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Constructing objectivity: emotions in legal decision-making

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Published in
Frontiers in Sociology

ISSN 1664-8714
ISBN 978-2-8325-6653-4
DOI 10.3389/978-2-8325-6653-4

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Constructing objectivity: emotions in legal decision-making

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Citation

Bergman Blix, S., Roach Anleu, S. L.-A., Plesnicar, M. M., Johansen, L. V., eds. (2025). *Constructing objectivity: emotions in legal decision-making*. Lausanne: Frontiers Media SA. doi: 10.3389/978-2-8325-6653-4

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frontiers | Frontiers in Sociology

TYPE Editorial
PUBLISHED 15 July 2025
DOI 10.3389/fsoc.2025.1639607

OPEN ACCESS

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RECEIVED 02 June 2025
ACCEPTED 25 June 2025
PUBLISHED 15 July 2025

CITATION
Johansen LV, Plesničar MM, Roach Anleu S and Bergman Blix S (2025) Editorial: Constructing objectivity: emotions in legal decision-making. *Front. Sociol.* 10:1639607. doi: 10.3389/fsoc.2025.1639607

Editorial: Constructing objectivity: emotions in legal decision-making

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KEYWORDS

objectivity, court, legal decision-making, empathy, emotion, rationality

Editorial on the Research Topic
Constructing objectivity: emotions in legal decision-making

1 Introduction

The field of Law and Emotion originated in discussions that disputed the bifurcation of emotion and law and inspired, among other topics, socio-legal research on the dynamics and social dimensions of court work. The field has grown exponentially in diverse disciplines such as sociology, law, anthropology, criminology, and philosophy. This Research Topic originated from a symposium outside of Stockholm, Sweden, during September 2023. The symposium was part of the dissemination of the European Research Council project JustEmotions. It gathered prominent and promising scholars with expertise in different legal systems with the overall aim of engaging in stimulating cross-cultural discussions on empirical research in and around courts. As a result of these discussions, we have put together a Research Topic of empirical studies within the field of law and emotion, with contributions from Argentina, Australia, Denmark, Italy, the Netherlands, Poland, Portugal, Slovenia, and Sweden.

At the core of legal decision-making lies the fundamental principles of objectivity, impartiality, and independence. The Research Topic, *Constructing Objectivity—Emotions in Legal Decision-making*, addresses the dialectical processes of translating these principles into everyday judicial practice across a wide range of legal systems.

The Western, modern understanding of objectivity characterizes it as opposite to subjectivity; objectivity incorporates knowledge that "bears no trace of the knower" (Daston and Galison, 2010, p. 17). Objectivity is usually associated with science, in particular the natural sciences and requires the (systematic) observation of things that become facts (Fuchs and Ward, 1994). It does not matter who observes, the facts are observable, directly or indirectly; discoveries are made, and truth can be found. Empirical reality exists independently of the observer. The term objectivity "can be applied to everything from empirical reliability to procedural correctness to emotional detachment" (Daston and Galison, 1992, p. 82).

Objectivity becomes a disembodied state of being, not dependent on (subjective) interpretation and previous experience. Several concepts related to objectivity, often used

synonymously and interchangeably—dispassion, independence, impartiality, neutrality—all suggest an "unbiased, unprejudiced state of mind" (Geyh, 2013, p. 512 fn 96).

When legal professionals operationalize objective practice, they tend to link it to work processes free of bias and personal standpoints, incorporating standardization and typification (Rogers and Erez, 1999). In the actual work of legal professionals, objectivity is not a state of being but an ongoing process of balancing engagement and disengagement, commitment and detachment (Jacobsson, 2008; Roach Anleu and Mack, 2019; Bergman Blix and Wettergren, 2019). Building on empirical research, including observations, interviews, shadowing, vignettes and workshops with legal professionals, this Research Topic addresses objectivity in the making. It investigates such questions as: What role do court architecture and material objects play in the emotional dynamics of legal procedure? How do judges manage victims' emotional statements or evaluate their credibility? How do judges make independent decisions in a collective setting? What role does extra-legal (lay/specialist) expertise play in co-constructing legal knowledge relevant to decision-making? How do judges embrace the idea of objectivity? How does the growing digitalization of courts and hearings affect the answers to these questions? In so doing, the articles encompass the complexity of objectivity as an ideal, a judicial value, requiring performance, promoting courtroom atmosphere, and as sometimes feigned.

Ultimately, the question of whose emotions are acknowledged and to what effect, is not a neutral one. It is a mechanism of power, shaping how legal authority is performed, reinforced, and sometimes contested. By interrogating the emotional hierarchies embedded in legal practice, this Research Topic challenges the long-standing myth that objectivity is an absence of emotion. Instead, it reveals that objectivity is an emotionally managed ideal—one that legal professionals, victims, and even technological systems must continually work to perform and sustain.

This introduction is divided into four themes that together cover the different articles in the Research Topic. First, we discuss whose emotions we study and the implications for our analytical lens. Next, we turn to the role of space to co-create emotional dynamics, both looking at the architecture of courts and imaginary spaces for future virtual court hearings. Third, we focus on the role of emotion in rulings and sentencing, and lastly, we discuss how preconceptions and bias may create and uphold differences in legal settings.

2 Whose emotions do we study?

The study of emotions in legal decision-making requires fundamental inquiry into whose emotions are recognized, analyzed, and given epistemic value within judicial processes. Traditionally, the law has positioned itself as a domain of rationality, where emotions are viewed as external disruptions to objectivity (Grossi, 2019; Karstedt et al., 2011). However, socio-legal research increasingly demonstrates that emotions are not merely incidental but constitutive of legal practice—shaping interactions, influencing credibility assessments, and reinforcing institutional norms (Bandes et al., 2021; Bandes and Blumenthal, 2012; Maroney T. A., 2006; Nordquist and Blix, 2022). The question of whose emotions we study, then, is not just methodological but also deeply political, as it reflects broader power structures within the legal system (Rossmanith et al., 2024).

2.1 Expanding the analytical lens: from defendants and victims to legal professionals

A fundamental question in the study of law and emotion is whose emotions are assessed as relevant to legal decision-making. Traditionally, courtroom emotion has been studied in relation to victims and defendants, focusing on how their emotional expressions influence credibility assessments and legal outcomes (Maroney T., 2006; Tsoudis and Smith-Lovin, 1998; van Doorn and Koster, 2019). Although not a primary focus in the articles collected here, defendants' emotions have long been a central concern in both sociological and legal research, for instance examining how expressions of remorse, defiance, or emotional detachment influence assessments of credibility and sentencing outcomes (e.g., Field and Tata, 2023). Defendants' emotional perspectives remain crucial to understanding courtroom dynamics: what is perceived as objective or neutral from within the legal system may appear distant or alienating from the defendant's standpoint (Johansen, 2022). These divergences highlight how legal objectivity is not a universally shared experience but one that is often shaped by power and positionality. However, a broader approach reveals that legal professionals—judges, prosecutors, and even lay decision-makers—are also deeply embedded in emotional dynamics (Bergman Blix and Wettergren, 2018). Their emotions do not merely exist alongside judicial reasoning; they actively shape how legal objectivity is constructed, negotiated, and performed (Grossi, 2015).

One key issue is that the emotions of certain courtroom participants are deemed appropriate within legal settings, while others are treated as disruptive. As papers in this Research Topic show, victims, for example, are often expected to display their distress in ways that align with culturally embedded norms of believability (Johansen). The legal system does not simply react to these emotional expressions; it actively structures the terms on which emotions can be expressed. Similarly, defendants' emotions—whether remorse, defiance, or detachment—are frequently interpreted as indicators of moral character or legal responsibility. Judges play a crucial role in interpreting, managing and curating these displays, ensuring that emotions do not appear to unduly influence legal outcomes (Bosma).

At the same time, the emotions of legal professionals—particularly judges—are often framed as either non-existent or irrelevant to decision-making. The ideal of judicial neutrality suggests that legal actors should remain detached, prioritizing reason over feeling. Yet, in reality, judges and prosecutors engage in significant emotional labor, managing their own affective responses while navigating the emotions of others (Plesničar). Judicial deliberations, for example, are shaped by collective emotional dynamics such as trust, doubt, and confidence, all of which influence decision-making processes (Bergman Blix and Törnqvist).

Even lay decision-makers, such as jurors and lay judges, must reconcile their emotional responses with legal reasoning. The assumption that professional judges embody rationality while lay participants bring emotion and subjectivity reinforces a false dichotomy between expertise and emotion. In practice, lay participants often actively regulate their emotions, working to align their judgments with legal norms. This negotiation is shaped by their efforts to reconcile personal moral intuitions with the affective expectations embedded in courtroom procedure, revealing how legal objectivity is co-constructed through emotional reflexivity across professional and lay domains (Amietta).

By expanding the analytical lens to include the emotions of legal professionals and the institutional structures that regulate emotion, we move beyond simple models that treat emotion as a contaminant of legal reason. Instead, we see that objectivity itself is constructed through affective work—a process that is neither static nor individual but collectively negotiated.

2.2 The politics of emotional visibility: whose emotions matter?

If all courtroom actors engage in emotional labor, the next question is: whose and which emotions are acknowledged or rendered invisible? Courts do not merely respond to emotion; they produce hierarchies of emotional legitimacy, determining which feelings are recognized as relevant and which are dismissed, suppressed, or framed as bias.

Some emotions—such as judicial composure, prosecutorial confidence, and defense skepticism—are viewed as neutral and professional. Others, such as victim distress, judicial empathy, and lay skepticism of legal reasoning, are treated as potentially disruptive to legal objectivity (Johansen; Stepień). These distinctions are rooted in professional norms and reflect broader cultural and gendered expectations about how authority should be expressed and felt in legal settings. Emotional legitimacy is unequally distributed; expressions of empathy in judges or moral doubt in jurors, for instance, are often tolerated when tightly managed or reframed as cognitive stance-taking. In courtroom settings where evidentiary clarity is limited—such as rape trials or jury deliberations—these tensions become especially visible, revealing how legal actors must continuously calibrate their emotional positioning to maintain institutional legitimacy (Amietta; Bladini).

These hierarchies are particularly evident in how victims' emotions are managed within courtroom narratives. While legal procedures often claim to accommodate emotional testimony, this accommodation comes with strict limitations. Victims are expected to express emotions in institutionally appropriate ways—sufficiently distressed to appear credible but not overly emotional to the point of seeming irrational (Bosma).

Judges themselves are subject to conflicting emotional expectations. While legal norms dictate that they must remain unemotional and detached, they experience doubt, trust, frustration, and even empathy—emotions that influence their decisions in subtle but powerful ways (Bergman Blix and Törnqvist; Stepień). Judges develop strategies to manage these internal tensions, sometimes formalizing their approaches into unofficial rules and internalized frameworks that allow them to maintain a sense of emotional coherence in their rulings (Plesničar). These affective processes are especially visible in courtroom contexts where evidentiary ambiguity requires legal actors to draw on embodied and empathic forms of understanding. In such cases, objectivity is not merely about distancing oneself from emotion but about calibrating one's emotional responses in relation to others—an approach that foregrounds empathy as an epistemic practice, particularly in settings marked by gendered power dynamics (Bladini).

The control of empathy is a particularly contentious issue. While some judges see empathy as a cognitive tool that aids decision-making, others view it as a threat to impartiality. Legal professionals often frame their own emotional engagement in strategic ways, ensuring that it does not appear to compromise their authority (Stepień).

The politics of emotional visibility also extends beyond human actors. The rise of artificial intelligence (AI) in judicial decision-making introduces new ways of structuring emotional legitimacy. While AI is often framed as a neutral tool to reduce bias, it ultimately reflects and reinforces existing emotional hierarchies. Because these systems rely on historical data and legal precedents, they risk encoding the same biases that have traditionally shaped which emotions are recognized as relevant within the legal process (Contini et al.).

3 Court spaces and emotional dynamics

Courtrooms are prominent physical environments rich in symbolism, authority, and emotional resonance. These spaces not only shape users' experiences but are deeply entwined with legal decision-making. Interactions, whether between professionals and laypeople or among legal professionals, are influenced by the courtroom's architecture and the emotional, linguistic, and behavioral norms it imposes (Dahlberg, 2009).

It is no coincidence that defense and support attorneys coach their clients on appropriate courtroom behavior (Flower, 2019) or that legal professionals interpret subtle cues, such as facial expressions or a judge's weary pencil drop, as indicators of emotional states (Bergman Blix and Wettergren, 2018). This Research Topic brings together contributions that examine the courtroom as a restrictive emotional environment and site where emotions serve as tools for acquiring knowledge (Branco; Tait and Rossner).

Emotions provide judges and legal actors with insights about cases and people; a defendant's or victim's emotional outburst—or lack thereof—can impact judicial outcomes. What counts as an "appropriate" emotional display is shaped by both cultural and spatial expectations (Johansen).

While courtrooms have attracted substantial attention in research on law and emotion, other areas within courthouses remain underexplored despite their critical role in decision-making. One such space is the deliberation room, for instance, in civil law jurisdictions where judges and lay judges engage in collective decision-making. This backstage setting becomes a site

for negotiating between legal reasoning and everyday knowledge (Amietta), as well as for sharing and processing doubt. In the Swedish context, Bergman Blix and Törnqvist show how feelings of certainty and uncertainty are integral to the evaluation of case knowledge during deliberations characterized by a collective environment quite different from the formal courtroom setting. The study links shared attention, emotional energy, and trust to the success or failure of legal deliberations, highlighting how epistemic emotions shape legal decisions.

Expanding the scope to the courthouse as a symbolic and architectural co-creator of emotions, Branco demonstrates how the inadequate design and maintenance of Portuguese Family Courts affect emotional experiences for all users—judges, prosecutors, and litigants—alike. These emotionally charged spaces shape perceptions of fairness and empathy, with different users experiencing them according to their roles. Substandard courthouse conditions foster frustration and insecurity, undermining professionals' legitimacy and the quality of their decisions, while litigants may feel alienated or excluded from adequately participating in their own cases.

The definition of courtroom space is evolving through digitalization and the integration of Generative AI. Participants in legal proceedings may now join remotely, raising questions about how emotions are expressed and perceived in hybrid or virtual settings, redefining experiences of justice and transforming perceptions of trials (Flower, 2025; McKay, 2018; Rossner et al., 2021). Drawing on literature, dramaturgy, and the sociology of emotions, Tait and Rossner propose a framework for designing immersive judicial environments, showing how such spaces could enhance accessibility, empathy, inclusiveness, and procedural fairness, while raising questions about security and privacy. Rather than a static reproduction, the metaverse courtroom is presented as a flexible, performative space that challenges conventional notions of the physical courtroom.

More radically, aspects of sentencing can be delegated to generative AI. In an Italian criminal case context, Contini et al. highlight how predictive systems disrupt the emotive-cognitive foundation of legal judgment. AI tools simplify judicial processes by relying on statistical patterns, side lining the emotional nuances and interpretive reasoning that are crucial to fair outcomes. These systems diminish the interpersonal exchange such as those in deliberation rooms that are vital for constructing legitimate decisions, as emphasized by Bergman Blix and Törnqvist.

Since generative AI is hailed as a time-efficient and potentially more impartial tool, its absence of emotional engagement must be scrutinized in contrast to the dynamic, human-driven processes it aims to replace, even if those are not without their flaws.

4 Emotions, knowledge, and decision-making

Emotion is not simply present in legal decision-making—it is learned, rehearsed, and professionally managed. Judges and legal professionals are socialized into emotional repertoires that align with institutional expectations of neutrality, detachment, and control. Emotional expressions must be calibrated to fit the normative frameworks of the legal field, often through tacit training, observation, and collective practice as well as through formal training and professional education (Bergman Blix and Wettergren, 2018; Roach Anleu and Mack, 2014). Emotional management is not a deviation from legal reasoning, rather an essential part of it, constituting how legal actors embody authority, build trust, and navigate uncertainty. This section examines how emotional competencies are cultivated and performed within the judiciary and legal professions.

Legal professionals are acutely aware of the importance of consistency in sentencing. Yet, disparities often arise due to subjective influences such as emotions, biases, and differing cognitive approaches. In Slovenia, Plesničar illustrates how legal professionals attempt to reconcile the ideal of objectivity with the inherent imperfections of human judgment. Strategies include informal peer discussions, *ad hoc* sentencing guidelines, and other support mechanisms. These efforts often generate emotional strain and are not always successful in creating consistency. Nonetheless, legal professionals resist systemic reforms like mandatory sentencing due to concerns about preserving judicial discretion, independence and individualized justice, calling for a nuanced approach to sentencing that considers both emotional and systemic dimensions.

Judicial work inherently involves managing complex emotional dynamics, making emotional competence a critical, though often unspoken, part of performing judicial authority (Roach Anleu et al., 2021). A recurring theme across several contributions is the ambivalence legal actors feel in balancing emotional engagement with judicial objectivity. For instance, judges in Poland actively manage this tension by distributing empathy evenly among parties and regulating their emotional expressions in the courtroom (Stepień). Empathy, in this context, is simultaneously viewed as a valuable resource and a potential threat to impartiality. Its legitimacy depends on how it is framed and applied. In the Netherlands, Bosma examines the expanded use of Victim Impact Statements in criminal proceedings since 2016. While these statements raised concerns about judicial bias, judges have sought to maintain objectivity by acknowledging victims' emotions empathetically, while fostering empathy between victims and defendants.

Whereas legal professionals strive to moderate emotionality in service of objectivity, lay judges often face the inverse stereotype as overly emotional and thus must be restrained (Johansen, 2019). In Argentina, lay participants in mixed tribunals challenge this characterization. As Amietta shows, these lay actors see themselves not merely as emotional or common-sensical contributors but also as engaged co-users of legal language and reasoning. From both professional and lay perspectives, legal decision-making emerges as a continuous and interwoven process of emotion and reason (Bergman Blix and Törnqvist).

Another layer of complexity concerns the often unconscious ways emotions shape judicial decisions, particularly regarding the evaluation of defendants' and victims' emotions (van Oorschot, 2023). Johansen, in a Danish context, explores how legal professionals may misinterpret the emotional expressions and communication styles of ethnic minority victims due to unexamined cultural norms that shape courtroom expectations.

Expectations for victims to be "calm and quiet" reflect broader Danish cultural schemas that are not neutral but shaped by intersecting factors like race, gender, and class.

5 How preconceptions and stereotypical interpretations create and uphold differences within and across legal settings

Although objectivity is often treated as a universal legal ideal, the ways in which emotions and biases are managed in court are deeply shaped by cultural, institutional, and legal contexts. What counts as appropriate emotion, credible testimony, or rational judgment varies across systems. What is considered to be bias is not simply personal but socially constructed and embedded in courtroom practice. This section explores how legal decision-making is influenced by preconceptions about emotional expression, professional conduct, and evidentiary legitimacy and considers how these assumptions help uphold both interpersonal and systemic differences. These dynamics play out differently across national legal cultures—objectivity is always locally made—as the articles here demonstrate.

The concept of judicial neutrality relies on the idea that legal actors can transcend their social and emotional positioning to advance fairness and impartiality. Yet socio-legal research has long argued that emotion and bias are not merely external threats to reason but part of how law functions (Bandes and Blumenthal, 2012; Roach Anleu and Mack, 2017; Grossi, 2015). Rather than being excluded from legal processes, affect and preconceptions shape how cases are interpreted, how parties are evaluated, and how decisions are justified. These effects are not the same everywhere; legal professionals are trained to adopt different emotional styles depending on the culture and structure of their institutions (Bergman Blix and Törnqvist, 2025)

Preconceptions and stereotypical interpretations often operate through tacit norms about emotional appropriateness, which differ depending on the courtroom participant and the surrounding legal culture. As several articles in the Research Topic show, victims' emotional expressions are evaluated against normative standards that are both gendered and culturally specific. For example, in the Swedish context, legal actors are expected to assess credibility with detachment, yet these assessments remain deeply influenced by how well a victim's emotional display fits the expected script of sincere distress (Bladini). Similarly, in the Netherlands, judges manage the inclusion of victim impact statements by controlling the extent to which emotional narratives can be acknowledged without appearing to compromise neutrality (Bosma). In both cases, institutional expectations about proper courtroom emotion produce differential outcomes that reflect broader social hierarchies.

Similarly, preconceptions and stereotypical interpretations also appear in the emotional responses of legal professionals themselves. While judicial neutrality implies emotional self-restraint, maintaining this posture requires substantial affective labor. Judges develop informal strategies, such as heuristics or internal "rules of thumb", to make difficult or ambiguous decisions feel coherent. In Slovenia, for instance, judges facing inconsistencies in sentencing rely on internal codes that help them justify outcomes, even when formal guidelines fall short (Plesničar). These strategies can provide emotional stability, but they also risk reinforcing normative assumptions about what kinds of defendants, victims, or stories appear consistent, reliable, or deserving.

Importantly, these emotional dynamics are not the same. What appears as proper judicial detachment in one jurisdiction may be interpreted as coldness or inattention in another. In Argentina, lay jurors must learn how to perform objectivity in ways that conform to institutional expectations, even while grappling with their decisions' moral and emotional weight (Amietta). Unlike professional judges, who are trained to regulate emotion as part of their role, jurors must quickly learn to align their affect with courtroom norms. This disjuncture between legal rationality and lay intuition reveals how bias is embedded in individuals and in the emotional expectations that structure institutional roles.

Beyond human actors, technologies used in legal decision-making can encode and reproduce bias. As Contini et al. argue, predictive algorithms and AI-based tools are often framed as impartial, but they draw on data that reflect past inequities and emotional hierarchies. By embedding assumptions about credibility, risk, and emotional appropriateness into their design, these tools risk replicating—even amplifying—the very patterns they are meant to overcome. The aspiration to depersonalize decision-making through automation may, paradoxically, obscure how affective and social values continue to shape legal outcomes.

The increasing integration of generative AI and predictive systems into legal decision-making therefore raises important questions about how objectivity and emotion are conceptualized and operationalized. As this Research Topic suggests, emotion is not peripheral to legal reasoning but central to how objectivity is performed and sustained. Given that AI systems lack the capacity for emotional reflexivity, empathy, or contextual understanding, their use in legal contexts demands critical scrutiny. Future research would benefit from interdisciplinary engagement to explore whether and how technological tools might be developed to acknowledge the epistemic role of emotion without reinforcing patterns of exclusion or oversimplification.

Across these examples, the contributions in the Research Topic demonstrate that preconceptions and stereotypical interpretations are not simply a deviation from objectivity; they are part of how objectivity is produced, stabilized, and performed. They operate not only between individuals but across professional cultures, legal traditions, and national contexts. Whether through empathy, doubt, moral discomfort, or calculated restraint, legal actors engage in emotional work that is shaped by—and helps to reproduce—existing hierarchies. Understanding these dynamics requires us to see objectivity not as a universal standard but as a locally and emotionally negotiated ideal.

6 Conclusion

These research articles collectively challenge the traditional dichotomy between law and emotion, illustrating that objectivity in legal contexts is not a detached, universal standard but a socially constructed and emotionally negotiated practice. This perspective

aligns with the growing body of scholarship that recognizes emotions as integral to legal processes, shaping and being shaped by institutional norms and cultural contexts.

By examining how emotions influence legal actors' perceptions, decisions, and interactions across various jurisdictions, our contributors highlight the variability and complexity inherent in legal systems. This approach underscores the necessity of understanding law not as a purely rational system but as one deeply embedded in emotional and social frameworks, and reinforces the importance of empirical research.

We are pleased to contribute to this expanding field of inquiry, offering insights that deepen our understanding of the emotional dimensions of law and challenge preconceived notions about legal objectivity and neutrality. As legal systems continue to evolve amidst societal changes, acknowledging and investigating the multidimensional nature of emotion is vital for a comprehensive and equitable understanding of justice and law in action.

Author contributions

LVJ: Writing – original draft, Writing – review & editing. MMP: Writing – original draft, Writing – review & editing. SRA: Writing – original draft, Writing – review & editing. SBB: Writing – original draft, Writing – review & editing.

Funding

The author(s) declare that financial support was received for the research and/or publication of this article. The workshop that initiated this Research Topic has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme, awarded to Bergman Blix (grant agreement No 757625).

Conflict of interest

The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

The author(s) declared that they were an editorial board member of Frontiers, at the time of submission. This had no impact on the peer review process and the final decision.

Generative AI statement

The author(s) declare that no Gen AI was used in the creation of this manuscript.

Publisher's note

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frontiers | Frontiers in Sociology

TYPE Original Research
PUBLISHED 14 October 2024
DOI 10.3389/fsoc.2024.1412161

OPEN ACCESS

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RECEIVED 04 April 2024
ACCEPTED 23 September 2024
PUBLISHED 14 October 2024

CITATION
Branco P (2024) What's emotion got to do with it? Reflections on the buildings of the Portuguese (Family) Courts.
Front. Sociol. 9:1412161.
doi: 10.3389/fsoc.2024.1412161

What's emotion got to do with it? Reflections on the buildings of the Portuguese (Family) Courts

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Courthouses, as public edifices, serve as the physical backdrop for the administration of justice. Simultaneously, they are spaces inhabited and visited by a diverse array of court users, ranging from judicial professionals to litigants. This article explores the nuanced interplay between courthouse spaces and the emotional experiences they generate. It starts by surveying existing studies that examine such an intricate relationship. Then, and by drawing from a sample of interviews conducted across two distinct time periods (2010-2011 and 2017-2019) in Portugal, the article delves into the lived experiences of judges, prosecutors, and litigants. Their narratives provide a multifaceted view of the emotional experiences associated with the Portuguese (Family) Court buildings. To analyse these experiences, I turn to Henri Lefebvre's concept of lived space. Lived space refers to the emotions, memories, and interactions within a particular spatial context. Such dimension, in relation to courthouses, directly connects to the lived experience of legitimacy loss and low self-esteem affecting decision-making, on the one hand, and estrangement and rights' exclusion, on the other hand, felt by those subjects. By investigating how the spatial configurations of courthouses shape our emotions, we gain insights into the profound impact of such built environments on our understanding of the justice system, and the physical and symbolic obstacles in accessing it.

KEYWORDS

courthouse buildings, emotions, Lefebvre's lived space, court users, Portugal

1 Introduction

> (…) the tears and the turmoil of family strife characterize family court. We know they are law-related tears when they are shed in and around the court.
>
> John Brigham, *Seeing Jurisdiction: Some Jurisprudential Issues Arising from Law Being "… All Over"* (2009, p. 386)

Architecture, insofar as it is linked both to the outside world and to society, through the relationships established between social framework, culture, and technique, incorporates and creates the contexts in which feeling is produced. Emotions are thus embedded in particular contexts (Roach Anleu et al., 2016). Such a particular context, or setting, is the courthouse building. For Dahlberg (2009), in a courthouse there are strong emotions at play, which are shaped and co-created by the physical design of the space and the expression of seriousness of the professionals involved (along with procedural rules and the rationality of the law).

Courthouse edifices consequently can prompt a variety of emotional responses. These spaces have the potential to evoke positive and negative feelings, contingent upon the circumstances and users involved. Therefore, the expectations and experiences expressed

by users regarding these buildings may vary significantly. Contrary to the notion of these spaces as neutral settings, devoid of influence on their occupants, court buildings play an active role in shaping societal perceptions of justice. Far from being mere physical structures, they impact the interpretation and experience of justice. Their design influences the overall experience of justice, or what Schliehe and Jeffrey (2022, p. 2) call the 'lived experience of the justice journeys'.

How then do court buildings shape emotions and perceptions of justice for different users, such as judges, prosecutors, and parties?

To analyse their emotional experiences, I turn to Henri Lefebvre's concept of the lived space. In his seminal work, *The Production of Space* (Lefebvre, 1991[1974]), Lefebvre asserts that space is not a mere container or neutral framework; rather, it is a dynamic social product. My idea of working with Lefebvre's theoretical framework stems from Dahlberg's (2009) notion of the courtroom as a special kind of social space and from Schliehe and Jeffrey (2022) concept of the lived experience. Lefebvre discerns three dimensions—perceived space, conceived space, and lived space. Such dimensions are thoroughly present in court edifices and shape the perspectives of judicial professionals and litigants in regard to the justice system. I focus on the dimension of the lived space, which offers a lens to examine the multiple ways the spaces of the courthouse are experienced, and the emotions it evokes.

In the subsequent section, I undertake a comprehensive review of the extant literature that investigates the interconnections between courthouse architecture and emotional responses. Following this, in Section 3, I scrutinize Henri Lefebvre's triadic conceptualization of space—conceived, perceived, and lived—in the context of courthouse environments. Section 4 delineates my methodological framework, with a particular emphasis on the application of thematic analysis.

In Section 5, drawing upon a dataset of interviews conducted during two distinct periods (2010–2011 and 2017–2019) in Portugal, the article explores the lived experiences of judges, prosecutors, and litigants, categorized as user-inhabitants and user-visitors. This section examines the lived space from the perspective of inhabitants, focusing on their experiences of perceived threats to objectivity and quality in judicial decision-making and sentencing, as well as their experiences of empathy. Additionally, it investigates the lived space from the perspective of visitors, highlighting their experiences of estrangement, distress, and exclusion of rights. Through this analytical lens, the study elucidates the significant impact that the architectural design of courthouses exerts on our comprehension of the justice system, as well as the physical and symbolic barriers that impede access to justice.

2 Courthouses' spaces and emotions: exploring the existing literature

The literature surveying court users' experiences and feelings connected to the courthouse buildings is somewhat limited, but very insightful. While some authors have used ethnographic work inside the courthouse, observing hearings and photographing courtrooms (Ouviña, 2014; Perrault, 2020), and others have conducted research with undergraduate (law and psychology) students using photos (Maass et al., 2000; Clinton and Devlin, 2011; Chase and Thong, 2012), the most interesting research explored such subjective experiences through interviews with defendants (Schliehe and Jeffrey, 2022), crime victims (Toews, 2018), and asylum appellants (Gill et al., 2021). The present article also explores interview material (I will deal with this in more detail in Section 4).

Kafka's *The Trial* is perhaps the most illuminating example of a novel illustrating the role of court buildings in shaping public perceptions of law (Jeffrey, 2019). K. is forced to explore the dark spaces of the court, rambling on in a careless, almost morbid, atmosphere, facing stairs and floors that look like an Escher drawing, left to himself, without any point of orientation in that legal labyrinth, which leaves him with feelings of emptiness, oppression, and precariousness (Nitrato Izzo, 2013).

Architectural features and façades of courthouses (and police stations) are thus said to influence how users perceive authority, professionalism, and legitimacy, or the lack of it, of the justice system (Clinton and Devlin, 2011). Likewise, courtroom settings, and judicial attire, are said to affect the evaluation of judicial behavior, as the judge in robe is seen as more respectful because the black robes and the marble columns are associated with a sense of authoritative and unbiased justice (Chase and Thong, 2012). As suggested by these authors, it is therefore possible to assume that participants—especially if they are not repeat players—will feel disrespected and disinclined to trust the judge if the court in which they are heard does not live up to expectations—as happened with K.

In her study of the Donostia-San Sebastian penal courthouses, Ouviña (2014) argued instead that the solemnity of the buildings, courtroom, and robes, are aspects litigants, and victims in particular, are not familiar with, which can generate a feeling of distance about justice. Toews (2018) research also points to participants frequently referring to the court buildings as cold, hard, and distant. After conducting semi-structured interviews and focus groups with survivors of violence and representatives of community organizations, Toews' findings revealed that crime victims associated courthouse architecture feelings of insignificance, unwelcoming, inhumanity, and a high potential for revictimization.

Issues of discomfort and stress have also been correlated with intimidating design by Maass and colleagues. In their study, they compared two courthouses, with completely different styles, located in Padova (Northern Italy): the old one located in a former convent, and the new courthouse, built in 1991 and in use since 1995, situated in a modern building. Participants imagining themselves accompanying a friend to the courthouse experienced greater discomfort and stress when facing a trial in the modern courthouse than in the older one, associating such feelings with an increased probability of being convicted (Maass et al., 2000). A recent study conducted by Song and Zhao (2023) amplified this question in terms of the audio impact inside the courthouse, having investigated the influence of the sound environment at court on the defendant's emotions.

There is thus an intriguing point to note here: court buildings project a sense of majesty and solemnity, they command respect and project an image of unbiased justice, which can be perceived positively. At the same time, solemnity can be associated with

disrespect and intimidation. Conversely, if courthouse buildings appear too modern or mundane, they may look less trustful, but this could potentially foster a greater sense of equality. This ambivalence presents an interesting conundrum. The balance between maintaining respect and trust, while ensuring fairness, is therefore delicate and complex.

Jandura (2018), on his part, claims that certain physical elements in the courthouse design—like crowded corridors or waiting areas, the absence of natural light, or lack of legible wayfinding, to which we can add security barriers to entry or the (in)availability of refreshment (Schliehe and Jeffrey, 2022), features which are different from the issue of solemnity/mundanity—can also trigger negative emotions. Schliehe and Jeffrey (2022), drawing on interviews with 455 defendants who were convicted in criminal courts in England and Wales, examined how defendants perceive trial spaces and how such perceptions shaped their experiences of justice: their narratives conveyed feelings of unfairness, missing respect, a sense of being silenced, which led to defendants doubting the existence of justice. For such reasons, Toews (2018) argues that design should provide psychological relief, privacy, and safety.

Gill et al. (2021) came to similar conclusions. After observing asylum appeals in the U.K., and interviewing former asylum appellants and legal representatives, they identified disorientation, distrust, and disrespect as qualitative obstacles to access to justice. When appellants were confronted with the (often difficult to find) location of hearing centers they frequently experienced disorientation; when they entered the deceptive and cold atmosphere[1] of the tribunal they felt intimidated or disrespected, and their participation and engagement in the hearing was severed. All these aspects resulted in a perception of unfairness and as a threat to access to justice.

Moving away from the penal context, Perrault (2020) examined the Chambre de la Jeunesse[2] in Montreal, Quebec, in Canada. The issue of privacy, or the lack of it, was one of the dimensions the author analyzed. Complaints concerned discomfort and privacy, especially regarding corridor furniture and the private nature of the procedures. Meetings between lawyers and their clients took place in the few partitioned offices provided, meaning that several discussions, of a confidential nature, were held in the corridors, without the possibility for the people involved sitting down. This led families, parents, young people, and victims to feel uncomfortable and concerned with the possible echoes of their conversations likely to reach the public waiting outside.

As said previously, it is important to examine the literature exploring users' experiences with the architecture and design of justice buildings. By narrating their emotional experiences in court spaces we can infer that positive experiences might foster trust and confidence, while negative experiences (dealing with discomfort, lack of privacy, disorientation, intimidating design) might lead to distrust or deception, which will influence how users interact with the justice system. Positive and negative experiences can serve to inform reforms of the justice system and replicate best practices.

The literature review provided here does not aim to be exhaustive, nor could it be, as it mainly considered texts in English and French, thereby excluding other contexts. My objective was to identify architectural and organizational aspects of the court spaces that directly influenced the emotions and experiences of participants, thereby emphasizing the significance of considering building designs' impact on individuals' interactions with the justice system. Furthermore, my intention, with the present article, is to extend beyond criminal court studies, which make for the bulk of the existent literature, and to incorporate research on family courts, thus adding another contribution to it. Finally, the studies examined have not dealt with the professionals' emotions, and so this article covers that gap, not only by exploring the lived spaces of judges and prosecutors (the inhabitant-users), but also because that analysis is important as it relates emotional responses to space and its potential effects on sentencing and legal decision-making. As for the litigants and witnesses (the visitor-users), it moves beyond Perrault study (2020) of the Chambre de la Jeunesse, not only because Portuguese Family Courts have a broader material competence, but because my analysis incorporates interview data, capturing the specific details of experiences.[3]

3 Lefebvre's lens on the court building as a lived space

Lefebvre argues that space is socially constructed, reflecting power relations, ideologies, and everyday practices. Space can thus be characterized as a triad of spatial practices, representations of space, and spaces of representation. This triad alternates with another one, that of the perceived, of the conceived, and of the lived space. Thus, spatial practices produce perceived spaces, representations of space relate to conceived spaces, and spaces of representation are assessed as lived spaces (Lefebvre, 1991[1974]; Stanek, 2007; Leary-Owhin, 2015).

Perceived space is the physical organization of space, such as the buildings, streets, and infrastructure that shape the daily routines and activities of people. Conceived space is the space created and imagined by urban planners, architects, and other professionals, who impose their visions and ideologies on the spatial layout. Lived space is the individual, subjective experience of space, shaped by personal emotions, practices, and symbols: hence

1 The authors use Bens (2018) analysis of courtroom settings as affective atmospheres. The notion of the courtroom as an affective atmosphere was developed by Bens in an ethnographic study on the International Criminal Court (ICC) in The Hague. It describes the overall sensation that occurs at a specific time and space. Although this notion seems interesting, I will not deal with it for the purposes of this article as I engage with Lefebvre's dimension of the lived space, which extends beyond the courtroom, and directly connects to the individual emotions of different court users.

2 The Chambre de la Jeunesse, or Youth Chamber, is one of the divisions of the Court of Quebec. It is competent to decide matters related to children at risk (until the age of 18 yo); adoption; child custody; parental responsibilities; and juvenile delinquency. For more information see: https://www.quebec.ca/justice-et-etat-civil/systeme-judiciaire/tribunaux-du-quebec/cour-du-quebec/chambre-de-la-jeunesse (last visited 12 August 2024).

3 According to Faria (2018, p. 184), courthouse "user-inhabitants" refers to those working within court spaces, while court "user-visitors" encompasses those who visit said spaces for different reasons. Each group possesses distinct needs and expectations regarding the court buildings.

the space of 'inhabitants' and "visitors" (Lefebvre, 1991[1974]; Lampropoulos et al., 2020). The notion of lived space is one of Lefebvre's central contributions, as it refers directly to bodily lived experience (Lumsden, 2004).

Court buildings can thus be seen as an illustration of conceived, perceived and lived space. They are conceived spaces for they are designed and built by professionals (architects, technocrats, and political decision-makers, linked to the ministries of justice) who have a certain idea of what justice and judicial authority should look like. By using specific architectural elements, they create a symbolic and ritualistic spatial setting that conveys, and imposes, the power and legitimacy of this institution and of the legal profession. The perceived space of the courthouse is the physical layout and organization of the (court)rooms, entrances/exits, corridors, furniture, equipment. It is linked to the way they are seen and used. Finally, the lived space of the court buildings is the emotional and subjective space that is experienced and imagined by those who participate in the courtroom dramas (Dahlberg, 2009), i.e., the diverse types of court users (judges, prosecutors, lawyers, litigants, witnesses, court staff, and even the public). These users may experience different feelings and emotions regarding the buildings and internal spaces, depending on their roles, status, (cultural and emotional[4]) backgrounds, and (legal) expectations.

The dimension of the lived space hence brings our focus back to the complex meanings that subjects create in and with space (Michon, 2024). Lived space provides the context for emotional encounters, affecting our well-being, stress levels, and social interactions. Lefebvre's concept thus enriches our understanding of the role courthouse spaces play by emphasizing the lived experience, the individual emotions. I am aware that Lefebvre's work has been adapted for various uses by socio-legal and critical legal scholars, particularly regarding the produced nature of space or the concept of the right to the city (Butler, 2018). In this article I am not engaging in the discussion on the nature of space in relation to its normative framework. I am interested in Lefebvre's dimension of the lived space, which highlights how space comes to have particular meanings for an individual, encouraging us to explore these layers of meaning and experience, and the lessons we can learn from it. Such a lens helps us to gain a better grasp of the importance of understanding the subjective experiences within spatial contexts by directly relating space to emotions, and so to the production of meaning which is connected to particular spaces. In addition, it introduces a layer of theoretical sophistication to studies on the justice system, courthouse architecture and access to justice.

