentencing guidelines.[7]

In 2013, there were 78,628 offenders convicted and sentenced in federal courts across the United States and almost half (48.83%) received some form of departure, meaning that they were sentenced outside of the recommended guideline range. Although departures can be initiated by the prosecutor or the judge, in this paper, we limit our analysis to offenders who received judicial, rather than prosecutorial, departures. There were 16,421 sentenced offenders who received a judicial sentencing departure; this represents 42.76% of all departures. These departures can be either downward (i.e., below the guideline range) or upward (i.e., above the guideline range). For each sentenced offender, judges can provide multiple reasons for departing from the guideline range. In 2013, judges gave an average of 3.67 departure reasons per offender (SD = 2.52; range = 1-16), resulting in a total of 60,267 reasons for departures included in our review. Table 1 provides descriptive statistics for these sentencing departures.

For each case involving a departure, judges were required to provide the reasons for departing from the sentencing guidelines. Although judges can depart from the guidelines based on their discretion, the U.S. Sentencing Guidelines Manual does provide provisions for when a departure may be warranted (USSG, Nov. 2013). During sentencing, judges may use these policy provisions to justify their departure decisions and/or may provide reasons for departures that are not specified by the guidelines manual. The specific reasons for departures are noted in the Statement of Reasons that accompanies the final Judgment and Commitment order, which details the court's sentencing decision.[8] This information is then provided to the USSC, which generates a numerical coding scheme for most of these departure reasons. Reasons that are unable to be coded are included as "other," and the original text of the departure reason is provided.[9] In order to create our coding strategy (as outlined below), we collected additional information from the sentencing guidelines manual, federal

statutes, and case law regarding the justifications for judicial departures that were provided within the USSC sentencing data.

Table 1: Judicial Departures for FY 2013

Departures	Downward	Upward	Both
Number of Departures	14,740	1,681	16,421
Total Number of Reasons	55,043	5,224	60,267
Average Number of Reasons[a]	3.73	3.11	2.59
Standard Deviation	2.52	2.19	2.30
Range	1-16	1-12	1-16

Notes: 48.83% of cases in 2013 received a sentencing departure or variance, 27.96% were government sponsored departures and are not included in these analyses.
[a] The average number of coded reasons given for each departed case. Judges can specify multiple reasons per case for departing from a guideline sentence.

Coding Procedures and Analytic Strategy

Given the unique nature of the data—consisting of the USSC dataset of numerically coded and textual departure reasons, guideline manual policies, federal statutes, and case law—a two-stage review process was used to systematically code departure reasons. First, we noted and reviewed the statutes, the sections of the sentencing guidelines manual, and the court cases referenced within the data. For example, some judges cited court cases, such as "*US v. Gigante*,"[10] "*US v. Maier* 2nd Cir. 1992," [11] and "*US v. Koczuk*,"[12] among many others, in their reasons for departing. Other judges cited specific sections of the sentencing guidelines or a U.S. statute. We examined these court decisions, policy statements, and statutes to determine the guidance that each provided for departures.[13] Once this information was collected and catalogued, we proceeded with the qualitative assessment of departure reasons.

During this stage of our review, we used an inductive analysis strategy to identify major themes present in the justifications given by judges for both upward and downward departures. Following a grounded theory approach (Alexander, Denzin, & Lincoln, 2005; Charmaz, 2006; Corbin & Strauss, 2014; Padgett, 2008), we used an open coding strategy to classify the terms into conceptual groupings. The goal of this inductive approach was to identify common patterns in judicial reasons for departures without being bound by specific theoretical frameworks. We first identified common words and passages by closely reviewing the departure policies, statutes, cases, and other information collected, which involved repeated readings by both authors and numerous comparisons. After careful review of these identified concepts, six themes emerged. This process resulted in a coding sheet that was then used in the second stage of our review process. An example of the coding sheet is provided in Appendix A.

After our initial review of the departure reasons, we progressed to the second stage of our analysis, which involved quantifying the number of times judges used each departure reason. This was an important step as not all reasons for departures were used with the same frequency.[14] By quantifying the number of times judges rely on specific types of departure reasons—for example those that represent defendant or victim considerations—we can better understand how and why judges are using departures. We coded all reasons for each offender who received a judicial departure, resulting in the coding of 60,267 individual departure reasons for the 16,421 offenders. We first coded for the presence of the key terms or concepts for each departure reason; however, we used the offender as our unit of analysis rather than each individual departure reason for the purpose of parsimony and ease of interpretation. In other words, as judges used multiple reasons for departures for some offenders, we coded for the presence of key terms in *any* of those departure reasons, but we only counted the presence of that term once for that offender. [15]

There are some limitations to our approach that must be acknowledged. First, although the data include each of the reasons that judges gave for every offender who was sentenced outside the guideline range, the information that judges provide is limited. We assume that the information judges provide on the statement of reasons is an accurate accounting of their justifications for departing. We have no reason to believe that judges are not truthful in their stated reasons for departures (and, in fact, the candid nature

of some departure reasons suggests forthrightness); nevertheless, we acknowledge that unstated reasons for departures may exist. Second, as reasons for departures are only given for cases involving offenders who received departures, we do not know why judges decided that they would not depart from the sentencing guidelines. This, however, is not the purpose of the present paper and does not diminish the wealth of information that can be obtained by reviewing those cases that received a judicial sentencing departure.

Findings

The first stage of our review uncovered the key concepts that were reflected in the justifications for judicial departures. As shown in Table 2 and as discussed in the sections that follow, we grouped these concepts into six broad themes: 1) philosophy of punishment, 2) defendant focused, 3) victim focused, 4) offense specific, 5) guideline corrections or issues, and 6) system contexts.[16] We then quantified the use of reasons for downward and upward departures that reflected these concepts and themes. Although we initially identified victim specific concepts as a unique theme based on review of policy and statutes, this was by far the least common reason ascribed by judges for departing, appearing in fewer than four percent of all cases (3.81% of upward departures and .45% of downward departures). Chi-Square tests were performed to determine whether there were significant differences in the reasons given for upward and downward departures. In the sections that follow, we discuss these themes and provide examples of the types of reasons that fall within each theme. Although we present them separately, we want to emphasize that many of these themes are interconnected and that judges may rely on more than one to justify a particular departure.

Table 2: Main Themes by Departure Type

	Downward		Upward		
Reason Theme	**Count**	**Percent**	**Count**	**Percent**	χ^2
Philosophy of Punishment	8,345	56.61	827	49.20	33.67***
Defendant Focused	11,586	78.60	794	47.23	800.29***
Victim Focused	66	.45	64	3.81	216.83***
Offense Focused	10,656	72.29	857	50.98	327.04***
Guideline Corrections/Issues	7,311	49.60	757	45.03	12.59***
System Contexts	2,184	14.82	399	23.74	90.55***
Other/Not specified	1,720	11.67	135	8.03	12.46***
Total Number of Cases	14,740		1,681		

*** $p < .001$

Reasons Based on Philosophies of Punishment

In about half of all upward (49.20%) and downward (56.61%) departures, judges justified the decision to depart using a specific philosophy of punishment. As shown in Table 3, the departure reasons that fell into this category reflected one of the philosophical purposes of sentencing, including *retribution*, *deterrence*, *restoration,* and *rehabilitation.* With the exception of *deterrence,* there were statistically significant differences between upward and downward departures in how often these reasons were cited.

Table 3: Philosophy of Punishment Reasons for Departures

	Downward		Upward		
Philosophy Category	**Count**	**Percent**	**Count**	**Percent**	χ^2
Deterrence	5,062	34.34	1,681	35.81	1.44
Rehabilitation	3,264	22.14	117	6.96	212.76***
Restoration	859	5.83	31	1.84	46.71***
Justice/Reasonableness	6,503	44.12	695	41.34	43.83*
Protect Public	4,071	27.62	584	34.74	37.69***

Note: Some judicial reasons for departure may be included in multiple categories.
* $p < .05$; *** $p < .001$

For both downward and upward departures, *justice/reasonableness* was the most common type of punishment philosophy used, accounting for 44.12% of downward departures and 41.34% of upward departures ($\chi^2 = 5.17$, $p < .05$). This reason for departure is reminiscent of retribution, in that the justification for the departure is that the punishment should fit the crime, but judges also frequently referenced the need to "achieve a reasonable sentence" for the offense and stated that the departure was in the "interest of justice." To justify downward departures, judges frequently provided reasons such as "adequate punishment to meet the purposes of sentencing" and "lost job/punishment enough." "Sufficient punishment" was a common reason for both upward and downward departures, as was to "provide just punishment for the offense."

Deterrence, incapacitation, rehabilitation, and restoration were additional reasons for departures that fit within the context of philosophy of punishment. Often, judges would cite these reasons directly (e.g., "Afford adequate deterrence to criminal conduct (18 3553(a)(2)(B)," "Incapacitation," and "Rehabilitation"). For examples of rehabilitation, some judges cited "training/treatment opportunities" and to "provide the def [defendant] with needed educational or vocational training, medical care, or other correctional treatment in most effective manner (18 3553(a)2)(D))" as reasons for downward departures.

Protection of the community was also a common reason given for both upward (34.74%) and downward (27.62%) sentencing departures. A judge may use this as a rationale for a downward departure if he or she believes that the defendant does not pose a risk to the public. For example, the judge may sentence a defendant below the guideline range because the "offense conduct posed no risk to security or foreign policy interest of the US." For upward departures, a judge may believe the defendant to be an exceptional risk to society (34.74%) and therefore may justify the departure as designed to "protect the public from further crimes of the defendant (18 3553(a)(2)(D))," or because "his conduct undermined the safety and security of the Fed Detention Center," or because the "court believes that defendant is a sexual predator and a danger to the community."

Defendant-Focused Reasons

Circumstances related to the defendant was another recurrent theme in judicial reasons for departures. In fact, this was by far the most prevalent, appearing in over 78% of downward departures and 47% of upward departures. The key concepts and terms that are incorporated within this theme are presented in Table 4. Above all, judges were concerned with the *attitude and character of the defendant*. For example, when imposing a downward departure, judges provided reasons such as the "history or character of the defendant…," "acceptance of responsibility," and "remorse." Some judges were more specific, bringing up the defendant's "newfound religious outlook," or indicating that the defendant "acknowledges offense impact on victims." By contrast, a perception that the defendant lacked these positive attitudes and had "taken no responsibility for actions" was often used as a justification for an upward departure.

Beyond the defendant's attitude or character, judges also justified downward departures based on the defendant's circumstances, such as *drug or alcohol abuse* (4.00%), *kids and family ties* (13.19%), *employment or education* (8.49%), or other *life circumstances* (7.67%). These reasons were almost never given to explain upward departures. Downward departures justified on the basis of kids and family ties were often related to the collateral consequences to the family as a result of the defendant's sentence. For example, some judges relied on section 5H1.6(B)(i) of the guidelines manual, which states that a departure may be warranted if "the defendant's service of a sentence within the applicable guideline range will cause substantial, direct, and specific loss

of essential caretaking, or essential financial support, to the defendant's family."

Another aspect of defendant-focused reasons for departures is the defendant's behavior or conduct, which was present in both upward (8.03%) and downward departures (13.18%). For downward departures, judges provided general reasons such as "aberrant behavior"[17] and "defendant's conduct." Judges were also more explicit about the specific nature of the defendant behavior that justified a departure, such as "absent defendant's voluntary return to US it is unlikely any further action would have been taken," "Court considered defendant turning in a handcuff key that he found in detention facility which could have potentially created a dangerous situation in the hands of another inmate," and "defendant's journey through the jungles to surrender." These reasons for downward departures illustrate how the defendant's behavior both during and after the crime can influence judicial decisions. Similar types of defendant-focused reasons were given for upward departures—judges cited such things as "extreme conduct," "untruthful testimony," "def[endant] guided people through desert for 11 days and ran out of water and food," and defendant "attempted to bribe arresting agents."

Table 4: Defendant Focused Reasons for Departures

	Downward		Upward		
Reason Category	**Count**	**Percent**	**Count**	**Percent**	χ^2
Age/Health	1,596	10.83	1	.06	199.29***
Mental Health	828	5.62	2	.12	95.07***
Drug/Alcohol Abuse	590	4.00	4	.24	61.34***
Employment/Education	1,251	8.49	12	.71	128.42***
Kids/Family	1,944	13.19	2	.12	246.73***
Community ties	438	2.97	1	.06	49.18***
Life Circumstances	1,130	7.67	15	.89	106.74***
Attitudes/Character	10,015	67.94	731	43.49	399.12***
Behavior	1,943	13.18	135	8.03	36.22***

Note: Some judicial reasons for departure may be included in multiple categories.
*** $p < .001$

Victim-Focused Reasons

Although we initially found victim-focused reasons for departures present within guideline policies and statutes, these were given infrequently by judges to justify either downward or upward departures. As shown in Table 5, when determining whether to depart from the guideline sentence, judges rarely considered issues related to the victim, even when it came to *victim harm or injury*. In those cases in which judges did use victim-focused reasons for departures, they cited such things as "lesser harm,"[18] "No victims/no harm," and "Victim's conduct." The use of the victim's conduct as a reason for downward departure is articulated in section 5K2.10 of the sentencing guideline manual, which states that "if the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense."

Victim-related reasons for upward departures often reflected the amount of harm or injury sustained by the victim. These include if the offense resulted in the "death"[19] of the victim, "physical injury,"[20] or "extreme psychological injury."[21] Victim harm, however, did not have to relate to physical or psychological injury. For example, one judge stated that the "defendant stole lifes [*sic*] savings and devastated victims" and another stated that the number of victims involved was a key consideration for an upward departure, noting that the "instant offense caused 170 employees to be laid off." Furthermore, characteristics of the victim, such as the "diminished mental capacity of one of the victims" and the fact that the "abuse occurred on more than one occasion" were also cited as reasons for upward departures. The age of the victim was noted in some cases as a reason to justify an upward departure, including one judge who stated that the "def smuggled 14 yr old girl for his carnal purposes."

Table 5: Victim Focused Reasons for Departures

	Downward		Upward		
Reason Category	**Count**	**Percent**	**Count**	**Percent**	χ^2
Injury/Harm	41	.28	53	3.15	219.09***
Character/Conduct	28	.19	14	.83	24.45***

Note: Some judicial reasons for departure may be included in multiple categories.
*** $p < .001$

Offense-Focused Reasons

Second only to defendant-focused reasons for downward departures, judges relied on aspects of the instant offense when determining whether a departure below (72.29%) or above (50.98%) the guidelines was warranted. These reasons for departures are presented in Table 6. The *severity or seriousness of the offense* is the predominant offense-focused reason given to justify both upward and downward departures. Overwhelmingly, this was due to the application of more general reasons for departures based on 18 U.S.C. 3553(a), such as to "reflect the seriousness of the offense," and the "nature and circumstances of offense." Other reasons related to the seriousness of the offense had to do with the specific nature of the offense. For instance, judges referenced drug purity and quantity as a reason for either a downward departure (e.g., "low drug purity") or an upward departure (e.g., "unusually high drug amount/purity"). For child pornography offenses, reasons such as "number of images," "no inappropriate conduct with children…," and "has had inappropriate contact with or exploited minors" were reasons used to justify upward and downward departures. Additional downward departure reasons that relate to the seriousness of the offense involved comparisons to what could have happened, such as "the defendant did not produce child pornography," "the court found that the defendant used less serious means to counterfeit currency," and "no inappropriate conduct with children/not a pedophile."

The violent nature of the offense and use of a weapon are also related to the seriousness of the offense and are captured within this category. *Violence and weapon use*, however, may also tap into a separate determination by judges when considering a sentencing departure. We found that violence and weapon use were not prominent reasons for departures. Although this is not particularly surprising for downward departures, we anticipated that violence and use of a weapon would play a more important role in judicial explanations for upward departures. However, these factors were specifically mentioned in only three percent of cases involving upward departures. When violence or weapon use was mentioned as a reason for a downward departure, it was most often due to the lack of violence or mitigating factors regarding firearms. One example of this can be drawn from one judge's written explanation, which stated that there was "no loss of life or gratuitous torture or violence." The lack of presence of departure reasons for violence or weapon use may be related to the level of detail that is involved in the calculation of offense levels for sentencing determinations. Based on our results, it would appear that judges may accept how violence and weapon use are currently included within guideline offense calculations.

The defendant's *role in the offense* was also a departure reason provided by judges, typically for downward departures. These reasons reflect the judge's consideration of whether the defendant was "influenced/used by others" or had a "mule/role in the offense," among other similar concerns. One judge stated that the "def did not control amount of ammo" and another noted the "limited duration of involvement" of the defendant. Although this was a less common reason given for upward departures, "abuse of trust/skill/position" was one potential aggravating factor related to the defendant's role in the offense. The *motive and intent* of the defendant was another consideration for departures. For example, some judges noted the "lack of culpability/accountability of defendant," or that the "defendant did not set out to defraud victim," and had "no motive for personal gain." In one case, the judge imposed a sentence that involved a downward departure based on the fact that there were extenuating circumstances as motive for the offense; this judge stated that "deft absconded believing their child was being abused."

Table 6: Offense Specific Reasons for Departures

	Downward		Upward		
Reason Category	**Count**	**Percent**	**Count**	**Percent**	χ^2
Violence/Weapon	308	2.09	56	3.33	10.74***

Role in Offense	964	6.54	27	1.61	64.77***
Motive/Intent	477	3.24	37	2.20	5.33*
Seriousness of Offense	10,406	70.60	831	49.43	312.80***

Note: Some judicial reasons for departure may be included in multiple categories.
* $p < .05$; *** $p < .001$

Reasons Related to Guideline Corrections and Other Guideline Issues

Judges gave reasons specifically addressing guideline issues in just under half of the cases that received either a downward (49.60%) or an upward departure (45.03%). Presented in Table 7, the reason most often cited related to *criminal history correction* to account for nuances of criminal history that are not captured with the criminal history score calculations. This reason was present in both upward and downward departures, and there was not a statistically significant difference between the two groups. Most of these reasons were condensed under an aggregated reason called "criminal history issues," and we were therefore unable to discern the exact nature of the "issue" the judge had with the calculated criminal history score.[22] "Safety valve" departures also represent corrections for criminal history issues, specifically for drug offenders (see §5C1.2 of USSG).

Judges also cited issues relating to *disparity and policy disagreements* as a reason for downward departures (21.87%, compared to only 8% for upward departures). Judges provided reasons such as to "avoid unwarranted sentencing disparities among defendants," "crack/powder disparity," as well as frequent mention of the disparities that exist between other drug sentences, such as "pseudoephedrine to meth disparity" and "oxycodone ratio not rational and disproportionate to the ratio for equivalent substances." One judge was particularly explicit in his reason for downward departure by stating, "Career offender qualifying events such as street drug dealing have a disproportionate impact on African American offenders." We also noted that judges were using policy disagreements as reasons for downward departures. This was most common for drug offenses, as noted above, and for child pornography offenses. Judges sometimes explicitly stated that the departure was based on a policy disagreement, such as "policy disagreement with the guidelines," and "policy disagreement with the meth actual guidelines US v Hayes."[23] Others cited specific cases that authorized judges to use policy disagreements as a reason for departures such as "US v Crosby 2nd Cir 2005"[24] and "US v Garcia Jacquez."

Table 7: Guideline Specific Reasons for Departures

	Downward		Upward		
Reason Category	**Count**	**Percent**	**Count**	**Percent**	χ^2
Disparity/Disagreement	3,223	21.87	127	7.56	190.30***
General Guideline Correction	1,612	10.94	269	16.00	38.18***
Criminal History Correction	3,999	27.13	460	27.36	.04

Note: Some judicial reasons for departure may be included in multiple categories.
*** $p < .001$

Reasons Related to System Contexts

The final theme found in judicial reasons for departures, presented in Table 8, is a reference to either court or correctional contexts. Reasons that were classified as *court contexts* included those that were to maintain good working relationships with court actors by departing in a case due to "party motion/agreement/consent" or "based on defense attorney" and were more common for upward departures. The few that related to downward departures were typically related to court efficiency. For example, "waiver of pretrial motions," "waiver of appeal," "early resolution of case," and "expedited resolution of case" were cited as reasons for downward departures. Although not as common, some judges compared federal court and state court processes in determining whether to depart. A judge in one case stated that the departure "tracks sentence that would have been imposed if sentenced in state courts," and others stated that "state authorities are pursuing charges for the same conduct" and that "one month variance due to unusual nature of state and federal involvement in this case."

Correctional contexts were often related to the defendant's ability to do time or to the costs of incarceration and were more often used for downward departures. A number of judges cited the *defendant's physical condition* as a reason for downward departure. According to the cited statute

(§5H1.4), "an extraordinary physical impairment may be a reason to depart downward; e.g. in the case of a seriously infirm defendant, home detention may be as efficient as, and less costly than, imprisonment." Additional reasons related to the defendant's ability to do time include considerations that he or she may be "prey to other inmates/susceptibility to abuse in prison" and "conditions of confinement."

Overall, the findings from our review of departure reasons demonstrate that judges rely on a multitude of reasons to justify the use of sentencing departures. As these are complex decisions, judges may rely on more than one reason when making their decisions; however, we were able to classify the majority of these reasons into six general themes. Of these, defendant-focused and offense-focused justifications were used most often to justify downward departures and offense-focused and philosophy of punishment reasons were most often used as explanations for upward departures.

Table 8: System Context Reasons for Departures

	Downward		Upward		
Reason Category	**Count**	**Percent**	**Count**	**Percent**	χ^2
Court/Community	931	6.32	382	22.72	552.24***
Corrections	1,325	8.99	17	1.01	127.97***

Note: Some judicial reasons for departure may be included in multiple categories.
*** $p < .001$

Discussion and Conclusions

Within the first few pages of the U.S. Sentencing Guidelines Manual, the Commission states that "by monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so…the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted" (USSG, 2013, §1A.4b). Reviewing the explanations provided by judges for sentencing departures offers many insights into these decisions. These stated reasons for departures can lead to a better understanding of the decision rules used by judges and shed light on how judges work within—and beyond—the sentencing guidelines. The goal of this study was to use these judicial reasons for departures to evaluate judicial sentencing decisions from an alternative perspective to see whether these stated reasons for departures can be used to provide insights as to how judges are using departures and for what reasons. Through this effort, we uncovered several findings that contribute to the refinement of theory and policy.

First, the results of this study lead to significant conclusions regarding judges' use and perceptions of sentencing guidelines. The commonalities observed in the reasons for departures hint at key aspects of the guidelines that effectively address judicial concerns at sentencing and also identify areas where the guidelines fall short and may be in need of revision. For instance, the lack of judicial departures for reasons of victim considerations may suggest that these concerns are adequately addressed by the guidelines themselves and that, overall, judges do not see a need for adjustments at sentencing to account for them. There are notable findings that may indicate a need for further investigation for the improvement of guideline policy as well. For example, although the sentencing guidelines are meant to accurately capture prior criminal history and severity of the offense, these both represent common reasons for judicial departures. The meaning of this particular finding is conditioned on the actual goals of the sentencing guidelines themselves. If the purpose of sentencing guidelines is to offer a guideline range appropriate for the majority of offenders, this finding would suggest that judges do not find this to be the case and would indicate the need for reform to make appropriate adjustments to guiding policy.

Additionally, and perhaps most significantly, the finding that over 20% of downward departures are for issues of disparity and disagreement with disparate sentencing policies warrants further consideration. The use of departures to correct for inherent disparity within sentencing guidelines has received some limited attention from scholars (see Hartley et al., 2007b; Kaiser & Spohn, 2014). These policy disagreement departures are most likely to affect certain types of offenders and offenses (e.g., drug crimes, child pornography, armed career criminals) more than others, and future studies should continue to examine the nuances of this phenomenon. The fact that judges used both upward and downward departures to correct for perceived errors in defendants' criminal history scores in interesting, especially in light of the prominent role that criminal history plays in determining the presumptive guideline sentence. That judges frequently use departures to adjust criminal history scores suggests

that the Sentencing Commission may want to revise the procedures used to calculate these scores.

Beyond policy considerations, our findings also lead to a number of conclusions regarding sentencing theory and the focal concerns that guide judges in their departure decisions. Overall, our findings are generally consistent with the focal concerns perspective. Judges often explicitly cited concerns of offender's blameworthiness and culpability as well as the need to protect the community from dangerous offenders likely to recidivate. These factors clearly influence judges' sentencing/departure decisions. By contrast, we found less support for the assertion that judges consider practical constraints—such as prison crowding or courtroom efficiency; however, concerns about correcting for disparity and policy disagreements may be a practical consideration of sentencing to which judges are more highly attuned. This finding is consistent with recent research which indicates that judges may be cognizant of disparities in sentencing outcomes (see Clair & Winter, 2016; Kaiser & Spohn, 2014) and may use their discretionary power to limit these inherent disparities.

Also of theoretical interest is the degree to which the various punishment philosophies were used to justify sentencing departures. Further research should delve deeper into how these philosophies are used. We were not able to examine the departure decisions of individual judges, and therefore, we cannot say whether certain judges justified their departure decisions using a consistent philosophy of punishment whereas others took a more pragmatic and eclectic approach that involved the use of different philosophical perspectives depending upon the nature of the crime or the characteristics of the offender. The presence of several different philosophical perspectives among the rationales for departures suggests that judges bring different philosophies of punishment and beliefs about the goals of sentencing to the bench. The ways in which these philosophical differences may shape their sentencing decisions is a potential topic for future research.

It is important to note that our findings are with respect to the formally articulated reasons for departures as noted in sentencing documents and may not necessarily reflect the judges' true feelings or opinions. Additionally, these findings only speak to the reasons for departures in federal cases and may not reflect decision-making processes of judges within the state court systems. Finally, although over half of federal departures are prosecutor initiated, such as substantial assistance departures, we are not able to as closely examine prosecutor reasons for departures given that there is no requirement for prosecutors to justify their reasons for offering substantial assistance or other types of prosecutor-based departures.

The goal of this paper was to systematically review the reasons judges give for departing from sentencing guidelines and, in so doing, to shed light on the decision rules and focal concerns that guide the sentencing process. The sentencing research conducted to date—most of which involves estimating models of sentence outcomes using variables purported to measure the factors that judges take into consideration in determining the appropriate sentence (but see Clair and Winter, 2016, for an exception)—cannot say with any degree of certainly that these are, in fact, the concerns that motivate judges' decisions. Like Clair and Winter (2016), we believe that the judicial decision making process is complex and that "researchers should focus analytic attention on the situationally specific social processes of decision-making" (p. 355). We suggest that examining and cataloguing judges' stated reasons for departing provides a deeper and more nuanced understanding of the factors they consider as they attempt to tailor sentences to fit offenders and their crimes.

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Appendix A

Departure Coding

These themes and key concepts were identified by reviewing the USSC codebook for sentencing departures and textual "other" reasons for departures provided within the data, the U.S. Sentencing Guideline Manual policy statements on appropriate use of departures, U.S. case laws referenced within departure decisions, and U.S. federal sentencing statutes that pertain to departures. After these themes and concepts were identified, this coding sheet was used to quantify the number of times judges cited reasons for departures that correspond these concepts for each sentencing offender.

Theme 1: Philosophy of Punishment

- Deterrence (1 = present; 0 = not present)
- Rehabilitation (1 = present; 0 = not present)
- Restoration (1 = present; 0 = not present)
- Justice/Reasonableness (1 = present; 0 = not present)
- Protect Public (1 = present; 0 = not present)

Theme 2: Defendant Focused

- Age/Physical Health (1 = present; 0 = not present)
- Mental Health (1 = present; 0 = not present)
- Defendant Past Drug/Alcohol Use or Abuse (1 = present; 0 = not present)
- Defendant Employment/Training/Education (1 = present; 0 = not present)
- Defendant Kids/Family Ties (1 = present; 0 = not present)
- Defendant Community Ties (1 = present; 0 = not present)
- Defendant's Past/Life Circumstances (1 = present; 0 = not present)
- Collateral Consequences of Punishment (1 = present; 0 = not present)
- Defendant's Attitude or Personal Characteristics (1 = present; 0 = not present)
- Defendant's Behaviors/Actions (1 = present; 0 = not present)

Theme 3: Victim Focused Reasons

- Victim Injury/Harm (1 = present; 0 = not present)
- Victim Age/Characteristics (1 = present; 0 = not present)
- Victim's Conduct/Behavior (1 = present; 0 = not present)

Theme 4: Offense Focused

- Violence or Weapon Used (1 = present; 0 = not present)
- Defendant's Role in the Offense (1 = present; 0 = not present)
- Defendant's Intent/Motive (1 = present; 0 = not present)
- Severity of Offense (1 = present; 0 = not present)

Theme 5: Guidelines Focused

- Disparity/ Guideline Disagreement (1 = present; 0 = not present)
- Criminal History Issues/Correction (1 = present; 0 = not present)
- Guideline Corrections (1 = present; 0 = not present)

Theme 6: System Contexts

- Court Contexts (1 = present; 0 = not present)
- Correctional Contexts (1 = present; 0 = not present)

Endnotes

[1] This includes the defendant's race, sex, national origin, creed, religion, and socio-economic status (§5H1.10) and whether the offender had a lack of guidance as a youth or similar circumstances indicating a disadvantaged upbringing (§5H1.12).

[2] These factors include the defendant's educational and vocation skills, drug or alcohol dependence or abuse, employment record, and family ties and responsibilities (§5H1.1-5H1.6).

[3] There were several changes prior to 2005. In Koon v. United States (518 U.S. 81, 1996), the Supreme Court attempted to restore some measure of judicial discretion by establishing an "abuse of discretion" doctrine of appellate review. In an effort to curb judicial departures, Congress subsequently responded with the enactment of the Feeney Amendment to the PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today; Pub. L. No. 108-21, 117 Stat. 650) of 2003, which reinstated a "de novo" standard for appellate review (18 U.S.C. § 3742 (e)), thus restricting judicial discretion. Therefore, it could be argued that, from 1996 to 2002, judges' discretion was enhanced and, then, restricted again by the PROTECT Act of 2003.

[4] Although departures and variances are different, both terms refer to sentences imposed outside of the guideline range. This paper will use the term "departure" to generally refer to all sentences that are imposed outside of the guideline range, including departures and variances.

[5] In 2013, 78,628 offenders were convicted and sentenced in federal courts, and almost most (48.83%) received a sentence outside the guideline range. Of those, 43% received a judicial—as opposed to a prosecutorial—departure.

[6] In 2016, 97.3% of all cases in the U.S. District Courts resulted in a guilty plea (United States Sentencing Commission, 2017). Because only three percent of federal cases resulted from trial convictions, it was not possible to provide meaningful comparisons in departure reasons between sentences from trial and plea agreements for this particular study. Additionally, the Guideline Manual, which we used to create our initial coding scheme, does not differentiate policy guidelines for departures between cases that resulted in guilty plea and trials. For these reasons, we do not examine departures between guilty pleas and trial convictions, although this may be an area for future research.

[7] Prosecutorial departures tend to fall into two categories: (1) fast track and (2) substantial assistant departures. Unfortunately, departures based on substantial assistance or fast track do not have the same level of detail in to the reasons for departures as those that are given by the judge. Also, there is far less guidance given within the U.S. Sentencing Guidelines on the use of these types of departures. Because of these reasons, we purposefully excluded prosecutorial departures from our analysis. Further, the results from our study do not make any implications to prosecutorial reasons for departures.

[8] An example of the Judgment in a Criminal Case form (AO 245B) can be found at http://www.uscourts.gov/forms/criminal-judgment-forms/judgment-criminal-case, last accessed April 9, 2016.

[9] The reason codes for departures are provided within the USSC Variable Codebook for Individual Offenders. The USSC variable codebook can be found at http://www.ussc.gov/sites/default/files/pdf/research-and-publications/datafiles/USSC_Public_Release_Codebook_FY99_FY13.pdf, last accessed March 25, 2015. The reasons for departures can be found in the Code Attachment pages A10-A16.

[10] Case that found that downward departure due to advanced age and health problems of defendant were appropriate (U.S. v Gigante, 989 F. Supp. 436 (E.D.N.Y. 1998).

[11] Case that affirmed the use of downward departure for "efforts toward rehabilitation followed an uneven course, not a surprising result for someone with a fourteen year history of addiction" (*U.S. v. Maier*, 975 F.2d 944, 945, 2d Cir.1992).

[12] Case in which the appellate court ruled that the district court departed downward for an erroneous reason (*U.S. v. Koczuk*, 166 F. Supp. 2d 757 (EDNY 2001).

[13] There were few occasions in which we were unable to determine the reason for departure or the specific code description was missing from the codebook. In these instances, clarification was sought by contacting the USSC directly.