4 Methods and data

The analysis I present in this article builds on data from two research projects I coordinated in two different periods: 2010–2011 and 2017–2019. The research question which guided my research on courthouse architecture was informed by this idea: the importance and relevance of the courts' physical spaces and everyday practices to research on access to justice. I chose the Family Courts as my case study because family justice addresses situations of great social conflict, emotional fragility, and personal vulnerabilities. In Family Courts emotions are clearly palpable, as the people involved are often suffering from very painful legal and psychological conflicts (Vasconcelos, 2010)—the tears that are shed in and around the court (Brigham, 2009). For many families, the interaction with the judicial system is associated with overwhelming feelings and numerous emotional issues, such as the tension divorce implies (many times involving domestic violence); highly conflictual cases involving parental responsibilities; juvenile delinquency; and neglected children—the type of cases that fall under the material competence of Family Courts in Portugal (see article 122, Law no. 62/2013, from August 26th). As Dahlberg claims, these are a "very emotionally charged kind of private case" (2009, p. 185).

Family Courts, given their material competence, are different from the criminal courts (which are more commonly examined) and need to be analyzed apart from the criminal court model. The emotion's perspective, however, was not something I had pondered, but it was there, naturally. I understood it at a later stage. This article is thus an exploration of the nuanced interplay between courthouse buildings (in Portugal), emotional experiences, and perceptions of (un)access to justice. For a detailed account of the methodological outlines of my research, see Branco (2023).

In this article, as I said, I will examine the emotionality lived inside the Portuguese Family Courts buildings vis-a-vis the lived space experiences of the diverse users. To do so, I will rely on the interviews I conducted with user-inhabitants, such as judges and prosecutors,[5] and with user-visitors (litigants).[6] How space comes to have particular meanings for an individual can only be expressed by that individual alone (Michon, 2024). Interviews, therefore, play a crucial role in understanding lived space, for they allow the researcher to delve into users' (inhabitants and visitors) experiences and emotions within the courthouse walls. The interviews are the most organically capable method for capturing the context-specific details of experiences, which might be missed by other methods (such as ethnography, for example), allowing hearing, encouraging speech. This process thus permits access to the lived space, the most elusive of Lefebvre's dimensions (Michon, 2024) because of its subjectivity.

Between October of 2010 and October of 2011, I conducted a total of 27 interviews (six judges and four prosecutors working in Family Courts, and six with litigants/witnesses; the remaining interviews were conducted with attorneys, architects, and relevant decision-makers) (Branco, 2018). In the period 2017–2019 I conducted 17 interviews with 14 key stakeholders (three judges and two prosecutors; the remaining interviews were conducted

4 Nordquist and Bergman Blix (2022) use the concept of emotional capital, building on Bourdieu's theoretical framework.

5 Although generally identified with the tasks and powers exercised in the criminal field, the Public Prosecution Services have a polymorphic nature, which extends to the relevant functions assigned to it in other jurisdictional areas, among which the Family and Minors area. For more information see: https://en.ministeriopublico.pt/en/perguntas-frequentes/activity-areas (last visited 12 August 2024).

6 I have decided to focus on litigants only, as user-visitors, because other visitors, such as legal counsel, have a more in-depth knowledge of the court spaces, even though they are not inhabitants. I wanted to concentrate on the litigants' point of view.

with attorneys, court officials, mayors, and representatives of the Ministry of Justice) (Branco, 2019). The semi-structured interviews, ranging from 30 to 120 min in duration, were audio-recorded and subsequently transcribed verbatim manually, without the aid of speech-to-text converter software. All interviews were conducted in Portuguese and later translated by the researcher. Anonymisation was carried out in compliance with the research ethics code of conduct. In the selected quotations, participants are identified by their roles followed by a sequential number and the period during which the interview took place.

A thematic analysis was performed on the interview data, enabling the authors to identify, examine, and interpret recurring patterns of meaning within the qualitative data collected (Braun and Clarke, 2006). This method facilitates the construction of common variables to analyze how individuals refer to the same topic—such as courthouse buildings, experiences, and feelings—either similarly or differently (Schwarze, 2023). Consequently, thematic analysis proves to be an effective approach for uncovering individuals' views, opinions, and experiences from a qualitative dataset. The data was coded by highlighting sections of the transcribed interviews or individual sentences, and assigning shorthand labels or "codes" to describe their content. This codes turned into themes, giving form to Sections 5.1 to 5.5.

Interviews with judges and prosecutors, in addition to being important to understand the lived space of these user-inhabitants, also serve to deepen the issue of emotions and legal professions, deeply related to objectivity and quality in decision-making and sentencing, bringing to the fore the connection with space. While the interviews conducted with user-visitors are fewer than those conducted with the user-inhabitants (the professionals), the insights gathered significantly resonate with and strengthen the existent international comparative panorama through the lens of the Portuguese context.

5 Courthouse narratives: the lived spaces of inhabitants and visitors in the Portuguese courthouse buildings

Portuguese courthouses have multiple and/or varied architectural profiles, which can be classified in terms of the coexistence of different architectural styles from different (political and temporal) periods. Thus, we find buildings, inherited from the dictatorship period (which lasted from 1926 to 1974), that are monumental in scale and present grand entrances, columns and profusely decorated façades and courtrooms. At the same time, the buildings constructed or adapted during the democratic period (from 1974 onwards) exhibit an architectural model which can be characterized as heterogeneous, alternating columns with apartment-like layouts and banal décors.

Concomitantly, in any report dealing with the state of maintenance in the (Portuguese) courts, we are presented with images of courts operating in buildings in poor conditions or where parts of the building threaten to collapse; in buildings where the temperature rises, due to the lack of air conditioning, leading to hearings being suspended; in buildings where the rain comes in; courts where users have no waiting rooms, where the toilets are out of order or where the elevators constantly break down. We hear of courts where there aren't enough courtrooms to carry out the various types of hearings, or where judges must share tiny offices and carry out hearings in their own offices because of the lack of courtrooms. We also know that not all courts have metal detection gates or, if they do, they are often out of order or broken. Courts where the electricity grid is down, where the computers are old and slow. Situations are often reported, but little is done by the responsible institutional bodies.[7]

Such characterization presents the combination of the conceived and perceived spaces of Portuguese courthouse buildings. In the next subsections I present the lived spaces of judges, prosecutors, and litigants/witnesses. Their narratives provide the complex meanings that these subjects create in and with such particular spatial settings.

5.1 Lived space as the inhabitants' experience of legitimacy lost

The interviewed judges and prosecutors narrated a complex interplay of expectations and feelings. They experience exhaustion, frustration, a sense of loss of legitimacy when the physical conditions fail to match the importance not only of their professional roles but also of the judicial institution.

> *I find this building to be absolutely unqualified. What will people think of this? Will they think this is a courthouse? I have had litigants here who've asked me "And now when are we going to court?"!* [Judge 1, 2011]
>
> *This continuity of immense corridors, an all-white corridor, with a gray linoleum on the floor, is absolutely depressing. And in a court of law, it doesn't lend it much dignity. This issue of dignity may seem a false question, but it is an important one. Because it is not, obviously, due to the dignity of the materials that the exercise of the function is dignified. But, for a person who rarely goes to court and enters a building that, externally and internally, looks the same as all other office buildings, but perhaps even with less quality, with less appearance… And, moreover, if the hearing takes place in the judge's office, if you don't even go to the courtroom, which always has some distinction in terms of space, you won't even realize that you are in a courthouse!* [Judge 4, 2011]

The quoted excerpts are a clear illustration of this sense of loss of authority, of unaccomplished expectations that relate to a building without any dignity, quality, or distinction to serve its function. Inadequate resources, outdated facilities, and absence of proper conditions exacerbate this frustration and raise questions on the symbolism and power of the judiciary. The question "Will they think this is a courthouse?" (echoing Clinton and Devlin's study on police stations), accentuates a feeling of disenchantment

7 Cf. http://www.cnnportugal.iol.pt/videos/falta-de-magistrados-profissionais-cansados-e-edificios-a-cairem-aos-bocados-um-retrato-dos-tribunais-nacionais/634d556e0cf2ea367d53a1ef (last visited 22 March 2024).

toward the institution, amplified by the constatation that the courthouse becomes an administrative building, and the hearing lacks ceremony (Lucien, 2010). Furthermore, the next observation suggests a potential intentional strategy to promote professional efficiency at the cost of symbolism:

> *It's all white, it looks like a hospital. I think that, more and more, courts look like hospitals. Maybe it's on purpose, so we don't get too distracted.* [Judge 3, 2011]

The professionals also acknowledge the changes that occurred regarding the conceived space of the buildings in terms of architectural styles. They express, nonetheless, a sentiment of overstretched lines that contribute to a discredit of the judiciary when the buildings suffer from a complete scarceness of those characteristics that conceptually embody the courthouse symbolism. They argue that such changes have transformed the foundational conceived and perceived spaces of the courthouses, challenging the configuration and symbolism of the lived space in which they found their function. At the same time, they understand the courthouse as a space of dignity, that should match the expectations of all users by being comfortable, welcoming, and accessible.

> *I think the architecture of the courts has become a little desacralized and thank goodness for that! We no longer have the idea that the court must be upstairs for people to "ascend to heaven". We now have some courts that are much closer and accessible to people. However, and to a certain extent, I believe the extreme happened, when the courthouse got mixed with [office] buildings. I think there it also loses. The symbolic function, which is important, is lost. And when people go to court, they also look for the symbolism of the court. This symbolism is also in the building. It doesn't have to be an imposing building, it doesn't have to be a building that scares people, as was the idea [before]. I think it must be a functional building, but it must be a building with dignity, where people feel welcomed, where they feel comfortable. With working conditions too, where people work in good conditions.* [Prosecutor 3, 2017]

5.2 Lived space as the inhabitants' experience of threat to objectivity and quality in decision-making and sentencing

As I described before, Portuguese court buildings present a series of maintenance problems. Perceived space translates into a lack of working and safety conditions, which have to do with uncomfortable buildings (absence of air conditioning, natural light, and adequate furniture), inadequate use of space (insufficient spaces to work comfortably), and outdated infrastructure. These conditions influence the lived space of the inhabitants: the creaking chairs, the piles of files, the peeling paint, mirror the system's defectiveness. By complaining about their everyday working conditions, feelings such as anger and frustration are repetitively present:

> *Working in a place surrounded by files, where the files aren't where they should be, which is on the shelves, but are on the chairs, on the windowsills... No, I can't stand it! There are offices where there isn't even a table to put the files on. (…) where the floor is all dirty, there's no varnish, the carpet has a hole in it and a vase is placed on top. I'm fed up with letting it be! (…)* [Prosecutor 2, 2017]

Moreover, judges and prosecutors reveal their experiences of insecurity and powerlessness, exposing the courthouses' spatial disruptions related to conflict, which magnifies inside the family courts. These narratives of their lived space provide the context for social interactions and emotional encounters affecting their well-being and stress levels, revealing a sense of exposure that should not occur in relation to their role.

> *The issue of security: I always pray to Our Lady of Fátima that the courts don't have any problems! We are completely open, exposed.* [Prosecutor 1, 2011]
>
> *There is a general amnesia about the conflict environment that exists in the family courts and the danger that this implies. We don't exactly deal with saints, because everything happens here, from people with mental disorders to people with a criminal record, with personality problems, etc... And complicated situations arise. There should be a clear concern with the protection of those who are serving State's authority, because we are not imposing our authority or using authority for our own personal purpose (…). There should be concern, for example, with chairs and materials that are easily thrown, they should be fixed to the floor. Years ago, at the court in XXX, we all had to run away, the large wooden benches that were in the atrium were all thrown at us, and everything was broken. It was a very complicated situation.* [Judge 1, 2011]

The issue of the direct relationship between the physical conditions of the workplace, in this case the courts, and the levels of stress and low self-esteem of magistrates has been a topic under debate recently, in Portugal (Dias et al., 2024) as in other countries. In November 2018, the Lord Chief Justice presented his annual report to the British Parliament, in which he denounced with concern the low self-esteem of the judiciary and how the state of dilapidation of the courts in England and Wales contributed to this (Judiciary of England and Wales, 2018). He added that it would be completely unreasonable to expect magistrates and court officials to work in such conditions, conditions that would be intolerable in any other activity. Also in England, the UK Judicial Attitude Survey of 2017[8] revealed that 76% of judges felt their working conditions had deteriorated greatly in the preceding 5 years, and 43% of judges felt that the state of maintenance of their court buildings was poor. In a report written by two professors from the University of Cambridge (Turenne and Bell, 2018) about the attractiveness of the judicial function in the United Kingdom, one can read some excerpts from interviews with English and Welsh

8 A report based on an online survey carried out by the Judicial Institute of University College London and in which 99% of English and Welsh judges, circa 1600, took part. See Thomas (2017).

lawyers and magistrates, where questions of malaise, self-esteem and sad emotions were evident.

This brings back the questions enunciated by Clinton and Devlin study (2011): when the expectations of professionalism and authority do not correspond, professionals may be seen as unskilled. Furthermore, their decision-making capabilities and legal expertise may be weakened by the "dilapidated state of the buildings". Lefebvre's spatial theory reminds us that the physical space of a courthouse—its layout, and comfort—shapes judges' experiences and, consequently, we may question if this might affect their rulings. A direct link was actually made between self-esteem and decision-making, being self-esteem "very important for getting things done, for deciding" (Prosecutor 3, 2017).

Jerome Frank and other realists were ridiculed for supposedly having said (which was never proven) that how a judge decides a case depends on what they had for breakfast. American realists were, in fact, associated with the idea of "breakfast jurisprudence". Frank and other realists never maintained that it all boils down to "what the judge had for breakfast". However, he would not deny that this could influence the decision (Tumonis, 2012). My reflection goes in the same direction, not in relation to what the judges eat,[9] but in relation to the settings in which they work—in poorly maintained, run-down buildings, looking like hospitals, sitting on uncomfortable chairs,—and the impacts these might have on objectivity and quality in decision-making and sentencing processes. However, it's important to note these are just potential correlations, and a direct connection between the two might not exist. In any case, it would be crucial to address both aspects to ensure the overall effectiveness and efficiency of the justice system.

Judges and prosecutors, however, seem to show no concern about these issues, not only because they are mindful of their professional status and responsibility, but also because they are part of a professional culture that values strength and self-sacrifice (Roach Anleu et al., 2016). This relates also to the judiciary's working experience: routinization can lead to emotional alienation (Bergman Blix and Minissale, 2022). The next quote confirms this:

> *I think magistrates have never said much about this, despite the conditions in which we work, because we are in court to solve the cases that come our way. I, and I think most of my colleagues too, put the issue of comfort and of the decoration of our offices aside, because work absorbs us so much that these things just vanish.* [Judge 2, 2011]

Judge 2 is calling attention to his own lived space made of professional expectations, which relate to those of his colleagues as well. By implying they care little about the issue of comfort and that their only concern is to work on their caseload, Judge 2 is revealing a feeling of resilience which fits with a reliable profession, capable of working hard and of upholding objectivity, integrity and ethical standards despite the spatial disruptions affecting their lived space.

9 On this question, see Danziger et al. (2011).

5.3 Lived space as the inhabitants' experience of empathy

The magistrates interviewed also agreed that the courts can cause fear and intimidation to the visitors, and they are sensitive to that. As Prosecutor 2 said[10]:

> *Even nowadays we still meet a lot of people who say "I've never been to this place"; and people come into the court and are frightened to talk to us. And I've often found myself saying to them: "Look, it's nice to come to court. Don't you like it here? Has anyone treated you badly? It's just nice people here", to break the ice a bit, because you feel that people are nervous.* [Prosecutor 2, 2011]

In the context of family legal proceedings, professionals acknowledge it is incumbent upon them to ensure that the court environment minimizes discomfort and respects peoples' emotional state, in particular if children are involved.

> *I need the child to be comfortable telling me what they have to say and what is painful for them. It is always painful because a child's place is not in a court of law. (…) I often bring some toys from the family home, some drawings, and things like that. To try to create this proximity. One cannot approach a child dressed in a black robe, and inside a courtroom, [a room] completely cold and distant…* [Judge 2, 2011]

This empathy both professionals display, understanding and connecting with others' emotional experiences inside the courthouse, relating to how such space can affect people's interactions and stress levels, is also experienced as essential for just decision-making, which involves continuous work to ease the emotional burden of the proceedings.

5.4 Lived space as the visitors' experience of alienation and distress

Lived spaces are imbued with emotional significance, as was mentioned. I now turn to the visitors to examine their emotional responses to courthouse spaces. One of the issues that most affected the litigants' experiences had to do with the recognizability of the building as a courthouse, or the opposite of it. Their lived space reveals a mismatch between the expectation and the perception. As one of the user-visitors said:

> *That's hardly a courthouse, that's a house... That's just a building. … it's a normal space, as if it were, I don't know, something else.* [Litigant 6, 2011]

10 Nordquist and Bergman Blix (2022) also interviewed a judge who reflected on the divergence between his own feelings of ease in the court setting and the anxiety felt by the people coming to court. This management of the feeling of ease in court, as well as being sensitive to the unease of others also relies, according to the authors, on the professional's emotional capital.

This quote reveals Litigant 6/s frustrated expectations regarding a building seen unfit to stand as a physical embodiment of justice. The symbolic meaning of the courthouse was not respected due to the spatial insignificance of the building, seen as a normal building, as something else, but not as a courthouse.[11] There is a sense of estrangement toward the (ineffectual) symbolism of the building exteriors (Clinton and Devlin, 2011).

Regarding the interiors, the experiences of the visitor-users in the Portuguese Family Courts were particularly marked by two different spaces: the waiting areas and the hearing room/courtroom. In regard to the latter, it is worth noting that the spaces where the hearings/trials took place left an indelible mark, especially the design of the courtroom, evoking that of the criminal court, and creating the perception of being condemned and under arrest, even though the issue related to divorce matters:

> *It seems like we owe everyone money. The judge seems like a crow that appears there to devour someone. I'm sorry for saying this, but that's what I felt! Because it wasn't a crime that was being tried, it was a divorce!* [Litigant 6, 2011]

Litigant 6 further recalls his experience of feeling insignificant:

> *I felt small in there, and I was a soldier, I fought war overseas! I don't think I was as scared during the Ultramar war as I were there. It wasn't fear, it was that reverence, that really scary environment. Everyone seems to be imprisoned!* [Litigant 6, 2011]

The justice system seems to always equate with a punitive character and with a "space of sacrifice" (Lucien, 2010, p. 186)—where the judge looks like an evil crow about to devour the litigants. Even if the material competence in question is different, as is the case with family courts and its civil nature. Litigant 6 describes a feeling of liability toward society (owing money to everyone), of scare and fear—the memories of the war were pale in comparison to what being inside the courtroom felt like. His lived space of the courtroom speaks of high levels of stress and estrangement.

While the primary function of the symbolic space where the trial takes place, that is the courtroom, is to legitimize the institution, it nevertheless intimidates and even marginalizes the inexperienced (Perrault, 2020), no matter the layout. The experience of being inside a courtroom can thus be quite intimidating, even if it is an adult we are talking of. While adults may find the experience daunting, it is reasonable to assume that the impact on a child can be significantly more profound. As the next quote tells, Litigant 2 confronts her lived experience with the emotional response she believes her child could feel:

> *Even for a child, for example, seeing a court like that, I think the child would leave there more scared than when she arrived. For us, it's scary, for a child, I think, it must be even worse.* [Litigant 2, 2011]

11 Which resonates with what was mentioned by the judges and prosecutors.

The waiting areas in the courthouses are, also, of considerable importance since this is the space where the parties wait for their cases to be heard. Nevertheless, what court user-visitors narrated during the interviews was mostly a sense of vulnerability, distress, and exposure [in many ways identical to what Gill et al. (2021), Perrault (2020), and Toews (2018) have identified in their studies]. The next quotes highlight lived space as a strong sense of emotional and physical distress:

> *There was no privacy, and we were left there in the hallway. Man, we were here, and the other party was there, a meter or so away. I was a little distressed. I felt exposed there, you know? I didn't feel physically threatened, but I felt uncomfortable, and since I couldn't let my friend down, I maintained my pose. But I think there is no concern with separating the parties.* [Litigant 1, 2011]

> *In that courthouse, if there were some rooms where we could be a little more reserved, we would have a little more privacy. Especially because we were there talking to our lawyer, and it had to be kept quiet so that we could have as much privacy as possible, since there were a lot more people there.* [Litigant 5, 2011]

Such emotional and physical distress can be high in family courts, especially when it comes to divorce cases or parental responsibilities. Having parties together in the same waiting areas may lead to a tense ambience that will project into the way the trial or hearing will take place.

Users invoke court experiences in other countries to better illustrate how different buildings have impacted their lived experiences. Comparing memories, expectations and experiences conveys a sense of self-awareness and allows relational reflection on emotions, in different contexts. The next quote shows a tension between different spatial practices (those between Portugal and abroad) and how the expectations were matched, giving the user a sense of justice he had not felt before:

> *What did I see there [referring to the experience in a Danish courthouse]? I saw a modern building, and there was a witness room, a place for the police. And I realized that when there are several parties, they make sure to safeguard the different parties. [Buildings] With lots of light and lots of space, and in good condition. The waiting room had comfortable sofas. And I waited there calmly. A pleasant space.* [Litigant 1, 2011]

5.5 Lived space as the visitors' experience of rights' exclusion

The users' experiences also depend on their ability to participate in the processes. Participation is not just a matter of understanding technical language and verbalizing responses. It concerns physical participation as well. This is in line with what Gill et al. (2021) have identified as qualitative obstacles to access to justice.

As one of the users said, courthouses are places of exclusion. And this is even more poignant when the buildings are not prepared to welcome people with disabilities. This is a matter of structural ableism (Lundberg and Chen, 2023).

> *No one has thought, not even now, in the 21st century, about transforming the courts. Like many public departments, many public institutions, they forget there are people who have disabilities, and who have as many rights as those who move around easily.* [Litigant 4, 2011]
>
> *There are no access ramps. Lots of stairs. It is not easy for an elderly person to go to that court. Climbing upstairs is not easy.* [Litigant 3, 2011]

Ableist architecture refers to the design of built environments that prioritize the needs of able-bodied individuals, often excluding or marginalizing elderly people or those with disabilities (American Bar Association, 1991; Allen, 2021). This can be manifested in numerous ways, from a lack of wheelchair ramps to the placement of essential services on upper floors that are only accessible via stairs. In this context, Lefebvre's lived space becomes a tool for critiquing ableist architecture. When we apply this to courthouses, we can see how the architecture of these spaces can reinforce ableist norms: a courthouse with a staircase leading up to the entrance presents a physical barrier to those who cannot navigate stairs, instead of symbolizing justice and authority. The irritation these users feel is precisely about that: a sense of missing respect, of injustice that derives from the fact that the same institution one seeks to claim rights is physically denying them. After all, courthouses are the pillars of our legal system, the guardians of our rights.

6 Concluding remarks

The courthouse, an emblem of the justice system, stands tall in the collective imagination. Its layout is meant to symbolize the promise of fair hearings and the legitimacy of the institution, depending on the viewpoint. However, reality often diverges from this idealized vision. Interviews reveal emotional turmoil.

In these spaces, like Nir and Musial (2020) claim, and interviews illustrate, emotions run high: frustration, fear, insignificance, loss, exclusion, distance, can be quite close to the surface and are also shaped by the physical design of the space (Dahlberg, 2009).

Based on the thematic analysis done and on the intersection with Lefebvre's concept of lived space, the following themes emerged from the different users' experiences:

- **Lived space as the inhabitants' experience of legitimacy lost:** the outdated facilities, and absence of proper conditions of the buildings, lead the professionals to speak of frustration and exhaustion, thus relating to a loss of symbolism, legitimacy, and authority of the judiciary and professionals.
- **Lived space as the inhabitants' experience of threat to objectivity and quality in decision-making and sentencing:** inhabitants' complaints about their working conditions reveal feelings of anger, insecurity, and powerlessness. These emotions impact their overall well-being and stress levels, ultimately influencing their decision-making processes.
- **Lived space as the inhabitants' experience of empathy:** acknowledging other peoples' emotional experiences inside the courthouse, particularly those of children, becomes crucial for ensuring just decision-making.
- **Lived space as the visitors' experiences of estrangement, distress, and rights' exclusion:** Distress, exposure, and irritation reveal a denial of justice, affecting people in unequal ways (children, the elderly, people with disabilities), emphasizes the need for more inclusive and supportive courthouse environments.

Court buildings are not just physical structures, they are made of conceived, perceived and lived spaces. They produce emotions, power dynamics and social relations. By considering the lived spaces of the diverse court users, architects and planners can begin to design courthouses that are more inclusive and accessible, challenging the exclusionary and distant assumptions often underpinned by the architectural design of courthouses, as the diverse narratives by visitors illustrated. Furthermore, and like inhabitants stressed, good working conditions are essential to promote decision-making processes. There is a need for a new approach to courthouse design, one that reflects the values of justice, fairness, respect, and also that of care, which should be at the heart of the (family) court system.

Data availability statement

The raw data supporting the conclusions of this article will be made available by the authors, without undue reservation.

Ethics statement

The requirement of ethical approval was waived by Centre for Social Studies, University of Coimbra for the studies involving humans. The studies were conducted in accordance with the local legislation and institutional requirements. The participants provided their written informed consent to participate in this study. Written informed consent was obtained from the individual(s) for the publication of any potentially identifiable images or data included in this article.

Author contributions

PB: Writing – original draft, Writing – review & editing.

Funding

The author(s) declare financial support was received for the research, authorship, and/or publication of this article. PB is a contracted researcher under the Scientific Employment Stimulus Program (https://doi.org/10.54499/CEECIND/00126/2017/CP1402/CT0001).

Acknowledgments

I would like to thank the generous comments made by the reviewers. I am most grateful to Stina Bergman Blix for inviting

me to engage with an emotion's perspective. I also would like to thank Jonas Bens for commenting on my presentation at the JUSTEMOTIONS symposium at Näsby Castle, in September 2023. I am very grateful to Louise Victoria Johansen: her kindness and precious comments were vital, especially at a time when I was lacking inspiration.

Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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frontiers | Frontiers in Sociology

TYPE Original Research
PUBLISHED 30 October 2024
DOI 10.3389/fsoc.2024.1417766

OPEN ACCESS

EDITED BY
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RECEIVED 15 April 2024
ACCEPTED 21 October 2024
PUBLISHED 30 October 2024

CITATION
Contini F, Minissale A and Bergman Blix S (2024) Artificial intelligence and real decisions: predictive systems and generative AI vs. emotive-cognitive legal deliberations. *Front. Sociol.* 9:1417766. doi: 10.3389/fsoc.2024.1417766

Artificial intelligence and real decisions: predictive systems and generative AI vs. emotive-cognitive legal deliberations

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The use of artificial intelligence in law represents one of the biggest challenges across different legal systems. Supporters of predictive systems believe that decisionmaking could be more efficient, consistent and predictable by using AI. European legislation and legal scholars, however, identify areas where AI developments are at high risk or too dangerous to be used in judicial proceedings. In this article, we contribute to this debate by problematizing predictive systems based on previous judgments and the growing use of Generative AI in judicial proceedings. Through illustrations from real criminal cases in Italian courts and prosecution offices, we show misalignments between the functions of AI systems and the essential features of legal decision-making and identify possible legitimate usages. We argue that current predictive systems and Generative AI crunch the complexity of judicial proceedings, the dynamics of fact-finding and legal encoding. They reduce the delivery of justice to statistical connections between data or metadata, cutting off the emotive-cognitive process that lies at the core of legal decision-making.

KEYWORDS

emotions, empathy, legal decision making, predictive justice, generative AI

1 Introduction

Digital technologies have contributed to handling legal proceedings for more than 30 years. Initially through case registrations and case management, later with fully-fledged e-justice platforms, they provided the digital workplace needed to run judicial proceedings from filing to disposition. The first wave of technological deployment mainly concerned procedures, records, case files and the collection of judgments in dedicated databases.

In the last decade, artificial intelligence triggered a second wave of innovation. The promise of robot judges and systems predicting judicial decisions caused the excitement of many (Ashley, 2017; Chen, 2019). However, the first systems applied in real settings generated bias, discrimination against minorities, and undue and potentially dangerous pressures on decision makers (Angwin et al., 2016; Morison and Harkens, 2019; Morison and McInerney, 2024). Over the years, the rise of issues and ethical concerns about AI in several fields cooled down the enthusiasm and hype on automatic and robotic judicial decisions. As a result, several ethical codes have been approved (Lupo, 2022) and, more recently, the European Union passed

the AI Act.[1] In this article, we contribute to the debate on the role of AI in judicial decision-making by problematizing the use of predictive systems based on natural language processing of previous judgments and of generative AI (GenAI) based on large language models. We draw on illustrations from Italian data collected in the Justemotions project consisting of observations of deliberations and interviews with magistrates showing the emotive-cognitive dynamics of real decision-making. This unique data set is used to reason on the implications of introducing predictive and generative AI systems in judicial and prosecutorial decision-making, highlighting the importance of accurately accounting for how human interpretation works in real legal practice. We argue that both predictive justice systems and GenAI, in their distinct forms, introduce logical simplifications that crunch the complexity of judicial proceedings and alter the dynamics of fact-finding and legal encoding. These technologies cut off the emotive-cognitive process of legal decision-making, reducing the delivery of justice to statistical connections between data, metadata or text. The following sections describe the features and logic of predictive systems and GenAI; provide a brief explanation of the methods used to collect data and of the characteristics of the Italian criminal procedure that are relevant to understand our illustrations; and compare real deliberations to AI, highlighting the integration of emotional dynamics to fact-finding and interpretation. In the conclusion, we discuss the implications of our empirical findings and identify possible risks and opportunities.

2 AI in justice systems

AI entered into court operation mainly through systems supporting text processing (Reiling, 2020), in the form of *speech-to-text* and *anonymization of judgments*. For years, speech-to-text or language editing have been based on AI-systems embedded in everyday word processing applications. Today, professionals involved in judicial proceedings use these systems to write (dictate) and check the language. Speech-to-text improves writing speed, making it possible for judges/clerks to write minutes during hearings. The second type of systems—those anonymizing judgments—are designed to allow the publication of judgments compliant with privacy regulations. AI based anonymization erases personal data from judicial decisions, with huge time saving. The outputs of both these systems can be easily checked by users, and are not considered by the European AI Act. In contrast, direct usages of AI in legal processes, particularly applications influencing judicial deliberation, are acknowledged by the EU AI Act as "high risk" (Chapter 2 AI Act).

Criticisms of these systems touch upon various arguments, including systems' bias, limited accountability (Chiao, 2019; Gualdi and Cordella, 2021), complexity and lack of understandability of AI and consequently of justice administration (Re and Solow-Niederman, 2019). Lack of explanations about the machines' suggestions (Mittelstadt et al., 2016) can result in undue influence on the judicial function (Contini, 2024). Further critiques stress the black-box problem (Bathaee, 2018), magnified when private companies own these systems, which are non-accessible to third-parties, and the risk of jurisprudential ossification due to the *effect mouton* (all judges follow uncritically the decision suggested by the machine) (Garapon and Lassègue, 2021).

The predictive systems in use, or more often under development, fall into various categories: those estimating the recidivism risk not further considered in this article,[2] and those supporting sentencing (Bagaric and Hunter, 2022) or designed to predict and/or suggest a decision by identifying a case (or cases) very similar or identical to the one to be decided, through statistical analyses and probabilistic calculations. These systems are designed to exclusively fulfill the specific function of predicting and/or suggesting the judicial decision. In contrast, GenAI has multi-purpose functions not established in advance. They intend to interact with users through questions and answers and are autonomous in generating text (but also other outputs like images or sounds) in reply to prompts. For this reason, these applications are also referred to as general-purpose AI systems in the EU AI Act. Answer and text generation is probabilistic, based on statistical relationships discovered during training processes (Ferrara, 2024).

2.1 Predictive systems

Predictive justice systems allow forecasting possible outcomes of disputes based on previous solutions to analogous or similar cases. They entail a broad spectrum of applications mainly (even if not exclusively) based on supervised machine learning (Galli and Sartor, 2023, p. 173) through which data sets first are annotated and then algorithms are trained and supervised to predict outcomes and recognize patterns. Predictive systems are classified as high risk by the EU AI act (Annex III Art-8). A typical example of how predictive systems work is the approach developed by Aletras et al. (2016, pp. 3–19), Medvedeva and McBride (2023) and Collenette et al. (2023) to predict decisions of the European Court of Human Rights (ECtHR) dealing with articles 3, 6, and 8 of the Human Rights Convention. The authors state that the system is designed to "rapidly identify cases and extract patterns that correlate with certain outcomes" (pp. 3/19). The algorithm, using natural language processing and machine learning, predicts whether the Court will rule a violation of a specific provision of the European Convention on Human Rights (ECHR) with a 79% of accuracy. The tool works on information from previous judgments available in the online database of the ECtHR. The logic behind the system is that when uploading a new petition ("application" in ECtHR

1 The Act is the first comprehensive regulation of AI, establishing Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act) (Text with EEA relevance) requirements and duties based on the risk of causing harm by products and services building on AI systems. The act classifies four categories of risk ("unacceptable," "high," "limited" and "minimal"), and one additional category for general-purpose AI.

2 Recidivism risk assessment builds on decision support systems designed to suggest precautionary measures like pre-trial detention or the final sentence. Since these kinds of decisions are not the focus of our study, they will not be included in the discussion.

jargon), the system checks the similarities with previous cases and predicts the decision of the Court. The checking between the "new petition" and the existing body of judgments is made automatically. In all the cases of the ECtHR, predictions assume that there is enough similarity between specific chunks of the text of published judgments and complaints lodged to the Court.

Discussing Aletras and colleagues' work, Reiling (2020), noticed that AI algorithms in this system do not work on the entirety of texts generated from previous cases. Initially, the system singles out judgments included in the ECtHR online database, in which cases classified as inadmissible requests are not available. In the next step, judgments are tagged through semantic annotations, associating chunks of the texts (sentences, words) with concepts. As a result, each judgment is classified based on several variables: procedure, circumstances, facts, and relevant law. These annotations transform the unstructured text[3] of each judgment and its flow of arguments into structured data suitable for statistical elaboration based on AI techniques. In this system, annotations can be made by humans, automatically by a machine, or by a mix of the two.

The two steps are examples of functional simplifications on two levels. First, judicial cases are reduced to final judgments,[4] whereas other documents in the case files and the dynamics that may affect the unfolding of proceedings, such as preliminary hearings, trials, and courts' deliberations are cut off. Second, arguments and nuances of judgments are streamlined into machine-processable concepts (annotations and learning algorithms).

In similarity to Aletras and colleagues' system, other predictive systems already in use or under development have in common the classification of existing procedural documents through tags or semantic annotations. Differences entail mainly the ways in which users interact with the data generated by the systems to get predictions. Some systems are designed to allow users to query the judgment database through a pre-established subject matters list, following decisional trees. This is the case of the System for predictive justice of the Court of Appeal of Brescia[5] for labor and company law. Once the thematic area of interest has been selected (either labor or company law), the system provides pre-established pathways to identify a case, either identical, or similar to the one searched for by users. This operation is referred to as predicting the *sought-after solution*. Other systems allow queries in natural language (i.e., the common language, usually juxtaposed to queries based on Boolean or other non-necessarily intuitive criteria). This is the ambition of the system experimented by the Court of Appeal of Venice (Musella, 2023), the Tribunal of Pisa (Nencini, 2024)[6] and several commercial services promising to provide the most relevant answers to complex legal questions by database searches. These simple search methods identify, among the vast jurisprudence available on the platform, the judgments that better fit with the query[7]. If a case with the same features has been already decided, that judgment(s) identified by the machine will predict the decision. Hence, the prediction is based on similarities between the case and the existing jurisprudence. These systems receive high regards within the judicial community even in civil law countries like Italy or France, where the *stare decisis* (i.e., following the precedent) principle does not apply. They transform the content of a judgment into fragments that can be elaborated through machine learning and other AI techniques.

To a minor extent, predictive systems also aim to address prosecutorial decision-making. In 2021, a group of Chinese researchers claimed to have created the world's first AI prosecutor (Petersen, 2022). The robot, tested in the Shanghai Pudong People Procuratorate, was set to press charges based on 1,000 "traits" from the human-generated case description texts. The AI prosecutor was "trained" using 17,000 real life cases from 2015 to 2020 and was considered able to identify and press charges for the eight most common crimes in Shanghai with 97% accuracy.

In sum, the philosophy behind all these systems is that if the law is objective, repeatable and based on predetermined and binding rules, its application can be foreseen, combining "big data" analysis and "machine learning" techniques (Medvedeva and McBride, 2023). Hence, these models reproduce judicial reasoning through syllogistic logic and work on pieces of "knowledge" mainly extracted by judgments.

2.2 Generative AI

GenAI systems like ChatGPT, CoPilot or Gemini, are a new family of applications increasingly used in judicial proceedings (Pierce and Goutos, 2024; Grossman et al., 2023b). They are based on Large Language Models that, through probabilistic calculations, predict the next word in a sentence. Chatbots with GenAI reply to 'prompts', i.e., natural language instructions given to the system, to obtain an output based on pre-trained data sets (Courts of New Zealand, 2023, p. 1), hence are multipurpose. In legal work, they can be asked to summarize documents, select facts from different stories of an event as collected in interviews, or look for similarities and differences between stories. Users could also ask to separate the issues disputed from those agreed upon and check prosecutors' arguments against those of the defense. Finally, a judge could ask the GenAI system how to decide a case. In contrast to the systems discussed earlier, GenAI can be used privately and without external control and is freely accessible on the Internet (the more advanced versions for a subscription fee).

Before venturing into the analyses of GenAI in judicial proceedings,[8] it is necessary to explore its actual usage and define uses that are considered acceptable. The suspicion that judicial officers took advantage of these systems in the privacy of their chambers proved well founded when some of them began to report the use of GenAI into judgments. Evidence is anecdotal but constantly growing. The first known case (February 2023) is by a Colombian judge who asked

3 Unstructured simply means that data are not organized into structured database formats. Unstructured data has an internal structure, but it is not predefined through data models.

4 In some cases, judgments are supplemented by other case files' documents.

5 The system was developed by the Court of Appeal in cooperation with the Law Department and the Department of Information Engineering of the local University. See https://giustiziapredittiva.unibs.it/ [Last visited August 11, 2023].

6 See also the project website at https://www.predictivejurisprudence.eu/.

7 This is the promise of LISIA, a legal tech offering natural language search on a large jurisprudential database https://Lisia.it.

8 A fuller presentation goes beyond the scope of this paper.

a GenAI system to help him decide a case involving the medical insurance of an autistic child. The dialogue (question and answer) between the judge and the bot was reported in the judgment and sparked a debate (Gutiérrez, 2024). The following month, an Indian judge asked ChatGPT for advice about granting bail to a murder suspect (Grossman et al., 2023b). At the same time, a Pakistani judge made an 'experimental' usage of ChatGPT to rule a sexual assault case. The judge asked for a legal definition of the concept of "consent" and included the response in the judgment (Web Desk, 2023). In September 2023, an English appeal judge admitted having used ChatGPT to summarize an area of law in which he was an expert. He received an answer that he felt was acceptable and included it in the judgment (Farah, 2023). More recently, a Dutch judge was criticized for having asked ChatGPT to figure out the 'current average price of electricity', as well as the 'average lifespan of solar panels', to calculate damages in a case (Amalaraj, 2024).

These different examples became public because the judges referred to using GenAI in various ways. They show that judges can use such systems unofficially and without previous approvals or checks. There are cases indicating that other legal professionals, such as lawyers and prosecutors also use GenAI in this informal and undisclosed way (Grossman et al., 2023a). Furthermore, they show the multipurpose usage of GenAI. Functions can range from asking the definition of a legal concept (Pakistan) to summarizing a legal area (England), from exploring the conditions for granting bail (India) to going straight to the point and checking how the case should be adjudicated (Colombia).