[14] There may be guideline policies, statutes, and cases which provide guidance for the use of departures that were not used at all by judges in their departure decisions in 2013. These were therefore not included in our review.

[15] For the majority of cases, presence of key terms and concepts were identified by the explicit inclusion of that term or phrase. For example, if the reason for departure stated "injury to victim" that would be coded using the key term "victim injury." Other instances required more subjective judgment on the presence of key terms, such as "waiver of pretrial motions." While this does not use a specific key term, such as "court contexts," it is clear to see this reason for departure is related to issues of court efficiency, which fits within our definition of court contexts. Instances in which reasons for departures captured two or more key concepts were also noted and would be coded in both places. For example, "willingness to continue mental health treatment" could be coded as "rehabilitation" philosophy of punishment as well as "defendant mental health" reasons for departures. Coding decisions where subjective determinations of the presence of key terms and concepts were reviewed and discussed between authors to maintain consistency.

[16] There were roughly 11 percent of judicial reasons for departures that we were unable to identify key terms or phrases and therefore unable to include in our thematic review. Most of these reasons were too vague to code confidently. These were included within the "other/not specified" category.

[17] USSG §5K2.20 Aberrant Behavior (Policy Statement)

[18] USSG §5K2.11 Lesser Harms (Policy Statement)

[19] USSG §5K2.1 Death (Policy Statement)

[20] USSG §5K2.2 Physical injury (Policy Statement)

[21] USSG §5K2.3 Extreme psychological injury (Policy Statement)

[22] We contacted the USSC directly to gain clarity on what this aggregated reason for departure represents. According to the USSC (personal communication, C. Kitchens, February 9, 2015), this aggregates reasons that are based on §4A1.3 of the guidelines manual, which states reasons such as "pattern of conduct," "pending cases," and "related cases," among others. This category also includes reasons such as "criminal history category over-represents the defendant's involvement," "age of priors," and "no prior record/first offender," as just a few examples.

[23] Case in which judge states that "The methamphetamine Guidelines are fundamentally flawed because they fail to consider additional factors beyond quantity" (*United States v. Hayes*, __ F. Supp. 2d __, 2013 WL 2468038 38, N.D. Iowa June 7, 2013).

[24] Case in which the second circuit outlined post-*Booker* sentencing procedures and standards of review that has been applied to policy disagreement departure cases (*United States v. Crosby*, 397 F.3d 103, 2d Cir. 2005)

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Birds of a Feather Flock Together: The Nigerian Cyber Fraudsters (Yahoo Boys) and Hip Hop Artists

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ABSTRACT AND ARTICLE INFORMATION

This study sets out to examine the ways Nigerian cyber-fraudsters (*Yahoo-Boys*) are represented in hip-hop music. The empirical basis of this article is lyrics from 18 hip-hop artists, which were subjected to a directed approach to qualitative content analysis and coded based on the moral disengagement mechanisms proposed by Bandura (1999). While results revealed that the ethics of *Yahoo-Boys*, as expressed by musicians, embody a range of moral disengagement mechanisms, they also shed light on the motives for the Nigerian cybercriminals' actions. Further analysis revealed additional findings: "glamorization/de-glamorization of cyber-fraud" and "sex-roles-and-cultures". Having operated within the constraint of what is currently available (a small sample size), this article has drawn attention to the notion that Yahoo-Boys and some musicians may be "birds of a feather." Secondly, it has exposed a "hunter-and-antelope-relationship" between Yahoo-Boys and their victims. Thirdly, it has also highlighted that some ethos of law-abiding citizens is central to Yahoo-Boys' moral enterprise. Yahoo-Boys, therefore, represent reflections of society. Arguably, given that Yahoo-Boys and singers are connected, and the oratory messages of singers may attract more followers than questioners, this study illuminates the cultural dimensions of cyber-fraud that emanate from Nigeria. In particular, insights from this study suggest that cyber-fraud researchers might look beyond traditional data sources (e.g., cyber-fraud statistics) for the empirical traces of "culture in action" that render fraudulently practices acceptable career paths for some Nigerian youths.

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Fraudster*: "Honey, your sparkle always lights up my heart."* Victim*: "Oh, hmmm, I love you, darling."* Fraudster*: "Me too. I can't wait to hold you in my arms. But there's a little problem."* Victim*: "What is it, honey?"* Fraudster*: "I urgently need a small amount of money to hasten the process of my travelling documents and visa."* Victim*: "How much do you need, darling?"* [1] The above type of dialogue may be commonplace in a cyber-fraud context, and we often hear stories about cyber-fraudsters duping victims through catfish[2] relationships (Whitaker, 2013). While we may know little about cyber-fraudsters (Levi, 2016), in recent years there has been an upsurge in victim-oriented studies (Button et al. 2014; Cross, 2016; Owen, Noble & Speed, 2017; Webster & Drew, 2017). At least two factors are responsible for this upsurge: first, the extensive media coverage of high-profile victims in the West (BBC, 2016), and second, victims are mainly defrauded in the context of "love" and "friendship" (Kopp et al. 2015; Whitty & Buchanan, 2016). Romance is in itself a source of excitement and mystery, whereas romance that is created through *freestyle tricks* is different. *Freestyle tricks* is the use of online dating sites and apps by cyber-fraudsters to befriend unsuspecting victims to the extent that victims fall in love with the perpetrators and support them instrumentally (Ibrahim, 2016a). Research on the psychology of cyber-fraudsters could offer a greater understanding of cyber-fraud, especially the fraud that emanates from Nigeria. According to the Federal Bureau of Investigation (FBI, 2010) statistics[3], Nigeria is the third worst country globally when it comes to the prevalence of "cybercrime" perpetrators.

The term "cybercrime" encompasses a broad spectrum of rule-breaking behaviours, such as cyber-fraud, cyber-bullying, cyber-stalking and cyber espionage (Hutchings and Chua, 2016; Yar, 2016). This research, however, focuses exclusively on cyber-fraud, not least because it constitutes the bulk of cybercrimes that emanate from Nigeria (Adeniran, 2011; Ojedokun & Eraye, 2012; Trend Micro & INTERPOL, 2017). The defrauding of victims for monetary benefits is the most significant theme in the analysis of Nigerian cybercriminals, and cyber-fraud, for this study, refers to the computer or/and internet-mediated acquisition of financial benefits by false pretence, impersonation, counterfeiting, forgery or any other fraudulent representation of facts (Ibrahim, 2016a). While there are many types of cyber-frauds associated with the broader canon (Button & Cross, 2017; Schoepfer et al. 2017), researchers have predominantly associated the Nigerian cybercriminals with Advance Fee Fraud (AFF) or "419" fraud (Igwe, 2007; Adogame, 2009; Rich, 2017). AFF is a confidence trick in which victims are deceived into advancing relatively small sums of money in the hope of realising a much larger gain (Chang, 2008; Rich, 2017). The term "419" is historically derived from section 419 of the Nigerian Criminal Code[4] and deals with fraud and money laundering. Therefore, this research acknowledges that, historically, online 419-fraud has been situated in a Nigerian context, and thus, "cybercrime" in this article is exclusively understood as cyber-fraud (e.g., romance-scam, advance fee fraud). Before the digitalization of these crimes, a Nigerian lawyer, Fred Ajudua, supposedly revolutionised multiple offline "419"-formats (Longe, Mbarika, Kourouma, Wada, & Isabalija, 2010). The online versions of 419 and AFF are locally known as "*yahoo-yahoo*" (Adeniran, 2011; Melvin & Ayotunde, 2010). "*Yahoo-yahoo*" is coined from the dominance of Yahoo emails, apps and instant messaging in perpetrator-victim communications during the mid-2000s (Trend Micro & INTERPOL, 2017) when there was an Internet boom in Nigeria. The perpetrators of "*yahoo-yahoo*" are popularly called "*Yahoo-Boys*" (Aransiola & Asindemade, 2011). Having defined the above terms, this article examines the ways *Yahoo-Boys* are represented in hip-hop music. In particular, it assesses the connections between them (*Yahoo-Boys* and musicians) looking for, in Swidler's (1990) term, the empirical clues of "culture in action."

Media Representations of Yahoo-Boys and Singers Connections

"*In the Nigerian music industry, Yahoo boys reign supreme*" - Music Critic, Tayo

D'banj's song "*Mobolowowon*," which came out in 2004, was the first song with a cyber-fraud-theme in hip-hop music (Tayo, 2017). It supposedly described how the singer escaped from the British police when he was wanted for credit card scams in London. Beyond *D'banj's* alleged biographical accounts, he explained in a recent interview[5] that "most of the new generation record labels are founded by Yahoo-Boys" (e.g., Daily Post, 2018). *D'banj's* explanation aligns with some Nigerian music critics and commentators' assertions that "Yahoo-Boys have floated music labels, and some are singers themselves" (e.g., Tayo, 2017, p.1). Such speculations have drawn huge (social) media attention. They have, for example, triggered various discussions on national TV channels in Nigeria, such as "Linda Ikeja Hot Topics TV Show" (2017). While

one might still question whether singers and Yahoo-Boys are indeed "birds of a feather that flock together," it is worth considering the following: First, according to the Daily Post (2017), many singers do not only benefit directly from the cyber-fraud, but they are also ex-con men (see also University of Wisconsin-Madison, 2017). For example, "9ice," a singer with a cloak of respectability, mentioned "street-names" of some five popular Yahoo-Boys, allegedly his associates, in his recent song "Living Things" (Punch, 2017a). Like "*9ice*," other singers (DJ Sidez featuring Slimecase and Masta T) also mentioned names of well-known Yahoo-Boys in their recent song, "Oshozondi[6]. However, not all singers share a similar viewpoint (Computer World, 2010). Microsoft and the Nigerian government have jointly sponsored some singers to campaign against Yahoo-Boys as part of a war against cyber-fraud in Nigeria. In particular, Microsoft's Internet Safety Security and Privacy Initiative for Nigeria was prompted by one primary reason: to reduce the impact of Yahoo-Boys on singers and vice versa. Second, beyond the above loose link between Yahoo-Boys and singers, Nigerian hip-hop star Dammy Krane was arrested on cyber-fraud charges before boarding a private jet in Miami (Neal, 2017). Additionally, while *Sauce Kid*, a Nigerian rapper, was jailed in America for cyber-fraud (Punch, 2017b), another prominent figure in the Nigerian music industry, *Special Ed*, had been arrested in the USA for First Degree Forgery (Information Nigeria, 2014). Third, apart from these direct connections between cyber-fraud and singers, *Rapper N6* (a singer), summarised his views on the connection between Yahoo-Boys and musicians as follows:

> Entertainers cannot be separated from illegal money....Most of the highest money that they've [singers] made come from people that have made money from illegal means....The new guys are the militants [Yahoo-Boys]. They are the new money guys. We are all trying to get a militant godfather. (as cited in Hot TV Topics, 2017, p.1)

Insights from the above suggest that Yahoo-Boys and music artists may not be two separate entities with clearly defined boundaries. Beyond the realm of social media, however, research has not yet established the connections between Yahoo-Boys and musicians. In other words, apart from media speculations (Punch, 2017a, 2017b), the ethics of Yahoo-Boys and their representation in music have only been discussed as gossip in most Nigerian chatroom forums and some television channels. For this article, the ethics of Yahoo-Boys can be understood as a set of perceptual alterations that offer them "psychological shields" to justify their conduct and thus, circumvent self-condemnation (Bandura, 1999; Sykes & Matza, 1957). Three questions are at the core of this study: [1] What are the ethics of Nigerian cyber-criminals as expressed by music artists? [2] Which techniques do artists deploy to describe their views on cyber-criminals? [3] What might the justifications say about the motives for "cybercrime"? To gain a deeper insight into the ways crime and illegal money are represented in hip-hop music in general, this article proceeds with a literature review. Doing so is prompted by two central drives: [1] to examine the core characteristics of hip-hop culture and [2] to assess the main features of Yahoo-Boys.

Literature

Hip-Hop Ethics and Culture

"Keep in mind when brothas start flexing the verbal skillz, it always reflects what's going on politically, socially, and economically[7]"

Most generalizable research on hip-hop has traced the genesis of hip-hop in Nigeria to African communities in the South Bronx (New York), where contemporary hip-hop music originated during the 1970s (Blanchard, 1999; Shonekan, 2013). However, Bailey (2014) and Persaud (2011) pointed out that hip-hop culture is rooted in multiple cultures, and prominent among these are West African cultures. Hip-hop singers were historically believed to serve as "*griots*" in their social communities. Since the *griots* were respected West African oral historians and praise-singers (Keyes, 2002; Persaud, 2011), they were believed to have preternatural creative and emotional intelligence or talents (Blanchard, 1999). For Schulz (1997) and Blanchard (1999), the oratory messages of *griots* generally attract more followers than questioners. The "*griots*" have immense power to impose reception, not primarily due to the uniqueness of their messages, but also because their messages have always been at the heart and lips of the masses – they represent the harsh realities of their lives (Blanchard, 1999; Schulz, 1997). In this context, the *griots* are the voices of those who otherwise have no power to impose reception. For Bourdieu (1977), powerful speakers speak, not exclusively to be understood, but more importantly, to be believed, respected, and repeated (p. 648). Repeating discourses normalizes their claims, and the orthodoxy of the *griots* by implication is almost certain.

The American hip-hop and rap[8] artists, through their African oral storytelling heritage, could be seen

as the contemporary *griots*, and by the same token, they are powerful speakers who have an immense power to impose reception (Blanchard, 1999; Keyes, 2002; Persaud, 2011). These music artists not only depict and reflect the realities of American inner cities (Royster, 2016), but they primarily embody street entrepreneurship, practices, dispositions, and habits. This type of embodiment has been referred to as "street habitus" (Ilan, 2015, p.57; see also Dimou, 2017). By implication, most American artists, through songs, performances and records, chant about their life stories and experiences such as gang violence, glamorization of wealth, illicit drug business, street hustling, and thug life (Dimou, 2017). For example, the following song from Notorious B.I.G, "Juicy," (Genius Lyrics, 2018, p.1) summarised a part of his life succinctly. "*Yea, this album is dedicated to all the teachers that told me I'd never amount to nothing, to all the people that lived above the buildings that I was hustling in front of that called the police on me when I was just trying to make some money to feed my daughter*" (Genius Lyrics, 2018, p.1). Therefore, it is key to remember that first, hip-hop singers such as Notorious B.I.G are like the *griots* (Peraud, 2011), and their songs can influence attitudes possibly due to the artistic and emotional framing of their messages (Louw, 2017). Second, a specific aspect of hip-hop singers' dispositions and attitudes is street habitus, and as Ilan (2015) noted, street habitus is fundamentally embodied and cannot be easily "tried on" (p. 57).

Hip-hop music symbolizes street habitus and contributes to who we are: "In short, hip-hop lyrics instruct listeners in how to make sense of urban street crime and how to understand the identities of those who participate in crime (or avoid) it" (Kubrin, 2005, p.367). Kubrin's (2005) study on music and behaviour pointed out that while hip-hop and rap music do not cause crime, they offer vivid vocabularies of motive, which justify criminal conduct and provide a way for listeners to understand and appreciate them. Rehn and Sköld (2003) noted that the effects on listeners of narratives that glamorise material goods, such as in Puff Daddy and colleagues' hit song "[I]t's All About the Benjamins" ("*Lex and Range Rovers…/...../It's All About the Benjamins, baby...*"), is plausible. *Benjamin* here denotes the US$100 note, because it has Benjamin Franklin's head on it. Such songs may influence listeners' attitudes toward the consumption of brand goods and the means to obtain them (via crime or otherwise).

Like their historical antecedents in America, researchers have argued that Nigerian songs such as "I go chop your dollar" were supposedly produced for the recruitment of youths into cyber criminality and "easy ways to affluence" (e.g., Oduro-Frimpong, 2014). In the Nigerian context, due to the absence of an economic, medical, and social security system as well as political impunity (Shonekan, 2013; Smith, 2008), hip-hop music has served as an escape vehicle to self-employment for some Nigerian youths (Oladipo, 2017; Shonekan, 2013). Most university students "hustle" to pay school fees, and they face unemployment or poor wages and inefficient health care when they graduate (Ibrahim, 2016a; Smith, 2017). As a consequence, established Yahoo-Boys are often perceived as heroes and transnational "Robin Hoods" who take "dollars" from the rich in the West and give to the poor in West Africa (Tabu, 2011). Indeed, according to some media commentators, "many awesome Yahoo-Boys and kind-hearted artists are using their money to open foundational programs and help the poor masses" (e.g., Segun, 2017, as cited in Naijaloaded, 2017, p.1). Although the links between unemployment/poverty and offending rates are far from straightforward (Newburn, 2016), it is plausible that economic hardship unified the destiny of hip-hoppers and that of Yahoo-Boys in part, offering real-life scripts for singers to represent "street entrepreneurship" and cyber-fraudsters in their songs. This study will henceforth provide a brief historical overview on Yahoo-Boys.