As a result of these episodes testifying an exploratory use of chatbots, several bodies issued guidelines to regulate their use (Contini, 2024, p. 11–16). In December 2023, the Courts and Tribunal Judiciary of England and Wales released of the first specific guidance to address the use of GenAI in judicial proceedings (Courts and Tribunals Judiciary, 2023). The document highlights many limitations and risks of GenAI and suggests possible usages. The guidelines make clear that any information entered into a public AI chatbot is made publicly available worldwide. Hence, using confidential information in a chat with a GenAI represents an inappropriate disclosure. The document further highlights that GenAI systems are prone to errors. They can make up fictitious cases, citations or quotes, or refer to legislation, articles or legal texts that do not exist. In this way, they can provide incorrect or misleading legal information or make factual errors. Since GenAI responses—as any other AI based system—are based on the dataset they are trained upon, they will reflect errors and biases in training data. Moreover, in the legal field, it is often difficult and sometimes impossible to understand if the answer is based on the US, UK or other jurisdictions. Despite these serious limitations, the Courts and Tribunal Judiciary of England and Wales guidelines identify possible usages of GenAI limited to summarizing texts, conditioned to verifying the summary's accuracy, and to side activities like getting "suggestions for topics to cover" or drafting emails and memoranda. In said guidelines, GenAI is not recommended for legal research analyses or other case-related activities. Furthermore, the use of GenAI must not necessarily be disclosed. Judicial officers are personally responsible for their writing, particularly those forming the case files. Judges are not generally obliged to describe the research or preparatory work leading to the final judgment. The same applies for legal representatives, which "are responsible for the material they put before the court/tribunal and have a professional obligation to ensure it is accurate and appropriate. Provided AI is used responsibly, there is no reason why a legal representative ought to refer to its use" (Courts and Tribunals Judiciary, 2023, p. 5). In this article, we draw on the possible usages identified by the Courts of England and Wales, to consider GenAI implications for summarizing case related documents.

3 Methods and research context

This article uses Italian data collected within the Justemotions project financed by the European Research Council (757625). The project investigates, using ethnographic methods, the emotive-cognitive process of legal decision-making in courts and prosecutors' offices in Italy, Sweden, the US, and Scotland. In Italy, we followed cases of fraud, intimate partner violence (IPV), homicide, rape, theft, and libel, totaling 80 criminal cases. We shadowed and interviewed 34 prosecutors and 40 judges, observed 158 hearings and 47 deliberations (40 at tribunals and seven at the court of appeal).

During shadowing (Czarniawska, 2008), we followed legal professionals during their workday, and engaged in reflection on their activities and the development of their decision-making. In observations of trials, we focused on legal professionals' presiding in hearings and examining witnesses and defendants and on their emotional expressions. During deliberations, we were attentive to the interaction between judges and to the reasoning leading to the final verdict. We also used pre-hearing and post-hearing semi-structured interviews, to add participants' own reflections about each case, their decisions and emotions. Lastly, we analyzed written judgments, to understand how the reasoning occurred during the deliberation was then transformed into a legal story.

In this article, we use examples from different types of emotional dynamics that we analyze elsewhere in a more comprehensive manner (Bergman Blix and Minissale, 2022; Törnqvist and Wettergren, 2023; Minissale, 2024; Bergman Blix and Törnqvist, 2024; Bergman Blix, 2019). Since the scope of the current article is to contribute to the debate on the risks and opportunities underpinning the use of AI in legal decision-making, we use the Justemotions data to explore misalignments between real decision-making, on the one hand, and predictive justice and GenAI, on the other hand.

In our examples, we meet judges and prosecutors, whose names are fictitious and experience indicted by an +five age range, dealing with criminal trials at different stages of the criminal process, from preliminary investigation to deliberation. In Italy, criminal proceedings start with an investigation conducted by the public prosecutors' office. Triggered by a police report or a complaint, the prosecutor directs investigative police to examine the crime scene, interview witnesses, and gather evidence. At the end of the investigation, the prosecutor can dismiss the case or issue the indictment, which outlines the charges and the evidence gathered during the investigation. The subsequent phase is a preliminary hearing during which a judge reviews the evidence. If the case is not dismissed, the judge decides the next steps after considering the parties' requests.

The trial is an adversarial process where prosecutor and defense present their case before a judge, a panel of three judges, or a special panel composed of two judges and a jury of six laypersons. The parties can appeal the first instance court's decision at the Court of Appeal,

which reviews cases considering evidence and legal matters. Both defense lawyers and prosecutors can ask the Court of Cassation to review the decisions taken at the appeal level. The Cassation considers only legal issues.

Three fundamental legal principles shape the criminal procedure: its adversarial structure (*contraddittorio*), orality (*oralità*) and immediacy (*immediatezza*). According to the adversarial principle, prosecutor, defense and eventually the victim's counsel can present their evidence, examine and cross-examine witnesses, challenge mutual arguments and argue their case before an impartial judge. The principle of orality emphasizes the importance of the oral presentation of evidence during the trial allowing the judge to hear witnesses' and parties' statements directly, creating a dynamic and interactive trial. The immediacy principle entails that the judge must have direct experience of the evidence and depositions presented during the trial, observe the demeanor of those involved in the procedure, assess witnesses' credibility, and make decisions based on first-hand knowledge acquired during the trial. This principle minimizes reliance on written records and enhances judges' ability to evaluate the evidence in real-time. Taken together, these principles shape procedures and hearings and mold the context in which evidence is built and assessed and objectivity is constructed.

4 Contrasting real decision-making with AI systems

Legal decision-making is a process requiring fact finding, fact interpretation, and legal encoding—the translation of lay stories into legal stories purified of their subjective elements (Bergman Blix and Minissale, 2022). This section shows that legal professionals evaluate cases in small steps, fragmenting the story in separate pieces, interpreting those pieces both separately and in relation to one another. Legal professionals reduce and simplify the case story to selected events relevant from a legal perspective (i.e., legal check), but also need to verify that the constructed legal narrative holds on social reality (i.e., reality check). The gradual simplification of the case story, accompanied by the reality and legal checks, build on cognitive and emotional processes, such as empathic attuning, interest in relevant issues as well as disinterest in irrelevant aspects (Bergman Blix and Minissale, 2022). These emotional dynamics are important to arrive at a judgment that accounts for the specificities of each case. Predictive systems based on previous judgments, instead, work with already simplified versions of the facts at stake in a legal dispute, where judgments are annotated and connected by machine learning algorithms, purifying stories from their nuances and details. Even if through different statistical systems—such as LLM predicting the likelihood of the word coming next based on training data—information loss also occurs in summaries made by GenAI.

4.1 Deliberation as an emotional reflexive dialogue with jurisprudence

The following example is a case of theft with six individuals accused of stealing mimosa flowers from a private garden. From the fieldnotes taken while observing the deliberation, it is possible to notice how Tribunal Judge Ines (40+) fragments the story to establish whether the theft is limited to an attempt, and if it there is the aggravating circumstance of "violence against things." The judge critically reflects on previous rulings of the Court of Cassation about seemingly similar cases. This allows us to see the effort made by the judge to identify nuances in cases that are similar in the big picture but different on a closer look. That is, the effort made by the judge is not just to frame the case in the big picture but to discover and account for the details that qualify the story from a factual and legal perspective.

> *Judge Ines: "Okay, we have several people accused of stealing mimosas in a private home on women's day […] the police watched them all the time as they took the flowers" […] Judge Ines re-reads the police report out loud […] She circles in the report "The tree had split-up and broken branches; there was a clear degree of damage to the tree." "So, there is also damage." Keeps browsing and says: "I would say that there is really nothing to do." Ines remains silent and then reads the defense brief: "They do not take possession, according to the defense." Ines searches on her computer and finds a judgment about a case similar to the present one, where a person took some objects from another car and put them inside his car. In this case, the Court of Cassation said that it was an attempted theft. "Just like in a supermarket theft, the security guards watched them all the time. It is necessary to understand if there is an attempt. However, there is violence because—says the Court of Cassation—there is violence even when you steal fruit from a tree—lemons, for example—because if you do not collect them in a certain way, you cause some damage." Ines searches for further jurisprudence on attempt on her computer. "So, in 2018, the Court of Cassation says that the theft is in the consummated form when the defendant maintains, even if for a short time, the full and autonomous availability of the stolen goods. So, for us, too, it is theft, because they had branches in the car. In my opinion, the first ruling of the Court of Cassation relates to a partially different hypothesis, because here the police only saw part of the action, they saw a part of the theft but there were already branches in the car when they arrived. This is different from the hypothesis in which the police observe the theft in a supermarket from the beginning."*

In this excerpt from the deliberation, the judge's reasoning fluctuates between the evaluation of the legal categories of "violence against things," "attempted theft," and "theft." Her reasoning follows a complex journey in which the construction of a coherent legal story is preceded by a more or less chaotic navigation through the story at stake. Early on during the deliberation, Ines seems to feel certainty about the final decision ("I would say that there is really nothing to do") because "the police watched them all the time as they took the flowers" (i.e., theft) and "[t]he tree had split-up and broken branches; there was a clear degree of damage to the tree" (i.e., violence). The judge, however, uses doubt to resist her certainty (Minissale and Bergman Blix, 2024) and dig deeper into the case. She re-reads the defense brief and analyzes previous rulings of the Court of Cassation. A first ruling seems to be in favor of the "attempt" hypothesis, but Ines detects a crucial difference between the cases, as in the current one the police observed only part of the theft *in vivo*. To reinforce her certainty about this line of reasoning, Ines searches for more jurisprudence and compares specific factual elements of the different stories under consideration. Reading the defense brief and previous rulings prompts

the judge to reflect and find connections, patterns and ultimately making sense of the case to reach a decision. She constructs a legal story that considers the versions of both parties (adversarial principle) and is coherent with the reality under scrutiny. In the quest for certainty about the final decision, the reality check and legal check are intertwined.

Seen from a distance, all trivial thefts might look alike, but as the mimosa case demonstrates, facts can be unclear also in this type of cases. It is only by digging into the small details that relevant differences between prior judgments and current cases emerge. The structural features of predictive justice exclude those details. Summaries made by GenAI building on case briefs or judgments would incentivize shortcuts and a summary consideration of legal and factual details.

The richness of the full case file is not considered because the system works on statistical calculations of the annotations and their connections made on a written judgment or on selections of relevant points made by GenAI. In our example, the judge critically examines facts and previous jurisprudence about similar cases after considering the different qualifications of the events presented by the defense. The trial dynamics, its adversarial and oral structure as mentioned earlier, are designed precisely to share different understandings and qualifications of the facts at stake, to give the judge the information required to reach a decision.[9] Facts become progressively clear, while their selection and qualification for the final judgment is built in interaction and dialogue with the legal framework and the jurisprudence of the Court of Cassation. A reflexive dialogue between the judge and the jurisprudential archive is required to explore and define factual and legal issues (Giabardo, 2023). Here emotions, particularly epistemic feelings of doubt, uncertainty, interest, curiosity, and empathy, are key to maintain "sensitivity to the situations" (Gaboriau, 2018) and to prompt a reflexive problematization of knowledge and information (Bergman Blix and Minissale, 2022; Törnqvist and Wettergren, 2023; Minissale, 2024). This emotional-reflexive dialogue (Burkitt, 2019), however, is not considered or rather removed in the logic of the predictive systems, where the goal is to suggest the decision based on previous judgments as identified by machine learning processing of historical case data. In this case, the GenAI reduction of data and streamlined analysis (i.e., tagging) would not allow judge Ines' back-and-forth reflections on different versions of the facts of the case in dialogue with previous judgments. Nor would it instigate the epistemic emotions of interest, doubt and eventually settled certainty that guide the deliberative process, making it possible to balance legal and reality checks to reach a sound judgment.

Another example where we can see the importance of the reality check together with empathic interpretation of the facts at stake, is the following case of IPV and sexual violence decided by a panel of three judges at the tribunal. During the deliberation, Judges Enrico (Head of the Panel, 55+), Beatrice (45+), and Sonia (honorary judge, 45+) evaluate the victim's credibility by trying to make sense of the relationship between the couple (victim and defendant). They engage in joint *empathic attuning* (Bergman Blix, 2019) to understand the victim's perspective and the defendant's personality, alternating this with the legal check (i.e., evaluation of the story under the legal framework). By contrasting fieldnotes from the deliberation with the final written judgment, we show how the empathic reasoning used to understand the facts at stake disappears in the final text. Simplification is embedded in judicial procedures and occurs at different levels as procedural events and hearings are reduced into text from the first instance to the appeal. We stress that the additional simplification brought in by predictive systems and GenAI becomes an obstacle to considering details of the story that open up for emphatic imagination and attuning relevant for its legal categorization. In the extract below we see how the interpretation of facts described in legal transcripts gives rise to empathic reasoning necessary to assess what goes on in a case:

> *Enrico (looking at Beatrice): [The victim] talked about the sexual violence in a particular way. The defendant was stunned. If I took my notes correctly, she went into [one of the witnesses] car, with her handbag, she put her handbag in the backseat, [the defendant] attacked her physically, with his body, picked up her handbag, somehow convincing her to get into his car again.*
>
> *Beatrice: everything in a great agitation…*
>
> *Enrico: a very particular sexual violence…*
>
> *Beatrice: a person with whom she had a relationship…*
>
> *Enrico: that is…he did not bring me into the forest and held me there for an hour, raping me…but it is part of that context…*
>
> *Beatrice: also, because she talked about particular sexual requests. Consistent with his sexuality…*
>
> *Enrico: as the civil part said, it was a gesture of affront…*
>
> *Beatrice: done in a public space…*
>
> *Enrico: it is part of his way of conceiving the relationship, sex…a bit like witness told us… it is not that he wanted to steal the handbag, but for a sentimental reason, so to speak [he took the handbag]. So, in short, he reacts like that because he wanted to deal, from his point of view…*
>
> *Beatrice: in his own way, he wanted to resume his position…he substantially had not worked out the separation from her….*
>
> *Enrico: let us say not worked out AT ALL!*
>
> *Beatrice: The only thing going against the victim's credibility would be that she did not report it immediately?*
>
> *Enrico: well, not very immediately…but when she returns a bit calm, she recovers, in that moment she tells a full story of what happened, and in this story, there is also the moment of the finger…*
>
> *Beatrice: she appears reliable overall…when a fact happened only with two people there, the only thing is that of credibility…*

9 Taking a broader perspective, other scopes emerge. For instance, considering case parties, the scope of the proceeding and of the trial is to assure procedural justice, hence, to show that justice is done.

> *Enrico: her narration was short but precise…surely, when she was heard […]*
>
> *Beatrice: she does not dwell on superficial things during her examination, neither she tries to exaggerate facts…which have been confirmed…*

To decide on the victim's credibility—whose word is enough for conviction in this type of crime—the judges in unison analyze the sequence of actions allegedly done by the defendant in a step-by-step fashion. Emphasis is placed both on demarcating legally relevant facts in the victim's narrative ("she went into the witness' car, with her handbag"), and on understanding the nuances of the story. Reflections on the defendant's "sexuality," "a gesture of affront," "his way of conceiving the relationship," "he wanted to resume his position," "he had not worked out the separation from her…" all together render visible how the judges collectively use empathy to interpret the relationship between victim and defendant. This practice is not covered by the legal method, but is nevertheless crucial to evaluate the credibility of conflicting stories. They empathically immerse themselves in the victim's story indicating an abusive relationship ("sexual violence," "a person with whom she had a relationship"), even describing it in a first-person account ("he did not bring *me* into the forest and held *me* there for an hour, raping *me*") to relive the story from the victim's perspective. They also engage in a fleeting superficial empathic attuning with the defendant depicting his dominant role in his relationship with the victim ("was stunned," "…consistent with his sexuality"). In this effort, the details of the case, the personal experiences of the trial (immediacy principle), and the richness of verbal and non-verbal communications emerge through judges' memory of the hearings and personal notes taken from the bench. This reality check comes out as necessary to establish whether the alleged episode of sexual violence—as told by the victim—could have actually occurred. When, instead, the panel describes the narration of the victim as "short but precise," emphasizing that "she does not dwell on superficial things during her examination, neither she tries to exaggerate facts…which have been confirmed…," their attention goes back to the legal check—what is legally relevant to establish credibility based on the criteria defined in the jurisprudence. In this example, we see that when relevant *facts* are established, they require interpretation to fit within legal categories (credibility). Interpretation builds on a thorough assessment of human relations and emotions, which are dimensions removed from the logic of predictive systems and GenAI working on cold statistical elaboration based on textual analyses (Galli and Sartor, 2023; Contini, 2024). The judges in the appellate court also analyze text (rather than oral evidence), but their analysis, relies on joint empathic attuning with descriptions of facts offered by witnesses, victims and their legal representatives. Through reflexive-interpretative work, relevant facts become progressively clear and can be legally encoded. Notably, the final judgment does not reveal these reality checks based on joint empathic attuning performed by the judges:

> *On the basis of the evidence, it is believed that the criminal liability of the accused should be affirmed for all the charges. Underlying the affirmation of the defendant's responsibility there are, first of all, the accusatory statements made by the victim, which appeared to be fully credible. […] In this regard, it is observed that the narrative of the victim appears to be consistent in the essential points of the events. There are no expressions of animosity or rancor towards the accused that would lead one to believe that the facts narrated did not take place, that the victim narrated them in a deliberately more serious manner, or that she is animated by a slanderous intent. The circumstances told by the victim are confirmed by multiple and timely corroborations, in particular: by the statements of witnesses 1, 2, 3; by the content of the e-mails produced […] by the medical certification acquired in the files […] by the content of the police record.*

When comparing the reasoning during the deliberation with the final judgment, we see how the legal method and writing style cut off the reality check and the emotive-cognitive processes behind the final verdict, such as the joint empathic attuning by the three judges during the deliberation. These "hidden" dynamics refer to important temporal and relational dimensions of legal decision-making, where evaluations are made in small steps, fragmenting the narrative, considering the nuances of the case, which is necessary to avoid simplifications based on previous cases or brief summaries, aligning legal narratives to social reality.

In sum, predictive systems work with annotations based on fragments of texts that are derived from abstract legal categories, such as linearity, coherence, lack of contradictions, and restrained declarations for evaluating credibility (Collenette et al., 2023). As depicted in this IPV and rape case, these abstract categories require interpretation linked to the specificities of each individual case. The interpretative work demands empathic attuning into the different stories at play. However, in the final judgment, the traces of this vital part of the process remains hidden. GenAI summaries cannot be used for these purposes since they minimize the information required for empathic attuning.

4.2 The necessity of emotional-interactional information

The reality check described in the previous section returns in the following examples in a slightly different form, as it refers to legal professionals' need to incorporate emotional-interactional information about the person giving testimony and their storytelling in diverse types of texts, such as police reports, transcriptions of witnesses' declarations, and minutes of the hearing. We argue that this type of information is crucial to include in, and account for, in analyses made by predictive systems and GenAI. Furthermore, even when this type of information is present in the text and can thus be potentially tagged and processed by predictive systems and GenAI, it requires human interpretation to validate a meaningful understanding of the case. In the following example, we show how emotional-interactional information is used by prosecutors and judges in their decision-making practices.

During an interview, Prosecutor Stefano (40+) recounts a case of IPV where the details in the police report indicated a serious offence. Before taking any decision, however, Stefano decided to personally hear the victim as he could not find sufficient elements to categorize the type of criminal behavior.

> *Stefano: [the police] called me around 3 a.m. saying they had intervened inside a house a couple […]. And the woman recounted to the police that she was arguing with her husband about a situation*

> *that was festering, and in the course of the argument the man took their little daughter in his arms, lifted her up, SHAKED HER and while doing so he THREATENED his wife. So, he does not threaten to harm the child, but it is a gesture that is objectively ambiguous, equivocal, even towards the child. In the course of this quarrel, when the police intervene, there is no remaining evidence of the crime. The lady had no signs of injury, he had pulled her hair, he had slapped her and left no marks. And the house was not in particular disorder. And so, I, that very day…when they brought me the complaint of the lady, I see that it is badly done, there are not many elements. So, I ordered her to be brought to me [for a personal examination]*
>
> *Interviewer: bad from what point of view?*
>
> *Stefano: Technical. I cannot reconstruct the story of this couple from that report, nor can I understand if there is actually abuse, and above all this fact of the little girl, I cannot understand it. So, I had the lady brought immediately to me, in the afternoon.*

In the quote, Stefano draws attention to missing aspects in the account presented by the police, which he considers important to make sense of a potentially grave criminal action (shaking the child). He highlights the need of "reconstructing the story of this couple" in order to decide on precautionary measures and hopes to solve this doubt through a direct interaction with the victim. In the continuation of the interview, Stefano describes how the interaction with the victim enhanced his understanding of the social context underlying the specific episode described in the police report:

> *Stefano: I heard her and, in the evening, I wrote the request for precautionary measure, a restraining order ('prohibition to approach her'). Because, actually, this fact that seemed bad, the lady actually tells me well, in detail, about her life with this man. So, she was here, at my place. A simple person. […]. She describes a story, which is certainly a story of IPV and of a relationship that no longer works and from which she wants to free herself, but… basically… he does not drink, he does not use drugs, it wasn't a bad story. It was a story of marginalization, of poverty, of a family where he was constantly obsessed with not being able to cope financially. And there were a series of quarrels that, no matter how hard they both worked…it was a family relationship that NO LONGER WORKED and that HE, as a male, wanted to solve in an arrogant and violent way. So, it was a BROKEN, DEGENERATED family situation, but there was no proven pattern of violence.*

The most interesting part of this quote comes in the final remark on the lack of a "proven pattern of violence." This signifies the missing proof regarding the "habitualness" of the conduct, which in the Italian legislation is a prerequisite for the crime of IPV to exist. From the police report, the story was originally interpreted as indicative of a serious offence—IPV—("this fact that seemed bad"), but is reframed as one with a lower criminal disvalue ("it wasn't a bad story"), and most importantly as one missing the requirement of 'pattern of violence'. In order to solve his feeling of doubt and settle on a decision that this is not a case of IPV, prosecutor Stefano needed to put the specific events into their social context, and empathically attune to the perspectives of both parties. Reconstructing the nuances of the story at stake through a direct interaction with the victim generates in the prosecutor a clearer understanding of the events than in the police report. The social context both clarifies that the defendant neither abuses alcohol or drugs, and that the family lives under severe marginalization and poverty leading to constant conflict. Empathically attuning with the victim, prosecutor Stefano acknowledges her fear of the defendant's "arrogant and violent way" and want to "free herself," leading him to ordering a restraining order. Empathically attuning with the defendant, instead, Stefano acknowledges his struggle with poverty, causing aggressive, but not legally abusive behavior. Taking in both sides, Stefano assesses the case as a "BROKEN, DEGENERATED family situation," without "proven pattern of violence."

Textual descriptions of cases are those used by AI systems meant to aid or substitute prosecutors, like in the Chinese example mentioned earlier. Predictive systems base their predictions on previous judgments/indictments, hence on documents providing a key, but radically simplified exposition of facts, legal issues and their connections. Information regarding emotions, non-verbal behaviors and the nuances of the case can be crucial to take decisions from the investigative phase, as visible in prosecutor Stefano's example. In our material, prosecutors often stressed the importance of emotional-interactional elements in order to evaluate witnesses' and victims' credibility. Prosecutor Anna (30+), for instance, clarifies that the benefit of a direct perception of the victim's narration is being able to "see their expressions, their gestures, their reactions," which enhances one's certainty about perceived credibility. In real life, prosecutors rarely have the time to personally hear the complainant due to the high number of investigations (especially on IPV allegations) that they handle. As a consequence, they must rely on documents provided by the police, which often lack descriptions of non-verbal behavior and emotions. Already in current practice, prosecutors struggle to evaluate information from written reports in order to make investigative and indictment decisions. Both in its current form and in potential GenAI systems, the written sources need to integrate more elaborate contextual information, verbal markers such as pitch, hesitation, and emphases, indicating emotional information (Bergman Blix, 2022), to allow for an accurate understanding and assessment of the case. It is also worthwhile to note that this example contradicts the common conception that emotions should be taken out of legal stories to secure correct information.

The problem of lacking emotional-interactional knowledge also applies to judges. Below, tribunal judge Lina (55+) develops on her methods to include not only verbal markers, but also body language as vital pieces of information in the transcriptions from a hearing:

> *Judge Lina: Another thing that I do, that you might have noticed, is keeping track of aspects connected to non-verbal language, bodily communication. […] When people stop, cannot talk, are particularly emotional…I keep track of this in the minute of the hearing, but not by saying—"let us acknowledge that the woman is having an emotional moment," because I do not want the person to feel unease, as if she's under a sort of …examination. I say "do you want some water," "I can see that you are not able to speak fluently, do you want to have a break," "I can see that your moved, why?" So, this is something that it's necessary to me both to get in contact with the witness and make her feeling that she's not only a voice on the tape recorder, but a person listened to by another person….and to have a reflection of these events in the minutes. So when I read it, and I write something about the person in the motivation of the judgment, I can describe certain behaviors symptomatic of this … And this serves to the appeal. Because, if the judge of first instance says "it could be seen that she was*

> *emotional" but this does not have a validation in the minute, it's more an interpretative truth, lacking a validation…I mean, you have to trust your colleague who felt that the person was struggling.*

In this first excerpt, Lina explains that she intervenes when witnesses struggle during the trial to put them at ease. Her use of professionally accepted cues ("do you want some water," "do you want to have a break") abide by the "limited repertoire" of judges to show empathy for witnesses without risking their impartial display (Bergman Blix and Wettergren, 2019). Moreover, these interventions are necessary to register in the minute the type of emotional reactions occurring in the courtroom, offering a validation of judge Lina's interpretation of the person giving testimony both to the public, the parties and to the appeal court. Continuing on this line of reasoning, Lina offers an example from a recent case of IPV and rape of a young woman:

> *Judge Lina: For example, when there was the little girl, the 17 years old little girl. She was really struggling, truly struggling. […] When she left, I said "let us acknowledge that the witness did these gestures [speaks in a very fast speed]: of touching her hair, of touching her neck, of stopping, of getting emotional, of not being able to speak, of looking for the therapist's hand [slower speed]. I said these things, because for me it's very important…that in the minutes there is track of how things happened, and I say that in the moment when things happen, before everyone. Because it's not my interpretation, and if someone wants to contest the way I am summarizing the witness' behavior, they can do that. Then, when the appellate judge read the minutes with those things and no one had contested this information, the appeal judge already has a support which is not the judge's sensation, but what emerged during the trial.*

In this extract, judge Lina demonstrates the importance of reporting bodily and emotional communication in a way that is coherent with the orality, immediacy and adversarial principles. The orality and immediacy principles demand evidential information to be constructed in the presence of all involved parties in the courtroom ("*when* things happen, before *everyone*"). The adversarial principle allows for all parties to present and respond to arguments ("if someone wants to contest the way I am summarizing the witness' behavior, they can do that"). We can also note that judge Lina's interventions and descriptions imply an empathic attuning and understanding of the witness' situation in court. On a substantial level, these pieces of bodily and emotional information are necessary to support Lina's credibility assessments as outlined in the final judgment. In the Italian system, where the court of appeal evaluates evidence based on transcripts, these rich and nuanced texts allow for the appeal judges to understand and reassess the reasoning of the lower court. If predictive systems or GenAI should function in a legally sound way, they need to tag these types of information into annotations and develop methods to achieve valid interpretations.

5 Concluding discussion

Real judicial proceedings entail establishing the events at the center of the dispute, and interpreting and evaluating these events from a legal perspective. All these activities reduce the complexity of stories to fit within legal categories. The "skeletonization of facts so as to narrow moral issues to the point where determinate rules can be employed to decide them" is considered by Geertz (1983, p. 170) as the defining feature of the legal process. Nevertheless, it is vital that the reduction assists rather than hinders decision-making also from a procedural justice perspective (Remolina and Osa, 2024). Our illustrations show that legal professionals' emotive-cognitive efforts aim at arriving at a reduction that is correct under the legal framework and has a hold on social reality. These efforts are evident both when prosecutors conduct the investigations and when judges deliberate, and are connected to the need of achieving the required level of certainty about the decision. Legal professionals try to make sense of the nuances of the case, using empathy and emotional-interactional information, to scrutinize and/or validate their interpretations of observed behaviors, in critical dialogue with the jurisprudence and the law (as shown in the Mimosa case with judge Ines).

In the everyday work at prosecution offices and courts, information gathering and transferring are produced in texts of different kinds, such as police reports, indictments, minutes, transcriptions, and judgments. Together, these texts compose the case file, which realizes a significant cut off of the full experiences of the trial, with its emotive-cognitive processes. Since "*quod non est in actis non est in mundo*" (what is not collected in the case file does not exist for case adjudication), the contextual information, as well as verbal, emotional, and bodily nuances and reactions not captured by the case file get lost (as demonstrated in prosecutor Stefano's failure to decide on measures based on the police report in a IPV case). Legal professionals can try to remedy the loss of vital information by inventing their own methods for including these data into the case file, as illustrated by judge Lina. Nevertheless, the final text file, that is the judgment, in our material, always cuts off these types of behavioral and social information. This loss of information became clear when we compared the content of the deliberation with the written judgment about the same case (judges Enrico, Beatrice and Sonia in a IPV and rape case), noticing that the empathic attuning performed by the judges disappeared between the lines of the motivation. An Italian judgment is composed of various sections, explaining and linking facts with the reasons for the decision and the relevant laws. It follows that the judgment, while being the apex of the entire proceedings, captures a minimal amount of what happened from filing to disposition and during the deliberation.

So, in light of the importance of progressively purified texts in legal proceedings (Abbott, 1981), what can be a legitimate usage of GenAI, if any? As envisaged by the Courts and Tribunal service of England and Wales (Courts and Tribunals Judiciary, 2023), Gen AI can contribute to the skeletonization of the full trial experience by summarizing the content of the case file, for example by abridging the transcripts of the hearings, the procedural documents filed by prosecutor and defense, or the experts' reports. To some extent, this function is in continuity with the skeletonization work done by judges. However, since the capacity of these models to capture what matters from a factual, legal perspective is rooted on statistical analysis and not on actual legal practice, the quality of their outputs cannot be taken for granted and must be verified on a case-by-case basis. Judges can ask GenAI to do the job of summarizing documents of the case file, but they need to confront the output with their full knowledge of the document summarized and of the events described. Using the summary without verifying its content open the door to potential bias and removal of key pieces of information. If adequately checked and implemented with the emotional-interactional information collected during trial, GenAI's summaries can positively assist judges and prosecutors in their work. The risk, however, is the viability of said

quality check, as caseload pressure can push judges to focus on summaries without controlling their quality.

Predictive systems, as described earlier, base their predictions on previous judgments that are radically simplified expositions of facts, legal issues and their connections. As argued here, emotions, non-verbal behaviors and the nuances of the case are cut off in the judgments. The prediction is thus based on a subset of the data generated by previous trials, but with several blind spots about components that have a relevant role in the decision. Differently from GenAI predictive systems work through a process of digital codification of the text into annotations and relations requiring human supervision from persons with legal expertise, at least in the form discussed in this paper (Galli and Sartor, 2023, pp. 173–4).

Another potential challenge is predictive systems' timing in selecting and simplifying the nuances and richness of the proceeding, the history of those involved, and several pieces of information that judges, as shown in our analysis, normally consider. Predictive systems imply a jump to the conclusions of the case. As shown in our first example where judge Ines came back to nuanced details in her dialogue with jurisprudence in the late stages of the deliberation, these queries, if made to a predictive system, could not have been answered, since what was cut off during the simplification discussed above cannot be regenerated. Furthermore, if these details are cut off in the simplification process of the predictive system, two cases can seem identical, although they carry important distinctive elements. This is particularly problematic since the logic of predictive systems conceals all the details not captured by semantic annotations. Lastly, the more judges and prosecutors are pressed by caseload and performance expectations, the more they will be tempted to rely on GenAI summaries and predictive devices, losing effective human control and putting high demands on correct machine-made justice.

Data availability statement

The datasets presented in this article are not readily available because confidentiality due to cases dealing with criminal proceedings. Requests to access the datasets should be directed to stina.bergmanblix@uu.se.

Ethics statement

The studies involving humans were approved by Swedish Ethical Review Board; Ethical Clearance Progetti CNR. The studies were conducted in accordance with the local legislation and institutional requirements. The participants provided their written informed consent to participate in this study. Written informed consent was obtained from the individual(s) for the publication of any potentially identifiable images or data included in this article.

Author contributions

FC: Conceptualization, Data curation, Formal analysis, Investigation, Methodology, Resources, Validation, Writing – original draft, Writing – review & editing. AM: Conceptualization, Data curation, Formal analysis, Investigation, Methodology, Project administration, Resources, Validation, Writing – original draft, Writing – review & editing. SB: Conceptualization, Data curation, Formal analysis, Formal analysis, Funding acquisition, Investigation, Methodology, Project administration, Resources, Supervision, Validation, Writing – original draft, Writing – review & editing.

Funding

The author(s) declare that financial support was received for the research, authorship, and/or publication of this article. This work was supported by the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant no. 757625).

Conflict of interest

The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

The author(s) declared that they were an editorial board member of Frontiers, at the time of submission. This had no impact on the peer review process and the final decision.

Publisher's note

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frontiers | Frontiers in Sociology

TYPE Original Research
PUBLISHED 01 November 2024
DOI 10.3389/fsoc.2024.1417762

OPEN ACCESS

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RECEIVED 15 April 2024
ACCEPTED 01 October 2024
PUBLISHED 01 November 2024

CITATION
Stępień M (2024) Unveiling polish judges' views on empathy and impartiality. *Front. Sociol.* 9:1417762. doi: 10.3389/fsoc.2024.1417762

Unveiling polish judges' views on empathy and impartiality

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The exploration of empathy's significance in judicial decision-making has garnered attention in scholarly discourse, yet there is a noticeable gap in studies delving into judges' perceptions of empathy's role, advantages, and impediments. This neglect reflects an "anti-empathetic" discourse that overlooks the insights of those central to justice delivery. Consequently, there is an urgent need for empirical inquiries into judges' perspectives on empathy, its definition, and its integration into their work. Primarily concentrated in Anglo-Saxon jurisdictions, empathy research in judicial decision-making lacks diversity. This paper responds to two critical calls: understanding judges' views on empathy and expanding research beyond common-law systems. It presents empirical research investigating Polish judges' perspectives on empathy, with a focus on its relationship with impartiality. This inquiry is crucial given debates on whether empathy compromises impartiality, particularly evident in discussions surrounding judicial appointments. Based on in-depth interviews with Polish judges, this article identifies five strategies employed by judges to reconcile empathy with impartiality, termed as "paths": (1) claiming symmetry in distributing empathy between parties, (2) defining empathy as unemotional, (3) mitigating empathy's influence on judgments, (4) emphasizing control over empathy, and (5) deabsolutizing formal impartiality and making more room for empathy. The paper discusses these strategies and comments on them, shedding light on the nuanced ways in which judges navigate the intersection of empathy and impartiality in their decision-making processes.

KEYWORDS

empathy, judging, judges, decision making, in-depth interview

1 Introduction

The examination of empathy's role in broadly understood judicial decision-making has garnered significant interest in the literature (e.g., Henderson, 1987; Bandes, 2009, 2011; Booth, 2019; Stępień, 2021). However, only an exceptionally limited number of studies focused on providing access to how judges perceive the role, advantages, or obstacles of empathy in their work (Bergman Blix, 2019; Roach Anleu and Mack, 2021: Chapter 3). This marginalization implies that the almost entire discourse on empathy in judging overlooks the views and experiences of individuals whose role in delivering justice is crucial. Therefore, there is a pressing need for empirical research oriented toward understanding what judges think and experience concerning empathy, including what this term encompasses for them and how they perceive and situate empathy within their work.

Moreover, it is crucial to highlight that the majority of studies focusing on empathy in judicial decision-making, especially empirical ones, are primarily centered around the Anglo-Saxon sphere. A notable exception comes from Sweden (e.g., Wettergren and Bergman Blix, 2016; Bergman Blix and Wettergren, 2018: 11–12, 107–109, 119, 144, 166). There is a critical need to broaden the discussion and empirical research on judicial empathy beyond common-law jurisdictions. This expansion would bring forth a new set of judges' experiences and thoughts on empathy embedded in different organizational and institutional settings. Such

diversity in research efforts is vital for achieving a more comprehensive and less confined understanding of the role empathy plays in the context of judicial decision-making.

In response to the two aforementioned calls—the need for investigating judges' perspectives on the role of empathy in their work and broadening the scope of interest beyond common-law jurisdictions—the research underpinning this paper aimed to empirically investigate the views and experiences of Polish judges of common courts (which administer justice within the scope beyond the authority of administrative courts, military courts, and the Supreme Court) regarding empathy in judicial decision-making. Specifically, this paper zooms in on judges' views on the relationship between empathy and impartiality. Focusing on this topic is justified because a huge part of the discussions in the literature is oriented toward the claims that empathy and impartiality are "foes" (as the former brings biases, unequal treatment of parties, or emotional impact which corrupts impartiality) or they remain "friends" as some argue (Franks, 2011; Lee, 2013; Colby, 2012; Maibom, 2022: Chapter 10). Importantly, the claim that judicial empathy undermines impartiality was expressed loudly during the public debates in the United States around Barack Obama's statement that the possession of empathy should play a role in the appointment of judges [see reconstruction of these critiques on empathy in: West (2011) and Fissell (2017); see also Zipursky (2012)]. The paper places judges' perspectives at the forefront to facilitate a comprehensive exploration of this pressing issue.

The paper begins by offering sketch of the main points of the discussion on empathy in judicial setting. It then delves into the Polish judicial system and some basics about Polish judges. Subsequently, it provides a broad outline of the research methodology employed to examine judges' perspectives and experiences regarding empathy in their professional practice. Once these introductory themes are established, the paper delves into judges' comprehension of empathy and impartiality before proceeding to reconstruct their perception of the relationship between these two. The research identifies five strategies employed by judges to reconcile empathy with impartiality: (1) claiming symmetry in distributing empathy between parties, (2) defining empathy as unemotional, (3) mitigating empathy's influence on judgments, (4) emphasizing control over empathy, and (5) deabsolutizing formal impartiality and making more room for empathy. The paper examines these strategies and provides commentary, shedding light on the nuanced ways judges articulate their approach to balancing empathy and impartiality in their decision-making processes. The final section outlines potential reasons behind the key findings and highlights the main challenges associated with the strategies discussed. Overall, this investigation aims to address a neglected yet crucial aspect, essential for a comprehensive understanding of the current and desired role of empathy in judges' work from multiple perspectives.

2 Studies on empathy in judicial setting

There is no place here to fully comprehend the literature on law and empathy. Even presenting writings on empathy in a judicial setting can be challenging due to the vastness of these studies and the multitude of explored threads. In addition, comprehending these conversations necessitates a certain level of proficiency in the overall field of empathy studies. It is not the purpose here to provide a comprehensive overview of empathy literature or research in legal settings, but some general comments are required to clarify the viewpoint proposed in this paper.

Firstly, the term "empathy" made its entry into the English lexicon in the early 20th century, primarily as a translation of the German term *Einfühlung* (Lanzoni, 2018). What might not be immediately intuitive is that the original context of *Einfühlung* resided in the realm of art and aesthetic experiences. It wasn't until later that the word found its way into the vocabularies of a plethora of fields. However, if we associate the meaning of empathy with "putting oneself in another's shoes," a process through which one person comprehends another's situation or perspective, or alternatively "emotional attuning with others," it becomes evident that these have been a part of human beings' experiences long before the coining of the term. When we examine the history of philosophical thought, for instance, David Hume's or Adam Smith's notion of sympathy, the Confucian concept of *shu*, or even the Golden Rule, they all cover similar processes to what we now associate with empathy.

Secondly, considering the approximation of empathy, it seems to be beneficial for judges and judicial decision-making. To put it briefly, taking another person's perspective, in certain conditions, can lead to a better understanding of the case. Moreover, transcending a decision based on one's view by entering the perspectives of others can be seen as crucial for impartiality. In addition, sensitive management of hearings calls for recognizing the emotions of all participants, which can be achieved through empathy. In these lines, some authors argue that judges' empathic responses are crucial for implementing procedural justice. According to Megan Pearson (2020), empathy plays a critical role in achieving several elements of procedural justice, particularly about treating litigants with respect, fostering trust among the parties involved, and enabling open expression. Nevertheless, Pearson also emphasizes that while empathy offers these advantages, it should not be confused with emotion itself. In discussions of procedural justice, the active and empathic listening of judges is often emphasized as a necessary quality to ensure fair proceedings.

However, on the other hand, empathy is viewed as an undesirable quality of judges, with its role in the decision-making process painted in dark colors. In general, perhaps the initial reaction of many lawyers is that "empathy" is a concept that initially seems counterintuitive in the legal world (Henderson, 1987: 1576). Using empathy can be seen as introducing distortions into the legal process when employed by legal decision-makers. From this perspective, its influences should be tamed rather than elaborated upon, as it brings unbridled subjectivism into judging and opens decision-making processes to well-known empathy biases. These biases include the similarity bias, which means that one tends to empathize more with a person who shares similar characteristics, and the here-and-now bias, which covers situations in which one empathizes more with people who are present and less with those who are absent. From this viewpoint, the influence of empathy on legal decision-making threatens judicial impartiality, objectivity, and neutrality. In this reading, empathy in the judicial context is considered "a wild, untamed, destabilizing force that cannot coexist with the rule of law" (Bandes, 2011: 105). Indeed, these claims made within the judicial context reflect broader discussions and critical voices [see Bloom and Prinz (n.d.)] regarding the role of

empathy and its centrality in fundamental conversations about morality and core elements of human cooperation.

Thirdly, it is essential to underscore that the role of empathy in judicial decision-making relies on how it is perceived and ramified. The literature suggests that there is a range of understandings of empathy in research on empathy's impact on judicial decision-making. Scholars, especially those with a social sciences and psychology orientation, tend to prioritize empathy as an automatic emotional response characterized by emotional sharing or mirroring, highlighting the potential negative impact of empathy on judicial decision-making. The main reason for this is that (affective) empathy introduces biases (like familiarity bias, here-and-now bias) into decision-making, contradicting the fundamental principles and values of the judiciary. For example, studies of mock jurors demonstrate that inducing empathy toward a defendant can influence the jury's decision (Wood et al., 2014; see also Glynn and Sen, 2015). In this perspective, empathy is seen as an automatic response leading to identification with the defendant based on certain stimuli. In contrast, a vast tradition views empathy in the context of judging differently. The famous mentioned above declaration by Barack Obama that the selection of judges should prefer individuals who possess empathy, that is, who understand the broader social context and who possess diverse life experiences (Rollert, 2014). Certainly, this implies a different reading of empathy, as here it is seen as a disposition to delve deeper and consider the larger social and historical context in judging. In this view, empathy involves an intellectual process that is navigated and based on deliberate choices. It is evident that the former example links empathy with emotional reactions that are hard to control, while the latter suggests a more intellectual process (but not necessarily devoid of emotions) guided by deliberate choices.

The examples make it clear that a grasp of what empathy entails is essential for considering its impact on judicial decision-making. Some view empathy as an asset in the judicial system, while others perceive it as a weakness depending on their interpretation of empathy. Given these circumstances, it is even more critical to reconstruct judges' perceptions of empathy and how they tie it to impartiality.

3 Polish judiciary—a glimpse

To comprehensively understand even a fragment of the views, perspectives, and experiences of Polish judges of the common courts regarding the role of empathy in their work, as well as to comprehend the methodological choices, it is imperative to possess basic knowledge about both the structure and characteristics of the Polish judicial system, the place of common courts within it, and the basic conditions of the profession of judges. This knowledge is essential for carefully integrating the collected findings into the growing body of research on empathy in judging and understanding how to approach this topic by empirical methods.

The Polish legal system follows the civil law tradition, and consequently, the Polish judiciary displays typical characteristics of civil law jurisdictions [see Merryman and Pérez-Perdomo (2018)]. In accordance with Article 10 of the Constitution of the Republic of Poland (issued 2 April 1997), the system of government in the Republic of Poland is founded on the separation and balance between the legislative, the executive, and the judicial powers. The judicial powers encompass courts and tribunals, represented by the Constitutional Tribunal, responsible for scrutinizing the constitutionality of laws. The courts include military courts, administrative courts, and, finally, the common courts and the Supreme Court. The Supreme Court oversees the ordinary courts, manages cassations of specific judgments rendered in the second instance, and, since 2018, handles the so-called extraordinary complaint, which can be applied to valid and final judgments. The jurisdiction of common courts is the most extensive, and typically, Polish citizens come into contact with them for matters such as divorces, adoptions, damages, violations of contracts, offenses, and crimes.

There are three following types of common courts. First, regional courts (*sądy rejonowe*) serve as the courts of first instance, with extensive original jurisdiction, handling most cases except those reserved for other specialized courts. Their jurisdiction typically covers an area encompassing several communes. These courts are organized into specialized divisions such as Intellectual Property Courts and the Competition and Consumer Protection Court. Regional courts, as the primary trial courts, are frequently involved in a wide array of cases with a multitude of participants, primarily witnesses. The establishment of the factual basis of the cases leads to a high density of human interactions in the courtroom, often accompanied by participants' emotional displays. Regional courts process a large number of cases daily. The courtrooms in regional courts tend to be small and bear the marks of time. Hearings are characterized by a lower degree of contentious legal disputes and less legal wrangling compared to higher levels of the judiciary. The scope of the presence of ritual and symbolism is limited. Typically, with the exception of some labor and family cases (where lay judges employed for a period of time, and not *ad hoc*, are prescribed), cases are handled by a single judge sitting alone, engaging face-to-face with participants. Second, district courts (*sądy okręgowe*) function both as first- and second-instance courts, handling more serious cases as well as appeals of judgments from regional courts. Their jurisdiction covers an area of several district courts. Third, appellate courts (*sądy apelacyjne*) function as second-instance courts, and they do not possess original jurisdiction. Their appellate jurisdiction covers a territory of at least two district courts. In general, they do not examine the evidence and rely on the material gathered by lower courts. Appellate courts resemble "the courts basing mainly on papers."

The court proceedings in Poland are governed by procedural codes, with the most important being the Criminal Procedure Act of 1997 and the Civil Procedure Act of 1964 (see Bednarek, 2014; Ryan, 2016). There are two types of civil procedures in Poland: contentious proceedings and non-contentious proceedings. In general, the former is adversarial in nature, while the latter, due to not involving two opposing and conflicting parties, is less adversarial. The criminal procedure is mixed, possessing both inquisitorial and adversarial elements, as it is based on the two-party model, involving an accused and a public prosecutor. In cases of severe crimes, the professional judges are accompanied by two or three lay judges who are selected for a period of 4 years.

In Poland, trial judges assume an active, if not hyper-active, role in both civil and criminal cases. Polish trials are characterized by the extensive involvement of the judge (or judges when sitting in a panel) in establishing the factual basis of cases. Judges often take the lead in proceedings, including the evidentiary phase, where they actively question witnesses, among other tasks [further details and examples

on this matter can be found in: Dudek and Stępień (2021)]. This stands in contrast to the roles of judges in common-law systems, where their primary function is to ensure adherence to procedural rules.

Returning to the process of becoming a judge, it is crucial to understand that the selection and advancement of judges in the Polish judiciary resemble the civil service [see Mistygacz (2020)]. Individuals aspiring to become judges undergo extensive specialized training, typically lasting a minimum of 10 years, which includes obtaining a master's degree in law. Law schools in Poland have a 5-year duration, and a law degree serves as the initial step toward a career in the legal professions. After earning a law degree, aspiring judges must successfully pass a highly competitive entrance exam to gain admission to the state-managed National School of Judiciary and Public Prosecution, established in 2009. Previously, specialized training for those who passed the entrance exam was conducted in appellate courts. Since 2009, a centralized, 4-year school-like education has been established. Following rigorous training and a final examination, successful candidates can apply for open positions in the judiciary. They serve as judicial assessors before being appointed to full judge positions. There is also the possibility of being appointed as a judge after practicing other legal professions for some period. In both cases, candidates for open positions in the judiciary are assessed and recommended by the National Council of the Judiciary of Poland. Only after receiving a positive evaluation, they get nominated by the President of the Republic of Poland for an unspecified period of time. The constitutional status of the currently functioning National Council of the Judiciary, based on the legal act issued in 2018, has been a source of division among lawyers, politicians, and the wider public, leading also to evaluations by European courts (ECHR, ECJ). Nevertheless, judges undergo periodic evaluations of their work and decisions throughout their careers, with promotions being determined by the National Council of the Judiciary of Poland. The career of a judge typically begins at the lowest level of the judiciary, such as regional courts.

Significantly, the positivist tradition holds considerable influence in Poland regarding how judges are trained, how they perceive their role, and manage hearings. This influence has deep historical roots, as legal professionals used a "formalistic shield" during the communist era (1945–1989) to safeguard their professionalism. The substantial impact of German legal traditions before World War II further contributes to this influence. The convergence of these factors shapes the role of judges and their judicial conduct, emphasizing the long-standing dominance of the "stone-face" (or "poker face") ideal, which underscores the importance of showing dispassion, employing highly formal communication, and maintaining a high power distance between lawyers and laymen [see Dudek and Stępień (2021)].

4 Basics about the conducted research

The research commenced by prioritizing the views and experiences of judges regarding the role of empathy in their work. The subsequent step involved selecting an appropriate research technique aimed at gaining insight into their internal world. Given the nuanced nature of the subject matter, qualitative research was deemed most suitable for comprehending perceptions, opinions, sentiments, and experiences of judges. The study employs in-depth interviews as primary source of data [for more general insights on interviewing legal professionals and legal elites, see Korkea-aho and Leino (2019), Kenney (2020), and Gupta and Harvey (2022)]. Judges were invited to participate in semi-structured dialogs following a predetermined set of questions that delved into various dimensions of empathy and its relationship to judicial decision-making. Initially, the study leveraged the snowball method to tap into existing contacts within the judiciary to identify potential interviewees for recruiting judges. Subsequently, after randomly selecting courts from a pre-established pool, general invitations were sent to judges from these selected courts to participate in the research.

The interview began by inquiring judges about general topics related to empathy and its connections to other processes. Questions about fundamental intuitions, beliefs, and even instances from their personal lives regarding empathy were posed to encourage a diverse range of interpretations in this domain. This approach aimed to dissuade judges from immediately framing their responses within the judicial context and its associated professional culture, with the goal of avoiding the activation of dominant cognitive patterns and instead eliciting language and concepts less central to their professional roles. In the subsequent phase of the interviews, judges were prompted to share their experiences and reflections concerning judicial behavior directly or indirectly associated with empathy within a judicial context. This included discussions on how they address human suffering, anguish, and challenges typically observed during trials, as well as whether and how they respond to courtroom events. They were also asked about their experiences of "putting themselves into someone else's shoes" and whether they show a "human face" during hearings. Only after exploring these topics were judges asked for their opinions on whether judges should exhibit empathy. Finally, the issue of the relationship between empathy and impartiality in the judicial context, along with inquiries about their training and needs in this regard, served as the focal point of the interviews. The objective was to gather examples of specific judicial behaviors, cases, and real courtroom situations, as well as to glean insights into the personal experiences of judges.

Due to the impact of the COVID-19 pandemic, the research protocol shifted from the planned face-to-face interviews to internet-based in-depth interviews [see Salmons (2016) and Howlett (2022)]. This adaptation allowed for flexibility and comfort for the participants, as most interviews were conducted from their homes after work hours. Surprisingly, this change to a virtual setting created a relaxed atmosphere, fostering openness among the participants. Interviews took place between mid-2021 and early 2022, with a total of more than 40 conducted, but only 37 were included in the data analysis because of technical problems with recordings and internet connection.

The interviewed judges represented diverse specializations, including civil (14), family (9), criminal (8), commercial (5), and labor (1), with all but three working in regional courts. The participants had an average work experience as a judge of almost 16 years. The length of the interviews varied depending on factors such as time constraints of participants and the depth of the narratives provided by them, with an average duration of approximately 100 min and some extending up to two and a half hours. While the interview followed a structured format, interviewees were urged to freely share their perspectives, with the researcher actively engaging in discussions and seeking

elaboration. All interviewees consented to recording the interviews, enhancing accuracy in reporting the results. The data collected from the interviews were transcribed and anonymized.

Thematic analysis was chosen and employed as the main method for organizing, analyzing, and interpreting the data at the research stage due to its potential to "identify, analyze, and report patterns (themes) within the data" (Braun and Clarke, 2006: 79). The aim was to identify and map judges' views on empathy-related subjects and to extract key themes—meanings that capture the core ideas within the data in relation to the research question and represent a patterned response or cluster within the dataset. Thematic analysis is commonly used to condense extensive and varied raw data into an ordered, structured format. In this study, after the initial familiarization with the transcripts, themes related to the research questions were identified. These themes often enabled the creation of typologies of the interviewees' views. Subsequently, the transcripts were re-read, and the list of themes (and typologies) was refined and reinterpreted.

It is important to stress that the judges who decided to participate in these in-depth interviews and invest their precious time in this manner can be seen as not typical representatives of the judiciary. This suggests that it should be considered whether the interviewed group was in some sense exceptional, consisting of judges who, hypothetically, are more sensitive, curious, and perhaps empathic. This hypothesis is unsupported and relies on the assumption that participation in this study indicates a willingness to engage in activities that may not have clear instrumental benefits, while also recognizing the potential for empathy within the judicial system.

Moreover, the study was conducted under extraordinary conditions, particularly considering the sociopolitical backdrop in which the research team operated while examining judges' views on empathy in their work [see Sadurski (2019) and Zoll and Wortham (2019)]. Over the past few years, judges have found themselves embroiled in tense political and legal disputes. While specifics are challenging to provide, foundational information is necessary to contextualize the study.

The issue began in the autumn of 2015 when the ruling majority, led by the right-wing *Prawo i Sprawiedliwość* (Law and Justice) party, initiated significant legal reforms primarily aimed at the judiciary. The first major battleground was the Constitutional Tribunal, vested with significant powers, including the authority to review the constitutionality of laws. Subsequently, the attention of the ruling party shifted toward judges of the common courts, who were often portrayed in government narratives as an "unaccountable" occupational group, commonly referred to as a "caste" [for a comparative insight into attacks on judges in Central Europe, see Čuroš (2023)]. By the summer of 2017, the government introduced legislative proposals regarding the recruitment and appointment of judges, the organization of common courts, and a comprehensive reorganization of the Supreme Court. The legislative process was marked by an aggressive propaganda campaign by the government against judges, which emphasized issues such as judicial errors and alleged misconduct. Despite unprecedented public protests and the mobilization of judges (Matthes, 2022; Puleo and Coman, 2024), all three significant reforms affecting the judiciary came into effect by the beginning of January 2018, following vetoes of two out of three bills by the President and proposing slightly different details. These reforms further exacerbated the crisis surrounding the judicial branch and introduced new areas of conflict. In general, the measures introduced through these legislative changes were perceived as attempts to exert even greater political control over the judiciary and undermine its independence [see Szwed (2023)]. The change in the ruling majority in late 2023 did not bring about the resolution of the issues, largely because the man holding the presidential office is aligned with the Law and Justice party. Moreover, the task of restoring the rule of law becomes a source of new controversies.

The impact of the political-social context on the research remains uncertain. It is hard to determine whether this affected the willingness of judges to participate and resulted in presenting a more positive view of judges who were under attack. During the interviews, judges primarily focused on their actual experiences and views related to empathy and judging, often refraining from delving into political discussions. However, they sometimes acknowledged this tense atmosphere without providing details or expressing complaints.

5 Judges' understanding of empathy

The analysis uncovers the various ways judges understand empathy that can be categorized into several themes. These classifications offer insights into the diverse perspectives, choices, and tensions within judges' views on empathy.

The first theme is close to perspective-taking. Some judges define empathy as the ability to understand others by putting oneself in their shoes, seeing things from their perspective, and attempting to comprehend their feelings and life situations. For instance, one judge [2] understood empathy as "an ability to put oneself in the place of the other person, seeing things from their eyes; an attempt to understand what they can feel in a given moment, how they can perceive a given situation." Similarly, another judge [17] described empathy as "an attempt to understand other humans in the sense of putting oneself into their position and their life situation." A family judge [15] summarized empathy as "embodying someone else's way of thinking, delving into their emotional states and reasoning," equating empathy with the "ability to look at reality through someone else's eyes."

Next, judges often describe empathy as "*wczucie się*," a Polish term implying emotional connection and understanding someone else's feelings deeply (entering emotionally into). This perspective goes beyond mere emotional identification and involves comprehending the needs and situations of others. For example, one judge [33] delved into the "feeling into" approach by describing empathy as "an ability to feel into the needs and situation of another person as well as the being, that is an animal." Another judge [3] characterized empathy as "understanding the needs and feelings of the other side … looking at the other human not through the prism of one's own ego, but to understand and feel into the situation of the human on the other side." One judge [12] proposed a two-element view on empathy as "a skill, ability to reading the others' emotions, emotional states and the skill of feeling into them, understanding them."

The third way to grasp empathy is correlated with the Polish term "*współodczuwanie*," which suggests feeling or experiencing emotions in unison with others (feeling together). This emphasizes the emotional aspect of empathy, with some judges focusing on understanding others' emotions and sharing in their emotional experiences. For example, a judge [5] equated empathy with "co-feeling … with such an understanding of someone's emotions … the ability to feel into these emotions." Some judges initiated their descriptions of empathy by emphasizing co-feeling and then added the perspective-taking component. A judge equated empathy with "a

skill to co-feel into others' situations and understand their situation; looking a little at the case from their eyes." Similarly, another judge [4] defined empathy as "co-feeling, that is feeling into the situation of another person, at least attempting to do so, as we frankly never can state and feel what the other person feels," adding also "at least attempting to take into account their situation, their feelings."

Next, some judges view empathy as being open-minded and understanding others' situations without making quick judgments. This approach emphasizes understanding, listening, and being open to different perspectives. For instance, one judge [6] described empathy as "understanding what other humans feel or experience," stressing the importance of delving into someone's perspective, especially in situations where one "does not support [something], does not accept [something]," highlighting empathy as a reason-related and motivated skill. Similarly, another judge [7] characterized empathy as "understanding what other humans feel or experience," emphasizing that it serves as a way to "avoid issuing fast, cheap, and superficial judgments."

Last but not least, judges' understandings of empathy indeed vary widely, with some presenting unique perspectives that diverge from the typical consensus found in professional literature. For instance, one judge [14] described empathy as "being open to other human beings, understanding what triggers them, discerning their needs, attempting to feel into their situation … comprehending the mechanisms that guide them … finding a path to agreement, and perhaps offering assistance—this entails seeing deeper, as well as not being easily offended." Similarly, another judge [1] viewed empathy as a "sense of service for the other human … emerged from the respect for another human." These perspectives highlight empathy as a comprehensive understanding and service toward others, which may not align precisely with conventional definitions.

In summary, the majority of the presented understandings align closely with tropes found in academic literature [see, e.g., Cuff et al. (2016) and Guthridge and Giummarra (2021)], particularly with the umbrella-like understanding of empathy that encompasses perspective-taking, sharing emotions, and emotionally tuning. However, some inconsistencies and over-inclusivity can be identified within these understandings. Notably, several approaches emphasize that empathy involves grasping the other's situation or needs, which is more demanding than simply understanding their states of mind. Additionally, certain judges highlight empathy's emotional aspect, which raises questions about its integration with impartiality in the judicial context. On the other hand, some judges emphasize empathy as a cognitive process, focusing on understanding others' situations and perspectives without necessarily sharing their emotions. This understanding of empathy appears to align with judicial values such as impartiality and may even be seen as a means of ensuring it. Interestingly, a few judges introduce unique perspectives that highlight empathy's role not only in understanding others but also in fostering collaboration and mutual respect, which is less controversial when applied to the judicial sphere. These viewpoints provide valuable insights into the judges' diverse interpretations of empathy.

6 Judges' understanding of impartiality

Remarkably, the interpretation of impartiality by judges has not yielded substantial insights in the literature, with few exceptions [such as Mack et al. (2021) and Roach Anleu and Mack (2021: 67–70)]. However, it is worth noting that although this subject was not the primary focus of the interviews conducted for this research, judges indeed presented varied approaches to impartiality, which can be organized into several typologies.

The first criterion considers the scope, scale, and depth of judges' reflections on impartiality expressed during interviews. In this regard, presented views can be distinguished as (i) succinct, often also flat, reducing complex issues to simple "truths," and (ii) complex, aiming to problematize the discussed issue, considering conditions and intervening factors, and highlighting problems. It can be observed that the approaches to impartiality presented by the judges were not as deep and nuanced as one might expect. Perhaps for judges, this is a non-controversial issue, and tacit knowledge dominates their thinking about it. Only a minority of judges attempted to shed some light on their understanding of impartiality, rather than treating it as a self-explanatory concept. For some, impartiality is equated with "non-favoritism" [37] or "seeing the interest of both sides" [30].

Next, typology refers to the fundamental difference between (i) impartiality related to reaching the final decision, and perhaps other elements of the court proceedings, but considered in terms of the actual processes occurring "inside" the decision-maker ("internal" impartiality) and impartiality as (ii) ensuring that the judge is not perceived by others as biased without delving into the actual reasons for the decision ("external" impartiality). In the latter case, emphasis is placed on how judicial behavior, decisions, words, and gestures are perceived by others (i.e., whether they are biased or whether they may seem so) [see Roach Anleu and Mack (2017: 9)].

The majority explore "external" impartiality. For example, one judge [13] expressed the view that "we [judges] should secure impartiality … this should be stressed and manifested at each step, that we are not on any side." Another judge [29] emphasized: "I have to be very careful not to violate this principle of impartiality in [someone's] perception because someone can perceive my actions as partial." Referring to the use of empathy, this judge frankly points out: "I do not always see the need [for using it] and not always I have measures… But I must be very conscious and careful, in order not to violate the principle of impartiality in perception, in perception [of others], because my actions can be read out as partial." An interesting perspective was expressed by another judge [15] who said: "an empathic judge can be impartial toward the parties, but if he would show this empathy too much, as I said, the other side of the trial can think that the judge favors this party, thus is not impartiality. Thus, we cannot show to some extent empathy, emotions, and we must keep a stone face." The stone face, often attributed to the opposite of empathy, is used here as a strategy to ensure the hidden working of empathy, which does not corrupt the perception of the judge as impartial. In this case, there is no attempt to control empathy or manage empathic impulses, but not showing it is enough to guarantee that the participants would not make a legitimate accusation of partiality. The judge assumes that the problem lies only in expressing empathy, which by definition does not interfere with the decision-making process.

In the following typology, judges hold varying views on the concept of judicial impartiality—whether it is assumed, seen as a given, or viewed as a process that can be developed (and possibly diminished) similar to a form of work or performance. In the latter case, new topics and tensions arise, and the establishment of

impartiality is seen as (not easy) work that judges must undertake. Often, the first approach relies on normative considerations that judges should be impartial, but obtaining this state is not treated as a kind of effort, work, or something worthy of deeper attention, as it just magically happens.

Referring to the understanding of impartiality as a certain process (performance), considering the criterion of what is possible in this regard in reality, two positions can be distinguished. According to the first, impartiality is a state relatively easy to achieve for the judge (e.g., just maintaining a "poker face") or, as the second implies, it is an impossible state to fully achieve, even with the use of certain tools by judges and the presence of certain institutional conditions. The latter approach is realistic, not afraid to admit that full impartiality is not achievable, which, however, does not imply strong arbitrariness or the meaninglessness of attempts to achieve it.

There aren't many adherences to the "easy" task thesis. However, one judge [26] expressed a similar view while discussing the human face, acknowledging that despite expressing a kind attitude toward the participants, "there is a need not to make room for the feelings of the parties that the side of one party is taken," and what is important here—"this is not so hard [to do]." The majority stressed the hardship of being impartial. One judge [14] argued that absolute impartiality is a utopia as "everyone is shaped, has some opinions, ethical and moral, something for him is good and bad … talking about absolute impartiality … there is no chance." Fortunately, some shared their deeper views. A judge [20] admitted that "everyone is subjective; it is not true that everyone is objective. And the judges are not an exception. However, [they] must tend to look as objective as possible, and not to consider some circumstance that could corrupt this objectivity." This statement is tricky—we do not know whether the judge means that leaving aside subjectivity is impossible and only being perceived as objective is what can be done by judges. Another judge [29] mentioned: "I am always tending to be impartial, however, this is hard, because the heart often whispers something different" stressing the need for internal working on the "impulses of the heart."

Summing this up, generally the judges' view on the central category of judiciary—the impartiality—is not sophisticated and elaborate as one could imagine. Especially intriguing is that most of the judges focus solely on "external" impartiality, putting less effort into monitoring their internal processes.

7 How judges justify that empathy does not corrupt impartiality

The research revealed that judges do not view their empathy as conflicting with impartiality. It seems essential to contextualize this finding within each judge's unique interpretation of empathy and assumptions regarding impartiality, as the understandings of empathy articulated at the outset of the interviews likely influence subsequent discussions on judicial context and impartiality. However, rather than delving into individual judges' nuanced understandings of both concepts and their interrelationships, it is more productive to focus on the overarching tendencies and types of approaches judges employ to reconcile empathy and impartiality. This broader analysis can provide insights into prevailing attitudes within the judicial community regarding these fundamental aspects of judicial decision-making.

Five distinct ways in which judges attempt to explain or substantiate the absence of contradiction between empathy and impartiality can be distilled from the data. The presence of multiple "paths" in this regard does not imply that judges did not combine two or even three of them in their statements. On the contrary, they sometimes referred to several arguments simultaneously.

(1) According to the symmetry thesis, which is reflected in the literature (e.g., Lee, 2013: 163), impartiality is not compromised when a judge extends empathy not only to one party but to all participants involved. Under this thesis, the use of empathy by judges does not undermine a judge's impartiality, especially in the "external" dimension, as long as it is applied uniformly to each party. In this framework, there exists a harmonious balance between empathy and impartiality, wherein each party receives the same or a similar depth of understanding and consideration. This perspective arises from concerns regarding investing empathy exclusively in one party, which could introduce bias into the decision-making process.

However, achieving this balance is not without challenges. As one judge [18] emphasized, that only if one is "empathic to both parties—then he can secure impartiality." However, this is not an easy job, and "it can bring a negative consequence, thus [use empathy] with moderation." Another interviewee [14] noted that genuine empathy extends to all parties involved, suggesting that managing empathic inclinations is necessary to ensure equal distribution. This view assumes that one must manage the empathic inclinations to achieve its equal distribution. The next judge [33], with diverse experience, also adhered to the symmetry thesis by suggesting that true impartiality arises when a judge behaves "empathically in the same way toward both parties." This underscores the notion that emotions and personal worldviews must be set aside by judges to prevent bias, requiring a conscious effort to suppress inclinations that may arise due to emotional connections or shared values with one of the parties involved. Thus, some reactions need to be blocked in equal scope (negative aspect of symmetry thesis).

Importantly, some judges, even starting from a symmetry thesis, go deeper and subject it to fairly strong criticism. One judge [36] referred to these issues during the conversation. He starts from the observation that: "a lot of judges would say that <no> [to the thesis that the empathic judge can be at the same time impartial]." Then he examined the possibility that "empathy would be applied to all participants in the same way." Dwelling on this, he mentioned the case in which "we have a crying lady, and the other does not cry, and we would say <I understand your situation>," which in his opinion would undermine the impartiality. Another point relates to the problem with the civil cases between a private person and a company that has a legal standing—he asks, "how to be empathic toward the company." Of course, real persons represent any collative body, but still, this argument shows that the symmetry thesis, as simple as it looks, blurs the fundamental differences between persons and entities involved in court trials.

Other judges also emphasized the weaknesses of the symmetry thesis from various perspectives. Some argued that impartiality does not equate to uniform behavior or demeanor [32], while others likened the attempt to feel equally toward both sides to a "schizophrenic endeavor" [23]. Additionally, another judge [31] noted that the behavior and reactions of other participants in the courtroom influence the space for the use of empathy by judges. In certain situations, judges may find it challenging to employ empathy due to factors such as a lack of cooperation from one party.

These critiques underscore the complexity of applying the symmetry thesis in practice and highlight the need for a more nuanced understanding of the role of empathy in judicial decision-making.

(2) One of the obvious strategies for defending the conformity (or at least the non-existence of non-conformity) between judges' empathy and impartiality, also represented in the sample, is to accentuate the definition of empathy that does not suggest or imply a conflict between them (strategy of defining empathy as unemotional). Especially by emphasizing that empathy does not entail the dominance of emotions, but rather encompasses the understanding of someone's situation or role. Conceptualizing empathy as carriers of emotionality poses serious problems for most judges, as emotions in general tend to be portrayed in professional culture as irritants in the judicial decision-making process (although this perception is gradually changing, even in Poland, due to the expansion of the law and emotion movement) [see in general: Maroney (2011); and in references to Polish judges: Wojciechowski et al. (2015)].

A typical representative of such a view is a statement by one of the judges [25], for whom "an empathic judge can be impartial, empathy that means understanding the position of the other side, but [at the same time] acknowledging a given legal context." Similarly, another judge [34], in line with their understanding of empathy as being sensitive, noticed that "when the judge is sensitive to the needs of others and is not driven by emotions and does not tilt the scale to some party, [they] can be impartial. No one is a machine." The slip into emotionality is dangerous, but empathy as sensitivity does not bring any problems.

Another example demonstrates something telling. A family judge [27] argued that "because empathy does not assume that we are sorely going to feel into, but that we going to understand the situation of one party, [and] only empathy allows for understanding the situation of both sides—thus, we are not losing the impartiality." Later she admitted that "feeling into" is not possible in case of non-humans, but the "digging into the reasons of claims in the process" is possible. She clarified that empathy "it is not a case when one feels into the role of this person, this mother, this father, but empathy would allow us to maybe understand the situation of this person, why she acts this way, what her legal claim raised for, but not feeling into her role." However, what is crucial is that her approach to empathy expressed at the beginning of the interview encompassed the feeling-into. This represents a shift in accents—to fit the argument, the judge changed the emotionally saturated understanding of empathy to one more reason-based process.

Certainly, in these instances, when addressing matters related to impartiality, there seems to be a scripted effort to detach emotionality from judging, refining empathy as not inherently linked with emotions. Consequently, the judges appear to gravitate toward equating empathy with "understanding the situation," which is a safer option within the judicial context.

(3) Another "path" of merging empathy and impartiality explored by the judges involves strongly emphasizing that the role and impact of judges' empathy do not concern the making of the final decision (strategy of mitigating empathy's influence on judgments). In this way, the most important element of the process is presented as free from the problems and dilemmas that empathy—especially selective, partial, or strongly affective—brings. According to this line of thinking, empathy is pictured as a skill that works at the earlier phases of judicial decision-making. This strategy was most often mentioned by judges.

Exploring this avenue, a judge [35] elucidated: "I can understand both parties, but I will pass judgment which I think is just." Along the reference to the symmetry thesis, the judge, in the last resort, will pass the decision not driven by empathy, but by other factors as well. Empathy does not destroy impartiality then as in the last resort, the final decision is not in any way influenced by what empathy gained. Similarly, one judge [30] realistically admitted that "the feeling informs [the proceedings], but rationality is what decides." Furthermore, another interviewee [28] firmly stated that "the judgment is based on evidence and within the limits of the law—empathy helps but it is one element—empathy helps in questioning, contacts with people." Echoing this sentiment, a judge [17] acknowledged that all people possess some kind of empathy and "I could be empathic to an old lady, but if her testimony does not suit the other material and seems not to be true, then I will not decide in her interest, yes. Thus, I will be impartial, I will try to be impartial, although I am not sure that I will be always successful." The same approach was expressed by another judge [26] who stated that "empathy is needed for preparing everything for issuing the just, impartial judgment … but in the case of issuing the verdict, at this point, we are driven mostly by the binding laws." This sentiment was echoed by several other judges [24, 10, 11].

(4) The next strategy employed by judges to reconcile the use of empathy with maintaining impartiality involves setting limits for empathy and highlighting certain associated dangers of its use (negative aspect). Additionally, judges undertake various forms of self-work, such as "distancing," controlling, and self-monitoring, to mitigate these risks and ensure impartiality (positive aspect). In general, this strategy could be described as emphasizing control over empathy.

For example, a judge [8] claimed that there is no easy translation between being empathic and partial as "a judge must be aware of the different thought processes happening in his head and notice [them]. Extensive identification with one of the parties can lead to the balance being tilted in favor of that party. We are judges; we can consider, distinguish, and, as I am saying, [at the end] we are working by referring to the statutes." Then, the judge referred to the comparison between judges and cooks, stating that beyond the ingredients, there is also a need for experiences, knowledge, and empathy. This metaphor stresses the role of the personal element in judging, which is unavoidable and desirable but should be under some self-monitoring by judges. The last stance refers to the earlier claim that empathy can work but before reaching judgment, here the judge assures that the decision is determined by the laws but not empathy, which stays under control. These two arguments nicely reinforce each other and together seem much stronger.

In a poignant reflection, a judge [16], while navigating the intricate relationship between empathy and impartiality, inadvertently intertwined empathy with compassion, lamenting: "there are situations in which the situation of a given person is so hard—simply my heart is broken, but I have to judge against her, on her disadvantage. Then, there is a huge boxing match with myself, but I cannot allow myself to be partial … this is an issue of ethos." Here, the judge grapples with the emotional toll of difficult cases, acknowledging the internal struggle between empathic impulses and the imperative of impartial adjudication. Similarly, a judge [23, also 13], highlighted the importance of self-monitoring in preserving impartiality, stating: "but if it would happen during the trial, that I begin to tilt too much toward

one party … then I immediately mitigate myself, that … [say to herself:] < wait a minute, I cannot go in this direction because I have to be basing on these facts, that I pass objectively make the decision>. Yes, I think, that adequately balancing these all ingredients can allow me to be an objective judge." This introspective process of self-correction [done by self-talk—see Roach Anleu and Mack (2021: 105–106, 191–192)], a kind of internal work, serves as a crucial component of judicial ethos, ensuring that personal inclinations do not overshadow the objective assessment of facts and legal principles.

The judge from civil division [32], who possessed a deep understanding of empathy and its role in the judicial realm, provided profound insights into the impact of empathy-based biases and their management during trials. She articulated a conscientious approach toward recognizing and mitigating personal biases rooted in her life experiences, emphasizing the importance of maintaining impartiality. She expressed, "I try to be careful about my feelings which recall my life experiences and can understand such situations. And then I rather tend to think about myself, whether I favor [someone] and then I wonder whether I do not … lead toward the other side." This statement underscores her self-awareness and vigilance in ensuring fair treatment of all parties involved. Furthermore, she described how her similar experiences with litigants prompt her to distance herself from identifying too closely with any party, activating "alert lamps" to signal potential biases. She elaborated about the internal mechanisms that occur during hearings, highlighting that while interactions and engagements create impulses, there is also a concurrent process of self-evaluation. This reflective capacity allows her, and other judges, to monitor their reactions and regulate their responses. She elucidated, "I can give time to myself, which gives me a chance to see the situation … it is not possible to be separated from one's perspective, but it is possible to collect these moments in which I identify, in quotation marks, too hard, when someone's perspective is close to me." This demonstrates her ability to maintain perspective and discern when her empathetic identification with a party risk compromising impartiality, thereby enabling her to navigate empathy's complexities in judicial decision-making.

Another judge outlined the process of managing impulses, illustrating how it contributes to achieving a state closer to objectivity. In an insightful anecdote, a judge [35] openly shared her struggle with a specific bias—her strong inclination to protect animal rights. She candidly acknowledged the challenge of navigating cases related to this subject matter, stating, "In such issues, one really needs to have the skills to close this inside oneself, to prevent them from surfacing, to treat people in a just way without imposing one's worldview." This admission not only demonstrates the judge's self-awareness of potential biases but also underscores the delicate balancing act required to ensure a fair and unbiased decision-making process. The judge's ability to recognize and control these inherent empathetic impulses is crucial. This self-awareness becomes a powerful tool in the pursuit of impartiality, with the judge actively working to mitigate the impact of personal biases on decision-making. However, the judge's introspection also raises the important question of how she evaluates the adequacy of such control—whether it is a genuinely rationalized process or a potential area for further scrutiny and refinement. This highlights the ongoing challenge of achieving and maintaining impartiality in judicial decision-making, particularly when dealing with deeply ingrained personal convictions or biases.

(5) An interesting strategy for reconciling the use of empathy with impartiality is to avoid absolutizing or fetishizing impartiality in the face of real inequality between parties, or alternatively, to understand impartiality in a more justice-oriented manner rather than reading it as treating the parties identically. In the first scenario, impartiality is not necessarily the paramount value, creating room for empathy, while in the second, "just" impartiality may even necessitate empathy. This strategy can be called deabsolutizing formal impartiality and creating more space for empathy. Only two judges explored this avenue.

The first one [1], while acknowledging the crucial role of impartiality in the judicial process, astutely pointed out that impartiality should not be interpreted as ignoring the incompetence or ineptitude of any party involved. This perspective recognizes that the pursuit of justice cannot solely rely on strict adherence to formal impartiality when blatant imbalances or deficiencies exist. The judge further explored the complexities of maintaining balance between parties, suggesting that in cases where a lack of real balance is evident, actions may be justified that deviate from the rigid confines of formal impartiality. Similarly, the second judge [22] emphasized the importance of contextualizing impartiality within the broader framework of justice and fairness. While impartiality remains a fundamental principle of the judicial system, it cannot be divorced from the pursuit of equity and rectitude. The judge argued that rigidly adhering to impartiality without considering the unique circumstances and needs of each case risks perpetuating injustice rather than upholding true fairness. This insightful perspective reframes impartiality as a means to achieve justice rather than an end in itself, thereby allowing empathy to play a constructive role in promoting equitable outcomes.

8 Concluding discussion

The lack of acknowledgment of the potential incoherence between empathy and impartiality could be influenced by the socially desirable nature of empathy. Judges may strive to maintain both values or express a belief in their harmonious coexistence, especially given the importance placed on empathy in societal discourse. Additionally, the tense atmosphere surrounding the judiciary in Poland during the interviews could further influence judges to emphasize the significance of empathy in their decision-making processes, perhaps as a means to counter perceptions of judicial insensitivity spread by the then-ruling majority. In the face of such attacks, there could have been a mechanism of self-protection of the profession at play. However, it should be stressed that most of the judges did not fight to secure an ironclad picture of the judiciary but mentioned some of its problems and examples of unjust judicial behaviors.

Moreover, the total absence of voices suggesting that the two are conflicted can be surprising, considering the rather "positivistic" tradition and the continued dominance of the "stone face" ideal. However, as mentioned, Polish judges are hyper-active, and perhaps under the influence of other factors, they need to engage more empathic-like skills to navigate hearings, which could stimulate a greater openness to empathic engagement. However, the unanimous agreement among judges on the compatibility of empathy and impartiality could also suggest deeply ingrained beliefs within the judicial community. This alignment of perspectives indicates a prevailing consensus on the issue, and the research serves to elucidate

and articulate these commonly held views rather than uncovering dissenting opinions. Testing these hypotheses would require a specific and dedicated research design.