Yahoo-Boys and University Students/Graduates

Historically, the colonial[9] police and head teachers had noted that Nigerian schoolboys were "excellent psychologists" in manipulations (e.g., U.S. Consulate, 1949). These teenagers were described as "psychologists" because they defrauded many "knowledgeable and intelligent" victims in Western societies with postal scam letters (Ellis, 2016, p.28). These observations illuminate the psychology of the offline fraudsters. Some researchers have shed light on the psychology of their online successors (i.e., cyber-fraudsters) by examining their fraudulent emails (purportedly from Yahoo-Boys; Adogame, 2009; Dion, 2010; Rich, 2017). These researchers highlighted that authors[10] of scam emails (who may or may not be Nigerians) deploy a "trust rhetoric" (Rich, 2017), embody a "Machiavellian worldview" (Dion, 2010) and use "authoritative and urgent" language (Chang, 2008) to defraud their victims. In particular, Rich (2017) investigated how fraudsters invoke trust with the Nigerian-email-scam-formats and how recipients interpret such trust-laden offers. He found that references to trust language are most common in emails purported to have originated from the African continent and those that promised a large amount of money. These studies (Chang, 2008; Dion, 2010; Rich, 2017) expanded our understanding of the

psychology behind the scam letter format. The current study builds on insights from the above studies, and it examines the cultural dynamics of cyber-fraud. Indeed, it investigates the ways Yahoo-Boys are represented in hip-hop music, and the connections between them (Yahoo-Boys and musicians) searching for, in Swidler's (1990) term, the empirical traces of "culture in action."

Decoding the term Yahoo-Boys is a critical entry point for understanding the cultural dynamics of cyber-fraud originating in Nigeria. The "Boys" after the term "Yahoo" suggests that the perpetrators of the infamous sweetheart swindles, among other types of AFF, may be primarily male. In support, there is a reasonably clear pattern to suggest that young adult male Nigerians, mainly university students/graduates, constitute the bulk of cyber-fraudsters (Aransiola & Asindemade, 2011; Tade & Aliyu, 2011). While the accusation of male university students may be reminiscent of that of the colonial schoolboys in the 1940s mentioned above, the evidence on the demography of contemporary Nigerian swindlers demands a closer look. For example, Aghatise (2006) speculated that "80% of perpetrators in Nigeria are students in various Higher Institutions" (p. 2). However, he failed to provide any evidence for his claim. Empirical evidence for the prominence of male university students in the theatre of cyber-fraud came from Aransiola and Asindemade (2011), Tade (2013), Ojedokum and Eraye (2012) and Tade and Aliyu (2011). Like Ojedokum and Eraye (2012) and Tade and Aliyu (2011), Aransiola and Asindemade (2011) specifically contended that [1] male university students between the ages of 22-29 years mainly commit cyber-fraud that originates from Nigeria; [2] Nigerian universities serve "as the breeding grounds" for "*yahoo-yahoo*" (p. 762); [3] some 'Yahoo-boys' subscribe to the occult-economy[11], that being the use of spiritual-powers in the virtual world for wealth generation.

However, while the above studies portrayed youth cultures and male juvenile offenders to assume the appearance of ever-increasing outrage in Nigeria, they solely relied on university students as their samples, and this pattern of data has led to the authors' assertions. Conversely, other researchers who interviewed students and non-students (Jegede, Elegbeleye, Olowookere, & Olorunyomi, 2016), parents (Ibrahim, 2016b), and students and spiritualists (Melvin & Ayotunde, 2010) arrived at the same conclusion as the above authors (e.g. Aransiola & Asindemade, 2011). Considering that cyber-fraud involves cyberspace, this social phenomenon should not be limited by parochial conceptions that give it little or no global significance in our computer age (Hall, 2013 Levi, 2016; Kirillova, Kurbanov, Svechnikova, Zul'fugarzade, & Zenin, 2017). Indeed, the virtual world and cultural nuances in society are not separate entities (Jaishankar, 2011; Ibrahim, 2016a; Stratton, Powell and Cameron, 2017). These studies (e.g., Jegede et al., 2016; Ojedokum & Eraye, 2012), therefore, provide clues on the dynamics of youth cultures and cyber-fraud. Most Nigerian youths, despite economic hardship and the glamorization of crime, do resist criminal activities, whereas, for other youths, cyber-fraud constitutes innovative self-employment (Adogame, 2009; Jegede et al., 2016). The key point is that offenders and non-offenders respond differently to the same social and contextual conditions in society. "The line dividing good and evil cuts through the heart of every human being"[12], whereas there is no objective viewpoint for the rationalization of an "immoral" act (Bandura, 1999).

Theoretical Guidance

Unlike in a Nigerian context, Hutchings (2013) and George (2014), in Western societies, have used "neutralization techniques" (Sykes & Matza, 1957) and the "moral disengagement mechanisms" (Bandura, 1999) theories to assess cybercrime respectively. The neutralization techniques proposed by Sykes and Matza (1957) and moral disengagement mechanisms put forward by Bandura (1999) are essentially based on the premise that offenders and non-offenders have the same normative orientations and general moral beliefs (Ribeaud & Eisner, 2010). Similar to Sykes and Matza's (1957) argument that individuals offend if they find excuses to remove the feelings of blame from themselves, Bandura, Barbaranelli, Caprara, and Pastorelli (1996) argued that "people do not ordinarily engage in reprehensible conduct until they have justified to themselves the rightness of their actions" (p. 365). There is considerable overlap between the neutralization techniques and Bandura's (1999) mechanisms of moral disengagement (summarised in Table 1, modified from Ribeaud & Eisner, 2010). Since people do not ordinarily offend until they have justified to themselves the rightness of their actions (Bandura, 1999), it is conceivable that this theoretical background will shed light on the cultural dynamics of cyber-fraud that originates from Nigeria.

Table 1: Conceptual Similarities Between Theories

Cognitive Mechanism	Neutralization Techniques (Sykes & Matza, 1957)	Moral Disengagement (Bandura, 1999; Bandura et al., 1996)
Cognitive Restructuration	1. Appeal to Higher Loyalties 2. Euphemistic labeling (implied)	1. Moral Justification 2. Euphemistic Labeling 3. Advantageous Comparison
Minimizing Own Agency	Denial of Responsibility	1. Displacement of Responsibility 2. Diffusion of Responsibility
Disregarding/Distorting Negative Impact	Denial of Injury	1. Disregarding Consequences 2. Distorting Consequences
Blaming/Dehumanizing Victim	Denial of Victim	3. Attribution of Blame 3. Dehumanization
Condemnation of Condemner	Condemnation of Condemner	

Note: Table modified from Ribeaud and Eisner, 2010, p. 301

Method

Lyrics Data Collection

The following systematic steps listed were taken to select lyrics listed in Table 2:

1. Searched on Google with phrases such as "list of Nigerian musicians" and made a list of all Nigerian Hip-hop and rap artists.
2. Validated list with two professional Nigerian hip-hop DJs to ascertain that no artists have been missed. The underlying idea is that while some singers are famous in the realm of public spaces such as dance halls, they might not have produced their official first album. For example, *2Face Dibia* (one of the most successful Nigerian pop stars) was already a national star while performing in Nigerian university-campuses before he released his first album.
3. Visited the online profiles of each singer found and selected the ten most popular songs in descending order of significance from each artist. The criterion that songs are relatively the most popular of each artist ensured that the music had reached a significant proportion of the population as is evident in the case of '*Yahooze*[13],
4. Selected only songs produced in English, pidgin English, and three major indigenous languages in Nigeria (Igbo, Yoruba, and Hausa) respectively. Nigeria has over 500 indigenous languages, and due to practical reasons, songs produced in other numerous ethnic languages were excluded.
5. Selected songs produced between 2007 to 2017 because while Nigerian hip-hop emerged in the late 1980s, it has only become highly commercialized and accessible during the internet boom in the late 2000s (Adjirakor, 2017; Inyabri, 2016; Shonekan, 2016). The availability of electronic music production, editing, and distributing applications facilitated open participation in the street-entrepreneurship of hip pop music for underprivileged youths (Shonekan, 2016). Like Kubrin's (2005) study, which investigated rap music in the USA from 1992 to 2000 for a related reason, our study chose to capture this period.
6. Read the lyrics of the remaining songs from music websites such as "freenaijalyrics.com" and "sweetlyrics.com" while searching for cyber-fraud themes.
7. Made a list of songs that explicitly depicted "yahoo-yahoo" while using a wide spectrum of Yahoo-Boys' slangs such as "maga," "wire wire," "419," "Gameboy," "freestyling," and so on as a guide.
8. Validated the list with four professional DJs in Lagos and Abuja (the previous and current capital cities respectively) from the four popular nightclubs concerning the popularity of selected songs in leisure spaces. A list of songs was presented to these DJs, and any song that was not

endorsed by at least two DJs was excluded. Any song with less than 50% (n=2) of these DJ was excluded.

9. Selected 18 songs that explicitly represented 'Yahoo-Boys' over the period of 10 years as outlined in Table 2 (i.e., 2007-2017 and nine songs for every five years).
10. Songs were selected in descending order of significance; that is, if a singer has two songs that depicted cybercrime, the one that most explicitly represented 'Yahoo-Boys' ethics was chosen in place of the other one. Except if a singer is not a lead singer and has one or more co-singers involved in a second song, only one song from each singer is eligible for inclusion in order to have, in Kubrin's (2005) term, a diverse collection of lyrical "vocabularies of motive."
11. Lyrics were subjected to a directed approach to qualitative content analysis (DAQCA) (Hsieh and Shannon, 2005), and coded based on the moral disengagement mechanisms proposed by Bandura (1999). Findings, as shown in Table 3, are discussed.

Table 2: List of Songs Studied

Song
1. Yahooze (from Olu Maintain, 2008)
2. Living things (from 9ice, 2017)
3. Maga don pay (from Kings, 2015)
4. Yahoo boyz (from X-busta, 2016)
5. Yahoo boys (from Prince Hollywood, 2009)
6. Yahoo boys (from Gnext, 2011)
7. Maga don pay (from Larry Prince, 2013)
8. Maga don pay (from Kelly Handsome, 2008)
9. Maga no need pay (from Banky W and other artists, 2010)
10. I go chop your dollar (from Nken Owoh, 2010)
11. 419 state of mind (from Modenine, 2011)
12. I dey block IP (from Tupengo, 2011)
13. 2musssh (from Reminisce, 2013)
14. Irapada 2:0 (from Junior Boy featuring 9ice, 2016)
15. Maga don pay (from Jupitar featuring Patorinking, 2016)
16. Penalty lyric (from Small Doctor, 2017)
17. Mercies of the lord (from Oritse Femi, 2008)
18. Maga don pay (from Big Joe, 2015)

Table 3: Theory and Themes in Songs Connection

Cognitive Mechanism	Neutralization Techniques (Sykes & Matza, 1957)	Moral Disengagement (Bandura, 1999; Bandura et al., 1996)	Songs and Themes (songs as chronologically listed in Table 2)
Cognitive Restructuration	3. Appeal to Higher Loyalties 4. Euphemistic labeling (implied)	4. Moral Justification 5. Euphemistic Labeling 6. Advantageous Comparison	1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 18
Minimizing Own Agency	Denial of Responsibility	3. Displacement of Responsibility 4. Diffusion of Responsibility	1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18

Blaming/Dehumanizing Victim	Denial of Victim	3. Attribution of Blame 3. Dehumanization	1, 3, 4, 5, 6, 7, 8, 10, 11, 15, 16, 18

Discussion

Four central themes emerged from lyric data[14]. Three of them support the theoretical framework outlined in Table 3, whereas a new theme also emerged. Accordingly, the following fundamental themes are most basic to the discussion that follows: [1] blaming/dehumanizing the victim, [2] minimizing own agency, [3] cognitive restructuration, and [4] glamorization and de-glamorization of cyber-fraud.

Blaming/Dehumanizing the Victim

Firstly, as represented in most of the lyrics assessed, Yahoo-Boys blame victims for bringing suffering on themselves. Specifically, according to singers such as Modenine*, "some call it 419 or advance fee fraud /I say it's getting doe* [money] *from greedy victims."* For Yahoo-Boys, victims are "greedy," and hence, they are to be blamed for their plight. Conversely, the attribution of blame to victims enables Yahoo-Boys to circumvent the feeling of guilt for their fraudulent actions. "Mistreatment that is not clothed in righteousness makes the perpetrator, rather than the victims, blameworthy" (Banduras, 1999, p.203). Yahoo-Boys do not only blame victims, but they also dehumanize them. It is simplistic to suggest that Yahoo-Boys dehumanize their victims fundamentally because of the distance between them (facilitated by networked computers). At some stage of the romance scam cycle, the Yahoo-Boys' "freestyle format" may involve face-to-face interactions (Ibrahim, 2016a). In a similar vein, Whitty and Buchanan's (2016) interview study indicated that victims of romance scams actually meet their sweetheart swindlers offline. Arguably, irrespective of the distance between the victims and the perpetrators, as Wang and Krumhuber (2016) reminded us, objectification becomes permissible when targets are seen as senseless or foolish, hence being equated to mindless objects.

Accordingly, Yahoo-Boys commonly perceive victims as having low mental abilities, and likened them to stupid sub-humans. For example, as expressed in the lyrics, Yahoo-Boys used derogatory names for victims, particularly, "*maga*" or/and "*mugu*," which locally connote(s) "foolish, senseless, and gullible." However, linguistically, both words have slightly different meanings, where "*maga*" is more derogatory than "*mugu*," and means "foolish, stupid, or senseless animal." The mechanisms of moral disengagements, such as de-humanization, precede immoral acts and are central to their immediate causation (Bandura, 1999). The utilization of "*maga*" and "*mugu*" in "*yahoo-yahoo*" primarily functions as a "shield" against feelings of guilt. While the use of "*maga*" and "*mugu*" offers significant insights into dehumanization within cyber-fraud and Yahoo-Boys' ethics, this study will briefly introduce some critical Nigerian cultural folklore so as to contextualize these explanations.

In Nigeria, hunters commonly consider themselves wiser than and superior to the animals they hunt, which are conceived of as foolish and inferior. The antelope is the most common game-beast, generally thought to symbolize the rewards of the hunt. By the same token, hunters are believed to possess superior mental acumen in comparison with antelopes, which often fall into their traps (Igwe, 2007). It is the perception of mental superiority that enables hunters to bypass the feeling of guilt for killing senseless sub-humans (antelopes). As linguist Igwe (2007) noted, Nigerian fraudsters generally thought of their victims as "*mgbada*" (antelope in Igbo language), and of themselves, in contrast, as hunters in the digital realm. By implication, hunting is a "game." A game in itself is not a crime. In the same vein, when cyber-scam is likened to hunting, it becomes a game. This is vividly captured in Larry Prince's song: "*Maga don pay* [the senseless animal has paid]*, it's a holiday for the Gameboys../.../...."* Metaphor establishes the basis of people's everyday comprehension of life (Santa Ana, 2002). In hunting, victims are divested of human characteristics, and if perpetrators believe "yahoo-yahoo" is a game, it is a game in terms of its consequences. "It is difficult to mistreat a humanized person without suffering personal distress and self-condemnation" (Bandura, 1999, p. 200). Relatedly, the dehumanization of victims in the personification of hunter and antelope is a crucial entry point to unpack the code word "*maga*" (victims). Based on the above insights and Igwe's (2007) analysis of "*mgbada*," this article concedes that the word "*maga*" has linguistically metamorphosed from "*mgbada*" (antelope).