Noticeably, the reconstructed "paths" of explaining the absence of contradiction between empathy and impartiality also invoke some problems and unanswered controversies. The symmetry thesis, often mentioned by judges, was criticized by some of the interviewees (see above). This is an easy way to make empathy and impartiality seem to be "friends," but in fact, this strategy only pretends to solve the problem by arguing for a resolution that is in line with formal equality, which is easier for lawyers to accept. Moreover, it turns attention to the general claim of being equally empathic to each party, missing a plethora of problems and nuances. For example, Mack et al. (2021, 21) rightly mentioned that "empathy is not a zero-sum game; each party's need for judicial empathy may be different." Next, referring to the second strategy, some judges adjust their understanding of empathy to the circumstances—the topic of impartiality drove them to present views that are closer to "cognitive" empathy. Such instances of changing the accent during the interview could be interpreted as a way of securing the vision of professionalism of judicial officers and the activation of the script of judicial dispassion, activated without self-reflection. Moreover, acknowledging the lack of influence of empathy in passing judgment may, which forms the third strategy, seems sound, but it brings many issues—whether the judge indeed can control the internal processes in such a way and set such boundaries. Such a strategy can be interpreted as a kind of safe explanation. Moreover, the controlling theses that put emphasis on self-monitoring and self-disciplining seem promising but should be supplemented by more data based on the observation of judges and a more detailed description by judges of how these processes happen [how it looks in the case of Australian judges; see Mack et al. (2021: 9)]. In turn, the deabsolutizing of (formal) impartiality is certainly a bold argument. Although it was mentioned only by two interviewees, such a way of thinking leads to a rethink of the hierarchy of judicial values and principles.

Importantly, the judges were silent about the positive role of empathy in upholding judicial impartiality [see Lee (2013: 148)]. Only one judge [9] stressed that empathy "does not disturb impartiality, and even strengthens it. Absolutely, it is helpful." However, this exception, although formulated as a general observation and without providing details, suggests that the possibility that empathy is, at least in certain situations and when properly deployed, an important antidote to biases, prejudices, and closed-mindedness was not on the participants' radar. Even those judges who align with the understanding of empathy as general open-mindedness seem to not explore this avenue.

It is also crucial to note that employing in-depth interviews to grasp judges' perceptions of the relationship between empathy and impartiality has inherent limitations. Such interviews primarily rely on verbal statements and may present an idealized picture, lacking self-critical examination, especially given the social roles of the interviewees. The study's focus on verbal statements without comparing them with actual practices or observable actions may limit its depth. Interestingly, one judge [6], referring to himself as a "dinosaur" due to his extensive experience and adherence to traditional views, expressed concerns about the potential disparity between declarative statements and real-world application of empathy in judicial practice. He warned: "If we are going to talk about empathy, declaratively, the results will be quite good. However, in the real sphere, not necessarily. This is what I worry about, but today's situation of courts and judges does not favor empathy and does not favor at all the understanding of the role of empathy; today [in 2021] we have a completely different direction [than encouraging more empathy]." This cautionary remark sheds light on the challenges of implementing empathy in the context of broader institutional dynamics and sociopolitical pressures toward judges. Additionally, it highlights the inclination to portray oneself in a more favorable manner.

Data availability statement

The datasets presented in this article are not readily available to protect the privacy of participants. Requests to access the datasets should be directed to mateusz.stepien@uj.edu.pl.

Ethics statement

Ethical review and approval was not required for the study on human participants in accordance with the local legislation and institutional requirements. Written informed consent from the participants was not required to participate in this study in accordance with the national legislation and the institutional requirements. Verbal informed consent was obtained from the participants in this study.

Author contributions

MS: Writing – original draft, Writing – review & editing.

Funding

The author(s) declare that financial support was received for the research, authorship, and/or publication of this article. This article was a deliverable of the research project 'Empathy as a Challenge. Example of Polish Judges' (Grant number 2019/33/B/HS5/01664) financed by the National Science Centre, Poland and carried out at the Faculty of Law and Administration of the Jagiellonian University in Krakow.

Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Publisher's note

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frontiers | Frontiers in Sociology

TYPE Original Research
PUBLISHED 12 November 2024
DOI 10.3389/fsoc.2024.1423885

OPEN ACCESS

EDITED BY
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RECEIVED 26 April 2024
ACCEPTED 23 October 2024
PUBLISHED 12 November 2024

CITATION
Bergman Blix S and Törnqvist N (2024) Navigating uncertainty and negotiating trust in judicial deliberations.
Front. Sociol. 9:1423885.
doi: 10.3389/fsoc.2024.1423885

Navigating uncertainty and negotiating trust in judicial deliberations

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Autonomy and independence are key features of legal decision-making. Yet, decision-making in court is fundamentally interactional and collective, both during the information gathering phase of hearings, and in evaluations during deliberations. Depending on legal system and type of court, deliberations can include different constellations of lay judges, jurors, or judge panels. In this article, we explore the collective dynamic of knowledge acquisition in legal decision-making, by analysing their emotional undercurrents. We show how judges balance uncertainty and certainty in legal deliberation, elaborating on (1) trust; (2) uncertainty exchange, and; (3) certainty as an agile emotion. Theoretically, the article combines an emotive-cognitive judicial framework, which understands emotion and reason as intersecting and continuous, with social interactionist theory. The analysis builds on extensive ethnographic fieldwork in Sweden, including shadowing and interviews with judges as well as observations during court proceedings and deliberations. The article actualizes the joint accomplishment of legal independence, and contributes with a nuanced account of how the decision-making process unfolds in legal deliberations.

KEYWORDS

judicial deliberation, trust, epistemic emotions, judges, legal decision making, social interaction, legal independence, uncertainty

Introduction

The image of the judge is singular, the lone arbiter in her chambers or on the bench taking independent decisions. The stand-alone image of the judge rhymes with a founding principle of a democratic rule of law, both in terms of the judicial power as independent from the legislative and executive powers, and as a professional core, the judge must 'have the courage to arrive at uncomfortable decisions and be able to withstand pressure of public opinion' (Hirschfeldt, 2011: 7). Judicial independence tends to emphasize professional autonomy for the court corps rather than for individual judges (Ställvik, 2009). This focus on judges as a corps can be linked to the *image* of the judge as a mechanical and rational applier of legal rules, making individual autonomy a non-issue. Previous studies of legal *practice*, have found judges to emphasize the craftwork of judging, conveying that empathy, impartiality and irreproachability has more bearing on their work than legal expertise (Ställvik, 2009; Tata, 2007). Consequently, legal decision-making becomes associated with craftwork and empathic attuning rather than calculation and computation (Hutton, 2006; Ställvik, 2009; Tata, 2007; van Oorschot, 2021), paralleled by an upsurge of studies on the emotional dimensions of judicial work (Bergman Blix and Wettergren, 2018; Roach Anleu and Mack, 2021; Bandes et al., 2021). The judge as a craftsperson humanizes judges' work, but still emphasizes the individual rather than the collective. At the same time, knowledge processes are fundamentally social. What constitutes knowledge, how to evaluate knowledge, and make decisions are formed in interaction between people (Blumer, 1969; Durkheim, 2008). This is particularly evident in courts, where decision-making is inherently interactional and collective, both during the information gathering phase of

hearings, and in evaluations during deliberations (Bergman Blix, 2022b). In this article, our aim is to explore the collective dynamic of knowledge acquisition in legal decision-making, by analysing their emotional undercurrents. We show how judges balance uncertainty and certainty in legal deliberation, focusing (1) trust; (2) uncertainty exchange, referring to judges sharing and discussing legal or factual issues that they feel uncertain about, and; (3) certainty as an agile emotion. Despite high demands on independence, trust or mistrust form the basis for collective deliberations in court developing into group solidarity or alienation.

In the Swedish court system, the professional judge rules in a panel with three lay judges in the lower court, while the appellate court panel consists of three professional judges and two lay judges. The professional judge presides in trials and the panel decides on both guilt and sanction in the same trial. Deliberations are confidential and usually take place in the court room when the parties have left directly after a hearing. In larger trials going on for several days or weeks, the panel can start to deliberate after each day, but then meet at a separate occasion after the full trial is over. The decision is reached by a majority vote and potential disagreements are incorporated as dissenting opinions at the end of the written verdict.[1] The legal verdict can sometimes be delivered orally, but is always delivered in written form including motivations. In the district court, the professional judge writes the judgment, and in the appellate court, the reporting judge is responsible for writing the draft that is then circulated between the three professional judges.

How judges decide – previous research on legal decision-making

How do judges think and decide on cases? This engaging question echoes throughout the ample reservoir of socio-legal studies interested in understanding how legal decisions come about. In his seminal work, *How judges think*, American judge Posner (2008: 111) suggests that judges, like all human beings, are prone to 'rationalization'. This idea constitutes a hallmark of the positivistic legal tradition, in which legal decision-making is portrayed as a rational, rather mechanistic enterprise of information gathering and interpretation. In this framework, legal decisions are *reasoned* decisions purely based on the facts of the case and the law. However, this paradigm has been challenged based on findings in psychology, neuroscience and philosophy focusing on the role emotions play in rational inferences.

A wealth of psychological studies has showed that emotions have pervasive impact on all kinds of decision-making processes (Lerner et al., 2015). Besides elucidating emotions as drivers of decision-making, these studies also demonstrate that emotions affect the content of thought, the depth of thought and the content of implicit goals. Focusing on judges, Bennett and Broe (2010) argue that emotions facilitate legal decision-making as emotions enable learning and memorising, which is essential for acquiring experience. In addition, they maintain that emotions are of particular importance for hunches, gut feelings and feeling that a decision is right. Informed by experimental psychological research, legal scholars have argued that judges tend to intuitive reasoning when they make decisions and that judges, like all human beings, resort to mental shortcuts, involving anchoring, statistical inferences, hindsight and confirmation biases (Guthrie et al., 2007; Rachlinski and Wistrich, 2017). This aligns with research arguing that most legal decisions are part of a routine professional practice that demand little reflection where judges tend to 'know' the right decision before they have assessed the case properly. Education and working experience generate a decision-making process that is mainly intuitive and unarticulated.

Socio-legal research demonstrates how the nexus of legal principles (impartiality, objectivity, neutrality, independence, detachment and dispassion) form a normative framework that shapes legal decision-making. Through empirical work on Australian judges, Roach Anleu and Mack (2021) show how the legal concept of impartiality mobilize ambitions among judges to keep an open mind and an ability to put legally irrelevant information, attitudes or emotions aside. In a similar vein, Sutton (2010: 875) highlights open-mindedness, humility and the intent to get it right as central aspects of legal temperament. In a recent article on judicial independence, Jamieson (2021) argues that while this principle relies on collaboration with other legal actors, for the individual judge, it serves as a commitment to carry out their duties in particular ways. Realized in legal practice, independence becomes an act of balancing rather than separating rationality, intuition and emotions (Jamieson, 2021: 146). Pointing toward the emotional aspect of these professional norms, Bergman Blix and Minissale (2022) highlight that judges and other legal actors need to *feel* committed to these principles for them to be actualised.

Research focusing on social and collective backdrops of legal decision-making have to a large extent looked at outcomes in terms of sentencing rather than the collective process itself, by pinpointing the importance of local legal cultures (Eisenstein and Jacob, 1977) and legal training and legal socialization (Steffensmeier and Hebert, 1999: 1187) to understand legal decision-making practices and processes. Collegiality has been shown to play down personal and political orientations (Edwards, 2003), and safeguard against judge's individual preferences (Sutton, 2010), but collective aspects, or 'panel effects', such as voting order also indicate strong norms of consensus among the judges (Fischman, 2013).

To sum up, although previous research brings forward emotional as well as collective dimensions of legal decision-making, micro sociological studies that combine the two, exploring how judges emotionally and collectively arrive at a decision are scarce (Edwards, 2003). Analysing empirical data from actual deliberations in Swedish district and appellate courts provide a unique opportunity to advance our knowledge on how judges' decisions form and inform epistemic and collective emotions in exchange with their close peers.

Epistemic emotions and social interaction

Our theoretical vantage point assumes that rational action at large demands emotional support and motivation. As a state of mind, rationality, involves feelings, such as ease and confidence (James, 1879; Barbalet, 2011). These feelings are associated with an absence of obstacles implying that a rational decision is perceived as effortless or

1 If there is a two against two vote in the district court, the decision most lenient towards the defendant will be the decision in force.

evident.[2] Rationality is thus not emotionless, but demands smooth emotions, emotions that are not perceived as disruptive or 'emotional', but instead support intended actions (Barbalet, 2011). To reach a feeling of rational ease, a person needs to trust the possibility to reach her goals in the first place, as well as feel confident of her own ability to effectuate them, not to get stuck in self-doubt or anxious side tracks (see further Barbalet, 1998: 49). In complex rational deliberation, disruptive emotions such as uncertainty and doubt play a fundamental role and the sense of obviousness or ease can be understood as an ideal endpoint to a process of critical reflection, seeking and stressing potential obstacles as well as balancing consensus and conflict (Bergman Blix, 2022b).

Philosophical research has conceptualized 'epistemic emotions' as those involved in knowledge seeking and deliberation. These are vital for evaluating 'the quality of one's knowledge, on the extent of what one has learnt, and how much confidence can be placed in what one believes' (de Sousa, 2009: 140)[3]. In other words, epistemic emotions have 'epistemic ends' (Morton, 2010: 386) and influence our convictions and beliefs as well as our inferential strategies or cognitive processes. Curiosity, interest and wonder captivates the mind and sparks new lines of inquiry. Doubt and epistemic anxiety invite reassessments of beliefs and knowledge already acquired, while the feeling of certainty and conviction intermit deliberation and involve saturation (de Sousa, 2009; Terpe, 2016). In court, doubt is an expected and even required emotion (as depicted in 'without probably doubt'), and studies have shown doubt to be imperative in legal decision-making (Törnqvist and Wettergren, 2023; Minissale and Bergman Blix, forthcoming). Previous theorizing conceptualizes uncertainty as a meta-cognitive emotion that covers both doubt and epistemic anxiety (Arango-Muñoz, 2013), but for our purposes, we need to distinguish between *doubt*, as building on stable alternatives for evaluation (de Sousa, 2009), such as when doubting whether a statement is true or not, and *uncertainty* as lacking evident ways to tackle the problem. This means that uncertainty relates to dejection and confusion and therefore leans more heavily on the collective to be solved. In legal decision-making, uncertainty can arise when legal professionals need to assess legal matters with unclear or imprecise interpretative frames, such as when deciding on intent and credibility (cf. Minissale and Bergman Blix, forthcoming).

So far, our focus has been on subjective experiences, but the way people assess information and evaluate their beliefs are socially learnt and build on social responsiveness and sanctions (de Sousa, 2009). A social basis for cooperation and decision-making in collective settings is trust. Trust is a fundamentally social emotion in the sense that trust both presupposes and generates a bond between persons. Trust is a future-oriented emotion centring around a belief or feeling that another person is reliable, implying that trust comprises risk-taking, some form of dependence and commitment (Barbalet, 2019) that relaxes one's 'self-protective strategies' (Nussbaum, 2016: 94). To trust someone involves a belief in the trusted person's competence as well as their honesty (Hawley, 2017; Barbalet, 2019) and thus, distrust entails a form of moral criticism. Notably, Hawley (2017) distinguishes between distrust and low expectations and contends that while distrust involve stronger emotional and normative elements, low expectations rather implicate a practical adaptation to material matters. In the collective ritual of deliberations, we find trust and mistrust to be foundational for the epistemic process. Entering the deliberation, generalized trust or mistrust towards fellow judges or lay judges shape the form of reasoning and openness to reveal the epistemic process, while trust or distrust towards specific judges and lay judges can influence the way the epistemic process unfolds. Trust or distrust can also result from the interaction throughout the deliberation[4]. For analytical clarity, we call this latter form *momentary trust* in contrast to the *generalized trust* that serves as a starting point. As a general rule, judges express generalized trust in fellow professional judges, and generalized mistrust or constrained trust in lay judges. Since lay judges do not have legal training, the professional judges generally take a firm hold of the deliberations to ensure that the discussion sticks to relevant issues (Bergman Blix and Wettergren, 2018).

In order to zoom in on the social interactional process of legal decision-making, we employ Collins' (2004) concept of *interactional ritual chains* (IRC). The notion of chains emphasizes the temporal unfolding of decision-making where previous actions and interactions influence expectations for present and future actions, such as entering a panel with feelings of trust or mistrust for the other judges in the panel or feeling high or low emotional energy depending on previous meetings as well as expectations of being in the centre or periphery of the meeting. In social interactionist theory, meaning-making, how we understand situations and form norms and moral boundaries for how to act, are created in meetings with other people, and this link between interpretation and interaction accentuates the fact that meaning-making is dynamic and can change depending on how a situation develops (Blumer, 1969). We tend to endorse information that most people endorse, i.e., we pull towards consensus (Arango-Muñoz, 2013). In legal deliberations, which adhere to strict procedural rules and aim to apply law to facts, the elementary social arrangement for how to deliberate and how to evaluate facts build on situational agreements based on experience and adaption in the moment. How much evidence is needed to prove an assault, does the fact that the witness is a brother to the victim make him more or less credible, how can a disagreement between the judges foster independent collegiality or conflict? These issues cannot be solved from studying legal rules and regulations, they grow out of situational interpretations in interaction rituals. Interaction rituals, if succeeding, generate social solidarity and as depicted in earlier work (Bergman Blix, 2022b), legal deliberation includes an inherent tension between successful rituals, fostering solidarity, and judicial independence, demanding autonomy. Our interest is to analyze how this tension is managed in actual practice by concentrating the analysis on situations when judges need to tackle epistemic uncertainty. Since the feeling of uncertainty lacks clear options for moving towards feeling certain, it opens up to invite the collective and thus illuminates the tension between ritual collaboration and legal independence.

2 It is important to note that the perception of rationality does not assume that the action is correct or reasonable in any absolute sense.

3 Since emotions are linked to action readiness, all emotions can have epistemic qualities, for example anger makes us more prone to attribute blame and take fast decisions, but is seldom defined as an epistemic emotion. For epistemic emotions, the action readiness is primarily cognitive as when evaluating information or settling on a decision. They guide and motivate without articulate expressive features or stirring attention in their own right.

4 While mistrust and distrust largely convey the same meaning in vernacular language, in this article we distinguish between them for analytical purposes. Mistrust stands for a general suspicion and skepticism. Distrust, on the other hand, accounts for a settled stance, usually based on experience or concrete information about the other person.

Methods and materials

This study is part of an international, comparative research project, including four countries, but this article builds solely on Swedish data. In Sweden, we shadowed and interviewed 47 judges and observed 70+ criminal cases (homicide, fraud, domestic abuse and more) in different stages in the legal process (preliminary investigation, lower and/or appellate court). Due to long-standing presence in the field and networks established in earlier research projects, we were also able to secure access to deliberations. We were interested in the seemingly contradictory foundation for legal decision-making as both independent and autonomous yet collective and interactional. This article builds specifically on data from deliberations from both district and appellate courts where the composition of professional and lay judges varies, making interactional aspects, such as different forms of trust and mistrust salient.

Researching subtle emotional processes in the closed and confidential setting of legal deliberation is a challenging quest that demands inventiveness and delicacy. Emotional displays are varied and delicate to interpret, and it is crucial not to assume that people's experiences match their emotional expressions (Bergman Blix, 2022a). In the legal professional field, emotions are shunned as distortive and biased and emotional displays, particularly in the Swedish setting are very subtle (Bergman Blix and Wettergren, 2018; Flower, 2020). To overcome these methodological obstacles, this study builds on extensive ethnographic fieldwork embracing observations of proceedings and deliberations as well as shadowing and semi-structured interviews with judges in both district and appellate courts. The methodological triad with court observations, shadowing and interviews allows for diverse perspectives on the collaborative/independent efforts of judges' decision-making process.

To capture the sometimes elusive emotional undercurrents of legal decision-making, we paid attention to different forms of emotion cues, such as facial expressions, tone of voice, body language and metaphors during court and deliberation observations and shadowing. We combined small talk during shadowing with more formal interviews conducted in close relation to the observed deliberations. The interviews are based on a semi-structured template with questions tailored to judges' professional vocabulary for emotions. They lasted between 40 min and four hours and were all recorded and transcribed verbatim. Depending on the participants' interest and the length of the case, we conducted one or more interviews with the judges during the course of the proceeding.

The coding generated a multitude of both inductive nodes from the field, such as 'formal deliberation' and 'decisiveness', and more deductive theoretical nodes, such as 'emotion management' and 'epistemic emotions'. Our initial analysis drew on nodes related to strategies for decision-making, emotion management, deliberation, discrete epistemic emotions (including doubt, certainty, uncertainty, trust, distrust, hunches and gut feelings) and metaphors. Through close readings of these nodes, we teased out central elements of judges' multifaceted decision-making processes. Situations that involved uncertainty stood out in their shifting of or intensifying the interactional dynamic, and in the next step, we focused on these situations, and how they evolved during deliberations, in relation to both epistemic and interactional ends.

To illustrate the intertwined collective and epistemic process, we present four deliberations that represent the full sample of uncertainty displays in our data from deliberations in Sweden. We selected two cases from each instance to illustrate the difference in generalized trust depending on the constellation of judges (professional judge vs. lay judge majority). The selected cases also represent different types of legal challenges to illustrate the variation in interactional success and failure. The overall intention with focusing on only four cases was to display the complexity and depth of deliberating uncertainty. In our empirical examples, we have changed details about the cases and use pseudonyms to protect anonymity and a five-year age interval to indicate professional experience.

Mapping legal decision-making as a collective process

Many decisions in court, particularly juridically simple cases, unfold in a routinized way (Hutton, 2006). When cases follow standardized routes with anticipated options, the decision often appears evident. In Sweden, these deliberations include the presiding/reporting judge describing the case, presenting the relevant legal prerequisites, expected interpretations, and often proposing a judgment for the others to (dis)agree on. Here, emotions of trust are less salient for the deliberative interaction. The standardized route along with the presiding judge's expert status and firm hold of the presentation of the case and possible options, leave little room for deviations (Bergman Blix and Wettergren, 2018: 124–125). Instead, we zoom in on cases where challenges of juridical or evidentiary matters instigate epistemic uncertainty. Expressing uncertainty presents both social risks and benefits. On the one hand, uncertainty exposes vulnerability by revealing ignorance that can lead to professional shame for not knowing or running the risk of being run over by someone who is already certain, on the other hand, uncertainty can be overcome in dialogue with others. By focusing on situations when judges share their uncertainties about legal or factual issues, what we call *uncertainty exchanges*, we will demonstrate, that the way uncertainty exchanges evolve depend on trust or mistrust between participants. We link generalized trust or momentary trust in fellow judges with shared attention and emotional attuning to overcome uncertainty. A successful uncertainty exchange fosters emotional energy and solidarity and facilitates a legal decision-making process ending in deliberate and eventually settled certainty. When uncertainty exchanges are hampered by mistrust, we instead see epistemic anxiety and alienation.

Uncertainty exchange in district court

In our first two examples of uncertainty exchange, we visit the district court, where the professional judges Valdemar and Asta enter their respective deliberations with constrained generalized trust in the lay judges. Their expressed uncertainty develops in starkly different ways, either prompting momentary trust or distrust, depending on how they delineate their uncertainty, and whether the feeling resonates with the lay judges.

The first case from a district court, *the mindless attack*, refers to an assault in public ruled by Judge Valdemar (35+) and three lay judges. The evidence for the attack and how it happened is good, but the question of intent becomes complicated since the defendant has an

intellectual disability.[5] Judge Valdemar's well-defined and articulated uncertainty about how to evaluate intent allows for an open discussion in his interaction with the lay judges in the deliberation:

> Judge Valdemar folds his arms over his chest: "The test we're going to do is: did he [the defendant] have control over his action?" Lay judge 1 agrees that is a difficult question. Valdemar unfolds his arms and tells the lay judges about the Samurai case [a famous supreme court ruling about a man assaulting his partner with a Samurai sword during a psychotic episode]. He has an open stance and gestures the story with his hands. He ends by emphasising that it is unlikely that the defendant in the Samurai case did not know what he was doing at all. Valdemar pauses and Lay judge 1 comments on the fact that the Samurai defendant was psychotic while this defendant has an intellectual disability. Valdemar [with interest]: "I understand *exactly* what you mean, and it is a *difficult question*." He wipes his face with his hand. "Yes, it's not easy, because what he says here, the prosecutor puts the words in his mouth and the defence too, it's *so uncertain*. I mainly want to look at what has *happened*." Valdemar now directs all his attention towards lay judge 1.
>
> *The mindless attack*, Judge Valdemar, 35+, deliberation

This extract illustrates an open exchange of uncertainty between Judge Valdemar and one of the lay judges. This is not common in our data from the district court, but shows that Judge Valdemar is uncertain about how to make sense and interpret the question about control over one's action in this particular case. Valdemar has prepared for this question before the trial by reading up on legal analysis about intent, but the issue still needs to be solved in relation to the particular facts of the case that was presented at the trial. In the start of the extract, Valdemar verbally opens up for discussion, but his folded arms signals independence and a reluctance to open up for the lay judges' input. When he perceives recognition of his own thoughts from lay judge 1, he singles out this particular lay judge as a confidant, unfolding his arms and directing his struggle to find a perspective or frame from which he can interpret the issue of control of one's action only towards him. As argued above, in contrast to doubt that is directed towards a certain issue or fact, uncertainty lacks stable alternatives and thus demands more unguarded reflection. Still, the uncertainty here relates to a well demarcated issue. Valdemar is not uncertain in a general way and he does not lose his control over the deliberation, he engages in an open uncertainty exchange through an instance of momentary trust in one particular lay judge.

However, we also have a few instances of judges demonstrating more extensive uncertainty. In the *drunken brawl case*, Judge Asta (60+) loses control over the deliberation in a rather ordinary case of assault. Two groups of underaged drunken youth had a fight and a member of one of them is accused of assault. Judge Asta, ruling with three lay judges, opens the deliberation by referring to one of the alleged incidents: 'This wasn't easy, but I can say, that I do think that the kick did happen.' Lay judge 3 replies straight away that he agrees. Judge Asta's openness to discuss and reflect demonstrates generalized trust towards the lay judges, but her lack of delineation within a legal frame, and their inability or unwillingness to make room for an uncertainty exchange, invites a power struggle between her and them when they do not share her uncertainty:

> Judge Asta refers to the event as "a drunken brawl", but Lay judge 1 opposes, arguing that the victims felt that they were attacked. Asta replies "I'm a bit uncertain myself, that is why I'm open to talk about this". Lay judge 3 inserts that the victims didn't fight because they wanted to fight but because they had to defend themselves, and lay judge 2 agrees, adding that the victim probably would have been "smoother" in his defence is he had been sober.
>
> *The drunken brawl*, Judge Asta, 60+, deliberation

As the quote shows, Judge Asta's uncertainty is not shared by the lay judges. Instead they take advantage of the vulnerability associated with her uncertainty and seize the opportunity to get their interpretation across. While Judge Asta starts to look in her books for relevant case law, the lay judges continue in the same vain and the discussion soon revolves around moral evaluations of the defendant's perceived behavior without referring to evidence of any kind. When Asta remains uncertain lay judge 2 asks her what she is hesitating about and Asta says a bit vaguely that it is the situation, referring to her initial comment that the case concerns a drunken brawl. Lay judge 2 replies that it was the defendants' group that started it by yelling, and lay judge 3 adds firmly that 'the situation is no excuse!'.

In this deliberation, Judge Asta's risk-taking in trusting the lay judges eventually makes her lose control and power over the deliberation. Lay judge 3 starts by corroborating Asta's wavering reasoning, but not her uncertainty. Instead, her uncertain stance makes him gain agency for his reasoning and soon the other lay judges agree with his confident stance. It can be noted that lay judge 3 demonstrated confidence in his decision from before the trial, he did not take any notes and sat with his arms folded across his chest the whole trial, but he needed Judge Asta's expressed uncertainty to gain agency. Her uncertainty made her lose her presiding authority and lay judge 3 could gain emotional energy and self-confidence to go against her (Collins, 1990).

In both *the mindless attack* and *the drunken brawl*, the professional judges entered the deliberation with a constrained generalized trust towards the lay judges as a base for articulating feelings of uncertainty to stimulate further knowledge seeking. As a future oriented emotion (Barbalet, 2019), trust is necessary for any form of knowledge exchange during deliberations. Lack of trust can signal doubt in others' competence or sincerity (Hawley, 2017), and the Swedish lay judge system invites trust in sincere public participation, while calling for mistrust in competence, since lay judges lack legal education. This ambivalence between trust and mistrust (Hawley, 2017) is indicated in Judge Valdemar's restrained body language (arms folded) at the start of the deliberation, with a gradually more open body language when he gains trust from the lay judge reflecting his own uncertainty

5 From 1965, the accountability requirement is no longer part of the Swedish Penal Code. A defendant suffering from severe mental disorder or disability is prosecuted on the same grounds as a sane defendant and potential adjustments are made at the sentencing stage. This differs from most countries where accountability is seen as a prerequisite for criminal liability. The suspension of the accountability requirement has complicated the assessment of intent in these cases, in particular with regard to the assessment of the defendant's subjective awareness of the situation and their actions. In general, the threshold for awareness is set very low and includes actions that are not purely reflexive.

(cf. Nussbaum, 2016: 94). In contrast, Judge Asta's unrestrained uncertainty forces her into an interaction depending on discretionary trust, and on the way she exposes her vulnerability and loses in authority. The uncertainty exchange between Judge Valdemar and one lay judge was delineated by a legal prerequisite (control of one's actions) and amounted to a sharing of uncertainty between Judge Valdemar and one of the lay judges, while Judge Asta's uncertainty around an empirical fact (trying to dissect a 'drunken brawl'), along with lay judges who felt confident in their certainty when entering the deliberation, grew wider during the interaction. This shows that uncertainty exchanges may build trust and amend uncertainty (mindless attack) while failed uncertainty exchanges can lead to status degradation, growing epistemic anxiety, and distrust (drunken brawl).

Shared attention, emotional attuning and emotional energy in appellate court

Turning to the appellate court, the trust conditions for uncertainty exchanges are different. In contrast to the district court, where the professional judge is in minority, they are in majority in the appellate court and share a generalized trust in their fellow professional judges' competence and sincerity (Hawley, 2017). Professional judges can of course dislike or distrust individual colleagues, but the long route to become a judge in the civil legal tradition paves the way for institutionalized trust in professional adeptness. Our analysis shows that the judges in a panel need to collectively create a *readiness* to decide during deliberations. To overcome uncertainty, the deciding momentum (readiness) builds on shared attention, i.e., joint efforts to dissolve remaining uncertainties, and emotional attuning. Emotional attuning refers to the transient emotional checking in with the people in the deliberation, which is used to validate own interpretations and assessments in relation to the other judges.

Turning to a case of gross violation of women's integrity,[6] we show how shared attention and emotional attuning converge into emotional energy and epistemic relief. The case involves Judge Pernilla (35+), reporting judge, senior Judge Bo (50+), chair, Judge Mårten (45+), and two lay judges. In interviews, all judges frame the case as typical for intimate partner violence and state that the case was rather straight forward and 'easy'. We call this case *the ordinary puzzle*[7]. When we enter the deliberation below, the judges have arrived at the seventh charge in the indictment. They have agreed on the defendant's guilt on all of the charges discussed so far, which has infused a positive energy into the deliberation (Collins, 2004), building confidence and momentary trust in the group. The seventh charge concerning a minor assault where the defendant allegedly pushed the victim, disrupts their decision flow, and opens up for an uncertainty exchange:

> A bit into assessing the seventh charge, Pernilla turns to the defendant's story about the incident. Teasing out how the different events during the day are bound up, she exclaims "I just don't get it!". Judge Bo, the chair of the trial, frowns and says that "Don't they have two totally different stories?" The third judge, Mårten, starts reading the ruling from the district court, and so does lay judge 1. Lay judge 2 joins the discussion about what has been said about the defendant pushing the victim and when it eventually took place during the day. Lay judge 2 raises another question about the series of events the current day. No one can answer his question and for a while, everyone is silent. Judge Bo then says that they need to account for a situation from earlier during the day to understand how the victim acts in this situation, they need to consider that the defendant blames the victim for getting caught by the police driving drunk, "he is mad at her". With a firmer voice he says that "It is not *her* being angry with him, it's *him* being angry with her" and this explains the situation. Both judge Mårten and Pernilla react strongly to this piece of information, they seem to get an epiphany from realizing how this charge relates to the earlier event. Bo concludes by asking if they all agree that the victim is pushed in this charge and that the defendant should be sentenced for a minor assault. No one disagrees.
>
> *The ordinary puzzle,* Judge Pernilla, 35+, Judge Bo, 50+, Judge Mårten, 45+, deliberation

In this excerpt, we can see how hampered sense making relating to contradicting oral evidence feeds into feelings of uncertainty and even frustration, displayed by Judge Pernilla. As all the judges seem to share the uncertainty raised from the incoherence between the testimonies given by the respective parties, Pernilla's initial outburst invites interest and orients the group's attention and discussion towards this particular issue (if and when the push takes place).[8] When judge Bo finds a common-sensical explanation for the reason behind the defendant's anger, their uncertainty can be resolved: 'It is not *her* being angry with him, it's *him* being angry with her', and all judges immediately agree that the defendant committed the offence. Although many aspects of the actual offence remain unclear, their shared feelings of uncertainty turn into epistemic relief and emotional energy. In contrast to how Judge Asta's unreciprocated uncertainty in *the drunken brawl case* lead to the deliberation falling apart, the open display of 'I do not understand' in this case, invited joint reflection from all the present judges (including the lay judges who were in minority). Their shared uncertainty generated a collective effort to solve the puzzle and when the right piece was found, all judges displayed a readiness to decide. Essentially, this episode demonstrates how uncertainty exchange fosters momentary trust and emotional energy.

In another case in the appellate court, concerning a man who is accused of attempting to murder his wife, the *nonvalid evidence case*, we can see a similar uncertainty exchange leading into a collective build up (shared attention and emotional attuning) prompting a readiness to decide and reach a judgement. In this case, we meet the reporting Judge Ester (45+), the presiding Judge Albert (45+), Judge

6 Gross violation of women's integrity is a Swedish criminal construct aimed at repeated intimate partner violence. In this particular case, the indictment includes several charges, mainly assault and minor assault.

7 Despite instantiating an ordinary puzzle, the case also contained typical features of 'word-against-word' with a general lack of eye-witnesses to the incidents, which lead to uncertainty regarding several issues during the deliberation.

8 Note that this question is very similar to the issue in the drunken brawl case.

Felicia (30+), still under training, a court clerk and two lay judges. This case involves several legal issues that makes it unusual and arduous to handle. In addition, the victim, the wife of the defendant, was apparently afraid to talk about the incident and her testimony is restrained in details, while the corroborating evidence is weak. Overall, the deliberation is characterized by hesitation and several successive protracted uncertainty exchanges. Assessing the question of intent, the discussion eventually zooms in on how to evaluate the (lack of) supporting evidence. Judge Ester emphasizes that the weaknesses of supporting evidence is 'quite unsatisfying', wordings that echoes throughout the deliberation, pointing towards a lack of lucidness that generates uncertainty:

> Turning to the other judges, Judge Ester says: "I would like to discuss this as an open issue". Judge Albert affirms Ester's overall assessment of the evidence, but also tones down her worry, assuring that they are not lacking any important information to make a well-founded decision. When saying this, he looks at Ester with a gesture of open hands and finishes the sentence with higher pitch as in a question. Ester repeats: "I am very open for discussion, I have not made up my mind". The discussion moves back and forth as all judges and lay judges give their input on the case. On several occasions, someone in the panel say that they think there is enough evidence to find the defendant guilty. Coming back to the low evidentiary value of the corroborating evidence, the clerk joins the discussion and argues that "It falls back on the prosecutor" and that "It is not sufficient investigation to come to that conclusion" [that the defendant had the intent to kill his wife]. No one responds immediately and the clerk goes on talking for a while longer. Eventually, judge Felicia says that she is prepared to agree, stating that she now sees the weaknesses of the evidence against the defendant in a different light than before. While there is no verbal agreement to acquit the defendant, after this point everyone makes statements in this direction, emphasizing "beyond reasonable doubt", and when judge Albert says that they need to release the defendant from detention, no one disagrees.
>
> *The nonvalid evidence,* Judge Ester, 45+, Judge Albert, 45+, Judge Felicia, 30+, deliberation

Judge Ester's repeated invitation, 'very open for discussion', is a common way for judges to signal uncertainty. The phrase demonstrates a leap of trust towards an uncertainty exchange, involving emotional attuning with the other judges in the deliberation, as Ester wants to know their stance on the case to move her own thinking forward. Being the reporting judge, Ester has the greatest responsibility for the preparatory work paving for a focused and successful discussion. Her exposed vulnerability by inviting an uncertainty exchange at this point of the trial is met with affirmation and cautiousness in the following discussion. Judge Albert tries to build a collective readiness to decide [assuring that they have all the information they need] while being careful to not shut down Ester's uncertainty quest [open hands combined with higher pitch as in a question]. In this exchange, emotional attuning is manifested through a clear interest in other judges' point of view but also a seemingly strong search for consensus.

An important difference compared with the *ordinary puzzle case* analysed above, is the lack of epistemic relief or emotional energy in reaching this decision. Instead, the atmosphere is saturated by anxiety and solemnity burdened with responsibility. At the end of the deliberation both Albert and Felicia articulate their belief that the defendant actually intended to kill the plaintiff but assure that their *beliefs* are not enough to hold him responsible. The decision to acquit the defendant ends in joint concern for the victim:

> But we can't use that to convict him. I think it's too weak. But I think it's difficult because I have my thoughts about how it's really like and I think she's in great danger and it doesn't feel good.
>
> *The nonvalid evidence*, Judge Felicia, 30+, deliberation

While it is common in our data for judges to say that it is easy to acquit, emphasizing the rule of law and stressing the risk of convicting an innocent person, in this particular case, dismissing the case also entails a strong worry for the plaintiff's safety. The severity of the crime and the personal beliefs of *what really happened* take away some of the emotional energy and confidence that mutual decisions commonly entail. While Collins (2004: 49) stresses moral righteousness as an outcome of successful rituals, the emphasis on a separation between moral versus legal evaluations in the (Swedish) civil legal system seem to hamper emotional energy and solidarity, at least momentarily. The judges' moral investment lie in following a correct legal procedure, but their concern for the plaintiff's welfare blocks the emotional energy that their joint 'correctness' should entail.

Reaching autonomous certainty, solidarity or alienation

Our examples so far have illustrated uncertainty exchanges as profound to the judgment of the case. As we have seen, uncertainty exchanges, in many instances, move the deliberation closer to feeling certain. However, as we will turn to next, in legal decision-making, certainty is an agile and versatile emotion. Even when legal professionals feel certain already when entering the deliberation, this feeling needs to be thoroughly scrutinized due to the high demands on objectivity and impartiality. In fact, in our overall material, most judges are already *leaning towards* a decision when entering the deliberation, demonstrating what we here call *agile certainty*. Agile certainty is highly valued among the judges in our study and judges emphasize that during court proceedings their opinions of a case 'can turn a bit all the time' as 'you get different pieces of the puzzle' (Lydia, 35+, appellate court). In the deliberations, discussions that promote 'twists and turns' are seen as stimulating, and disagreement, as well as a reliance of discussions to further, or even break, one's chain of thoughts 'foreshadows for quality in judging' (Ruben, 55+, appellate court). Our analysis shows that the possibility for uncertainty exchanges during the deliberation is seen as a crucial stepping stone to secure a feeling of having reached a thoroughly reflected decision, a *deliberate certainty*. While deliberate certainty indicates readiness to decide, it does not necessarily entail the conviction and confidence of *settled certainty*. For the feeling of certainty to settle, the judges at times need temporal distance from the uncertainties and nuances that have aroused during the deliberation.

Similar to the uncertainty exchanges, these different levels of certainty are formed in collaboration with the other judges as a way to ensure independent decision-making. Illustrating the dependence of the collective for moving through different levels of certainty, we return to judge Bo in the *ordinary puzzle case*. Valuing the input from his fellow judges, he says that the other judges made him more

confident about his interpretation of the evidence in a charge where the defendant was accused of throwing a mobile phone on his partner:

> I decide…I would say I make up my mind when I decide in the deliberations. Because I want to hear everyone else's possible views. For example, now when the lay judge said "It must have been a hard throw". Well, that was good, it's an argument for *my* standpoint and before that I hadn't finished those thoughts.
>
> *The ordinary puzzle*, Judge Bo, 45+, post-hearing interview

This quote shows how Judge Bo came to the deliberation feeling agile certainty ('I want to hear everyone else's possible views'). His agile certainty moves into a deliberate certainty as confidence about his standpoint is gained through a collective confirmation ('when the lay judge said "It must have been a hard throw"'). Accounting for his independent decision-making process, Judge Bo uses the personal pronoun ('decided'), however the collective has a central role as the panel assisted him in 'finishing [his] thoughts'. As we can see, the input from the other judges can bolster the judge's sense of autonomy, resulting in *autonomous consensus* where both the individual and the collective are accentuated. Judge Bo's deliberate certainty is saturated with confidence and ease. For this seasoned judge, balancing independence and collaboration seems effortless. The more junior Judge Pernilla, the reporting judge in the same case, is more cautious in articulating this balance. Her collaboration leans on gratitude towards the senior judges in the panel since she, as a junior judge, 'learns things all the time'. Emphasizing that judges Bo and Mårten are 'diplomatic', she assures that:

> Sure, you can be dissenting if you want to, if you have a very [lowers her voice] strong … opinion of something. It may sound wrong to say that … that you shouldn't be [breathes in heavily] [dissenting]. If you want to rule in a certain way, you should DO SO. But there is a point to… [hesitates, resigned] that one can reason with both of them [Bo and Mårten]. They are open to reasoning. An open-minded atmosphere [raises her voice] and you can also sometimes be the devil's advocate and turn things around [lowers her voice]. But also, very pragmatic.
>
> *The ordinary puzzle*, Judge Pernilla, 35+, post-hearing interview

In this quote, we can see how Judge Pernilla balances the value of judges' autonomy and independence with more collegial and pragmatic aspects of the legal decision-making process. Pernilla expresses a threshold for having a dissenting opinion, yet her breathing and lowered pitch indicates that this pull toward consensus (Arango-Muñoz, 2013) is a challenging opinion as it counters the ideals of legal independence and autonomy. While pointing towards individual space for decision-making ('an open minded atmosphere') and room for opposing assessments ('playing the devil's advocate'), judge Pernilla also underscores trust and solidarity with her fellow judges as they are both 'open to reasoning'. Trusting that her fellow judges care for her independent process, increases solidarity with both with the panel of judges and their decision. Taken together, the quotes by Judge Pernilla and Bo are elucidative examples of how independence, as embedded in the social interaction of deliberations (Bergman Blix, 2022b), can produce solidarity (Collins, 2004).

However, not all deliberations end in solidarity and bolstered autonomy. For comparison, we return to Judge Asta in the district court and the *drunken brawl case*. Asta was uncertain about how to interpret 'the situation', but eventually resigned and agreed on a guilty verdict. As a professional judge, she is *not* uncertain about sentencing in these simple cases and in most deliberations, lay judges leave these assessments for the professional judge to decide. In this case, the most opinionated lay judge 3, nonconformally wants to maximize the possible fine. Asta tries to reason with him, arguing that the predefined sanction levels should be applied. When he refuses, she turns her back to him and tries to reason with the other lay judges: 'But what do you *think*?!' When that does not work either, she gives up but expresses her frustration: '*Screw it*, we'll give him the higher amount then. I'll feel bad about it, but we have to pass the judgment.' Asta tries to regain control, but fails and decides to go along with the unusually large fine. Since the lay judges' arguing based on personal opinions worked at first, the discussion gets stuck in this moral frame devoid of legal relevance. For Judge Asta, the deliberation becomes a struggle and exposing her uncertainty leads to diminishing her autonomy. In this situation, Asta started out trusting her fellow judges, but ended in stark distrust and conflict. In an interview a week later, judge Asta takes the blame for the disagreement herself:

> [laughing] I can almost feel ashamed, because it was ridiculous in a way I think … and it turned into an unfortunate discussion, because I tried [to convince the lay judges] for quite some time, and I should have stopped it earlier, but now I didn't. […] Sometimes stupid wins. That's how it is, and there was nothing I could do about it.
>
> *The drunken brawl*, Judge Asta, 60+, post-hearing interview

The resignation and lack of agency in this quote is telling of a collective process ending in non-solidarity and alienation. The failing uncertainty exchange impedes the possibility to reach a deliberate certainty and the decision becomes associated with professional shame and individual failure. The interaction between Judge Asta and the lay judges culminate in hollow consensus where pragmatic considerations conquer independence and autonomy.

Going back to Judge Ester and the *nonvalid evidence case*, the collective process during the deliberation steers her epistemic process in another way. In an interview after the court proceeding, judge Ester depicts her struggling with whether the defendant, the man who was accused of attempting to murder his wife, should be acquitted or not. Describing how she felt that the weaknesses of the evidence got more and more worked in' during the deliberation so that, in the end, she felt certain (deliberate certainty) that they should acquit the defendant. In an interview the week after, her anxiety about the decision (as depicted in a previous section) is gone. Trusting the process, Ester reckons that:

> But IN the deliberation, I was probably still a little unsure about [*the defendant*] in particular, I *was,* that was what I was *struggling* with. Because I had felt before that, or it was my thought that, that it was probably still *enough* [evidence to find him guilty]. Erm, but then I think we had a good discussion there as well, and everyone also brought up the insecurities everyone HAD about this and then I think it's… it WAS exactly like, like it turned out to be [acquitting him]. […] And, it makes me feel confident in that

> I cannot do this any other way, any other way would turn out *completely wrong*, and that makes it so much *easier after all*.
>
> *The nonvalid evidence*, Judge Ester, 45+, post-hearing interview

One week after the deliberation, Ester still remembers her initial leaning towards (agile certainty) finding the defendant guilty, and her own uncertainty struggle when they scrutinized the evidence during the deliberation ('a good discussion there as well, and everyone also brought up the insecurities'). At the same time, the judges' collective anxiety and moral worries that characterised the ending of the deliberation (as seen in the quote by judge Felicia on page seven) are gone and replaced with settled certainty and assurance ('it makes me feel confident', 'any other way would turn out *completely wrong*, and that makes it so much *easier after all*'). When everyone has shared and discussed their own uncertainties, they feel that they have sorted it out from multiple perspectives, the collective effort makes the decision seem evident. At this point, her decision is imbued with a naturalized ease and confidence that closes further inquiry. The high amount of issues that generated uncertainty along with moral worries for the victim that hindered collective emotional energy and epistemic relief at the end of the deliberation, have now receded into the background, providing room for professional pride in doing a good job (Ester, 45+): 'You feel confident with how to DO in an objective, legal way'. In retrospect, the collective deliberative process produces trust in her decision and reproduces solidarity with her fellow colleagues; together they can form legally correct ('in an objective, legal way') autonomous decisions.

Discussion

The ultimate aim of legal deliberations is to take decisions, and previous research has shown resoluteness and decisiveness to be valuable assets for individual judges, while dwelling or regret over made decisions are considered inapt (Törnqvist, 2017; Bergman Blix and Wettergren, 2018). As we have argued in earlier work (Bergman Blix, 2022b), the legal decision-making process is grounded in micro-decisions and the legal procedure in itself provides a structure where judges' decisions are mapped out in different sections. When judges have brought one question to an end by reaching certainty about an issue, they are able move forward in the decision-making process, usually by going into uncertainty or doubt regarding another question. Looping in and out of uncertainty/doubt and certainty becomes a prominent feature of the legal decision-making process (Törnqvist and Wettergren, 2023).

In this article we show that legal decision-making needs to balance uncertainty and certainty through 'uncertainty exchanges'. If the judges get stuck in uncertainty, they lack the vigor to decide, but if they solely feel certainty, they accept any proposal without scrutiny (cf. de Sousa, 2009). This emotional balance applies for legal challenges[9], as in the evaluation of intent in the *mindless attack case*, as well as challenges due to evidential weaknesses, as in the *ordinary puzzle case*. When judges rule in panels, building momentum to decide becomes a collective enterprise. By adapting Collins' (2004) interaction rituals, we link shared attention, emotional energy and solidarity to this balancing act, and demonstrate the significance of trust to understand ritual success or failure. In sum, epistemic emotions underpin legal decisions, and independent decision-making demands a collective effort.

The first two parts of our analysis focus on uncertainty exchanges in deliberations in lower and appellate court settings. While doubt is regarded as a crucial resource in legal decision-making and highly valued by the judges in our study, uncertainty involves vulnerability and jeopardize core legal values as autonomy and independence. To understand how uncertainty exchanges unfold in legal deliberation trust becomes key. Previous theorizing has stressed self-trust as important for rational action (Barbalet, 2011; James, 1879), a trust in one's ability to perform and find a solution. We find that in these collaborative settings, social trust is also important for the drive to stay open-minded, and to negotiate a collective, autonomous decision. Trust frames the uncertainty exchanges both as an entry point, referring to a *generalized trust or mistrust* for professional and lay judges respectively, and as an interactional achievement, generating *momentary trust* or *distrust*.

Uncertainty exchanges are potent vehicles for judges to move from uncertainty into certainty by exploring difficult legal issues collectively. Through shared attention and emotional attuning, successful uncertainty exchanges render emotional energy and epistemic relief, emotional undercurrents needed to create a readiness to decide and reach a judgement. As our data shows, uncertainty exchanges sometimes fail, turning into power struggles, diminished autonomy and growing distrust. In these cases, emotional energy and confidence is replaced with professional shame, alienation, and forfeited pragmatism. In other cases, uncertainty exchanges succeed in that they lead to deliberate certainty, where legal matters have been collectively solved and agreed on, yet the emotional energy is low since the outcome of the legal decision is perceived as morally ambiguous.

Our last analytical part explores the role of certainty in legal decision-making. Earlier theorizing argues that certainty 'freezes inquiry' (de Sousa, 2009: 146), it is a feeling one wants to hold on to. As we show, in legal decision-making, certainty follows a more complex route, both in the need to delay and scrutinize one's certainty, and in demands to balance independent certainty with collaborative consensus. Certainty should be agile during deliberations, and deliberate in forming decisions. The latter results in a potential temporal gap between deliberate certainty as a valid inference to take action (decide), and settled certainty, saturated with confidence and ease, when imminent uncertainties and moral consequences have subsided.

By analysing epistemic emotions, primarily certainty and uncertainty, at play in a collective setting, we show that these emotions coalesce with and depend on social emotions of trust and solidarity. Both generalized and momentary trust in fellow judges is shown to bolster autonomy. The emotional energy from the collective deliberative process produces trust in own (independent) decisions and (re)produce solidarity with fellow colleagues.

In relation to our findings, we would like to propose three endeavours for future research. First, interactions in the legal decision process form in and through power and status relations. A closer

9 The emotional dispositions involved in the epistemic process of interpreting legal texts can be seen as more complex since it evolves during a longer temporal perspective, including the training process in law school and in judge training.

scrutiny of how social positions influence the interactional frames of legal deliberation and link with rational emotions of ease and confidence may provide important insights to how trust/distrust and uncertainty/certainty develop. In deliberations, uncertainty is seen as productive means to substantiate knowledge, but it is also entwined with vulnerability. Since trust infuse social power between the dis/trusting and dis/trusted persons (Hawley, 2017), an analysis of status-trust can further our understanding of the dynamic of shared attention, emotional attuning and emotional energy in uncertainty exchanges. Second, our findings suggest that the interface between legal and moral frames can instigate, balance and complete epistemic processes by consorting epistemic and collective emotions. Lastly, and partly overlapping with the previous suggestion for future research, we would like to push for studies to explore how and when morality enters the legal decision-making process. While common sense in many instances provide a safe guard to keep legal decision-making relevant to reality, our data also suggests that it is often in relation to common sense moral evaluations enter. These last two questions emphasize the importance of international comparisons between different legal systems. Since morality and common sense are built into the legal process in different ways in different legal traditions, comparative studies are needed to study how and in relation to which questions moral evaluations and common sense enter into deliberations.

Data availability statement

The datasets presented in this article are not readily available to protect anonymity, and due to confidentiality of legal deliberations. Requests to access the datasets should be directed to Stina Bergman Blix, stina.bergmanblix@uu.se.

Ethics statement

The studies involving humans were approved by Regionala etikprövningsnämnden, Uppsala. Since they approved this project, they have made organisational changes and now the address is: Etikprövningsmyndigheten, Box 2110, 750 02 Uppsala, Sweden. The studies were conducted in accordance with the local legislation and institutional requirements. Written informed consent for participation was not required from the participants or the participants' legal guardians/next of kin because the study included tape recorded oral informed consent.

Author contributions

SB: Conceptualization, Data curation, Formal analysis, Funding acquisition, Investigation, Methodology, Writing – original draft, Writing – review & editing. NT: Conceptualization, Data curation, Formal analysis, Investigation, Methodology, Writing – original draft, Writing – review & editing.

Funding

The author(s) declare that financial support was received for the research, authorship, and/or publication of this article. This research has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme awarded to Bergman Blix (grant agreement no 757625).

Conflict of interest

The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

The author(s) declared that they were an editorial board member of Frontiers, at the time of submission. This had no impact on the peer review process and the final decision.

Publisher's note

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frontiers | Frontiers in Sociology

TYPE Original Research
PUBLISHED 18 November 2024
DOI 10.3389/fsoc.2024.1411155

OPEN ACCESS

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RECEIVED 02 April 2024
ACCEPTED 04 October 2024
PUBLISHED 18 November 2024

CITATION
Bosma AK (2024) Being in two minds: accommodating emotional victim narratives in Dutch courtrooms.
Front. Sociol. 9:1411155.
doi: 10.3389/fsoc.2024.1411155

Being in two minds: accommodating emotional victim narratives in Dutch courtrooms

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When Victim Impact Statements (VISs) were introduced in Dutch criminal law in 2005, victims were required to limit their statement to the impact of the harm done by the crime. In 2016, a major amendment lifted this restriction. Even though the statement may (still) not be used as legal evidence, critics worried that the change in scope would invite heightened levels of emotion into the courtroom, which would in turn undermine magistrates' objectivity. A comprehensive evaluation of the old/restricted legislation and a follow-up analysis of courtroom observations showed that the Dutch system was rather well-equipped to accommodate the expressive function of the VIS before 2016. These studies pay some attention to emotional labor to show how emotional narratives were being dealt with in the courtroom. Recently, a new evaluation of the VIS (post-2016) has been carried out. Observation data of this recent study is qualitatively analyzed and compared to previous findings. The paper also gives insight in the way magistrates manage emotionality in the courtroom in relation to perceptions of objective decision making. Results show that, despite the fact that balancing emotion work with safeguarding objectivity introduces feelings of uncertainty, magistrates accommodate empathy between themselves and the victim, but also open up a space for empathy between the defendant and the victim.

KEYWORDS

observation, victim impact statement, empathy, emotion work, emotional narratives

1 Introduction

The evolution of victims' rights, Dutch and global developments alike, has been characterized by an increasing emphasis on the victims' agency (Bosma et al., 2021; Pemberton and Bosma, 2024). The victim impact statement (VIS), which requires the victim to actively narrate their victimization experience and its aftermath in court, is now often presented as the pinnacle of victims' rights—the primary vehicle to accommodate victims' voice (Bandes, 2022). Yet, criticism regarding the fit between emotionally laden stories and the (so-called) objective nature of criminal legal procedure dominates the debate about introducing new and furthering existing victims' rights. While the VIS is deemed the prime exemplar for finding closure for victims, it is also the most problematic in the range of victims' rights in terms of magistrates' emotional labor. In this paper, I analyse observations of cases in which victims presented a VIS to see how magistrates balance victim acknowledgment on the one hand and uphold legal objectivity as a core value of judicial decision-making on the other hand.

1.1 The grand narrative of the courtroom: objectivity

In this paper, I hope to show why magistrates behave the way they do and what their motives are in cases where a victim impact statement is presented. To that end, it is helpful to explicate the so-called grand narrative of the criminal justice setting. A grand narrative is the meta-narrative that seeks to place existing practices in a position of progress toward or regress from the originating principle or ultimate end (Bernstein, 1991, p. 102). Put simply, a grand narrative is the 'story' that explains, rationalizes and legitimizes the state of affairs (Mäkelä and Björninen, 2022). Even though grand narratives are subject to change and may vary widely over time and in different cultures, grand narratives may be seen as pervasive scripts.

The current persistent script of modern western ideals about the rule of law and legal decision-making favor objective reasoning over emotional influence, and foreground the notion of (positivist) objectivity (Bergman Blix and Wettergren, 2018; Maroney, 2011). The purpose of the court is to decide in matters of conflict in an objective, unbiased, efficient, depersonalized and dispassionate way so that the conflict can be ended. This is illustrated by the appealing image of lady justice. Lady justice weighs matters on an objective scale, while blind to bias and personal distractions.

The traditional conception of objectivity is the direct opposite of subjectivity in the sense of bias and inclusion of personal standpoints and is achieved through typification and standardization (Rogers and Erez, 1999). Indeed, the law aims to structure social relations in forms of claims and counter-claims under established rules that are just "there" (Shklar, 1964). Remaining objective is aided by the internalization of certain legal fictions (Pemberton and Bosma, 2024). Generalizations—that are not necessarily true in the real world—standardize attitudes that promote objectivity. The presumption of innocence would be the clearest example: criminal justice authorities behave as if the defendant is in fact innocent, as not to be biased or drawn in the trap of tunnel vision.

Within the grand narrative of the law, magistrates and other legal professionals embody the "anonymous civil servant" (Dijkstra, 2017). Occupational norms require magistrates to suppress personal feelings, show courtesy and patience and foster remorse (Field and Tata, 2023; van Oorschot et al., 2017), shame and guilt in the offender while discouraging anger, contempt and indignation. Especially when dealing with legal representatives, who are familiar using the highly complex legal language, magistrates seem to construe an air of impartiality and neutrality by ruling out perceptions of subjective involvement. As Roach Anleu and Mack (2005) describe it, the judge "responds to the legal argument, not to a citizen's particular demands or desires" (p. 591).

1.2 Opening up: creating a space for empathy

The above relates to what legal professionals would defend is objectivity. However, the reality diverts from the grand narrative. *Doing* objectivity work in practice has become a matter of balancing engagement and detachment (Bergman Blix and Wettergren, 2018). Lady justice is still blind in current day practice, but rather than not empathizing with anyone, she empathizes with *everyone*. Empathy is used to understand what is at stake for litigants (Bandes, 2009). Those who still frame empathy as a threat against objectivity may have conflated the term with sympathy. Törnqvist (2022) distinguishes the two in a very clear manner: "Empathy implies a knowing of the other person's experience but does not necessarily include taking any stance on, or caring for, that person or his or her emotions. In sympathy, care is central and we experience someone else's plight as mattering categorically because we experience that person as mattering." (p. 266).

The shift toward acknowledging emotions' place in the courtroom gains more support in legal scholarship and practice. Emotions slowly came to be seen as being not only inevitable, but also legitimate and helpful in judging (Bandes et al., 2021). It is exactly the capacity to judge as an emotional being with a *rechtsgefühl* that makes a human judge to be preferred over an automated machine (Schnädelbach, 2018). Managing emotions in relation to judging can be referred to as emotional labor (Hochschild, 2003 [2012]). Emotional labor is performed both to manage other subjects' emotions and own emotion, with the goal of producing a proper state of mind.

1.3 Emotional narratives: victim impact statements

The narration of victimological experiences presents a crucial challenge to the grand narrative of objectivity that the law tries to uphold (Pemberton and Bosma, 2024; Shklar, 1990). Previous research has demonstrated that magistrates' attitudes change in the presence of the victim (Haket, 2007), which is often evaluated as a threat to objectivity. However, the re-emotionalization of law (Karstedt, 2011) gradually created more space for interaction with victims and their stories, such as via victim impact statements.

Research on victim acknowledgment stresses the importance of legal personnel's empathy. Victims' likelihood of deciding to continue to engage with the legal process as well as their overall satisfaction or perception of procedural justice has been linked to the level of empathy that victims experience throughout the criminal justice system (Goodrum, 2013; Rudolfsson, 2022). It is certainly true that empathic feedback is necessary for victim impact statements to reach their desired outcome, to account for their acknowledgment and possibly even to help the victim in their way toward healing (Bandes, 2022).[1] Proponents of the VIS have emphasized that not only the victim benefits from acknowledgment, but that the educational value of the VIS, as it might elicit empathy and even remorse on the defendant's part, also benefits the defendant and society as a whole (Bibas and Bierschbach, 2004).

This does not mean that now that emotions are more widely recognized as deserving a place within the law, judges, as if magically, know how to balance the pre-requisites to be both empathic and respectful toward victims and remain objective in decision making (Rudolfsson, 2022). It is well documented that professionals find working with victims' emotions both rewarding and demanding (Roach Anleu and Mack, 2005; Rudolfsson, 2022; Shuler and Sypher, 2000). Emotionally intense interaction is something that is not

1 The potential of healing should be regarded with care as the potential for closure is easily overstated – which may be harmful in itself, see Bandes (2022).

included the training of many judges, and does not become habitual in the everyday experience of magistrates, as the number of VISs that are presented are relatively low in comparison to the number of cases that they judge.[2]

1.4 The Dutch victim impact statement

In this paper, I study how magistrates manage courtroom interaction in relation to the victim impact statements (VIS) in my home country, the Netherlands. This requires some background information about the Dutch criminal proceedings and the legal implementation of the VIS in particular.

Dutch criminal proceedings adopt a largely inquisitorial approach. Victims can exercise certain rights in the capacity of '*procesdeelnemer*'—which roughly translates as 'participant to the proceedings'. Victims only have legal standing as a party in their capacity of civil claimant (art. 51f CCP). In contrast to adversarial proceedings, the judge not only manages the proceedings, but also has an active role in scrutinizing the evidence. It should be noted that evidence is laid down in the written case files, the *dossier*, which have been very carefully compiled by the prosecution before the start of the trial, and made available to all parties. The result is that interrogation of witnesses and victims in court is very rare. Rather, their statements have been taken *pre-trial* by the police or investigative judge, and the transcripts are in the dossier. The large majority of trials take place in the absence of the victim.

Criminal legal proceedings are not bifurcated. The hearings include the presentation of the indictment, the interrogation of the defendant, witnesses* and experts*, the overview of the case files, the presentation of the VIS*, the prosecutor's address, clarification of the civil claim*, the statement of the defense, counter-pleas of the public prosecutor and defense, and the defendant's last word.[3] The placing of the VIS has a performative function to elicit reactions from judge, prosecutor and defendant.

In terms of courtroom configuration, it should be noted that the victim is usually located with the audience, in the front row of the public gallery. This gallery is, in most cases, not fenced off from the central performance zone. The defendant faces the judges (right in front) and public prosecutor (desk slightly ajar from the judges' bench on their right).

The Dutch criminal code of procedure allows everyone qualifying as a victim to submit a written victim statement (art. 51b CCP) to the public prosecutor and request to add it to the case files, while only victims of crimes that carry a maximum sentence of 8 years of imprisonment or higher, as well as some crimes specifically named by the legislator, can deliver an oral statement in court (art. 51e CCP). Until recently, only oral-VIS-eligible victims were explicitly invited to present a statement (in writing, orally or both—the statements need not be the same). For that reason, hereinafter, when referring to the VIS, I refer to both modalities, but will describe the legal requirements of the oral VIS.

Eligible victims must be aged at least 12 years, younger children may be represented by their parents. Surviving relatives of the deceased victim qualify as victims according to art. 51a CCP, and thus do not represent the primary victim but deliver their VIS in personal capacity. For purposes of manageability, the legislator has limited the number of oral presentations in court to a maximum of 3. The victim may assign a representative to deliver the VIS. In practice, if the victim assigns a representative, this is often a victim support worker or the victim's lawyer. These representatives often help drafting a written version of the VIS and prepare the victim for the presentation thereof. As there are no reliable statistics about the number of VISs, there is no reliable information about the prevalence of VISs read by representatives either. My general experience is that if victims opt for the oral version of the VIS, they are encouraged to present the VIS themselves.

The VIS is a relatively new concept in the Netherlands, first introduced in the code of criminal procedure in 2005. Since its introduction in 2005 and evaluation in 2010, some major amendments have been implemented, most notably regarding the scope of the VIS.[4] Before 2016, victims were only allowed to include the impact of the victimization on their life in their statement. Opinions on evidence, guilt, the desired sentence and other remarks were not allowed, as they were thought to interfere with the presumption of innocence and pose a risk for the judges' impartiality. Despite minimal interruptions when victims tended to go beyond the allowed scope (Lens et al., 2010), many victims experienced the scope as impeding their wish to freely recount their experience of victimization and its aftermath. In 2016, the VIS became unrestricted in its scope. What has not changed is the influence that the VIS may have on legal decision making: it cannot be used as evidence, and may only "accentuate" the decisions that were taken on the basis of the rest of the casefiles.

The implementation was first evaluated in 2010 (Lens et al., 2010). Lens and colleagues found that the VIS meets a clear need for victims of crime. Especially victims of the more severe crimes appreciated the possibility to submit a VIS. The choice of modality was a matter of personal preference. Victims who were concerned they might not be able to control their emotions in court choose to submit a written VIS, while victims who stressed the importance of being able to voice their own opinion in court used the oral VIS. Communication with the offender and the judicial authorities was the main reason for participation. Although the law at the time did not allow for it, influencing the outcome was also important for the victims interviewed. Submitting an oral or written VIS turned out to have a small positive effect on the perceived control over emotional recovery and the experience of procedural justice. Delivering a VIS did not diminish the victims' anxiety or their anger toward the offender.

2 There are currently no reliable statistics about the number of VISs in Dutch criminal procedure, because of inconsistent registration, but it is clear that cases with oral VISs presented are the exception to the rule.

3 *If applicable, especially witness and expert interrogation is quite uncommon, as evidence is gathered in pre-trial investigations.

4 Other noteworthy amendments relate to the number of surviving family members who are allowed to present an oral VIS during trial (increased from 1 to 3 in 2012) and the 2021 law that introduced (1) the inclusion of stepfamily as representatives of the victim, (2) the requirement for the defendant to be present during a trial in which a victim presents a VIS and the fixed moment for the VIS during trial.

Data from the same study was used to study the expressive function of the VIS (Booth et al., 2018). Booth and colleagues found that the Dutch approach to the VIS was characterized by a rather flexible approach, that allows for a greater scope for victims to tell their story compared to implementations of the VIS in adversarial countries. On several occasions, victims were provided with multiple opportunities to tell their story. In terms of being heard, the study found that magistrates (especially prosecutors) directly acknowledged the content of the VIS and provided defendants with an opportunity to directly respond to the victim's statement, thereby facilitating important occasions for demonstrations of remorse and further acknowledgment from the defendant.

A second evaluation of the VIS—with its new scope—has been carried out only recently (Kragting et al., 2022), 6 years after the extension. This evaluation does not directly investigate emotional labor in the courtroom. In between the two evaluations of the VIS (post 2016), I carried out an experimental study with magistrates responding to video vignettes of victims delivering a VIS (Bosma, 2019). Data suggested that magistrates were performing emotional labor in response to the VIS. They were actively creating a calming atmosphere in the courtroom so that the victim would sufficiently be at ease to deliver the VIS, while at the same time suppressing own emotional expressions:

> "And sometimes that is a little… you would like to, as a person, you would like to say more. But you should stay in your role as a judge and you should protect your impartiality. And thus, you cannot say too much. I needed to get used to that again." (p. 157).

Furthermore, results from the same study suggests that magistrates struggled to find the right empathic balance, especially if the victims' narrative is a sad one. They explained that they would empathize more with the victim than they, beforehand, were prepared to, because they would "go through it with" the victim (p. 163).

2 Materials and methods

My current analysis is based on observation research that was carried out as part of the VIS evaluation study in 2022 (Kragting et al., 2022). From November 2021 to June 2022, 25 criminal legal hearings where victims were supposed to present an oral VIS were attended.[5] In two cases, the victim did not present a VIS, but in the 23 cases which did include the presentation of an oral VISs, 42 VISs were presented. Nine victims were related to the defendant (family $n = 4$; acquaintance such as neighbor, colleague $n = 5$). Time that had passed between victimization and court hearing varied widely: median: 18 months, ranging from 24 days to 40 years.[6]

Observations were geographically spread across the Netherlands (7 out of 10 judicial districts) and across the two types of divisions that deal with VIS-eligible cases: the single-judge criminal division ($n = 10$) and the three-judge criminal division ($n = 13$).[7] Crimes included homicide, arson, aggravated assault, sexual crimes, deprivation of liberty, threat of homicide, stalking, robbery, war crimes,[8] and traffic offences.

Observers made notes on the following themes. First, the way the presiding judge offered the opportunity for presenting the VIS (e.g., words used to give the floor to the victim, instructions on where to stand, etc.). Second, the VIS itself: observers noted to whom the VIS was addressed (e.g., the court, the defendant, society in general, the primary deceased victim or different), which topics the VIS addressed (such as the [emotional] impact, the crime itself, criminal evidence, culpability of the defendant, desired punishment, procedural justice). Third, observers attended to verbal and non-verbal responses to the VIS from the judge(s), the public prosecutor, and the defendant. Last, observers took notes on the victims' emotional display before, during and after presenting the VIS.

I analyzed the notes from the observers qualitatively, looking for cues that indicated that magistrates performed emotional labor. This means that I looked for notes on emotional expressions by any of the parties (including the victim), on the perceived atmosphere in court, and particularly for notes that signaled a potential change in atmosphere or emotional expression. For example, notes on judges offering a glass of water or a 'way out' were helpful indicating emotional labor, as were notes on the public prosecutor repeating victims' words. Gestures and other non-verbal information were also taken into account. Emotional expressions could easily be deducted from non-verbal behavior: e.g., shame from averting gazes, speaking very softly and making oneself as small as possible. I analyzed spaces of empathy by coding notes that were indicative of active listening, dialogue, growing mutual understanding, and affirmative communication. I structured my findings in parallel to the chronology of the criminal hearing.

3 Results

3.1 Preparations

Dutch legal proceedings are characterized by a strong emphasis on pre-trial investigations. The trial hearing is thus a carefully pre-planned ritual that leaves little room for spontaneous interruptions. Oral presentation of statements is limited compared to common law practice. Like the rest of the trial, victim participation is

5 Victim Support the Netherlands notified researchers about a case in which the victim intended to present an oral VIS.

6 The case in which 40 years passed between the date of the crime and the date of the hearing is a case about war crimes committed abroad. Another case in which a notable amount of time passed between the date of the crime and the date of the hearing, namely 25 years, was a case about sexual assault of minors.

7 No notable differences were found between districts. The Netherlands is a relatively small country. Although the judiciary is divided in 10 districts, they are governed by national laws and policies. Practice may differ slightly, but no notable differences were found in the observations.

8 Related to the MH-17 case. Flight MH17, departing from Amsterdam heading towards Kuala Lumpur, crashed on July 17, 2014 in the Ukraine due to a missile impact. All 298 people on board were killed. 91 surviving family members presented an oral statement during trial (www.courtmh17.com). For more information on victim participation in this case, see Buiter et al. (2022).

also carefully pre-planned. The victims' first contact with the judiciary is when the public prosecution service registers the case and sends out a registration form with inquiries about the victims' wishes: does the victim want information, to claim damages, to deliver a written and/or oral statement? If the victim does not return the form,[9] they will not receive additional information about the course of the proceedings.

In general, all communication up until the trial between the judiciary and the victim is in writing, and is hardly to be called a 'dialogue'. As Ryan (2023) explains, bureaucratic forms shape what is registered and how the personal identity—of, in this case, the victim—is documented in the eyes of the state. Whether the victim is registered as an active participant depends on the form. This is only different for victims whose case is tried by a three-judge criminal division and who are eligible to perform a VIS: they are invited (again, through the same form) to meet the public prosecutor prior to the hearing. This meeting is used to prepare the victim for the trial and to introduce them to the court house. In practice, only a very small minority of victims make use of this opportunity. For victims who do not meet the prosecutor prior to the hearing, the hearing is often their first introduction to the court, which may be quite a daunting experience in itself. The preparation of the VIS itself is up to the victim. For some, it is always in the back of their minds, because they are unsure how to deliver the VIS (Kragting et al., 2024).

3.2 Announcement of the VIS

The presiding judge opens the hearing and hands the floor to the different speakers. All parties communicate via the presiding judge. At the beginning, the presiding judge opens the hearing, often welcoming all parties individually, also tending to the victim. It happens that the judge seeks confirmation about the victims' intention to present the VIS at the beginning of the hearing, but that depends on the circumstances. After the indictment is presented by the prosecutor, the defendant is interrogated by judges and prosecutors, and the judge has given an overview of the case files, the floor is handed to the victim for the presentation of the victim impact statement. Up until that moment, there interaction with the victim is virtually absent in most cases.

When the floor is handed to the victim, the victim is not always sure what to do: stay at their place in the public gallery or move around, speak freely or read a written VIS aloud. They might even leave the presentation to a representative such as a victim support worker. The observation data does not show that the presence of a victim support worker or victim's lawyer alleviates the victim from this uncertainty. They may have discussed the presentation of the VIS prior to the hearing, but given the choice where to stand and what to do at that exact and conceivable important moment, seems to evoke uncertainty in the victim nonetheless.

The observation data shows that the judges often encouraged victims to at least try to present the VIS themselves, because they had chosen to attend the hearing and had the intention to present a VIS. Judges explicitly left open the possibility to change their minds: if they would feel they could not do it—even if half way or near the end—the judges said they could still hand the presentation over. Judges were actively trying to foster a calm environment in which the victim could present the vis. By normalizing the feeling of being upset, they would communicate that the victim was allowed to show these emotions. However, the following quote from one of the observations also shows awkwardness in face of intense emotions:

> *Judge:* "It is conceivable that this hearing will stir emotions, and that is understandable, and this can happen in a VIS. You can express your emotions, but not without limit. It is essential that everyone who speaks can say whatever they want, from their own perspective, and that they feel free to tell their story. If you cannot control your emotions, you may retreat from this courtroom to the main hall of the building. That happens more often, that is not a strange thing to do at all."

First, by saying that emotions cannot be expressed without limit, it is unclear what the judge means. Relating the quote to my previous research (Bosma, 2019), I would take it to mean that (extreme) anger, especially when expressed in the form of swearing, very firm accusations of guilt or a direct addressal of the defendant (rather than speaking via the presiding judge) would not be allowed. My research showed that judges are much more lenient in allowing expressions of sadness, and—as the current observations also show—generally take their time to let victims finish their story, even if they are overcome with emotions and need to regain their breath before they can continue. To the ear of a nervous victim who has previously never visited a courtroom, however, the statement may cause confusion.

Secondly, and this was noted frequently in other observations as well, the statement shows that judges tend to try calming victims by giving them an 'escape' if necessary: leaving the courtroom. Although the main hall of the building—to which most courtrooms give direct access—might indeed be a calmer place in the sense that it is free from discussion about the case and it takes the victim away from the defendant, it should be noted that the hallway is far from calm. It is often a busy place where litigants, lawyers and public move around. It is possible for victims to reserve a private room to withdraw to, but this option is fairly unknown and was never mentioned in the observed trials.

This shows that as soon as the victim is invited to actively participate in the trial, feelings of uncertainty arise. The victim is uncertain how to perform the VIS. Judges do not fully alleviate this, as there are no clear guidelines on how to resolve these uncertainties.

3.3 Presentation of the VIS

The observed cases show the presentation of the VIS proceeded in a civil and calm manner; interruptions were rare. In some cases, especially when the defendant had been quite talkative and inclined to interrupt the magistrates during previous discussions of the case files, the judge urged the defendant to listen very carefully, and if necessary, warned them to not interrupt.

> "*One more thing:* you just had a lot of time to talk and I have let you finish your story. Now [victim] will talk, and I don't want you to interrupt her."

9 They may react form-free, but most victims who actively engage with the criminal proceedings make their wishes known using this form.

In another case, where the defendant and his lawyer had spoken very accusatory about the victim, the judges had not reprimanded them before the VIS, neither had there been any interaction between victim and judge before the VIS. However, before the judge gave the floor to the victim, the judge addressed the victim and said:

> "A lot has been said about you just now. But you are not the defendant. Just say what you want to say. You can just take a seat and talk."

This statement recognized that the remarks that were made about the victim might have hurt, and that the victim might have experienced uncertainty about the value of the statements made about them. The judge empathized with the victim, without elevating the victims' plight as mattering categorically (sympathy—see Törnqvist, 2022), because the judge did not stop the defendant from defending their case in the way they choose.

While presenting the VIS, magistrates were often watching the victim or the case files, sometimes taking notes, reading along the earlier submitted written version of the VIS. Prosecutors were focused on taking notes and watching the defendants non-verbal response to the VIS. Although to the observant's eye magistrates were actively listening, to the victim who might be unfamiliar with the composure of the court, the appearance of the magistrates—especially those looking up, seemingly lost in their thoughts and those reading case files on their computer screens—might have given an impression of indifference.

The defendant, who was seated in front of the victim presenting their VIS from their place in the public gallery, did not often turn around. Rather, defendants often sternly kept their gaze at the judges. This, however, should not necessarily be interpreted as a sign of disregard for the victim. Defendants were instructed to speak via the presiding judge, and thus for that reason may remain their position facing the bench. Moreover, many defendants seemed to be nervous, especially in relation to listening to the VIS, and might be unsure how to react. In one observed case, the judge asked the victim to show their scars. The defendant did not turn to see before the judge asked him explicitly whether he had seen the scar, and was quick to turn back. Again, the way this interaction is valued by inexperienced court-users may highly differ from this interpretation that is informed by knowledge about court habits and procedures.

In the observed cases, victims were not cross-examined as a result of what they presented in their VIS. Cross-examinations at trial are quite rare in the Netherlands. The civil law tradition puts a lot of emphasis on pre-trial investigations, so that most witnesses are interrogated by either police or the investigative judge. Moreover, as the VIS may not be used as evidence in the determination of guilt, there seems to be little reason for cross-examination. However, many people worried that the extension of the VIS in 2016 would put the victim at risk of secondary victimization because VISs that would address the topics of guilt and proof would lead to cross-examination. In one observed case, the defendant's lawyer used information from the VIS to pose questions about the claim for damages, but the judge did not question the victim about this, although in the announcement of the VIS, the judge said:

> "She will tell what it did to her. Everyone will then get the opportunity to ask questions – also to you [victim]."

In another case, the defendant's lawyer responded to the VIS by requesting to adjourn the session for further investigations, namely the cross-examination of the victim-witness by the judge commissioner. This request was denied.

3.4 Defendants' responses to the VIS

Judges acknowledged the presentation of the VIS mostly by shortly thanking the victim. In most cases, the judge then gave the floor to the defendant to react. The reactions that defendants gave varied widely. The defendants who pled guilty were often quick to take up their responsibility and say sorry. Some clearly came across as ashamed, speaking softly and under their breath, almost inaudible, sitting in their chair, bend forward with sunken shoulders. Even when defendants did not plead guilty, some acknowledged the harm that was done.

> "So harmful. I genuinely did not want this to happen."

The judge did not allow the defendant to directly address the victim, and interrupted the defendant when they tried to do so:

> *Judge:* "Please address me. What would you like to say to her?"
>
> *Defendant:* "I feel really sorry. It should never have happened. Sorry for all the harm."

Other defendants were showing less self-reflection and regard for the victims' misfortune. In a case of sexual groping, the defendant remarked:

> "Well, I can say now: I'm sorry. 16 months have passed since [the crime], and the victim has now recovered from it as well."