The Igbo-speaking communities in the Delta and Anambra states of Nigeria are essential for understanding fraud neologism and vocabulary (from *mgbada* to *maga*). Although the actual demography of cyber-fraudsters and their offline antecedents is not fully established, Longe and colleagues' (2010) assumptions offer a glimpse of the main players. According to these authors, some high profile graduate fraudsters, such as Fred Ajedua (who originated from these Igbo speaking regions), dominated the 419-game before the "cyber" component of fraud emerged in Nigeria. It is reasonable, therefore, to theorise that the indigenous

language used by these high-profile, educated fraudsters has facilitated the entry of "*mgbada*" into the "419" vocabulary. The deployment of this coined word (from *mgbada* to *maga*) is particularly significant as it sheds light on the ethics of the Yahoo-Boys, as depicted in most of the songs studied. The perpetrator-victim relationship as that of a hunter and his game-animals (prey) is based on dehumanization: the ethics of the Yahoo-Boys. The centrality of the dehumanization of victims is vividly captured in the following lyric by Nkem Owoh: "*/You be the mugu,..../When they fall into my trap o /I dey show them fire.../...*" (You are the foolish,…./ when they fall into my trap, I show them no mercy).

Minimizing Own Agency

A second theme found in the lyrics examined in this study was the obscuring or minimization of the agentive role of the Yahoo-Boys concerning the harms they cause by shifting responsibility to circumstances beyond their control, such as poverty and unemployment. As expressed by a majority of music artists in this study, mass unemployment, abject poverty, and a lack of social welfare in Nigeria are responsible for the *"yahoo-yahoo"* that originates from Nigeria. Some singers are beneficiaries of active Yahoo-Boys' fraudulent activities (University of Wisconsin-Madison, 2017), while some others are convicted cyber-fraudsters or ex-cyber criminals (Neal, 2017; Punch, 2017b) as mentioned. It is reasonable, therefore, to suggest that the rationalization of cyber-fraud as found in most songs in Table 2 exposes the displacement and diffusion of responsibility as a key moral disengagement technique deployed by Yahoo-Boys. By implication, both Yahoo-Boys and the singers externalize the locus of control for socially sanctioned behaviours. The sympathetic representation of Yahoo-Boys and their "self-employment" endeavours online in the hip-hop songs examined are hinged on the assumption that harsh socio-economic realities in Nigeria are fundamentally a push factor. This type of representation also supports Ibrahim's (2016a, p.55) thesis that 'what constitutes cybercrime in Nigeria is rooted in socio-economics.'

However, not all Nigerian youths resort to Internet fraud as an answer to economic insecurity. Arguably, by obscuring the agentive role behind their harmful cyber actions, Yahoo-Boys not only justify their reprehensive activities but also remove feelings of blame from themselves. Self-exemption from the consequences of cyber-fraud is one of the moral disengagement mechanisms (Bandura, 1999) or neutralization techniques (Skyes & Matza, 1957) that delinquents deployed to deny responsibility for their harmful actions. The following lyric from X-Busta captures this strategy: "*... no job for street/no pay, no way, how boys go eat? /.../Dem no go do yahoo if dem get choice/....*" (no employment, no income, no hope, how will the youths survive? They would not commit internet fraud if they had the choice). According to this excerpt from X-Busta's song, most Nigerian youths face acute unemployment or poor wages, and "*yahoo-yahoo*" has become a way of survival for them. Closely related to the minimization of agency is cognitive restructuration.

Cognitive Restructuration

The song lyrics analysed also indicated that cognitive restructuring is one of the moral disengagement mechanisms the Yahoo-Boys use to make their cyber criminality appear acceptable. The following lines from G-Next's song, "*next of kin/bank to bank/ attorney fee/ affidavit/ cost of transfer*/….", as well as Prince Hollywood's song, "*Wilson has paid attorney fees, Wilson has paid the cost of transfer/…. Affidavits…/*", are a clear illustration of the deployment of euphemistic language as a means of cognitive restructuration. Yahoo-Boys use professional legal and banking terms, as represented in the above songs, to mask their criminal acts with a cloak of respectability. Whilst the "attorney fees" and "affidavits" scamming format are traceable to 419-letter scams prior to the digital version, the deployment of such terms in cyber-fraud illustrates the contemporaneity and efficacy of these old scam templates or formats.

Scam templates enable Yahoo-Boys to sanitize their fraudulent actions: "Cognitive restructuring of harmful conduct through sanitizing language, and exonerating comparisons, taken together, is the most powerful set of psychological mechanisms for disengaging moral control" (Bandura, 1999, p.196). Yahoo-Boys also use advantageous comparisons to render condemnable benevolent or righteous actions. The following lyrics by X-Busta are instructive in this regard: "*/Police pursue thiefs/ Leave Yahoo boyz o/ Police pursue thiefs/ Leave Yahoo boyz o/...Dem no wan carry gun so dem grab computer/ as dem no see job after dem fight for Aluta/...*" (Police go after thieves, leave Yahoo-Boys alone... They [Yahoo-Boys] have refused to carry guns [commit violent crimes], instead, they have only used computers [commit cyber-fraud], because of the lack of jobs after a university education). Similarly, Modenine's song is an example too: "…advance fee fraud/ [is] getting doe [money] from greedy victims abroad/Without pulling a trigger contact or slashing with a sword…"

These lines of the song make a sharp contrast between "*thieves*" and Yahoo-Boys. Culturally, the actions of "thieves" including non-violent ones, such

as pickpocketing in public spaces, often receive vigilante justice (Smith, 2008, 2017). On the other hand, multiple variations of crimes committed through deception, such as the embezzlement of public funds, are perceived as "business as usual" in a Nigerian context (Smith, 2008, 2017). Indeed, they are "business" in terms of their consequences. Insights from Chawki, Darwish, Khan, and Tyagi (2015) suggest that Nigerian cyber-fraudsters and hard-working, law-abiding citizens share a similar overarching ethos: the philosophy that "knowledge is power." So, possibly, this similarity may be implicated in shaping people's perceptions/attitudes towards Yahoo-Boys in relation to "thieves." There is no objective viewpoint for the critique or compliment of an "immoral" act (Becker, 1967/1997; Garson, 2015; Reiner, 2016). The process by which an action is graded as a crime in relation to other actions is a "moral enterprise" (Becker, 1967/1997, p. 9). The moral enterprise here encompasses not only the worldviews of Yahoo-Boys and their allies (hip-hoppers) but also involves the socio-cultural views of Nigerian society. The moral sanctification of Yahoo-Boys' actions as opposed to that of "thieves" normalizes their claims in Nigeria. Nigerian society is, therefore, the moral entrepreneur in the social construction of "*thieves*" and "Yahoo-Boys": "While terms appear to be objective, they are actually underpinned by value judgements that are rooted in particular cultural assumptions" (Ribbens, McCarthy, & Edwards, 2011, p. 6). The sharp comparison used by Yahoo-Boys to avoid self-condemnation, therefore, is grounded in a Nigerian contextual situation and the cultural meaning of "thieves" in relation to Yahoo-Boys. The Nigerian hip-hop songs examined here, therefore, are reflective of social realities in Nigeria, like their historical antecedents in America. Closely related to the above is the concept of "drift" (Matza, 1967), which intertwines with the Yahoo-Boys' cognitive restructuration.

Criminals are generally attracted to delinquency, not because of oppositional morality, but because of an exaggerated adherence to widely held "subterranean" values, such as the pursuit of adventure, hedonic lifestyles, excitement, and leisure activities (Matza, 1967; Matza & Sykes, 1961). For Matza (1967), delinquents transiently flirt with both convention and crime, responding in turn to the demands of each. Comparably, our data analysis suggests that Yahoo-Boys transiently flirt with both internet fraud and convention, which is evident in the following lyrics. While the first one, by Olu Maintain (2008), illustrates that Yahoo-Boys work hard in the same way that law-abiding citizens work weekdays and have leisure time during the weekends, the second one, by X-Busta, makes a moral justification in an attempt to redeem their condemnable cyber actions: [1] *"Monday, Tuesday, Wednesday, Thursday, Boys dey hustle / Friday, Saturday and Sunday gbogbo aye, Hennesy, Champagne, Mowet, for everyone/.../"* (Weekdays, boys are busy on the Internet, weekends, they shut down clubs, declaring champagne and expensive spirits for everyone). [2] *"/this one na self employment/so dem go see food for their table/ attend to family issues, so life go stable/"* (this is self-employment, so as to put food on the table, take care of family needs, so as to maintain a stable family).

Despite the small sample size of this study, the above verses can be seen as a window into the Yahoo-Boys' world. Yahoo-Boys view "hard-work" and having a stable family as virtuous, whereas, paradoxically, victims of cyber-fraud (and their families) may experience severe negative psychological and financial consequences (Kopp et al. 2015; Whitty & Buchanan, 2016). Irrespective of victims' predicaments, Yahoo-Boys achieve paradoxical adaptations through cognitive restructuration (Bandura, 1999). Additionally, given that they do not oppose conventional values (e.g., the virtues of hard-work), it is reasonable to suggest that they are attracted to "*yahoo-yahoo*" due to their exaggerated adherence to the pursuit of adventure and hedonic lifestyles (as vividly captured in Olu Maintain's lyrics above). Arguably, the Yahoo-Boys' perspectives on "hard-work" (directly or by implication) overlap with the ethos of law-abiding citizens in many respects. The above comparison is reminiscent of Matza's (1967) idea that offenders may not stand as an alien in the body of society, but may represent a disturbing reflection instead. The moral compasses of the two seemingly separate camps (offenders and non-offenders) appear to have a high degree of congruence. Also, the theory that most Nigerians glamorize wealth irrespective of its source (through crime or otherwise; e.g., Adeniran, 2011) reinforces the view that the boundary between offenders and non-offenders is blurred, inasmuch as the people involved in such moral categorization are economically successful and "hard-working." Also, given that musicians are generally influential as the "griots," by implication, they may shape the perceptions of cyber-fraud in the eyes of music lovers.

Glamorization and De-Glamorization of Cyber-Fraud

Unlike the themes discussed above, the "glamorization and de-glamorization theme" did not fit squarely with the overlapping theoretical frameworks in Table 1 because they cannot be termed as neutralization techniques as such.

Nonetheless, they are also revealing. Whilst most songs (*n*=16) explicitly glamorised the Yahoo-Boys, only one directly de-glamorised them. For example, Kelly Handsome's song explicitly glamorised cyber-fraud: *"…Maga don pay/ Mugu don pay / shout hallelujah…/...hallelujah hallelujah owo…/ …/...hallelujah hallelujah ego.../... hallelujah hallelujah kudi, kudi../I don suffer, but I now don hammer, papa God don bless me, no one can change it.../..."* (The gullible has paid, the senseless has remitted/ shout hallelujah…/...hallelujah hallelujah money…/...hallelujah hallelujah money…./…/ hallelujah hallelujah money, money… I have suffered a lot, but now I have hit the jackpot, Almighty God has blessed me, [and] no one can change it). While the above song glamorized cyber-fraud, it embodied biblical allusion (i.e. a reference to the Bible regarding prosperity as a critical element of religiosity). It reflects Yahoo-Boys' worldview that 'earthly riches' have spiritual aetiology mentioned earlier. The notion of spirituality in wealth acquisition (occult-economy) as depicted in Kelly Handsome's song, therefore, is also an aspect of the glamorization of cyber-fraud.

However, seven artists who collectively composed/performed the de-glamorised song, "*Maga no need pay*," were allegedly sponsored by Microsoft and the Nigerian government (Computer World, 2010). As far as this research is concerned, the song itself remains the only song that has been put forward against "*yahoo-yahoo*" in Nigeria (Computer World, 2010). By implication its content is not only dislocated from dominant narratives, but as "9ice" pointed out, it is "out of touch with reality" (Punch, 2017a, p.1) because "fraud is the way the less privileged people take care of these family in Nigeria" (Punch, 2017b, p.2). Capturing Nigerian socio-economic reality, Oritse Femi's song mostly blames harsh economic situation and bad government for Yahoo-boys' actions, which implicitly supports the glamorization narratives: "…*Bad government leading my people astray / Some working everyday but their salary dem no dey pay* [salary is not enough]." The critical point is that the oratory narratives of singers who glamorized Yahoo-Boys reflected the socio-economic realities of Nigerian situation more than the de-glamorization narrative: "*But maga no need pay to get a good degree/ or have a good opportunity*" (But victims do not need to make payment for the perpetrators to acquire a good degree/ or have a good job opportunity). For Barker and Taylor (2007) and Duncan (2017, p.33) "authenticity of an artistic creation" has both a representational element (something which is what it claims to be) and a cultural component (something which is in line with a contextual or cultural tradition). Based on the above definition, it is conceivable that the song "Maga no need pay" dislocates from the socio-economic and contextual conditions in Nigerian society in two central areas: representational and cultural.

Sex Roles and Cultures

Closely related to the glamorization of *yahoo-yahoo* is the idea that cyber-crime is male-dominated in a Nigerian context. Notably, like the male domination of cyber-criminality, the singers of all songs selected in Table 2 are male apart from song number nine: "Maga no need pay," which involved seven multiple artists. Allied with the above is the evidence for the prominence of young male Nigerians in the theatre of cyber-fraud mentioned (e.g., Jegede et al., 2016; Ojedokum & Eraye, 2012). In Nigerian society, the value of economic power (through crime or otherwise) is intertwined with the social work that it does (or fails to do) in human relationships (Smith, 2017). Insights from a range of gender-oriented studies about Nigeria (Chinwuba, 2015; Lazarus, Rush, Dibiana, & Monks, 2017) are revealing. Firstly, recent years have witnessed an upsurge of women in the paid workforce (Eboiyehi, Muoghalu, & Bankole, 2016), whereas 'men rather than women in this context, are predominantly socialized to be breadwinners' and the supreme head of the household (Ibrahim, 2015, p.329). Secondly, unlike women, economic power for men has limitless advantages. For example, a Nigerian man who has economic power, irrespective of his age, 'under customary and Islamic types of marriages can marry multiple wives' (Lazarus, Rush, Dibiana & Monks 2017, p.352). While he can even marry wives as young as 14 or 13 years old, depending on his "tastes" (Lazarus, Rush, Dibiana & Monks, 2017), culturally, even his adultery is seen as "a heroic feat" (Chinwuba, 2015; Smith, 2017). These types of gender relations not only shape the manner in which Nigerian society socializes its female citizens, but it also influences how women (and girls) are culturally expected to relate to males regarding wealth acquisition and status sustenance (Agozino, 2017; Mama, 1995). "Life online is an extension of life offline" (Morahan-Martin, 2000, p. 689), and as Ibrahim (2016a) speculated, "men's cultural positionality in society influences them to be generally more 'desperate' to achieve financial success than women online" (p. 54). Given that men are culturally and predominantly raised to be breadwinners illuminates the evidence for the male domination of cyber-fraud perpetrations and perhaps the prominence of male singers in Table 2.

Financial Incentives

Closely related to the gender dynamics of this type of cyber-fraud is the idea that 'financial incentives' are central to the meaning of 'cybercrime' in a Nigerian context. In fact, all the songs studied made explicit references to money, which translates as "*ego*," "*owo*," and "*kudi*" in the Igbo, Yoruba, and Hausa languages respectively (the three main indigenous languages in Nigeria). The centrality of money as expressed in these songs support the convergence of emerging evidence (Adogame, 2009; Jegede et al., 2016; Ojedokun & Eraye, 2012) that Yahoo-Boys are principally motivated by the need for economic reward and empowerment. The following lyrics from Prince Hollywood and Kelly Handsome, respectively, vividly captured this claim: [1] "*Hello Mr. Wilson / Yeah hello/how are you? I'm fine / have you made the payment? / yes, I've / Let me have the ten-digit number/2657785232 /.../ I'll get back to you as soon as possible / bye /...*". [2]*"Plenty, plenty maga, no matter the time you get the control numbers"* (multitude of senseless victims, no matter what time is it, you are sure to receive the payment numbers). Therefore, it is reasonable to conclude that pecuniary benefits in a Nigerian context mainly propelled cybercrime because the efficacy of a Yahoo-Boy is reflected in the number of victims that "*wire wire* [transfer money]" to him on a regular basis. For example, financial incentives are apparent in Kelly Handsome's song: *"/..plenty dollar straight to aboki make eh start to dey change it/...."* (plenty dollar straight to a bureau de change man [locally called aboki] to change it into naira [currently, $1 =380 naira]). Additionally, the crucial importance of money in *yahoo-yahoo* is also evident in most YouTube videos of songs in Table 2 (e.g., displaying briefcases filled with US dollars, spraying of dollar bills, showcasing expensive cars, partying with exotic drinks and women). In the language of Olu Maintain, which is reminiscent of Puff Daddy and colleagues' 1997 popular song (It's all about benjamins), "*it's all about 'Benjamin' baby/...*". Arguably, monetary success is a specific aspect of Yahoo-Boys' moral enterprise as represented by all songs investigated in this study.