The judge interrupted by saying that might not be entirely true, looking at how impacted the victim is in court. Later, the judge added that the defendants statements about himself needing to recover may sound harsh to the victim. The victim was nodding in response in the background, indicating that she interpreted this as acknowledgment for her harm.

When the defendant remained silent after the presentation of the VIS, some judges tried to encourage the defendant to open up. The VIS gave the judge an opportunity to empathize with the victim themselves, but also to encourage empathy between victim and defendant. Emotion work is 'triangulated': calming the victim after the VIS has an impact on the defendant, and calming the defendant has an impact on the experience of the victim in court.

In the following example, the judge was explicitly asking about the feelings of the defendant (rather than questions about evidence and case facts).

> *Judge:* "I'm curious what the defendant thinks."
> *Defendant:* "No."
> *Judge:* "How does this make you feel?"

> *Defendant:* "I do not want to talk about that. I cannot say anything about that."
>
> *Judge:* "You clearly feel uncomfortable though. They [the victims] would like a response. That is quite understandable."
>
> *Defendant:* "Sorry Mrs. Judge (then he looks down)."

When there was no reaction from the defendant in another case, the judge filled in what the victim might have wanted to hear, namely an apology. The following quote again is a reflection of a judge empathizing with the victim—putting themselves in the victims' position. By explaining that this is how a hearing works, the judge also respects the defendant's choice not to, but signals that making an apology and showing remorse would be the right thing to do, stressing what would generally be seen as 'good behavior' from the defendant (Tata, 1997).

> "Yes, that is difficult because you won't get a 'sorry'. I understand you will be disappointed, but this is how a hearing works."

3.5 The prosecutorial response to the VIS

The next step in the criminal procedure is for the public prosecutor to give their address. Especially in the lengthier trials, the judge adjourns the hearing to "cool out" (Booth, 2012) before the prosecutorial address. The break gives everyone some time to process the emotions that were triggered by the VIS.

The VIS is positioned in the criminal proceedings before the prosecutorial address because this allows the prosecutor to take the VIS into account. Booth et al. (2018) found the prosecutorial response to be a unique and key indicator of the accommodation of victims' voice in the Dutch criminal proceedings. The current observations show that the prosecutorial response is still very much present today.

In a Danish study, Johansen et al. (2023) found that police officers, prosecutors, victims' counsel and judges each interpret victims' feelings according to their own professional roles and motivations so as to gain an overview of a case and the actions required of them in relation to it. Prosecutors have a role that clearly differs from the judge's role. In the Dutch system, prosecutors are magistrates and are thus not directly opposite to the defendant, but often their rationale aligns with the victim's interest. They can therefore (cherry-pickingly) use some of the information as brought forward by the victim (similar findings in Bandes, 2022). The observations showed that prosecutors sometimes quote, and often rephrase, parts of the VIS.

> "As we just have heard in the VIS (…)"

The prosecutor may take a more judgmental attitude in relation to the defendant on the basis of the VIS than the judge can.

> The public prosecutor said that the defendant had behaved like a "bastard", as "is evidenced by the VIS that had just been read by the victim."

The prosecutor thus comes closer to sympathizing with the victim than the judge, but as it is only instrumental, it cannot be argued that the prosecutor places the victims needs as a categorical rule. The prosecutor also made instrumental use of emotions in the observed cases. First, complimenting the way victims had delivered their VIS, thereby fostering relief and feelings of pride in the victim. Second, they promoted fear and guilt in the defendant by explaining the seriousness of the situation. At the same time, this could also have a signaling effect with regard to the seriousness of the case toward the judges, underlining the message of their address.

> "I think you are all affected by what [victim] just told". The public prosecutor repeated the serious consequences that the assault had on the victims' family life and work life, and recounted that even in delivering the VIS it became clear how much difficulty the victim still has in the act of talking due to the injuries. The public prosecutor quoted one sentence from the VIS in particular: "I want to go back to how it was, but that is no longer possible."

The first sentence of the second example, which the prosecutor phrased descriptive, was clearly meant prescriptive: people *should be* shocked by the seriousness of the injuries that the victim had sustained. The prosecutor did not say he was angry, but there is a clear indignation about what happened. According to Milka and Lemmings (2017) the magistrates' anger may act as a proxy of state- and societal anger, and that seems to explain this fragment of the observations. The direct quoting of the victim about the impossibility of returning to the state prior victimization underlines this.

Shock is more often used as to signal a prescriptive state of anger. In one case, the prosecutor discussed camera evidence, and linked it to the VIS in which the victim had told to have watched that CCTV footage.

> "From the VIS it was clear that the victim was shocked by the video-evidence. I was also shocked."

Victims seemed to feel acknowledged by the remarks of the prosecutor. One victim broke into tears when the prosecutor remarked the following, while making eye-contact with the victim on the public gallery.

> "I got the chills while reading [about the injuries]". "I saw emotions in the claimant, the victim was being consoled just now. Still, six years after the incident, it impacts him."

3.6 Managing the defendant's emotions after the VIS

After the VIS has been delivered and the prosecutor has given his address, the civil claim for damages is discussed. In this part of the proceedings, there were again possibilities for the victim to speak up. But also afterwards, during the statement of the defense, counter-pleas of the public prosecutor and defense, and the defendant's last word, the victim's perspective seemed to linger in the discussion. For example, in a case when the defendant explained his actions one more time and said that he "panicked," the judge promptly responded, saying:

> "And so was [the victim], I think. You can imagine quite clearly that when this happens to you, you feel less safe."

When the defendant in a case of assault that led to very severe injuries told the judge that after the court case, he wanted to say sorry,

the judge asked why not right here and now. The defendant asked his lawyer whether this was the right moment, and then turned around:

> "I am sorry. I never wanted you to be like this. I regret it a lot. It should have never happened this way."

Referring to the victims' need to find answers also proved to be a way for the judge to get the defendant to talk more about their behavior. Because of the VIS, the judge is not only empathizing with the victim, but also increasingly learning about the personal motivations of the defendant. In a case of arson, the defendant was accused of setting the house of his family on fire. One of his sons did not survive the fire. The defendant had a hard time opening up and talking about the case.

> *Judge:* "There are co-victims in this room, your kids and your ex-partner. Do not you want to clear some things up, for them?"
> *Defendant:* "No."
> *Judge:* "Answers may be important for your family."
> *[…]*
> *Judge:* "Would you like to say something to the victims?"
> *Defendant:* [remains silent, but nods and cries].
> *Judge:* "Might they have the slightest right to? To hear something from you?"
> *Defendant:* "I do not know what to say to alleviate the pain. I'm not sure I was aware of it. Of course, I'm so very sorry, but if I say that, it does not feel enough. It feels contradictory even. I find it difficult… I did think about why it happened of course, and how I felt then, and I do not want to use that as an excuse."

Afterwards, the defendant was much more open and tried to answer the judges' questions at greater length. However, this strategy did not always turn out successful. In a case of stalking, the defendant starts off showing some regret, stating that his behavior was due to frustration. As the hearing progressed, the defendant seemed to grow frustrated with the procedure and requests to talk more about his behavior. He stated that he does not want to be in one room together with the victim, and said that he was "done looking at the victims' face," even though he was not directly facing the victim and did not try to communicate with the victim apart from these complaints.

When defendants got rude or accusatory toward the victim, the judge interfered but not very sharply. An example was already discussed in paragraph 3.2 where the judge showed dismay about the "talk about the victim" prior to the VIS. In one case, where the atmosphere had been quite tense, the defendant consistently referred to the victim in very rude terms, such as "whore" or "prostitute." He asked the judge whether he could "ask this whore a question," to which the judge responded that this was not allowed, and that the victim did not have any other role than being the civil claimant. Prosecutors take more room to correct the defendant. The prosecutor said it "triggered" them to hear the defendant's lawyer state that the victim is to blame. She then turned to the victim to confirm that it was not provocation.

> "For the victim, I wanted to state this very explicitly."

These examples of a judge trying to get the defendant in a talkative mood relate to cases in which the victim and offender were (once) related, they were family or ex-partners. In case victimization is a result of escalated family contact, it seems that judges try harder to establish a space of indirect dialogue between victim and offender. In a case of escalated play-fighting between an uncle and his nephews, the uncle played far too rough with the boys and ended up assaulting their mother. Having heard the victim refer to emotions of fear in the VIS, the judge asked the defendant whether the children would need to feel afraid of him in future encounters. The defendant answered:

> "No, they shouldn't be, but I can understand if they are".

The judge then proceeded to ask whether the victims (mother and children) were to blame to any extent for what happened, which the defendant explicitly denied. Questions like these do not only an empathic judge, but also allows for mutual empathy between victim and offender.

3.7 The verdict

In a three-judge division, the verdict is delivered 2 weeks after the closing of the hearing. Interested parties may attend the delivery of the verdict. This tends to happen only in high-profile cases. In a single judge division, the verdict is delivered right after the hearing is closed, so that parties are still present. In the observed cases, this provided the judge with an opportunity to explain the decision in person. In a case of acquittal, the judge turned to the victim. The judge explained that the acquittal did not mean that they thought the police report that the victim filed was illegitimate. The judge asked the victim whether everything was clear. This does not require the judge to move outside their professional objectivity, because the case was already closed. Even if the defendant or public prosecutor would appeal, another judge would try the case. So, if the case is closed, the judge seems to have more room to interact with the victim. In one of the observed cases, the judge asked the victim:

> "How does this all sink in? What did you hope to get out of this hearing? How will you feel when you travel home?

The extra attention that the judge may give to the victim at the end of the trial may enhance victims' perceptions of procedural justice and legitimacy of the court, because they feel heard.

4 Discussion: being in two (or more?) minds, establishing empathy

The above observations show that magistrates may find themselves in two minds when performing accommodating the victims' voice in the courtroom. Being in two minds first of all referring to the uncertainty of how to perform their role as objective decision-maker in relation to the emotional content of the victims' narrative. Criminal justice professionals may feel like they have to move "outside" their professional objectivity to do accommodate the victim (Rudolfsson, 2022). Like in many other countries, many legal scholars in the Netherlands have drawn attention to the VIS's potential to disrupt magistrates' objectivity, especially when the scope of the VIS was extended in 2016. As the number of VISs that are presented are

relatively low in comparison to the total number of cases tried, many magistrates have not yet got the opportunity to get fully accustomed to the practice of the VIS. Laws and guidelines are characterized by a rather flexible approach (Booth et al., 2018; Lens et al., 2010), leaving magistrates high levels of discretion on how to manage the courtroom proceedings.

There is yet another interpretation of being in two minds. The current study shows that magistrates make an effort to empathize with both the defendant *and* the victim. In the literature, the courtroom is sometimes described as a "three-team interplay" (Flower, 2018; Goffman, 1956), referring to the judge, the prosecutor and the defendant. The victim, who is not a party to the criminal proceedings in Dutch law, but does participate in the proceedings, presents a new three-team. Up until the designated moment for the VIS, there is little attention to the victim in the room. However, that changes as soon as the judge announces the VIS. Judges will try to create a safe moment isolated from the rest of the hearing in which the victim may speak uninterruptedly: the three-team of judge, prosecutor and victim.

After the victim finishes presenting the VIS, the judge opens up a space in which empathy may be established. Not only between victim and magistrate, but also between victim and defendant. The defendant does not communicate directly with the victim, but via the presiding judge. This gives the judge a position in which emotional labor is at its peak: the judge creates room for empathy, but has to guard for negative reactions. After the closing of the VIS, the presence of the victim and the message of the VIS lingers. The judge often uses it to create an atmosphere in which the defendant gets more talkative. The verdict does not always explicitly address the statement, but if the victim is present during the delivery of the VIS, there is another opportunity for the judge to empathize with the victim.

Overall, the study confirms that judges empathize with everyone rather than with no one. The distinction between empathy and sympathy is useful to see that this empathizing does not threaten the magistrates' objectivity. If magistrates would sympathize—placing the needs and perspectives of one party categorically superior to another's—that would be problematic. However, there were multiple examples in this paper where the judge or prosecutor showed equal regard for all parties perspectives.

Concluding, this paper shows that judges accommodate the victims' voice in Dutch criminal law, while succeeding in remaining objective decision-makers. However, it should be noted that the sample of observations is in a sense a very skewed sample: most victims do not reach the point of delivering a VIS in court. Apart from the justice gap due to low attrition rates—especially in cases of sexual assault—even victims whose case is tried, many choose not to present an oral VIS or do not get the opportunity to do so, either because of eligibility or because something went wrong in the preparation phase. Because the oral VIS seems to be a turning point in the trial for including the victims' perspective, it remains to be seen to what extent their voice is accommodated for the written VIS and to what extent victim acknowledgment is achieved if there is no VIS delivered.

Data availability statement

The data analyzed in this study is subject to the following licenses/restrictions: The dataset is owned by another organization (WODC, The Netherlands). Permission was granted to analyse the data for this purpose, but the dataset cannot be shared. Requests to access these datasets should be directed to abosma@nscr.nl.

Ethics statement

Written informed consent was obtained from the individual(s) for the publication of any potentially identifiable images or data included in this article.

Author contributions

AB: Writing – original draft, Writing – review & editing.

Funding

The author(s) declare that no financial support was received for the research, authorship, and/or publication of this article.

Acknowledgments

The author thanks Marleen Kragting, Freija Augusteijn, Nieke Elbers, Mijke de Waardt, Joris Beijers, Antony Pemberton and Maarten Kunst as well as the Research and Documentation Centre of the Dutch Ministry of Justice and Security for sharing their research data (Kragting et al., 2022).

Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Publisher's note

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frontiers | Frontiers in Sociology

TYPE Original Research
PUBLISHED 05 December 2024
DOI 10.3389/fsoc.2024.1488786

OPEN ACCESS

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RECEIVED 30 August 2024
ACCEPTED 20 November 2024
PUBLISHED 05 December 2024

CITATION
Plesničar MM (2024) The challenges of being imperfect: how do judges and prosecutors deal with sentencing disparity.
Front. Sociol. 9:1488786.
doi: 10.3389/fsoc.2024.1488786

The challenges of being imperfect: how do judges and prosecutors deal with sentencing disparity

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Legal decision-making aspires to be objective, a principle regarded as foundational to justice, public trust, and the legitimacy of legal outcomes. However, this ideal is often challenged by the reality of human judgment, which is influenced by subjective factors such as emotions, biases, and varying cognitive strategies. This paper investigates the psychological challenges faced by legal professionals in the context of sentencing, drawing on data from studies involving judges and prosecutors in Slovenia. Through workshops, interviews, and focus groups, the research highlights substantial inconsistencies in sentencing practices, even for similar offences. These disparities reveal the limits of objectivity within the judicial process, prompting legal professionals to reflect on the systemic and individual factors driving variability. The analysis focuses on how judges and prosecutors react to these discrepancies, examining a range of emotional and psychological responses—including the rationalization of decisions, the pursuit of consistency through personal "sentencing codes," and reliance on collegial input to cope with the absence of formal guidelines. The analysis draws on concepts from cognitive dissonance theory, deliberate ignorance, emotional labour, and personality types to explore how professionals reconcile the ideal of objectivity with the imperfections of human judgment. It highlights the profound emotional toll that discrepancies in sentencing can take on decision-makers and how these emotional reactions influence their professional identity and approach to justice. By contextualising these findings within the sociology of emotions, this paper emphasises how the emotional realities of legal professionals shape their responses to perceived failures and impact their capacity to deliver justice. Ultimately, this study aims to foster a deeper understanding of the human aspects of judicial decision-making, underscoring the need for systemic reforms to mitigate disparities, provide support, and promote consistency in sentencing practices.

KEYWORDS

sentencing, judges and lawyers, objectivity, emotions, disparity, cognitive dissonance, prosecutors

1 Introduction

Acknowledging one's own failures is universally challenging, a truth that resonates across various personal situations and professional fields. This difficulty is particularly pronounced in professions where decisions carry significant consequences, such as law and medicine.

For legal professionals, especially judges and prosecutors, confronting and admitting imperfections in their decision-making processes is fraught with complexity. The act of sentencing involves not only applying legal principles but also navigating a labyrinth of personal judgment, societal expectations, and ethical considerations. This multifaceted process

makes it essential yet particularly difficult for legal professionals to recognise and address their own shortcomings.

In the context of sentencing, the stakes are high. The outcomes of sentencing decisions profoundly affect individuals' lives and can have far-reaching implications for justice and public trust in the legal system. The challenge of acknowledging failure in this context is compounded by the ideal of objectivity that underpins legal decision-making. While the ideal suggests that sentencing should be impartial and consistent, the reality often reveals significant disparities influenced by various subjective factors.

Thus, understanding how legal professionals deal with the recognition of their own failures and the associated emotional and professional challenges is crucial for improving both individual and systemic practices. By integrating theoretical insights with empirical data, this paper aims to provide a comprehensive understanding of how legal professionals confront and manage their own imperfections in the context of sentencing, and the implications for justice and fairness in the legal system.

This paper aims to explore the dynamics of acknowledging and responding to imperfections within the sentencing process. It begins by presenting the problem of personal fallibility in professional settings, particularly focusing on the emotional and practical challenges faced by legal professionals in sentencing. The first part of the paper provides an overview of the conceptual underpinnings of sentencing, including the ideals of objectivity and the complexities of personal and systemic factors that influence sentencing decisions. It also examines how professionals handle failure and the emotional toll associated with acknowledging imperfections. Second, the methodology is discussed, followed by a portrayal of research conducted in Slovenia, highlighting the observed disparities in sentencing and the reactions of judges and prosecutors to evidence of their own inconsistencies. This section details the emotional responses, coping strategies, and the role of deliberate ignorance in managing the recognition of imperfections. Next, the discussion ties together the theoretical and empirical findings. It explores how the personal and systemic challenges of acknowledging imperfections affect legal professionals, and discusses the implications for sentencing practices. The discussion will also address how professionals' reluctance to embrace systemic reforms and their development of personal guidelines reflect broader themes of managing failure and seeking improvement.

2 Two backstories

To fully understand the challenges faced by legal professionals in the context of sentencing, it is essential to consider two interrelated narratives: the conceptual framework of sentencing itself and the broader human experience of dealing with failure. Sentencing is not merely a technical process of applying the law; it is deeply intertwined with complex social, psychological, and philosophical dimensions. The act of sentencing requires judges and prosecutors to navigate a web of legal principles, societal expectations, and personal judgments, often under the pressure of achieving an ideal of objectivity that is difficult, if not impossible, to attain. At the same time, the professionals involved in this process are human beings who must grapple with their own imperfections and the emotional toll that comes with making decisions that have profound consequences for others.

By examining both the conceptual underpinnings of sentencing and the ways in which individuals cope with failure, we can gain a more comprehensive understanding of the emotional and professional challenges that judges and prosecutors face. This dual focus allows us to see not only the structural factors that shape sentencing decisions but also the deeply personal struggles that influence those who administer justice.

2.1 Objectivity and sentencing

Sentencing, the process of deciding on the appropriate punishment following a criminal procedure, is undoubtedly one of the more visible phases of administering justice (Ashworth, 2015; Morgan and Clarkson, 1995) and is often said to be one of its most challenging parts (Ashworth, 2015; Maroney, 2012). Moreover, sentencing falls simultaneously at the end of the criminal proceeding and the beginning of the penal experience, thus combining very different conceptual fields. Philosophical, sociological, historical, and, importantly, psychological aspects of punishment are added to this equation, consequently producing a process that is as complex as it is important (cf. Tata, 2020).

Ideally, sentencing should be an objective process, grounded in legal principles and devoid of personal bias. However, empirical studies have consistently shown that sentencing decisions are influenced by a range of subjective factors, from personal experiences to cognitive biases (Dhami et al., 2015; Maroney, 2012).

Many authors point out that sentencing is not a solely rational (Ashworth, 2015; Lovegrove, 2006) or a solely objective process. The judge's decision is predetermined by more or less detailed statutory or other criteria. Retorting to reason, the judge determines whether a more or less severe form of criminal offence has been committed, which mitigating or aggravating circumstances are present, what is the past case law in similar cases, and similar factors that shape the court's final decision. However, the final decision on the sentence is much more than just a mathematical operation, a sum of rationally evaluated factors. The synthesis of all these factors requires surpassing a purely rational level and requires a certain intuitive knowledge, which, along with a rational reflection, offers a final decision. Dhami et al. (2015) refer to this concept as "quasirationality"—requiring the sentencer to work in the middle ground between the analytic and intuitive modes of cognition. It is as complex as it sounds; understanding everything it entails seems like a never-ending endeavour (Marder and Pina-Sánchez, 2020; Ulmer, 2012).

The question of objectivity in sentencing most typically comes through as the exploration of disparity. Disparity in sentencing is the occurrence of unwanted and unwarranted differences in sentencing that we can usually attribute to offenders' personal characteristics. It is thus the opposite of sentencing consistency (Pina-Sánchez, 2015)—which still allows for different sentences to be passed. However, these differences arise from legally and morally acceptable circumstances (such as a different level of the defendant's culpability and a different severity of crime). Inquiries into disparity in sentencing range from complex studies into its prevalence to more psychologically oriented studies into why it occurs (Sporer and Goodman-Delahunty, 2009). On the one hand, we aim to measure the extent of disparity—between judges and between courts or regions within a given jurisdiction. Generally, most such studies' prevailing result is that there is much

more disparity than expected and that even measures taken to limit it (such as restricting sentencing discretion) rarely lead to the desired outcome (Drápal, 2020; Scott, 2010). On the other hand, disparity is dissected and tied with potential prejudice and bias towards gender, race, nationality, or other personal characteristics (Cho and Tasca, 2018; Freiburger, 2010; Mustard, 2001; Skeem and Lowenkamp, 2016; Van Wingerden et al., 2014)—which would be the very opposite of objective legal decision-making.

Significant efforts have been made in the past against increasing evidence on sentencing disparity to curtail its detrimental effects or eradicate it completely. In this context, the main area of interest is structuring sentencers' discretion, thus answering the question of how much room is/should there be for the decision-maker to form the sentence (Brown, 2019; Drápal and Plesničar, 2023; Roberts, 2009). Legal systems vary from offering sentencers limited discretion (e.g., narrow sentencing tables, mandatory sentences) through offering ways of structuring discretion (e.g., sentencing guidelines, judicial self-regulation, statutory ranges) to broad discretion (e.g., vague statutory ranges). The extremes are less likely to be found in modern systems, but there are many different and constantly changing variants (Kurlychek and Kramer, 2019). Moreover, discretion in sentencing does not lay only in the hands of the judge but is distributed—sometimes haphazardly—to other participants as well, most notably the prosecution (Bushway and Forst, 2013).

Furthermore, given the complexity of the decision and the intersection of disciplines at which sentencing lies, sentencers might be even more prone to typical decision-making mistakes than in other decisions throughout the legal process. Most notably, the effects of cognitive bias, especially anchoring on sentencing, have been explored and confirmed. Judges seem to be as prone to cognitive bias as ordinary people, and anchoring—basing your decision on a previously randomly set anchor—substantially impacts their decisions (Guthrie et al., 2007; Mussweiler et al., 2012; Rachlinski and Wistrich, 2017). Moreover, the context of emotions in the courtroom has been the basis of some pivotal studies, changing our understanding of how (non-) emotional judges and other professionals are or should be (Anleu et al., 2016; Jamieson and Tata, 2017; Karstedt et al., 2011; Maroney, 2012).

Finally, it is important to recognize that one of the central goals of sentencing is to individualise the punishment to fit both the defendant and the specifics of the crime (Bierschbach and Bibas, 2016; Frase, 2001; Plesničar, 2013). This principle of individualisation is rooted in the idea that justice requires more than a one-size-fits-all approach; it demands careful consideration of the unique circumstances surrounding each case. Factors such as the defendant's background, the severity of the offence, and the presence of mitigating or aggravating circumstances all play crucial roles in shaping a sentence that is both fair and appropriate. Individualisation is emphasised differently in different systems, with continental European systems being quicker and more open about it being a guiding principle in sentencing than common law systems (Drápal and Plesničar, 2023).

However, a delicate balance exists between ensuring that sentencing is sufficiently individualised and avoiding the pitfalls of arbitrariness—opening doors to disparity. On the one hand, if sentencing guidelines and statutory frameworks are too restrictive, they can stifle the judge's ability to tailor the sentence to the nuances of each case, leading to outcomes that may seem unjust or overly rigid. On the other hand, if these guidelines are too lenient or vague, they can open the door to excessive discretion, which may result in inconsistent and potentially biased sentencing decisions. Thus, the challenge lies in finding the right balance—a framework that provides clear and consistent guidance while still allowing judges the flexibility needed to account for the individual characteristics of the defendant and the crime. None of the existing sentencing systems find this balance perfectly, but some do it better than others. Slovenia, which we will use as an example in the discussion below, falls within the second group.

2.2 Dealing with imperfection in a legal and sentencing setting

Professionals across various fields are often held to high standards, with little room for error. In professions where decisions have significant consequences, such as law or medicine, the emotional toll of recognising one's imperfections can be particularly heavy (Gawande, 2003; Nice, 2001). This is especially true in the legal profession, where the expectation of delivering just and fair decisions is paramount.

Just and fair is, however, very hard to define. Our modern legal systems often settle for the decision that results from an impartial and/or objective decision-making process. The difference between the two notions is not well defined (Breda, 2017; Dyrda and Pogorzelski, 2011) and not strictly necessary for the sake of our discussion. Impartiality is often viewed as an ethical and legal principle, where personal beliefs, past experiences, and personal connections should not influence the decision-making process. It is about maintaining neutrality and avoiding bias in judgments (Lucy, 2005; Papayannis, 2016). On the other hand, objectivity is broader and perhaps harder to define. Looking for a common thread among the many attempts to define it, we can see objective decision-making as a process of reaching conclusions or choices that are devoid of personal bias, emotions, and subjective opinions (Grossi, 2019). Such decision-making implies basing the final decision on the impartial evaluation of factual information and relevant data while using established rules and well-defined criteria. Like impartiality, objective decision-making would seek to minimise the influence of personal preferences, prejudices, and extraneous factors that could sway the outcome in a particular direction (Breda, 2017; Brink, 2000; Grossi, 2019; Leiter, 2000). Additionally, some definitions pose that objectivity involves emotion management and empathy to ensure that decisions are based on facts and evidence rather than personal feelings (Blix and Wettergren, 2019).

We have long known that objectivity is an ideal that is hard to achieve. Decades of empirical research have put it under significant scrutiny, resulting in findings that refute the idea of (total) objectivity in legal decision-making (Kapardis, 2009; Klein and Mitchell, 2010). Many of these studies show that legal decision-making is just as prone to cognitive bias, prejudice and errors as other contexts of decision-making. Studies have thus shown strong evidence of judges succumbing to anchoring effects, hindsight bias, confirmation bias, framing effects etc. (Guthrie et al., 2007; Kahneman et al., 2021; Meterko and Cooper, 2021; Mussweiler et al., 2012; Rachlinski and Wistrich, 2017). It seems, as Schauer (2010, p. 103) puts it, that it is "the judge as a human being and not the judge as judge or the judge as lawyer—that has the greatest explanatory power in accounting for judicial behavior."

Such insights occasionally come even from judges themselves, who admit through various writings their own or their colleagues' approaches to judging that deviate from the expected idea of objectivity. Such admissions often come from prominent judges in systems where the judicial function holds more autonomy and even character, e. g. the US Supreme Court (Wrightsman, 1999), but we can find them elsewhere too. Continental judges are less likely to circulate such ideas widely, but it may occur: a Slovenian former Supreme Court judge, for example, explains:

> *"This was a given among the judges, we were aware that there is no such thing as a completely impartial judge and trial, one where, with our eyes closed, following only the flow of argumentation, we will finally find the (objectively already existing?) correct solution. More so, because no such correct solution exists that could be found through simple intellectual research. It is true that judges do not find the right solution, they create it. This is all the more true if the decision is to be not only 'right' but also just"* (Testen, 2019, pp. 11–12).

Regardless of such testimonies and, more importantly, rigorous research, modern legal systems continue to operate under the assumption that objectivity is the norm in legal decision-making. The way law is designed in legislation, taught to law students, and presented to professionals and the public all imply that there is no room for subjective elements that could taint the objective façade of the legal norm. This is perhaps even more true in continental legal systems. These have evolved since Montesqueiu's position on judges being solely "la bouche qui prononce les paroles de la loi," but still act on this premise as a starting point.

This feigned ignorance of what lies underneath, however, has its purposes. In other contexts, "deliberate ignorance" has become an interesting notion, giving academic weight to Thomas Grey's insightful point that ignorance is bliss. Hertwig & Engel (2021, p. 360) have defined it as "the conscious individual or collective choice not to seek or use information or knowledge." They delineate a plethora of reasons why this may occur, listing, for example, deliberate ignorance as an emotion-regulation and regret-avoidance device, a suspension- and surprise-maximization device, a performance-enhancing device and, most relevantly, an impartiality and fairness device (Hertwig and Engel, 2021).

This concept seems relevant to our sentencing context, where judges and prosecutors may consciously or unconsciously engage in deliberate ignorance as a coping mechanism to manage the emotional burden of their decisions. By selectively ignoring certain imperfections or uncertainties, made known, for example, by numerous studies showing sentencing disparities, they can maintain a sense of impartiality and fairness, which is essential for upholding the legitimacy of their role.

However, this strategy might also allow them to avoid the paralysing effects of doubt and regret that might arise from acknowledging the full complexity and subjectivity of their decisions. In this way, deliberate ignorance may serve as both a protective device and a functional necessity, enabling legal professionals to carry out their duties while preserving their professional identity and emotional well-being (Eigen and Listokin, 2012).

However, when confronted with the realisation of their own imperfections, legal professionals often experience a profound emotional response. Research in the sociology of emotions has shown that professionals in general often experience guilt, shame, and anxiety when they perceive themselves as falling short of these expectations (Scheff, 1994). In the context of legal decision-making, these emotions are compounded by the knowledge that their decisions can have life-altering consequences for the individuals involved (Hagan and Kay, 2007; Krause and Chong, 2019). These emotions are not merely abstract; they manifest in very real ways as professionals grapple with the implications of their actions.

Immediate proof of imperfection, such as empirical evidence of bias or error in decision-making, can be particularly unsettling. Their reactions to such evidence may reflect distinct personality types as developed by Dattner and Hogan (2011), which can significantly impact their response to failure and blame. Extrapunitive responses may involve defensive behaviours where legal professionals shift blame to external factors or others involved in the case, downplaying the significance of the evidence and avoiding personal accountability. Impunitive responses may manifest as denial of the problem's existence or their role in it. This could involve dismissing or rationalising away evidence of errors or biases, thereby avoiding confrontation with the reality of their imperfections. Intrapunitive responses may lead to excessive self-blame and self-criticism. Judges and prosecutors with this tendency might experience intense self-doubt and anxiety, losing confidence in their abilities even when the evidence suggests that their mistakes are minor or part of the inherent complexities of legal decision-making.

Some professionals may even experience a form of cognitive dissonance, where they attempt to reconcile their self-image as fair and objective with the reality that their decisions are influenced by subjective factors (Festinger, 1957). Festinger's original idea that individuals feel psychological discomfort when they hold two competing cognitions (e.g., perceptions, attitudes, behaviours, feelings) was further developed and tested by various authors (Cooper, 2019). In the context of judges and prosecutors, the action-based model of cognitive dissonance offers a particularly useful lens through which to understand how these professionals deal with the conflicts between their ideal of impartiality and the subjective nature of sentencing. This model extends the traditional understanding of cognitive dissonance by emphasising that dissonance not only causes discomfort but also interferes with effective action (Harmon-Jones and Harmon-Jones, 2018; Harmon-Jones and Harmon-Jones, 2023). For judges, the experience of dissonance can stem from the recognition that their sentencing decisions—ideally based on objective criteria—are influenced by various subjective and situational factors. According to the action-based model, such conflicting cognitions can disrupt their goal of delivering just and consistent sentences, thereby hindering their ability to act effectively in their role as impartial decision-makers. To alleviate this discomfort and regain effective action, judges may be motivated to re-evaluate their approach to sentencing, seeking ways to align their behaviours more closely with their self-image as fair and objective. In this sense, the drive to resolve dissonance may lead some judges to engage in self-reflection and strive for improvements in their decision-making processes (McGrath, 2017). They might, for instance, reconsider their reliance on heuristics or subjective factors, or they may turn towards collegial input or newly proposed guidelines to enhance the consistency of their decisions. In the most optimistic view, by aligning their cognitions with their professional goals, they may ultimately improve their ability to deliver

sentences that are fair, consistent, and in line with the principles of justice.

Ultimately, the way legal professionals deal with imperfection and its immediate proof varies widely, but it often involves complex emotional and cognitive processes. Some may adopt strategies of deliberate ignorance, as previously discussed, to shield themselves from the full emotional impact of their decisions. Others may seek to improve their decision-making processes through self-reflection and additional training, allowing them to foster a deeper understanding of their professional conduct and the emotional impacts of their work (Gibbons, 2019; Maroney and Gross, 2014; Sheppick, 2024; Spencer and Brooks, 2019). At the same time, they may try to process their imperfection through peer support and feedback, though I was unable to find supporting research on this issue (cf. Roach Anleu and Mack, 2014; Završnik et al., 2023). However, paralleling findings in the medical field, discussing incidents and mistakes in a supportive environment is paramount to better one's performance. Such environments allow professionals to disclose their mistakes, discuss them with colleagues, and accept their fallibility, which is vital for their mental well-being and professional integrity (O'Beirne et al., 2012). Finally, some professionals may be unable to react to the issue in a meaningful way, leaving them despondent, professionally and personally frustrated and stressed (Edwards and Miller, 2019; Resnick et al., 2011; Schrever et al., 2021). Regardless of the approach, it is clear that the acknowledgment of imperfection adds significantly to the psychological and emotional toll that working in criminal justice necessarily entails. It unavoidably entails tiresome emotional work (Hochschild, 1983) and is a significant and challenging aspect of the professional lives of judges and prosecutors.

3 Methodology

3.1 Methodological background

Despite growing research on sentencing disparities globally, many (even European) countries remain underexplored. Slovenia, a youngish European democracy, has only recently begun examining these issues, with limited studies available (Drápal and Plesničar, 2023). The Slovenian sentencing system, characterized by broad statutory ranges and a focus on individualisation, compares with the more restrained penal models of Scandinavian countries (Dünkel, 2013; Flander and Meško, 2016; Plesničar and Drobnjak, 2019). This system emphasises tailoring sentences to the offender and the offence, allowing for extensive judicial discretion (Plesničar, 2013). The main sentencer in the system continues to be the judge—typically a single professional judge or, in rare, more serious cases, a mixed panel of professional and lay judges. However, the role of prosecutors has become more pronounced in recent decades—first by requiring them to propose adequate sentences in all cases and later by introducing plea bargaining where the prosecutorial decision on the sentence is merely confirmed by the judge (Plesničar et al., 2023a).

On one hand, the system has led to surprising parsimony in sentencing practices; however, recent studies suggest that this leniency may come at the cost of increased sentencing disparity. In an experiment using vignettes, we explored how biases related to gender, socioeconomic status, ethnicity, and appearance influenced sentencing decisions. Contrary to international findings, we did not find clear evidence of these biases but observed substantial variability in sentencing outcomes, consistent with Kahneman et al.'s (2021) concept of "noise"—unwanted inconsistencies in decision-making. This variability was evident in cases where judges and prosecutors imposed vastly different sentences for the same offence (see more details in the next section).

Our broader study, analysing 1,473 cases across 11 offence types, confirmed that such inconsistencies are also present in actual sentencing. We found significant variability in both the length of prison sentences and the imprisonment threshold, with a high percentage of unexplained variability, suggesting substantial disparity (Plesničar et al., 2023a).

A third study focusing on sexual offences employed a qualitative approach to further investigate sentencing variance. The findings indicated marked differences in how courts evaluated similar factors, with some courts treating mitigating circumstances inconsistently. This qualitative analysis corroborated the quantitative results, highlighting unequal treatment and inconsistent application of sentencing principles (Plesničar et al., 2023b).

This paper is built on the background of these studies. We wanted to investigate how facing these results—proof of failing at being objective at both a very individual, personal level and at the systemic level—impacted the professionals and how they reacted to it.

3.2 Data collection and analysis

The data used in this paper were gathered through three primary methods. The participants were selected based on their roles within the legal system and their experience with sentencing, ensuring representation from both judges and prosecutors involved at different levels of the judicial process.

First, we conducted observations during workshops involving separate groups of judges and prosecutors. These workshops were designed to explore sentencing disparities and other forms of bias. Participants were tasked with selecting sentences for various cases, first individually and then as part of random panels of three professionals, and their decisions were anonymously processed and shared with the group. This setup allowed us to observe how participants engaged with and responded to evidence of significant variations in their personal sentencing choices.

The three judicial workshops were organised within the Judicial Training Centre as part of regular professional development education offered to judges in 2018. Participants had to apply to participate, but all judges had access, and three iterations were conducted specifically for criminal judges. Both first-instance and appellate judges participated, along with a smaller group of judicial assistants who perform judicial tasks within the system. The judicial workshops included a total of 96 participants: 83 women and 13 men (reflecting the general gender structure in the Slovenian court system), consisting of 81 judges and 15 judicial assistants, with an average of 14.2 years of experience.

The three prosecutorial workshops were organised in cooperation with the Supreme State Prosecutor's Office and were held via Zoom in 2021. They were offered to all prosecutors, covering the entire geographical scope of the system. Both junior and senior prosecutors participated, resulting in a total of 66 participants: 46 women, 17 men, and 3 without gender data, with an average of 9.1 years of experience.

This ensured a comprehensive representation of perspectives within the prosecutorial service.

This approach ensured diversity across different regions and court levels, providing a comprehensive perspective on sentencing practices. However, the voluntary engagement of participants might indicate a stronger-than-average interest in these topics, which could be a potential limitation for these results. It suggests that those who participated may be more interested in and reflective about these issues, possibly limiting the generalisability of the findings. Nonetheless, given the difficulty of accessing legal professionals for experimental research, this was considered the best feasible approach.

During these workshops, five vignettes depicting fictional yet realistic cases were used to evaluate sentencing decisions, and the vignettes were developed based on typical cases seen in Slovenian courts. They were tested through limited cognitive interviews with professional judges and other legal professionals and validated by a panel of senior legal professionals at the Institute of Criminology to ensure their realism and relevance to actual practice. The professionals at each workshop were divided into two random groups and were randomly assigned the five vignettes, each containing one key variable (gender, social status, ethnicity, appearance, and prosecutorial suggestion). This setup allowed us to examine how each variable influenced sentencing decisions and to understand the degree of variability across participants.

Presenting the results in more detail would exceed the scope of this article, particularly given the complexity of the interactions among variables and the volume of data gathered. However, key results indicate significant disparity, with large standard deviations observed across different groups. For example, substantial variability was found within the sentencing decisions made by judges and prosecutors, with no statistically significant differences in responses to variables such as social status, gender, and ethnicity. Specifically, standard deviations for sentences ranged from 20 to 50% within the groups tested, pointing to a high level of inconsistency in sentencing outcomes.

During the workshops, one of the researchers took observational notes, which were later checked for consistency and copy-edited.

Secondly, six follow-up semi-structured interviews were carried out in 2020 with three judges who participated in the workshops and three who did not attend. The interviews were designed to be broader in scope, exploring participants' attitudes towards punishment in general, while also capturing in-depth reflections on operating in an imperfect sentencing system. The interview questions were developed to probe the impact of personal and systemic factors on sentencing and included questions such as: "How strict do you consider yourself when sentencing? More or less strict than the average judge? Do you feel that sentencing policy is consistent? How could it be made more consistent?" and "Is the approach to this question different at the start of a judge's career compared to after some time? How long does this period of 'adjustment' last?" This semi-structured approach allowed flexibility, enabling interviewees to elaborate on issues they found significant, while ensuring that core themes related to disparity and objectivity were covered. The interviews were recorded and transcribed.