Conclusion

This study has drawn attention to the notion that Yahoo-Boys and some musicians may be reciprocally constructing the destiny of one another. It is not only the first study to assess the ethics of Yahoo-Boys as expressed by music artists in a Nigerian context in particular, but it also the first study to explore how cyber-fraud, in general, is depicted in Nigerian popular music. Additionally, it has explored the presence of the mechanisms of moral disengagement (Bandura, 1999) and neutralization techniques (Sykes & Matza, 1957) in *yahoo-yahoo*. Thus, these analyses have not only helped to shed light on motives for cyber-fraud, but they have helped to conclude that Yahoo-Boys embody a range of the most powerful set of psychological mechanisms for disengaging moral control. Accordingly, given that Yahoo-Boys have been implicated in defrauding a multitude of victims all over the world (e.g., see Chang, 2008; Rich, 2017), insights from this study could provide a greater understanding about cyber-fraud that emanates from Nigeria.

Furthermore, the presence of the conceptual frameworks (see Table 1) in music lyrics illustrates the relevance and contemporaneity of these theories in modern times, and this is revealing. Hip-hop lyrics, therefore, could serve as useful tools in teaching these theories (see Table 1), because music not only may appeal more to a wide spectrum of students than abstract theories, but also musicians are more impactful and meaningful in the lives of youths than theorists (and abstract concepts). Additionally, the oratory messages of hip-hop singers may attract more followers than questioners, especially young people, as Inyabri (2016) noted. The lyrical words of musicians are often believed, respected, and repeated possibly as their historical antecedents, the *griots*. Repeating discourses normalize their claims. Hip-hop songs that legitimise *yahoo-yahoo* by implication could make it attractive to more people than otherwise. The adherents of music, in general, may not merely consume songs, but they may also co-produce the meaning they embody and thus, normalize the lyrical messages with all its entireties. Arguably, while music has the power to influence our beliefs and practices (Louw, 2017), online/offline, music contributes to making us who we are due to its artistic and emotional embodiment. Accordingly, this article has highlighted Jaishankar's (2011), Ibrahim's (2016a) and Stratton, Powell and Cameron's (2017) concept that contextual factors that are critical in the cyberspace are also vital in the physical space (implicating multiple academic disciplines). In exploring youth cultures, deviance, language, and communications, it has brought together topics of criminology, cultural sociology, social psychology, even musicology (if disciplinary boundaries are stretched a bit) to achieve its aims in an 'eclectic-way'[15]. It has done so by using data from a significant and underrepresented area (sub-Saharan hip-hop music).

Having operated within the constraint of what is currently available (a small sample size), this study's findings have limited generalizability at best. However, alongside the above contributions, it has not only underscored that some ethos of law-abiding

citizens is central to Yahoo-Boys' moral enterprise, but it has also highlighted that Yahoo-Boys, as represented in the hip-hop music examined, represent a disturbing reflection of our digital-age society. It is therefore critical that Yahoo-Boys phenomenon should not be ghettoized within parochial conceptions with little or no global significance. There is indeed a danger of failing to capture globalization in all of its complexities if each of such relevant social phenomenon is not taken as unconditionally serious beyond its physical geographical context (Hall, 2013; Tankebe et al. 2014). While this article has particularly examined Yahoo-Boys' phenomenon and their representation in hip-hop music within Nigerian society, by implication, these issues are also universalizable. Studies on rap music in the USA (e.g., Kubrin, 2005) have already enlightened cultural dimensions of street-violence and "thug life" because rap music could provide a way for listeners to understand and appreciate inner cities' youth culture and violence. Similarly, given that Yahoo-Boys and singers are "birds of a feather," and the oratory messages of singers may attract more followers than questioners, this study illuminates the cultural dimensions of cyber-fraud that emanate from Nigeria. In particular, insights from this study suggest that cyber-fraud researchers might look beyond traditional data sources (e.g., cyber-fraud statistics) for the empirical traces of "culture in action" (Swidler, 1990) that render fraudulent practices acceptable career paths for some Nigerian youths. Finally, further research may interview hip-hop singers to expand upon this study.

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Endnotes

[1] An excerpt from an online chatroom app.

[2] A relationship that is forged by one side through adopting a fraudulent or fictional online persona.

[3] However, critical perspectives pointed out that the statistics the FBI relied on to inform the currency of cybercrime perpetrators across nations are socially and selectively constructed. By implication, the FBI's claims are merely pictorial representations of that construction [https://doi.org/10.1016/j.ijlcj.2016.07.002]

[4] Nigerian Criminal Code Act: [http://lawsofnigeria.placng.org/laws/C38.pdf]

[5] D'banj was interviewed at the Social Media Week, Nigeria, February 28, 2018.

[6] Oshozondi was released in 2018: [https://itunes.apple.com/gb/album/oshozondi-feat-slimcase-masta-t-single/1337331237]

[7] Davey D. (1998) "Why Is Rap So Powerful". *Davey D's Hip-Hop Corner.* [http://www.daveyd.com/whyrapispowerart.html]

[8] 'Rap is a branch of hip-hop music, which makes use of rhyme, rhythmic speech, and street vernacular, which is recited or loosely chanted over a musical soundtrack' (Keyes, 2002, p.1).

[9] Nigeria was created by the British government through colonization from 1914 to 1960 (Lazarus et al., 2017).

[10] Authors of scam emails may or may not be Nigerians, and "there is an impossibility of knowing if every cyber-criminal using the Nigerian 419 or AFF letter/email templates is actually a Nigerian citizen" (Ibrahim, 2016a, p.51).

[11] The occult economy refers to the idea that the spirit world is an actual source of wealth and as a result, real or imagined, of magical means, can be used for material ends.

[12] A quote from a Russian historian, Aleksandr Solzhenitsyn [https://www.goodreads.com/author/quotes/10420.Aleksandr_Solzhenitsyn]

[13] Ex-US Secretary of State Colin Powell has joined a Nigerian performer, Olu Maintain on stage, while he sang his hit Yahooze [http://news.bbc.co.uk/1/hi/entertainment/7670788.stm]

[14] Given that most of the songs are bilingual, and not in standard English, as Davies and Bentahila (2008) and Gritsenko and Aleshinskaya (2016) suggested, to translate songs that are bilingual serves as a means of opening up the lyrics to 'outsiders', etc.

[15] Eclecticism' is a very good way to address multiple topics across academic disciples in an innovative way: https://doi.org/10.17744/mehc.27.1.tf591m8384t50njt

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Presidential Rhetoric as Crime Control Theater: The Case of Cybercrime

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ABSTRACT AND ARTICLE INFORMATION

Presidents have increasingly made criminal justice a part of their public agenda. Much of their political speech on crime and violence focuses on creating the impression of action, even when none is taken. Moreover, if actions are taken, they are ineffective and do not result in significant policy shifts. When presidents give the impression that they are fighting crime, it is often called crime control theater. This is characterized by the use of mythic narratives, a reliance on moral panic, little public dissent, and the ineffectiveness of the policy itself. While many previous studies have demonstrated the importance of crime control theater regarding different criminal justice topics, none have focused on the emerging problems of cybercrime. The current study examines the patterns and trends in presidential rhetoric on cybercrime using a qualitative content analysis to test the hypothesis that presidents rely on the techniques that comprise crime control theater when discussing cybercrime, in particular, mythic narrative and moral panic. The findings indicate that presidents, on the whole, tend to rely on these elements when discussing cybercrime. In other words, they rely on techniques of crime control theater to allay public fears of cybercrime but at the same time, postponing any significant action.

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In December 2013, during the holiday shopping season, retailer Target announced that they had been the victim of a major security breach that compromised the details of about 40 million customers' payment card numbers, expiration dates, security codes, and PIN numbers. The breach led to a 46% drop in Target's net profits during the shopping season (Berfield, 2014). In December 2014, SONY Pictures Entertainment was hacked by North Koreans, resulting in the theft of personal and commercial data and the destruction of portions of their computer systems (Sanger & Perlroth, 2014). In June 2015, hackers (possibly from China) breached the computer system of the federal government's Office of Personnel Management, compromising the personal information of 4 million government employees (Reuters, 2015). In June 2017, an international cyber attack affected hundreds of companies world-wide, including ATM machines in the Ukraine and the Cadbury Chocolate factory in Australia (Perlroth, Scott, & Frenkel, 2017).

Cybercrimes such as these are becoming common as the use of networked computer technology increases and both businesses and individuals rely on computers for daily activities. As this happens, the public's fear of becoming the victim of a cybercrime is also increasing, contributing to a "technopanic" amongst computer users (Thierer, 2013). A technopanic is a form of a moral panic, which results when a social problem is overblown in the media, causing a sudden increase in concern by the public and a reaction that is more severe than it needs to be (Waddington, 1986). Often the threat posed by a specific act is socially constructed and exaggerated (Cohen, 1972). A technopanic, more specifically, is a moral panic that is founded on inflated fears of technological crime. These can lead to calls for new laws and policies that crack down on the potential for cybercrime (Thierer, 2012).

Presidents have responded to this new fear of cybercrime and the associated technopanic by discussing the issue of cybercrime in various speeches. Recent Presidents (Clinton, G.W. Bush, Obama, and Trump) have each discussed the problems of cybercrime and possible solutions. While these speeches were intended to make it appear that action was being taken to solve the problem, they often contained proposals that will not be fully implemented or carried out, or will have little, if any, effect on cybercrime if adopted. Moreover, many of the presidential speeches seem to contain no specific policy proposals at all, but rather are geared towards generating the appearance of action without actually having to do anything.

The idea that authorities 'respond' to public concern about crime through placation rather than real, effective actions has been explained by what Hammond, Miller and Griffin (2010) define as "crime control theater." While past research has addressed whether laws and policies fit the criteria of crime control theater (e.g., Griffin & Miller, 2008; Hammond et al., 2010), this study is an analysis of presidential speeches on cybercrime to determine if the rhetoric that presidents use is largely crime control theater as presidents respond to an ongoing technopanic.

Crime Control Theater and Moral Panic

Crime control theater is defined as laws or actions taken by public officials in response to a crime or criminal event that "generate the appearance, but not the fact, of crime control" (Griffin & Miller, 2008, p. 160; see also Hammond et al., 2010; Sicafuse & Miller, 2010). In other words, policies that are crime control theater appear to prevent further crimes from being perpetrated, but in actuality, they will make no substantive or tangible changes to solve the problem. They are, in essence, an illusory means of controlling crime, as on the surface, they appear to solve a problem, but in reality, they do not (Sicafuse & Miller, 2012).

Policies that qualify as crime control theater are often proposed and even enacted by government officials as a response to a moral panic that occurs when a social problem such as crime becomes magnified (Miko & Miller, 2010). On occasion, the media may distort or exaggerate a crime or act of violence and turn the issue into a perceived immediate threat to societal values and interests (Cohen, 1972; Hunt, 1997; Sindall, 1990; Waddington, 1986). Reporters will repeatedly discuss the serious harms that could result from an offense, even if the harms are a rare occurrence. However, those who hear the reports quickly begin to think that the potential damage or injury from that crime is much more devastating or harmful than probable. This inaccurate media coverage often causes extensive anxiety about the dangers of a crime that are most likely untrue or unfounded (Sacco, 1995). The exaggerated reports will rapidly serve to crystallize widespread fear and anxieties about a crime. Even though the reported consequences of these crimes are inflated and even false, the public demands that elected officials respond in some way to prevent further crimes from occurring (Innes, 2004).

In 1972, Cohen investigated a series of "moral panics" to characterize the reactions of the media, the public, and agents of social control to youth disturbances. According to Cohen (1972), a moral panic has the following key elements or stages:

> Someone or something is defined as a threat to values or interests; this threat is depicted in an easily recognizable form by the media; there is a rapid buildup of public concern; there is a response from authorities or opinion makers; the panic recedes or results in social changes. (p. 9)

Politicians, in turn, react to the widespread public concern and demands for action associated with moral panics by proposing crime control policies that appear to be effective solutions to the problem. However, officials rarely seek out the real causes of the problem. Instead, they rely on quick and easy solutions that will allay the public's fears. Those who hear the proposals believe the policies will work and the ideas are therefore widely supported by the public (Sicafuse & Miller, 2010).

The proposals made by elected officials that do not provide tangible policy solutions are often referred to as symbolic policies (Edelman, 1964). These are used by politicians (both Presidents and members of Congress) for many reasons, primarily to educate, placate, or even obfuscate (Marion & Oliver, 2009; Oliver, Marion, & Hill, 2014). Symbolic policies and speeches educate the public about relevant issues and about the possible solutions that are being considered to solve the problem. In doing so, politicians are able to placate concerned citizens and make them feel that the elected official cares about the problem and the citizens and that political action is being taken to solve the problem (Marion, 1997; Marion & Oliver, 2011; Stolz, 2007). In other words, they "reassure and persuade the public" of action (Elder & Cobb, 1983, p. 13). Symbolic action will, at times, obfuscate or hide the complexity of the underlying problem, often making issues appear easier to solve than they really are (Stolz, 1983).

Symbolic rhetoric serves other functions as well. It can provide a moral educative function to send a message to the public about appropriate behavior (Stolz, 2007). In some cases, it helps maintain public order because it implies to concerned listeners that action is being taken to keep them safe (Edelman, 1964). Symbolic language and action gives the appearance of action, but in reality it will result in no permanent, significant changes. In the end, much like crime control theater, symbolic rhetoric often provides "well-publicized attention to a significant problem which is never solved" (Edelman, 1964, pp. 38-39). It "(does) not deliver what (it) appear(s) to deliver" (Anderson, 1990, p. 15; see also Marion, 1994b).

These symbolic policies, similar to crime control theater, are also characterized by an appeal to a mythic narrative. This happens when a series of events are linked or joined in such a way that they appear to have a particular meaning and significance (Bottici, 2010). The narratives are combined and presented so that they inaccurately portray the meaning of an event or are a false representation of actual occurrences, leading to an inaccurate perception of reality. The mythic narratives often express the beliefs of a particular group but may not reflect an existing policy or problem. However, they are able to link shared experiences and convey a message, whether accurate or not (Bottici, 2010).

Another characteristic of crime control theater is a high level of consensus. Policies recognized as crime control theater have a great deal of support by the public and even by other political actors. Many want to find a quick solution to a problem, which can be provided by politicians relying on crime control theater (Miko & Miller, 2010; Sicafuse & Miller, 2010).

However, when closely analyzed, the policies based on mythic narratives are unlikely to achieve the original intended goals. Many of the proposed solutions are not based on a detailed analysis of the underlying problem. They often ignore any potential disadvantages or outcomes, and possible alternatives are not considered (Sicafuse & Miller, 2012). They may provide biased solutions (Miko & Miller, 2010). If closely analyzed, it would quickly be apparent that the proposed policy would not have the intended effect of reducing a particular crime. Instead, the policy will be largely ineffective at solving the problem at hand and have outcomes that fall short of its intended goals (Hammond et al., 2010). Many of the proposed anti-crime policies fail and may even have unforeseen negative or detrimental consequences (Sicafuse & Miller, 2010).

Despite the lack of genuine action, politicians (and often presidents) rely on crime control theater as a way to demonstrate their concern for the public's safety (Sicafuse & Miller, 2010). While they know that there is often no simple solution to a complex problem such as crime, elected officials sometimes lead the public to believe that there is a simple solution to solving crimes that are, most often, highly unpreventable. When they use crime control theater language, politicians can appear to be solving a problem as a way to appease public concern and increase public support for their policies and themselves.

In addition to being responsive to public calls for action, Hawdon (2001) shows how politicians can actually contribute to the development of a moral panic. He demonstrates that many, through their speechmaking, can actually have an effect on how the public perceives a problem, and therefore whether or not a given issue develops into a moral panic. Specifically, presidents help define a problem, thus

giving it a specific "face" in terms of the political response required. In doing so, a president can magnify a social problem, cause fear, and, thereby, create a moral panic. This can help set the stage for the presidential use of crime control theater.

Recent research has identified two anti-crime policies as being examples of crime control theater. These are the Amber alert system for locating missing children (Griffin & Miller, 2008; Miller & Clinkenbeard, 2006; Miller, Griffin, Clinkenbeard, & Thomas, 2009) and Safe Haven laws (Hammond et al., 2010). Both laws were passed in reaction to moral panics and do not solve the intended problems. In the case of Amber Alerts, the law was passed after the abduction and murder of a 9 year old girl, Amber Hagerman. The public demanded action to prevent similar crimes from occurring. The ensuing federal law allows law enforcement to inform the public when a child is missing. Unfortunately, there is little evidence that Amber alerts help to find missing children (Griffin & Miller, 2008). This is because most people are unwilling to call police if they spot a child. Further, it is thought that the alert system could actually prompt copycat crimes from others who are seeking publicity for their crimes. The system may also frighten a perpetrator so that he or she decides to murder the abducted child to avoid capture (Griffin & Miller, 2008; Miller et al., 2009). Thus, the Amber Alert law is an example of crime control theater as it was passed in reaction to a crime, received a great deal of attention from politicians as well as public support, but, in the end, is ineffective in solving the problem at hand and may have serious unintended consequences.

Laws such as Amber Alert, Megan's law, and Jessica's law tend to be widely supported by the public as a way of addressing a particular crime. Often, such laws are attractive because they respond to a moral panic and appeal to mythic narratives, such as saving children from harm. However, they are unlikely to achieve their intended goals because they are very simple solutions to complex crimes (Miko & Miller, 2010).

Presidential Rhetoric and Crime Control Policies

One of the ways presidents can respond to moral panics is by giving speeches in which they discuss proposals to resolve, or that appear to resolve, issues. Presidential speeches on crime and criminal justice are not new. This pattern began in the 1964 Johnson/Goldwater debates for the presidency in which Goldwater blamed weak democratic policies as the basis for an increase in crime and promised the American voters that he would implement tough anticrime policies that would reduce violence. Since then, crime control has been on the agenda of every recent president to some extent (Calder, 1993; Marion, 1994a, 1997), and research shows that recent presidents often speak about their plans to reduce violence (Beckett & Sasson, 2000; Calder, 1993; Caplan, 1973; Cronin, Cronin & Milakovich, 1981; Finckenauer, 1978; Marion, 1994a; Scheingold, 1991, 1995).

Presidents either give speeches solely about a particular crime concern, often addressing a moral panic (Hawden, 2001), or choose to include crime concerns as part of a larger speech (Marion 1994a; Oliver, 1998, 2003). They often discuss the extent of violence in society or suggest proposals for solving crime as a way to make the nation safer for citizens (Fairchild & Webb, 1985; Jacob et al., 1982; Marion, 1994a; Marion & Oliver, 2012; Scheingold, 1991, 1995). While modern presidents have each spoken about crime issues, they focus on different problems and vary in the extent to which they take substantive action to fight crime (Marion, 1994a).

Many studies on presidential communication have focused on the annual State of the Union address since typically this is when the president communicates his issue agenda to the nation. As Lempert and Silverstein (2012) note, these have become "an oratorical performance designed to persuade, delivered by the president directly to the people via broadcast media over the heads, as it were, of Congress" (p. 54). However, presidents can also communicate and announce their policy preferences in other ways, such as presidential signing statements (Oliver et al., 2014), executive orders (Oliver, 2001), or budgetary requests (Caldeira, 1983; Caldeira & Cowart, 1980; Oliver & Marion, 2006, 2009). They can also use press conferences or the news (Perloff, 1998).

Past research on these different forms of presidential rhetoric has attempted to discern their impact on public opinion (c.f. Cohen, 1997; Light, 1999). Presidents choose to discuss crime because of the influence that they can have on the public's perception of an issue (Hill, Oliver & Marion, 2010). Research has consistently found that when the president speaks, people listen (Cohen, 1995; Denton & Hahn, 1986; Oliver, Marion & Hill, 2012). A study by Young and Perkins (2005) shows that after a president discussed economic, foreign policy, or civil rights issues in his State of the Union speeches, the public's concern about those issues rose (Young & Perkins, 2005). However, they noted that the influence through the State of the Union may be only short-term.

Thus, there is some evidence that presidents are able to use their power of the "bully pulpit" to

directly influence public opinion about an issue and what should be done about it. In other words, "a president's policy rhetoric can help create a vision of reality that breeds widespread concern about an issue" (Hawdon, 2001, p. 422). This means that presidents are able to define the problem as well as the solution. Thus, presidents use their rhetoric to reach out to the public and build up support for their initiatives (Brace & Hinckley, 1992, 1993; Hinckley, 1990; Kernell, 2006; Ostrom & Simon, 1985, 1988, 1989; Ragsdale, 1984, 1987).

Presidential debate and action on crime serves several potential functions. First, action on crime may provide policy cover for intended targets (Oliver, 2003). Crime, for instance, often stands in for presidents who wish to deal with issues of poverty or other forms of social exclusion in an unpopular way. He can turn it into a crime issue and make it more palatable for the public. Second, debate and action on crime may be used to direct attention away from other social problems (Beckett & Sasson, 2000). In some cases, a president may not want to discuss another problem because it may be complicated or involve many different actors. He may instead discuss crime, which is a problem that people understand and, at least on the surface, seems easy to solve. The third function of crime-related discussions for presidents is that it can be used to advance a fear-based agenda (Altheide, 2006, 2009; Hill et al., 2010). Presidents often couple crime with other issues that cause fear, terrorism most recently, which allows the president to take steps that are often more drastic than otherwise would be supported by the public.

Presidential Rhetoric on Cybercrime as Crime Control Theater

A relatively new type of crime that has been discussed by presidents in the past few years is cybercrime (Oliver et al., 2012). As technology improves, cybercriminals have found new ways to commit crimes via the internet. Computer crimes are advancing rapidly and pose serious threats to individuals, businesses and governments. Crimes committed through the Internet receive significant coverage in the media, especially when they involve high-profile individuals or companies such as Target or Sony (Wall, 2011). This repeated media coverage can, if prolonged, result in a technopanic. When the public hears that the private information of 40 million customers was breached, or that the personal data on 4 million federal employees was hacked, they are immediately afraid of becoming a victim themselves and demand action. Even though cybercrime is not well understood by the public (Wall, 2008), they want to know that the government is working to keep them safe.

Modern presidents have responded to the public's fear in their speeches by proposing new policies to address the harms done by cybercrime and to prevent further cybercrimes. In fact, the issue has become a topic of increasing public importance, and some have argued that it is part of a moral panic focused on technocrime (Levi, 2009; Thierer, 2013). When the president talks about cybercrime, he is indicating that he shares that concern and is putting it on the national agenda for action (Hawden, 2001; Kingdon, 1995). However, because cybercrime is a very complex, if not impossible, problem to solve, the president relies on policies that are crime control theater to appear as if he is addressing the public's fears and devising a solution at the same time.

To date, there has been no scholarly analysis of the role of presidential rhetoric on the issue of cybercrime. In order to fill this gap in the literature, this paper examines presidential speeches about cybercrime to determine how presidents frame the issue in their rhetoric and whether they support laws and policies that qualify as crime control theater. Given in the importance of presidents in developing moral panics (Hawden, 2001) and the fact that many issues within cybercrime have become part of a larger technopanic (Thierer, 2013; Wall, 2011), examination of presidential response to specific areas within the scope of cybercrime can be helpful to understand how crime control theater develops. The goal is to provide a description of the contexts in which presidents have used crime control theater, as well as to provide an assessment of the rhetoric presidents have associated with cybercrime in relation to crime control theater.

Method

Data

The primary source for the speeches made by presidents regarding cybercrime was the *American Presidency Project* (2015), which maintains an online, searchable database of presidential speeches. As the goal of the project was to assess whether presidents use crime control theater by examining their rhetoric, presidential speeches were the primary unit of analysis.

Searching for instances of cybercrime is difficult since many countries and organizations use different definitions to define these acts (Wall, 2008). Moreover, the term is sometimes used interchangeably with terms such as "computer-related crime," "technocrime," and "computer crime." This only serves to cause more confusion among the

public (Gordon & Ford, 2006; Kshetri, 2013; Wall, 2011). The matter gets yet more complicated when terms like cyberterrorism and cyber-attack are used. These terms are equally amorphous and are often used in conjunction with each other (Cavelty, 2007; Wall, 2011). However, recent scholarship has stated that, regardless of the accuracy of the term, cybercrime has become the accepted terminology (Wall, 2011). To that end, the term "cybercrime" was construed in the current analysis to include illegal activity conducted over the Internet or other networked systems. Thus, the study includes a wide variety of criminal activity ranging from child pornography to cyberterrorism.

The search term "cyber" was used to find presidential speeches on cybercrime. This generated a large number of results and captured a large number of the speeches given by presidents involving the issues ranging from cybercrime to cyberbullying. More specific search terms such as "Internet," "online," or "identity theft" were then used to find speeches that dealt with cyber issues that did not include the prefix "cyber." This captured speeches on those topics and others such as Internet predators, Internet pornography, or Internet stalking.

The original search, which covered the years 1995-2015, returned 491 cases. Many of these were references to elements outside the issues addressed in this study (cybernetics, for instance), and some were given by presidential staff rather than by the President himself, and so the original number of speeches was reduced to 380.

Given the fact that cybercrime is a relatively new phenomenon, only four presidents have made speeches about the topic: Bill Clinton, George W. Bush, Barack Obama and Donald Trump. The latter was excluded from the analysis because of the short time he had been in office at the time of collection. These presidents, oddly, have given relatively little attention to the topic in general, even though cybercrime has become increasingly important. Rather, presidents have tended to focus their speeches on specific topics within the overall context of cybercrime, such as identity theft. While these topics have changed, there has been a notable increase of online national security issues after the September 11th attacks on the United States.

The data analysis was comprised of two parts. First, all of the presidential speeches were evaluated for content relevant to crime control theater. A dummy coding scheme was used where presence of an element of crime control theater within a speech was coded 1, and speeches not containing any elements were coded 0. A speech was determined to be crime control theater if a president made a statement that had no specific policy proposals but instead made it appear that he was doing something to solve the problem. For example, Donald Trump said,

> Our goal is to lead a sweeping transformation of the federal government's technology that will deliver dramatically better services for citizens, stronger protection from cyberattacks --which we were just discussing in the Oval Office with a little bit smaller group. That's a big problem, there's no question about it. We're going to be working on it and we're going to solve the problem -- and up to a trillion dollars in savings for taxpayers over the next 10 years. Over a trillion" (Trump, 2017).

In this statement, it may seem that Trump will take action, but he provides no detail about what his plans are to solve the problem at hand. By making this statement, he is making people feel good, but no significant change will occur.

Another example is provided by President Bush, who described assistance being given to victims of cybercrime through the Victims of Crime act. He said, "In recent years, VOCA has begun addressing issues such as cybercrime, identity theft, hate violence, and stalking" (Bush, 2004). Here, Bush is indicating that the government is assisting victims who suffer as a result of cybercrime, but he does not give any specifics about what that assistance entails. Further, he is indicating that the administration knows that cybercrime is an issue of concern to people and that he is working to deter any future cyber attacks, which is a virtually impossible task.

Coding the presidential speeches for mythic narratives was done by focusing on the elements that comprise them. As defined by Miko & Miller (2010), there is no greater mythic narrative than the myth of protecting victims, and "the most likely victims are children, pregnant women, and the elderly—groups that tend to garner high levels of sympathy" (Miko & Miller, 2010, p. 7). The use of mythic narrative was also identified in presidential speeches by identifying when the public feels the need to "do something" about cybercrime to save lives, and presidents propose solutions that seem to achieve that goal.

For example, in a Statement by President Clinton on December 28, 1999, the use of mythic narrative was obvious:

> Prescription drug sites on the Internet have given consumers new options to obtain needed medications, sometimes at a more affordable price. This industry is in its infancy, however, and *rogue operators pose a threat to the health of Americans*. Today we are unveiling a proposal

> that sends a signal that we have zero tolerance for prescription drug Internet sites that ignore Federal and State laws and harm patient safety and health. Dispensing medications through the Internet without prescriptions or licenses must stop.

This is an example of a mythic narrative because of the implicit notion that the online sale of prescription drugs is an immediate threat to American lives and that all that is needed to stop them is to require the right documentation. There is little reason to believe that this is the case, but it allows the myth of an under-siege America to attach to the idea that drug sales should be limited in a way that seems simple. It provides a cultural understanding and context for the solution presented.

Relatedly, moral panic takes advantage of the public concern that something, somebody or a group of people are a threat to society and its values. Moral panics, while identified by Cohen (1972), have come to be associated with the criteria set out by Goode and Ben-Yehuda (1994) and Thierer (2013). According to these criteria, there are five elements that make up moral panics: concern, hostility, consensus, disproportionality, and volatility. During a moral panic, there is a disproportional fear that people are being targeted or will suffer some significant consequence. In a Remark on May 2, 2000, President Clinton took advantage of a moral panic. He stated, "You will see, more and more, drug cartels, organized criminals, gunrunners, terrorists working together. The Internet will make it easier for them to do so" (Clinton, 2000).

People's fear of terrorism, organized crime and drug cartels on American soil was amplified by President Clinton's statement that the Internet increases the threat of harm to American citizens. The folk devils are "terrorists" and "organized criminals" of unknown origin, who seek to harm the United States, and terrorism, in general, has widely been analyzed as a moral panic (Rothe & Muzzatti, 2004). It is interesting to note that, in this case, the threats turned out to be somewhat accurate, but it nonetheless demonstrates the harnessing of moral panic for the purposes of advancing presidential policy.

The second part of the analysis includes a more in-depth examination of presidential rhetoric on cybercrime, focusing on the two elements of crime control theater: moral panic and mythic narrative. Two subject areas, child pornography/predation and cyberterrorism, were chosen because of the large number of times they were discussed by the presidents. The focus of this secondary analysis is the actual language used in order to contextualize the mythic narratives and moral panics presidents use when talking about cybercrime.

All of the speeches were coded by two researchers; any disagreements between coding were discussed between them and a consensus reached. In Table 1, below, there is a summary of information regarding the number of speeches by each president, by topic.

Table 1: Presidential Speeches by Topic

Topic	Clinton	Bush	Obama	*Total*
Cyberterrorism	15	23	7	45
General Cybersecurity	5	21	51	77
Children & Pornography	8	13	0	21
Weapons Availability & Bomb Making	28	0	3	31
CIKR Protection	7	8	10	25
Cybercrime, Identity Theft, & Fraud	31	22	25	78
General Cyberattacks	3	11	14	28
Cyberthreats	2	0	18	20
Other	10	7	38	55

Results

General Trends

The story that the data tells regarding moral panics and mythic narratives in presidential speeches on cybercrime is compelling. First, when examining the speeches by presidents on cybercrime, about half contained either mythic narratives or references to a moral panic (n = 178, n = 168), as seen in Table 2, below.

Table 2: CCT in Presidential Speeches on Cybercrime

Element	*n*	% Total of Speeches
Mythic Narrative	15	23
Moral Panic	5	21

This suggests that presidents are using elements of crime control theater regularly in their speeches about issues of cybercrime. Even though all three presidents used elements of crime control theater about half the time in their speeches about cybercrime, not all presidents took advantage of both elements equally. This can be seen more completely, in Table 3, below.

Table 3: Elements of CCT by President

President	Mythic Narrative	Moral Panic
Clinton		
n	59	41
%	54.1	37.6
Bush		
n	42	43
%	44.7	41
Obama		
n	77	84
%	48.4	50.6

The consistency with which presidents have used mythic narratives and moral panics to support their policy positions on cybercrime is interesting. All three presidents gave approximately the same percentage of speeches on cybercrime that used moral panic, though because President Obama gave many more speeches than Presidents Clinton or Bush, this is deceiving in terms of actual numbers. This consistency is less obvious when we look across the elements of crime control theater that each president used. Indeed, President Clinton tended to rely on mythic narrative in a higher percentage of speeches than he did on moral panic. President Obama, on the other hand, tended to rely more heavily on rhetoric emphasizing moral panic when discussing issues of cybercrime, while President Bush used both equally.

While it is interesting to look at the elements of crime control theater in isolation, in order to support the contention that presidents are using crime control theater in regards to cybercrime, it is necessary not only to show that presidents are using mythic narratives and moral panics independently, but also that they are being used in conjunction with one another. Examining the correspondence between speeches that contained mythic narratives with those containing moral panics, it is clear that they are. As can be seen in Table 4, below, presidents use mythic narratives in about 75% of the speeches involving moral panics.

Table 4: Cross tabulation of Elements of Crime Control Theater

		No moral panic present	Moral panic present	Total
No mythic narrative present	Count	166	36	202
	% within Mythic Narrative	82.2%	17.8%	100.0%
	% within Moral Panic	78.3%	21.4%	53.2%
Mythic narrative present	Count	46	132	178
	% within Mythic Narrative	25.8%	74.2%	100.0%
	% within Moral Panic	21.7%	78.6%	46.8%
Total	Count	212	168	380
	% within Mythic Narrative	55.8%	44.2%	100.0%
	% within Moral Panic	100.0%	100.0%	100.0%

This not only represents a statistically significant correlation between the two elements of crime control theater examined ($r = .522$, $p < .000$) but also suggests that presidents view these elements as connected when constructing their rhetoric. In short, the overall findings regarding presidential use of crime control theater, at least in regards to mythic narratives and moral panics, is fairly strong.

Another interesting element of the data is also worth noting. While it appears as if crime control theater is present in about half of their speeches on cybercrime, this presence is closely related to the length of the speech. Specifically, speeches that focused little attention (as measured by number of words) on the issue of cybercrime were the speeches least likely to contain elements of crime control theater. In other words, when cybercrime was used only to bolster another topic of interest to the president, it was likely not as part of crime control theater. On the other hand, when a speech was more focused on cybercrime, crime control theater was much more prevalent.

Taken in total, this indicates that presidents are using crime control theater when talking about cybercrime. They tend to use it when they speak at length about the topic, and they tend to use the features of crime control theater in conjunction with one another, rather than relying on them individually. In the next section, more specific examples of the use of elements of crime control theater are examined in order to more completely answer the question of how presidents use crime control theater regarding cybercrime.

The Use of Moral Panic and Mythic Narrative in Cyberporn and Cyberterrorism

While the general findings above are suggestive in terms of crime control theater, they do not address *how* presidents use elements of crime control theater when talking about cybercrime. The second part of the analysis examines this question by looking at examples of two elements of crime control theater pulled from political speeches on cybercrime: moral panic and mythic narrative.

The use of moral panic. Fear is an extremely powerful motivating force. Such fears are frequently on display in the Internet policy arena and can take advantage of full-blown moral panics or 'technopanics' or other real-world manifestations of this illogical fear (Thierer, 2013). Interestingly, all three presidents use elements of moral panic, and often draw on broader moral panics present in society, in their speeches on cybercrime.

Perhaps the most obvious examples of the use of moral panics by presidents concerning cybercrime are in their speeches regarding cyber pornography or online child predation. For instance, on October 23, 2002, President Bush gave a speech in which he said,

> Sexual predators use the Internet to distribute child pornography and obscenity. They use the Internet to engage in sexually explicit conversations. They use the Internet to lure children out of the safety of their homes into harm's way. Every day, millions of children log on to the Internet, and every day we learn more

> about the evil of the world that has crept into it. (Bush, 2002)

By the time the President made the statement above, the issues of online child predation and child pornography had become, if not a moral panic, certainly a national concern. In fact, concerns with online access to pornography by children – a precursor to the child predation and pornography scare – had started nearly a decade earlier. *Time* magazine published a story in 1995 with the headline, "Cyberporn: A new study shows how pervasive and wild it really is. Can we protect our kids – and free speech?" By 1997, it had made its way to the presidential agenda, with Bill Clinton giving a speech entitled, "Remarks Announcing Steps to Make the Internet More Family-Friendly."

Americans are deeply worried about criminal activity on the Internet, and their revulsion at child pornography is by far their biggest fear. In a 2001 survey of United States citizens, 92% of Americans said that they were concerned about child pornography on the Internet, and 50% of Americans cited child porn as the single most heinous crime that takes place online (Lewis & Fox, 2001). While protection of youth is typically a motivating factor, some moral panics transcend the traditional "it's-for-the-children" rationale for information control. The perceived threat may involve other segments of society or other values that are supposedly under threat, such as privacy or security (Clinton, 1997).

The literature has clearly identified concern with cyberporn as a moral panic as well, though the focus goes beyond the illicit images themselves: "Like much historically recent mythology, the urban mythology that is emerging from the moral panic surrounding cyberporn is aimed at reinforcing 'good parenting' in the present time. Cyberporn represents the newest
danger in a long line of dangers to the innocence of childhood" (Potter & Potter, 2001, p. 46).

In his January 12, 2015 Remarks, President Obama echoed this broader focus on parenting stating, "We want to make sure that our children are being smart and safe online. That's a responsibility of ours as parents. But we need partners. And we need a structure that ensures that information is not being gathered without us as parents or the kids knowing it" (Obama, 2015b).

What is particularly interesting in President Obama's speech is that he links the child pornography moral panic to another issue that can be described as a moral panic: privacy. For example, in the same speech, President Obama also stated, "The more we do to protect consumer information and privacy, the harder it is for hackers to damage our businesses and hurt our economy. Meanwhile, the more companies strengthen their cybersecurity, the harder it is for hackers to steal consumer information and hurt American families" (Obama, 2015b).

According to a 2001 survey of American citizens, 87% of Americans say they are concerned about credit card theft online, 82% are concerned about how organized terrorists can wreak havoc with Internet tools, 80% fear that the Internet can be used to commit wide scale fraud, 78% fear hackers getting access to government computer networks, 76% fear hackers getting access to business networks, 70% are anxious about criminals or pranksters sending out computer viruses that alter or wipe out personal computer files, and 62% of the respondents said that new laws need to be written just for the Internet to protect their email and online activities (Lewis & Fox, 2001). Issues concerning "hackers" and other vague-yet-nefarious folk devils provide additional evidence that privacy is becoming salient to the public in the shape of a moral panic.

Like child pornography and online predators, cyberterrorism can be viewed as a moral panic (Bowman-Grieve, 2015). Wall (2011) argues that the public perception of cybercrime, in general, has been shaped by the media's depiction of cybercrime as scary and criminogenic, in particular, in the genre of social science fiction movies like *Hackers*. This is emphasized in the presidential use of pairing of cyberterrorism with other 'scary' social problems like weapons of mass destruction. In both cases, the President is hoping to take advantage of the panic and be seen as doing something to address the issue of cyberterrorism.

A good example of this is President George W. Bush's speech to the World Bank in 2001, given prior to September 11th. He said,

> This requires a new strategic framework that moves beyond cold war doctrines and addresses the threats of a new century, such as cyberterrorism, weapons of mass destruction, missiles in the hands of those for whom terror and blackmail are a very way of life. These threats have the potential to destabilize freedom and progress, and we will not permit it. (Bush, 2001)

While these examples are drawn primarily from two subjects within the overall topic of cybercrime, they are generally illustrative of how presidents take advantage of moral panics when speaking about the topic. Notable outside the contexts of child pornography/predation and cyberterrorism is the reliance on technopanic. Often, presidents seem to use the overall lack of knowledge among the

population (Wall, 2008) to generate fear regarding specific areas of cybercrime – such as privacy.

One final element of presidential uses of moral panics also bears mentioning here. Presidents can not only use moral panics to further their policy goals or develop crime control theater, but they can contribute to the development of moral panics (Hawdon, 2001). This would seem to indicate that even when presidents are not already tapping into an existing moral panic, or technopanic, they may, in some instances, be trying to create one.

The use of mythic narrative. As mentioned in the general analysis above, the use of moral panic often goes hand-in-hand with the use of mythic narratives. This can be seen in some of the examples in the previous section. One area in which there were frequent uses of mythic narratives was, like moral panics, child pornography. For example, when talking about the danger of child pornography in 1997, President Clinton remarked:

> We must recognize that in the end, the responsibility for our children's safety will rest largely with their parents. Cutting-edge technology and criminal prosecutions cannot substitute for responsible mothers and fathers. Parents must make the commitment to sit down with their children and learn together about the benefits and challenges of the Internet. (Clinton, 1997)

In his speech, President Clinton is using a mythic narrative in that he is telling parents that in order to protect our children from child predators on the Internet, parents need to take a closer look and get more involved in what their children do when using the Internet. In other words, parents can protect their children by simply sitting down with them and learning. This ties into the larger cultural picture of how America sees the importance of parenting. Again, it is worth pointing out that the elements of moral panic are also evident. Indeed, the moral panic surrounding cyber pornography is associated with the emergence of the mythic narrative aimed at reinforcing "good parenting" in the present time (Potter & Potter, 2001).

Despite the large difference in the topics of child pornography and exploitation and cyberterrorism, there were strong similarities in the presidents' approach to the topic in the ways they used mythic narrative and in the way they relied on moral panic to motivate the topic. In a striking example of the use of these mythic narratives, President Obama stated,

> The cyber world is sort of the Wild, Wild West. And to some degree, we're asked to be the sheriff. When something like Sony happens, people want to know what government can do about this. If information is being shared by terrorists in the cyber world and an attack happens, people want to know are there ways of stopping that from happening. By necessity, that means government has its own significant capabilities in the cyber world. But then people, rightly, ask, well, what safeguards do we have against government intruding on our own privacy? And it's hard, and it constantly evolves because the technology so often outstrips whatever rules and structures and standards have been put in place, which means that government has to be constantly self-critical and we have to be able to have an open debate about it." (Obama, 2015a)

The analogy of the internet to the "Wild, Wild West" is perhaps the most direct use of mythic narrative by a president regarding cybercrime (other than President Bush's refrain regarding "our way of life"). By relying directly on the cultural notion of the untamed West, the president is suggesting images of lawlessness and violence requiring governmental intervention, which he then speaks of as the solution. It is also interesting to note the rhetorical nod to the moral panic regarding privacy mentioned above, though in this case the president is forced to deflect it because the government is acknowledged as the potential invader.

Having the community fight the "bad guys" (like cyber terrorists) can also be a way to incorporate the listeners into the mythic narrative. People are given the opportunity to be the hero and save their community. Citizens "are offered the chance to identify with a hero in a technologically driven world who is saving the community. This culminates what is posited as a universal form of mythic narratives involving heroes" (Stroud, 2001, p. 416). A similar form of participant incorporation has been used by presidents in relation to issues of cybercrime.

This can be seen in the context of child pornography. President George W. Bush, in a speech entitled "Remarks on Children's Online Safety" said,

> Sexual predators use the Internet to distribute child pornography and obscenity. They use the Internet to engage in sexually explicit conversations. They use the Internet to lure children out of the safety of their homes into harm's way. Every day, millions of children log on to the Internet, and every day we learn more about the evil of the world that has crept into it.… We cannot allow this to happen to our children. The chief responsibility to protect

> America's children lies with their parents. You are responsible for the welfare of your child. It's your responsibility…. There are several practical things parents can do to protect their children from the dangers of online predators. First of all, pay attention to your children. If you love your children, pay attention to them. Know what they're doing." (Bush, 2002)

This is another case with a correspondence between moral panic and mythic narrative. However, the lines of the mythic narrative are clear: The children are in danger, and you can help by simply paying attention to them and knowing what they are doing. This, while relying on the elements of good parenting in the moral panic mentioned above, is also attempting to incorporate individuals into the mythic narrative as crime fighters. This is similar to Griffin & Miller's (2008) findings regarding the AMBER Alert system, whereby people could participate in catching predators with kidnapped children.

Discussion

"Crime control theater are policies that produce the appearance, but not the effect, of crime control" (Griffin & Miller, 2008, p. 160). In short, they are socially constructed "solutions" to problems that may only exist in the public's mind. The above analysis suggests that presidents use crime control theater when it comes to cybercrime, as the type of rhetoric they employ contains regular recourse to both mythic narratives and issues that are associated with moral panic.

The incorporation of these elements into presidential speeches on cybercrime is interesting for a variety of reasons. First, the fact that the overwhelming number of speeches that contained moral panic also contained mythic narrative is suggestive. In most cases, the mythic narrative that presidents were relying on was built into the moral panic as a component. This is perhaps most easily seen in the case of child pornography, but in other areas, such as cyberterrorism, presidents relied also on this combination.

Another interesting finding was that presidents often incorporated issues of cybercrime into other policy areas, which contributed to the short length of statements regarding cybercrime specifically. Often, presidents were speaking about issues such as national security or intellectual property when cybercrime was mentioned. This may be indicative of the fact that cybercrime is an issue that presidents would like to address more comprehensively. A recent study shows that presidents sometimes link two issues together as a more effective way to affect public opinion about an issue and increase support for their policies (Cavelty, 2013). For example, a president will discuss a relatively new concern with one already perceived as a problem by the public. In doing so, the president gives the impression that the new issue is as important as the previous one and also in need of action. In one of those studies, Cavelty (2008) found that presidents were likely to connect the issue of cybercrime committed against individuals and corporate entities with national security or even international security issues by the process of coupling (Cavelty, 2008; Kingdon, 2003). Thus, presidents have linked the emerging problem of cybercrime with already established problems of national security or international security.

Further, some issues are more dynamic than others. Issues such as war and terrorism will probably (though not always) get more attention in the media than issues of online identity theft and pornography. A president may link a less dynamic issue like cybercrime with a more interesting topic like terrorism, giving him a larger audience and a better opportunity to influence the public's opinion. Then, by incorporating mythic narrative, it may be easier for a president to generate interest in their policies – regardless of their likely effectiveness.

While the analysis here focuses directly on only two elements of crime control theater, there are suggestions within the speeches that indicate other elements are incorporated as well. First, at least in relation to child pornography and exploitation, presidents focused almost exclusively on the nature of the *delivery* of the content or exploitation – namely, the Internet. This is a direct response to a public perception of the Internet as criminogenic (Wall, 2011), whereas there is little information to support that (Wall, 2008). Moreover, by focusing on the delivery method, it ignores the fact that most of the injury occurs outside of the online environment (Jenkins & Boyd, 2006). In other words, the policies offered by presidents regarding child pornography or victimization are unlikely to be effective. Similarly, presidents often speak in terms of bi-partisanship and public support for specific policies they offer. This could be interpreted as generally indicating little opposition to a proposed policy – another element of crime control theater (Griffin & Miller, 2008). Unfortunately, a more complete assessment of these elements was outside the scope of this study.

Taken together, however, there does seem to be significant support for presidential use of cybercrime to qualify as crime control theater. Moral panic tends to be drawn upon to motivate how presidents talk about the issue, and mythic narratives are often incorporated into the speeches on cybercrime. In addition, there are suggestions that the other elements

of crime control theater are also present in the speeches presidents give.

This is problematic in terms of cybercrime because of the dangers crime control theater pose. These dangers include false claims of success (politicians can claim success even though it has not occurred, so the public remains ignorant of the realities of crime risk and prevention); deleterious effects (which have the capacity to backfire and cause more harm); stunted public discourse (the ability to warp public discussion and thus rational policy formation and divert attention toward mythical and not tangible threats; Hammond et al., 2010). These dangers might be especially troublesome in terms of cybercrime because of its links to larger issues of national security and the use by politicians of the fear that engenders.

Conclusion

While this study generally supports the contention that presidents engage in crime control theater when it comes to issues related to cybercrime, there are some limitations. First, while presidents spoke frequently about cybercrime, most of the time, it was couched in terms of other topical elements within speeches on issues such as national security or terrorism. In some respects, this actually supports the above analysis, but it also poses a limitation because the number of full speeches about *only* cybercrime were relatively few. Additionally, given the fact that cybercrime is such a new topic and that only three presidents have been able to speak about the topic, the study is inherently limited in terms of its scope. It also suggests that there is more to do to see if other political leaders engage in crime control theater on the topic of cybercrime.

Overall then, presidents have good reasons to use crime control theater when it comes to the topic of cybercrime and seem to have done so. Through taking advantage of using moral panic and using mythic narratives, presidents may be able to generate support for policies whose effectiveness may be questionable. Moreover, it is possible that by linking the topic of cybercrime to other salient policies, presidents can gain it more definite support.

While the analysis here supports the crime control theater framework, at least in regards to cybercrime, there are significant questions that remain. Because cybercrime is a relatively new topic for the Executive, there needs to be long term research to determine how presidents respond to cybercrime or other issues both rhetorically and in terms of policy. Additionally, presidential responses to moral panics that emerge outside of the issue of cybercrime can be examined for similar use of crime control theater. Finally, there is the question of other actors at the federal level. Does Congress use crime control theater in terms of their rhetoric, or just in terms of their policies? Additional research into this area will help to answer these questions and advance our knowledge about the role that crime control theater plays and its impacts on criminal justice policy.

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