Thirdly, we conducted focus groups with two groups of prosecutors and a separate group of senior judges and prosecutors via zoom, to discuss strategies for addressing the disparities identified in our study. The focus groups were organised in collaboration with the Supreme State Prosecutor's office. All prosecutors received an invitation to participate and were selected on a time-of-application basis. These discussions aimed to gather insights on potential solutions and improvements for managing sentencing inconsistencies. Focus groups were chosen to foster a collective discussion dynamic, where participants could interact and build on each other's ideas. The prosecutors were purposefully separated by seniority to ensure they felt comfortable discussing with peers of similar experience. The specific questions posed during these discussions included: "How do you decide on what sentence you will recommend?" and "What kind of support would you need to make better recommendations?" The focus groups were not recorded due to a reluctance on the side of the participants. Instead, two sets of notes were taken to record the discussion in as much detail as possible. The notes were later compared for consistency and copy-edited.

Participants were assured confidentiality, and all identifying information was anonymised to protect their privacy. Informed consent was obtained from all participants, and the research adhered to ethical guidelines regarding the management of sensitive data.

The interviews and focus group discussions were analysed thematically, alongside observational notes from the workshops. Thematic analysis (Braun and Clarke, 2019) involved systematically coding the data to identify key themes related to professionals' reactions to evidence of disparity, their explanations for its occurrence, and their personal and systemic coping strategies and solutions. This approach allowed for a deeper understanding of how legal professionals perceive and manage imperfections in their sentencing decisions. NVivo software was used to assist in organising and retrieving coded data, ensuring a systematic approach to identifying patterns and themes.

The decision to use a qualitative approach was driven by the need to explore the subjective experiences of legal professionals more in-depth, offering insights into their emotional and cognitive responses to the challenges of their roles. The combination of observational, interview, and focus group data provided a comprehensive perspective, capturing both individual reflections and group dynamics related to the emotional and professional challenges of sentencing.

4 Observing reactions to acknowledging imperfections

4.1 The reckoning

Ideally, professionals should be aware of the outcomes produced by the criminal justice system. However, their understanding may be constrained by the transparency of the sentencing system and the scope of available data. In a system like Slovenia's, where there is a lack of aggregated or disaggregated data on average sentences or sentencing practices, professionals' knowledge may be confined to their own limited experiences and case-specific observations. This limitation can affect their ability to fully grasp broader patterns and trends in sentencing.

On the other hand, knowledge of disparities in sentencing is widespread and in a system as small as the Slovenian one, professionals often feel that their personal experience confirms it. Prosecutors, especially, have expressed a firm belief that sentencing practices vary

significantly between different courts, with a common perception that courts in the Northeast are notably more punitive compared to those in the Southwest (which was, to a small extent, confirmed by the studies) *(Focus Group 1,3)*.

However, this perception can also be found among judges,

> *Judge 5: "Yes, yes, it seems to me that sentencing is even stricter here in [bigger court] compared to [smaller court]."*
>
> *Judge 2: " Unfortunately, determining the severity of sentences [in our system] is very subjective."*
>
> *Judge 1: "Yes, this range is noticeable among us. Certainly, it is. It is noticeable, for example, how informally things are handled. Initially, it is mostly the prosecutors or lawyers who know this best. Some [judges] are very strict, some are more lenient, some are more inclined towards acquittals. They are just stricter with charges, you know."*[1]

who sometimes pointed back at the prosecution itself:

> *Judge 1: "Yes, their [prosecutorial] sentencing policy is inconsistent."*
>
> *Judge 4: "Sentencing in [my court], based on criminal records of offenders who [have committed crimes] in other areas as well, is, at least according to the records, stricter than sentencing in [other town]. Or, I don't know, [other town]… or [other town]. For very similar offences, for example, where one sentence might be one month in prison, another might be two months or three months, the prosecutor here wanted six months as a starting point."*

In none of the settings where we discussed it at a general level, this knowledge of inconsistent sentencing was something new or surprising. Some of our collocutors expressed disappointment and were more bothered by it than others *(Focus Group 3)*, but generally at least partly attributed it to the notion of individualisation itself.

> *Judge 5: "Well, some differences are inevitable, I think; these are not things that can be completely standardised. It's also utopian to expect that, you know! However, there shouldn't be significant differences, you know."*
>
> *Judge 4: "No, no. I don't think it interferes with autonomy. I am firmly of the view that… legal interpretation must be socially specific, that is, tailored to a particular environment, and that differences in sentencing policies across different environments are not inherently problematic."*

However, this spot of bother grew when the disparity was either made more explicit or brought closer to the respondents. The experimental study was conducted as a workshop and served both research and educational purposes. We presented judges and prosecutors with immediate feedback on their sentencing choices for hypothetical cases, where the extent of variation among their decisions was obvious an obviously staggering. For example, in the most divergent case, where they needed to sentence an offender for the crime of aggravated bodily harm resulting in death, the sentences they chose ranged from a 6-month conditional sentence to 6 years in prison.

> *Judge 5: "We were just at your seminar […] if you remember. […] We worked in groups [and] one colleague, [in the case of the] female offender, proposed a significantly higher sentence than I did […]. Generally, he proposed harsher punishments than I did in all the cases. I was on the complete opposite end […]."*

The personal involvement in these decisions led to expressions of shock, disbelief, disappointment and even shame—emotions not observed with regard to the more general knowledge of sentencing disparities. When we observed their interactions in panel settings, some of them had animated discussions, at times even with raised voices and strong hand gesturing. When presented with the results showing large disparities, they shook their heads, murmured and whispered to each other with surprised facial expressions; some sighted loudly, and one participant loudly exclaimed: "This cannot be true!" *(Observation notes)*. The direct engagement in sentencing seemed to reinforce their own views on the appropriate sentences—which they had reinforced in the panel setting of the vignette—while simultaneously amplifying their discomfort upon discovering that their colleagues' views differed significantly.

When presented with the findings from our other studies, prosecutors expressed concern and disappointment, but were much less personally affected by the results *(Focus groups 1–3)*. Furthermore, not everyone felt discomfort even in the experimental setting, one judge, for example, expressed that she knows her sentences differ significantly from those of her colleagues:

> *Interviewer: "And … are you okay with this? I mean, do you feel comfortable with it? Have you ever found it problematic?"*
>
> *Judge 5: "No, because that's how I see things, that's how I interpret them. And I believe I explain them well, that I am thorough in this regard. Sometimes I succeed, but not often, not always, I would say. But it does happen, you know, that in the majority of cases, my decisions in this area are changed [by higher courts], usually resulting in increased sentences. It has happened, of course, in 23 years, that sometimes my sentences were reduced, but I don't think there were even ten such cases in 23 years."*

4.2 The reasoning

In exploring the reasons behind the observed disparities in sentencing and seeking potential solutions, many judges and prosecutors expressed a sense of abandonment in their decision-making processes. They highlighted a lack of systemic support and guidance, which significantly impacts how they approach sentencing.

Several professionals noted that, apart from occasional collegial advice, there is no structured guidance or data to inform their sentencing decisions. The absence of comprehensive, aggregated sentencing data and the lack of a formal learning environment

1 All transcriptions were originally in Slovenian and have been translated into English by the author.

contribute to this sense of abandonment. Judges and prosecutors often feel that they operate without adequate systemic tools to counteract disparities, acknowledging that generalised norms are insufficient to address the nuances and complexities of individual cases.

> *Judge 3: "It's challenging because, in practice, it is very difficult to determine a sentence for specific cases without some reference points. I usually… and this is… as a judge, it was one of the hardest things I faced at the beginning. I remember the first few times I had to impose sentences; I really had a lump in my throat. I clearly remember the first case where I sentenced someone to, I think, two years and six months. I was preparing and justifying that sentence. It was for a gentleman who had drug problems and so on. I had a lump in my throat […] It is frustrating because you don't have a reference tool or a measuring instrument to guide you in these initial, in your initial cases. For someone who has prior convictions, you can look at their record—say, for serial offenders or habitual criminals. For thefts and such, you check their criminal record and see what they've received before. You think, 'Okay, since they've done this five times before, I can't give them less than they received previously.' So you might go higher and then it builds up from there."*

This quote illustrates the profound emotional impact of sentencing, particularly in the absence of clear guidelines or structured reference points. Judge 3's use of the phrase 'a lump in my throat' captures the anxiety and personal distress they felt when making the first few sentencing decisions, highlighting the psychological toll of imposing life-altering consequences on others. The reference to a 'measuring instrument' further underscores the judge's struggle with the lack of clear and standardised tools to guide their decisions, adding to the emotional burden. This emotional turmoil can be linked to broader theoretical frameworks on guilt, shame, and anxiety in professional settings, particularly in high-stakes decision-making contexts (Scheff, 1994; Hagan and Kay, 2007; Krause and Chong, 2019). For judges, this dual pressure of having to balance fairness and consistency, while also managing their own emotional responses, creates a situation where they may feel 'left on their own' in the decision-making process. This isolation, combined with the weight of responsibility, often fosters a fear of making a wrong decision, as illustrated by Judge 3's statement. This fear is not only about the potential for personal mistakes but also about the broader implications of those mistakes, including the possibility of public scrutiny, shame, and professional consequences.

Similarly, one of the prosecutors expressed deep frustration and incredulity over the fact that he cannot access prosecutorial files in similar cases within their database due to data protection restrictions. He felt that this lack of access severely undermines his ability to perform effectively, as it hinders his capacity to propose appropriate and consistent sentences *(Focus Group 3)*.

This observation from the prosecutor adds another layer to the emotional challenges faced by legal professionals, specifically in the context of inconsistency and frustration with the system. Like Judge 3, who expresses the emotional toll of making sentencing decisions without clear guidelines, the prosecutor's frustration stems from being unable to access critical information that could help ensure consistency and fairness in their decisions. This lack of access to prosecutorial files underscores a key point from the judge's perspective: without the appropriate tools or structured support, both judges and prosecutors are left to rely on their own judgment, which can lead to inconsistency and a sense of isolation in the decision-making process.

In both cases, there is a struggle with the absence of standardised reference points, which can leave professionals feeling unsupported and vulnerable to making errors. For judges, the fear of making a wrong decision carries emotional weight due to the life-altering consequences of sentencing. Similarly, the prosecutor's frustration reflects the emotional toll of not being able to perform their role effectively, compounding their feelings of inadequacy. Both professionals are left to navigate the complexities of sentencing, but without the institutional resources or frameworks that could provide clearer guidance.

However, others seem quite unbothered with the lack of such institutional support and are happy to adhere to the personal codes that they themselves develop, as long as they are able to justify them to themselves:

> *Judge 1: "I really don't have any issues with this. You know, when I look back, my sentences are always approximately the same. It's hard to say that there are deviations or anything like that. For instance, a robbery is generally around four years. That's the starting point, you see. Because these are serious offences. Then, well, I don't know. If you ask me, I can generally recall that all similar cases are treated approximately the same, and I calibrate them similarly, even though I can't describe it to myself. People often ask me how I make my decisions. I don't know. It's based on each individual case, within a range, but also how I apply it to each person."*

> *Judge 4: "I don't know. [Laughs] I look at those with longer criminal records, review their case files, and see what sentences they received… then I go by some sort of intuition. I'm not sure if it bothers me that I don't have completely established criteria or not. But when I consider how to handle this issue, I think that… one starting point could be that I have no pre-set criteria at all, and another could be having completely rigid criteria. One of the prosecutors I never agree with is at the extreme end; they have rigid criteria that they don't deviate from, regardless of the specifics of the individual. Even if… I'm not just talking about the impression someone makes when they come into the courtroom, but also the circumstances in the case file that could affect the decision. But for them, nothing influences it. It's always the same: if I think it should be conditional, it's conditional, and that's what I propose in the order; otherwise, it's prison. And then, they have tables for how much prison time for each case. On the other hand, you only have the legal framework, and I don't think that's right. I believe I am somewhere in between these two extremes, in the sense that I consider… at this moment, I think about what I usually impose for such individuals or for these types of offences and what seems appropriate based on the impression someone has made on me, and the specifics of the offence. Or I mix in what might be suitable for the particular case."*

These quotes reveal different approaches to sentencing and demonstrate the varying levels of comfort legal professionals have with the lack of formal guidelines or institutional support. Judge 1, for example, expresses confidence in the consistency of their sentencing, noting that while they cannot fully articulate their reasoning, they rely on a personal, calibrated approach. This 'starting point' method

appears to offer them some security, as it allows for consistency across their cases, even though it might not strictly adhere to clear-cut criteria. The reliance on a personal 'range' for each type of offence, alongside the individualisation of each case, shows an acceptance of subjectivity. However, judge does not question it in a broader context, considering fairness across cases and the transparency of their reasoning.

Judge 4 offers a more reflective perspective on their approach, acknowledging the absence of rigid criteria but also comparing it with more structured approaches. Their method is seen as more flexible and tailored, considering the nuances of each case. The reference to 'intuition' as part of their decision-making process reveals the informal nature of their approach, allowing for subjective discretion. However, this approach also carries potential risks, as it might lead to inconsistencies and disparities, as seen when they contrast their own methods with a prosecutor's rigid application of sentencing tables. Here, Judge 4 reveals an awareness of the shortcomings of both extremes: a strict, table-based approach versus the more flexible, individual-driven one. This highlights the tension between flexibility and consistency in sentencing. While Judge 4 seems to believe in the importance of adjusting for the particulars of each case, there is no shared framework to ensure that this subjective flexibility is consistently applied across different judges and courts.

Both quotes emphasise the internal struggle faced by judges in balancing personal judgment and fairness. While Judge 1 seems comfortable with their approach, relying on a sense of consistency based on experience, Judge 4 is more critical of the extremes and seeks a middle ground. However, both judges ultimately fall into the category of relying on personal frameworks, which can mitigate the emotional burden of sentencing but also limit accountability and transparency. In comparison to prosecutors, who are more likely to follow established guidelines (even if rigid), these judges' methods reflect an ongoing tension between autonomy and the need for systemic structures that can foster greater consistency and fairness in the sentencing process.

In addition to Judge 3's initial observation in this section, several other professionals also discussed the contrasts between sentencing decisions made early in their careers compared to those made later, after gaining more experience as judges.

> *Judge 2: "Yes, I think that at the beginning I might have even been—now, at least in my experience, I was perhaps a bit too lenient at first. Then, after a few [appellate court decisions], I gained some insight into how the appellate court thinks and I adjusted my sentencing framework accordingly. […]*
>
> *Interviewer: "So, you learn what is expected of you?"*
>
> *"Yes, but I still miss, or rather, I really wish we had the German system, where for every crime there is a defined way to determine the sentence. Not as a … formula, but as parameters; this, this, this, this, and this, so you have a pretty good overview of sentencing for all offences."*
>
> *Judge 4: "Initially, I … I started by reviewing all the files assigned to me. I looked at the criminal records and saw what kinds of sentences were handed down in [my court], and I didn't think it was appropriate to deviate too much from expectations in that specific social context. That was a starting point for me, and then … in specific cases, I go by some kind of feeling."*

These quotes reflect the evolution of their sentencing approaches as they gain experience. Judge 2 acknowledges a more lenient approach in the early years, influenced by the appellate court's feedback. This evolution demonstrates how external guidance, such as appellate decisions, helps shape and refine sentencing frameworks over time. The judge's desire for more structured parameters, similar to the German system, suggests a preference for clearer guidelines to reduce uncertainty and improve consistency in sentencing. In contrast, Judge 4's experience highlights a different aspect of the learning process. Initially, they relied heavily on the criminal records and previous sentencing practices in the court, feeling compelled to align with established norms. Over time, this approach gave way to a more intuitive decision-making process, where personal judgment played a larger role. This shift from a reliance on reference points to intuition underscores the personalisation of sentencing.

Additionally, discussing the structural features of sentencing, some frustration was expressed with the procedural structure of the legal system. Some professionals expressed dissatisfaction with how the system is designed, noting that the lack of bifurcation in trials—where the verdict and sentencing stages would be addressed separately—further complicates efforts to achieve consistent and fair sentencing. They feel that this procedural rigidity, combined with the absence of robust support systems, exacerbates the challenge of maintaining uniformity and fairness in sentencing.

This dual responsibility creates additional cognitive load and can compromise the ability to focus solely on crafting a fair and consistent sentence. Moreover, without clear separation, professionals often struggle to apply consistent standards, leading to potential disparities.

Finally, prosecutors and judges felt that some of the inconsistences in sentencing were caused by unclear legislative changes and the slow rate at which case law adapts and refines them *(Focus Group 3)*.

Overall, the search for reasons behind sentencing disparities reveals a dual perspective. Some respondents voiced profound concerns about the current system, expressing that it lacks adequate systemic support and that procedural structures fail to effectively address or mitigate the factors contributing to sentencing variability. Conversely, others acknowledged the problematic nature of sentencing disparity but argued that it cannot be quantified to a degree that would make the process straightforward or fully objective.

Overall, the search for reasons behind sentencing disparities reveals a dual perspective. Some respondents voiced profound concerns about the current system, expressing that it lacks adequate systemic support and that procedural structures fail to effectively address or mitigate the factors contributing to sentencing variability. These professionals pointed out that without clear guidance or consistent frameworks, they are left to navigate the complexities of sentencing on their own, often making decisions in isolation. This lack of institutional support not only contributes to inconsistencies but also places a significant emotional burden on judges. The weight of making life-altering decisions without clear reference points can lead to feelings of inadequacy, anxiety, and fear of making mistakes. The emotional toll is exacerbated by the high stakes involved, as judges are acutely aware that their decisions can affect individuals' lives in profound ways. This emotional distress is compounded by the pressure to balance fairness, consistency, and individualisation, with many

judges expressing that they often feel overwhelmed by the responsibility.

Conversely, other respondents acknowledged the problematic nature of sentencing disparity but argued that it cannot be quantified to a degree that would make the process straightforward or fully objective. These professionals contended that the subjective nature of sentencing, with its reliance on personal judgment, is an inherent feature of the system and that trying to impose complete consistency would undermine the flexibility needed for individualised justice. While they recognised the disparities that can arise, they also believed that such variability is an inevitable consequence of the complexity of each case. For these professionals, the emotional burden of sentencing is less about the lack of systemic support and more about navigating the tension between ensuring justice in each unique case and maintaining consistency across decisions. This perspective suggests that while the system may benefit from improvements, achieving a fully objective and consistent approach to sentencing may not be feasible or desirable without sacrificing the essential human element of judicial discretion.

4.3 The resolution: from the personal to the systemic

The challenges associated with sentencing disparity have led many judges and prosecutors to develop their own approaches to sentencing. In response to the lack of systemic guidance and the perceived inadequacies of the current system, professionals often create personal 'sentencing codes' to bring consistency and structure to their decision-making. These individualised frameworks aim to help them navigate the complexities of sentencing in their own cases; however, they cannot truly address the issue of systemic disparity.

Despite the development of personal guidelines, many professionals rely heavily on input from colleagues. This collegial support can provide valuable insights and feedback, helping to refine sentencing practices.

> *Judge 2: "So, you go to your colleagues and ask, 'Listen, I have a case here […] how much do you usually give for these types of cases? Where did it happen? Who was involved? And how much was it—like, if it was three kilos of marijuana or a kilo of cocaine?' […] Because there's no [pause] if you think about it, quantifying how much someone loves their spouse or whatever—it's very difficult to translate that into specific numbers. So, it's a struggle in that context."*

> *Judge 5: "Yes, in my opinion, that's exactly it: [a junior judge will go] looking at all these judicial decisions, likely examining the actual circumstances and how they were evaluated. You seek more guidance from colleagues. They sometimes come to ask me what I think, and then often end up doing something quite different. But actually, it probably helps to discuss things with someone."*

These quotes highlight the reliance on collegial support to navigate the emotional complexities of sentencing. Judge 2 emphasizes the difficulty in quantifying subjective factors, such as emotional elements in a case, which leads to seeking advice from colleagues. This reflects the challenge of balancing personal judgment with the need for consistency in sentencing. Judge 5, while acknowledging the value of discussions, notes that colleagues sometimes make different decisions, revealing the limits of this approach in ensuring uniformity and is also consistent with academic findings in this area (Schultze et al., 2017).

The judges themselves highlighted this problem:

> *Judge 5: "That is, the judges in [my court] compare themselves with each other but not with those in [other court] or [other court], you know, so then [it's not very helpful]."*

Judges also reflected on their reliance on the prosecutorial recommendation, confirming the idea of anchoring, despite criticising the prosecution's inconsistency at the same time.

> *Judge 4: "What I've noticed is that, like it or not, a specific prosecutor's recommendation also serves as an anchor in my sentencing."*

This comment highlights the psychological phenomenon of anchoring, where a previously presented value—such as a prosecutor's suggested sentence—becomes a reference point that influences subsequent decisions (Bystranowski et al., 2021; Glöckner and Englich, 2015; Kim et al., 2015). Despite the criticism of prosecutorial inconsistency, Judge 4 acknowledges that this recommendation still plays a crucial role in shaping their sentencing decision. This reliance on external suggestions illustrates how, even when professionals recognise the lack of consistency in the system, they continue to be influenced by these external benchmarks.

Regardless, when presented with potential systemic solutions to address sentencing disparities, legal professionals exhibited a range of responses, reflecting their varying perspectives on the necessity and feasibility of changes.

Some professionals have actively sought to address sentencing inconsistencies on their own. For instance, one judge described creating a personal database of past cases to improve their own sentencing practices. At a broader level, the prosecution service, which had previously made only preliminary efforts to enhance consistency, has dedicated resources to a project aimed at improving sentencing practices *(Focus groups 1–3)*.

Their earlier initiatives, such as developing individual databases for each district prosecutorial office, were seen as somewhat beneficial but largely insufficient by most prosecutors *(Focus Groups 1–3)*. The new approach, which focuses on better collection and presentation of sentencing data and the development of general guidelines to promote consistency, received a mixed response. While it was generally accepted, it also generated some uncertainty. There was a clear rejection of mandatory structures, with preferences divided between sentencing tables and more flexible sentencing guidelines.

Judges, while agreeing that 'something' needs to be done, strongly opposed the idea of mandatory sentencing guidelines or rigid structures. They expressed concerns that such measures would unduly restrict their discretion and undermine the flexibility required to tailor sentences to individual cases. This apprehension reflects a belief that rigid standards could compromise their ability to deliver fair and individualised justice.

Moreover, many professionals were hesitant to embrace any kind of changes to the current system. They argued that there are no clear-cut solutions to the issue of sentencing disparity, aside from potentially increasing education on the topic over time. This reluctance

reflects a broader scepticism about the effectiveness of systemic reforms and a preference for maintaining the status quo.

> *Judge 4: "I probably would not use [a sentencing tool], but it's something… something that I have not yet addressed, which is that I generally do not review case law. I do not look at case law, so I'd probably look at other things even less. But, for instance, if I think about it, it might be useful to review such materials to see what others are doing, what they think, and why they think that way, especially if there are good explanations provided. Just a database with a section and the corresponding sentences would not be very helpful to" e."*

> *Judge ": "I don't know, I… [sigh] It's hard to give a straightforward answer. My colleague and I were talking recently, and he mentioned that when passing a prison sentence in a high-profile case, he reviewed some… or all… past [similar] cases trying to calculate and compare things, and that seemed a bit odd to me. I'm not sure if that's the right approach. You can't always predict or categorise these things mathematically, you know, so I'm not sure…"*

Another important issue that emerged in our discussions, was the question of publicising sentencing data. Professionals agreed that such data should be accessible to prosecutors and judges, potentially through a unified platform for both groups. This would support more informed and consistent decision-making within the legal community. However, there was significant hesitation about sharing this data with the wider public. Concerns about transparency and privacy, as well as fears that public access to sentencing data could lead to misinterpretation and undermining of judicial discretion, contributed to this reluctance *(Focus groups 1–3)*.

In Slovenia, first-instance judgments are not currently publicised; however, an ongoing project aimed at automated anonymisation is expected to bring this about soon. Some professionals have noted that once this data becomes accessible, it is likely to be revealed eventually, whether through public channels or by private companies that might seize the opportunity to collect and analyse such information independently. Indeed, some solicitors and firms are already gathering their own sentencing data *(Focus group 1)*.

Amid these developments, there is a principled argument supporting the notion that sentencing data should be public knowledge, provided that data protection concerns are adequately addressed. A number of professionals strongly advocated for the release of such data, believing that transparency is crucial for ensuring accountability and fostering public trust in the judicial system.

Ultimately, the consequences of these issues and the uncertainty about how to address them have led to a growing sense of resignation among professionals. Faced with the limitations of their personal codes and the disillusionment with systemic support, many judges and prosecutors feel disheartened and powerless to effect meaningful change.

> *Judge 2: "And so, I have to say, […] you become a bit desensitized over time… I mean, the first time I had to [sentence someone], I had a lump in my throat; now I don't anymore. I also see more clearly when it makes sense to say something. Another thing is that you become desensitised in that sense as well. I'm talking about procedural aspects—what does it mean if a higher court corrects a criminal sentence? I don't worry about that at all."*

5 Discussion

In this section, I want to bring together the theoretical background in which we started this paper and the empirical findings from the previous section. When we look at the thematic analysis, some thematic clusters emerge that can be useful in doing that. In the first one, we explore the emotional impact of recognising personal fallibility among legal professionals. This part draws on theories of cognitive dissonance and emotional responses to failure to explain how confronting evidence of one's own inconsistencies leads to significant emotional distress. It opens the door to understanding the personal struggles that arise when professionals face direct evidence of their own mistakes.

The second part shifts the discussion to whether frustration stems more from the sentencing process's inherent complexity or the disparity itself. By examining the challenges of standardising sentencing and the role of deliberate ignorance, this section highlights how professionals attempt to navigate the multifaceted nature of sentencing while grappling with systemic inconsistencies. This exploration reveals the broader frustrations and coping mechanisms that shape their approach to sentencing.

Finally, I address the professionals' reluctance to embrace systemic reforms. This part delves into their concerns about potential changes, such as mandatory guidelines, and how these might impact their discretion and the delivery of justice. This part of the discussion links theoretical concepts about discretion and consistency with empirical observations of professionals' resistance to structural changes.

5.1 Is it me?—facing personal fallibility

The emotional impact of acknowledging disparities in sentencing becomes particularly acute when legal professionals confront personal fallibility. Although the existence of sentencing disparities is widely acknowledged, it often does not evoke strong emotional reactions. However, the situation becomes markedly different when professionals face direct evidence of their own mistakes or inconsistencies. This realisation of personal imperfection is often accompanied by significant emotional distress, aligning with theories of cognitive dissonance (Festinger, 1957) and emotional responses to failure (Scheff, 1994).

In our study, judges and prosecutors exhibited a range of emotional reactions when confronted with their own inconsistencies. For instance, during workshops where they were shown the variation in their sentencing decisions, many displayed shock and disappointment through animated discussions, surprised facial expressions, and exclamations of disbelief. This personal involvement in the decision-making process heightened their emotional response compared to more general knowledge of disparity. Such reactions can be linked to the concept of cognitive dissonance, where professionals struggle to reconcile their self-image as fair and

objective with the reality of their inconsistent decisions (Festinger, 1957).

Theoretical models of coping with failure highlight how individuals deal with personal imperfection. The responses observed in our study somewhat mirror these theoretical models (Dattner and Hogan, 2011). Some displayed extrapunitive reactions, where they attributed disparities to external factors or systemic issues rather than their own decisions. This aligns with the concept of deliberate ignorance, where professionals may downplay the significance of evidence showing discrepancies to avoid confronting their own biases or failures (Hertwig and Engel, 2021). Others exhibited what may be categorised as impunitive responses, which involve denial or rationalisations of the problem. For example, many emphasised the idea of individualisation as a reason for disparity, reflecting a reluctance to acknowledge the full extent of bias or error in their sentencing practices. This form of coping helps them maintain a sense of impartiality and fairness, even when faced with evidence that suggests otherwise.

Interestingly, intrapunitive responses, where professionals engage in excessive self-blame and criticism, were much less prevalent. Instead of internalizing blame, many judges and prosecutors were more inclined to criticize the system or other external factors rather than their own decision-making processes. Despite recognising the broader systemic issues, they often felt that their personal codes and methods were appropriate and justified. This tendency to externalise fault and rely on personal guidelines can be seen as a coping mechanism when the system does not provide adequate support or structure. However, this approach can be problematic as it does not strive towards achieving consistency across the board. By focusing on individual practices and dismissing systemic reforms, legal professionals may inadvertently perpetuate existing disparities rather than address the root causes of inconsistency (Kurlychek and Kramer, 2019).

Ultimately, while internalising blame was less common, and criticising the system was more acceptable, this divergence from systemic accountability highlights a broader issue. It underscores the tension between maintaining personal belief systems and the need for systemic consistency and fairness.

A related issue may also be the question of publicising sentencing data. While professionals agreed that such data should be made available to prosecutors and judges—potentially through a shared platform—they were much more hesitant about sharing it with the wider public. This reluctance was at least partly driven by concerns that public disclosure could expose their fallibility and undermine the integrity of the legal system. The fear of public scrutiny and the potential misuse of sentencing data may stem from a broader apprehension about being held accountable for their imperfections and inconsistencies in a system that is admittedly rather hostile against them (Pina-Sánchez and Plesničar, 2022). Some professionals expressed concerns that making such data public could lead to increased pressure and criticism, potentially impacting their professional standing and confidence (cf. Sunstein, 2007).

The push towards greater transparency is ongoing, with first-instance judgments in Slovenia expected to become public soon due to an automated anonymisation project. Some professionals acknowledged that, regardless of the judiciary's stance, private entities might eventually publish this data. They argued that, considering these circumstances and the principle of transparency, any sentencing data should ideally be public knowledge, provided data protection considerations are adequately addressed.

5.2 Potato or potato?—sentencing complexity vs. disparity

While the evidence points to frustration with sentencing disparity, it is important to discern whether the frustration stems primarily from the disparity itself or from the broader challenges of sentencing. The complexity of sentencing encompasses numerous dimensions—legal, ethical, and personal—which makes it inherently difficult and often frustrating.

Professionals in our study expressed significant dissatisfaction with both the concept of disparity and the practice of sentencing. Many implied that while disparities are troubling, the broader frustration lies in the complexity and subjectivity of the sentencing process. Sentencing involves navigating a multitude of factors, including legal guidelines, personal judgments, and societal expectations, which can be overwhelming and difficult to standardise.

Efforts to mitigate this frustration included seeking advice from colleagues, developing personal sentencing codes, and striving to improve consistency through informal means. Despite these efforts, many professionals found that personal guidelines and collegial input were insufficient for achieving a systemic approach to consistency.

This aligns somewhat with the concept of deliberate ignorance, where professionals may acknowledge systemic flaws but choose to ignore them in favour of maintaining their current practices and beliefs (Hertwig and Engel, 2021).

The practice of deliberate ignorance allows professionals to cope with the emotional burden of recognising imperfections. By focusing on their individual practices and avoiding full engagement with systemic issues, they maintain a sense of fairness and impartiality. However, as in the previous section, this approach does not address the root causes of disparity and limits the effectiveness of systemic reforms.

5.3 Now what?—resistance to change

When presented with potential changes to address sentencing disparities, legal professionals demonstrated a clear reluctance. The primary concern was that mandatory guidelines or rigid structures would constrain their discretion and negatively impact their ability to deliver justice. This resistance reflects a broader apprehension about the implications of systemic reforms on their professional autonomy and the quality of justice.

There was a clear distinction among professionals regarding their attitudes towards potential changes and tools for addressing sentencing disparities. While all expressed a general wariness and scepticism towards systemic reforms, there were notable differences in how they approached the idea of guidance and tools. Some prosecutors and judges showed openness to the possibility of structured guidelines and expressed a willingness to welcome such changes, believing that they could improve consistency and fairness in sentencing. However, they also recognised the complexity of implementing these changes and the difficulties involved in tackling

such systemic issues, which often led to discouragement and a reluctance to pursue further action.

At the level of prosecution, there were proactive efforts to develop tools and improve practices. Some senior prosecutors actively worked towards creating better data collection methods and general guidance to address inconsistencies. Despite these efforts, they found the process to be highly complex and challenging, which discouraged them from continuing their initiatives. The intricate nature of the task, coupled with the fear of diminishing their discretion, often led to a preference for incremental improvements rather than embracing comprehensive systemic reforms.

This reluctance to embrace mandatory sentencing guidelines or rigid frameworks stems from a fear that such measures would undermine the flexibility needed to tailor sentences to the unique circumstances of each case. Professionals expressed concerns that rigid standards could lead to unjust outcomes and stifle their ability to account for the nuances of individual cases. This apprehension is consistent with the theoretical understanding of the balance between discretion and consistency in sentencing (Bierschbach and Bibas, 2016; Pina-Sánchez, 2015; Plesničar, 2013).

Despite acknowledging the need for improvements, many professionals preferred to enhance their own practices within the existing system rather than adopt more structured approaches. They supported initiatives aimed at better data collection and general guidance but remained wary of mandatory structures that could restrict their discretion. This preference for maintaining the status quo reflects a deeper scepticism about the effectiveness of systemic reforms and a recognition of the inherent difficulties in implementing meaningful changes within the current framework.

Moreover, countering expectations in line with the action theory model of cognitive dissonance—according to which we would expect a strong inclination to resolve the dissonance (Harmon-Jones and Harmon-Jones, 2023), some sort of almost catatonic despondence was observed in some cases with a view that sentencing is inherently flawed. The potential pitfall of accepting that disparity in sentencing exists and not much can be done about it, is thus the risk of exacerbating disparities rather than mitigating them. Without a unified understanding of what constitutes appropriate sentencing, individual decision-makers' attitudes and beliefs become more influential in shaping outcomes than the system ever intended (Hogarth, 1971). This variability in personal perspectives can lead to greater inconsistency and unpredictability in sentencing, further entrenching disparities within the system.

6 Conclusion

This paper has investigated the intricate dynamics between personal and systemic factors in addressing sentencing disparities, with a focus on the emotional and professional challenges encountered by judges and prosecutors. The difficulty of acknowledging one's own failures is a universally recognised issue, but it becomes particularly pronounced in the legal profession, where decisions have profound and far-reaching consequences. The high stakes associated with sentencing underscore the importance and difficulty of recognising and addressing personal imperfections.

Existing research has acknowledged plenty of issues in making sentencing decisions, especially in avoiding disparity (Drápal, 2020; Lynch, 2019; Pina-Sánchez, 2015; Ulmer, 1997). A different strand of research has looked at the emotional toll of legal decision-making (e.g., Maroney, 2012) and specifically at the struggle to pacify the strong emotional charge with objectivity in legal decision-making (Bladini and Blix, 2022; Blix and Wettergren, 2019; Minissale, 2024). This study adds a new dimension by focusing specifically on the emotional struggles that arise when legal professionals are confronted with their own inconsistencies in sentencing.

Our findings reveal that while legal professionals nominally strive for objectivity in their sentencing practices, for example, looking for a more uniform approach aided by systematic data, they frequently grapple with the reality of their own fallibility. This struggle leads to significant emotional and professional stress, as evidenced by their varied reactions when confronted with personal inconsistencies. This tension between the ideal of objectivity and the subjective reality of decision-making aligns with theoretical frameworks on cognitive dissonance (Festinger, 1957) and emotional labour (Hochschild, 1983). Professionals—judges and prosecutors are no exception—experience substantial stress when faced with evidence of their own biases or errors (FitzGerald and Hurst, 2017; Sirriyeh et al., 2010), resulting in a range of responses from denial and defensiveness to self-criticism and anxiety.

The empirical findings align with these theoretical insights, demonstrating that the emotional responses to acknowledging imperfections are not merely abstract but have tangible effects on professionals' well-being and their approach to sentencing. The study also highlights the limitations of personal guidelines and the role of deliberate ignorance in managing the emotional toll of decision-making. Legal professionals often develop personal "sentencing codes" and rely on collegial input to navigate the complexities of their roles. However, these individual efforts fall short of addressing systemic issues and can perpetuate disparities rather than mitigate them.

The reluctance of legal professionals to embrace systemic reforms, such as mandatory sentencing guidelines, reflects a deep-seated concern about preserving judicial discretion and flexibility in a system premised on the individualisation of punishment. This apprehension underscores the delicate balance between maintaining individualised justice and ensuring consistency in sentencing. The resistance to change suggests a preference for incremental improvements within the existing framework rather than overhauling the system in ways that could potentially constrain their discretion.

The findings emphasise the need for a nuanced understanding of sentencing that incorporates both emotional and systemic factors. Improved training on emotional and cognitive aspects of decision-making, along with enhanced support systems, seems crucial for helping legal professionals manage the pressures of their roles more effectively. Structured sentencing guidelines and clear support systems can contribute to a more consistent and fair legal process while also acknowledging the inherent human elements of decision-making, however finding the right balance is notoriously difficult.

Future research might continue to explore how legal professionals in different sentencing systems experience and manage their imperfections. Comparative studies of sentencing practices across various jurisdictions could provide valuable insights into how different frameworks impact professional behaviour and decision-making. Additionally, research on the effectiveness of potential reforms, such as enhanced training and support mechanisms, can help develop more effective strategies for

addressing the emotional and systemic challenges faced by legal professionals.

Future research could further explore the long-term effects of these emotional challenges on legal professionals, as well as examine how similar issues play out in different legal systems. Additionally, there is a need for research into the effectiveness of potential reforms, such as structured sentencing guidelines and enhanced support systems, in mitigating these challenges. Understanding how legal professionals cope with these pressures in different cultural and legal contexts can provide valuable insights for the development of more effective policies and practices.

Addressing the emotional realities faced by legal professionals is crucial for maintaining the integrity and fairness of the justice system. By acknowledging and addressing these challenges, we can work towards a more humane and effective legal process. It is essential to balance the need for objectivity with the recognition that legal decision-making is inherently a human process, influenced by emotions and cognitive biases. Through thoughtful reforms and a commitment to supporting legal professionals, the justice system can continue to uphold the principles of fairness and justice upon which it is founded.

Data availability statement

The raw data supporting the conclusions of this article will be made available by the authors, without undue reservation.

Ethics statement

The studies involving humans were approved by Institute of Criminology at the Faculty of Law Ljubljana. The studies were conducted in accordance with the local legislation and institutional requirements. The participants provided their written informed consent to participate in this study.

Author contributions

MP: Conceptualization, Data curation, Formal analysis, Funding acquisition, Investigation, Methodology, Project administration, Resources, Software, Supervision, Validation, Visualization, Writing – original draft, Writing – review & editing.

Funding

The author(s) declare that financial support was received for the research, authorship, and/or publication of this article. The article draws from two different research projects, in which the author was the PI: "Psychological mechanisms in criminal justice: Deconstructing objectivity" (J5 1795), funded by the Slovenian research and innovation agency, and "Improving consistency of sentencing in criminal proceedings" funded by the European Commission and led by the Centre for international legal cooperation in the Netherlands through the EC technical support programme to the benefit of the Slovenian State Prosecution Service. The writing was made possible by the research programme "Social control, criminal justice system, violence and the prevention of victimizations in the context of high technology market society" (P5 0221), funded by the Slovenian research and innovation agency.

Acknowledgments

Grammarly and Chat GPT 4.0 were used to copy-edit the paper.

Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Publisher's note

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frontiers | Frontiers in Sociology

TYPE Original Research
PUBLISHED 16 December 2024
DOI 10.3389/fsoc.2024.1457424

OPEN ACCESS

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RECEIVED 30 June 2024
ACCEPTED 29 November 2024
PUBLISHED 16 December 2024

CITATION
Johansen LV (2024) Incredibly emotional: interpreting trustworthiness in Danish courtrooms.
Front. Sociol. 9:1457424.
doi: 10.3389/fsoc.2024.1457424

Incredibly emotional: interpreting trustworthiness in Danish courtrooms

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This paper explores how Danish legal professionals assess the trustworthiness of victims in criminal cases based on emotional expressions. It focuses on the alignment of these expressions with the nature of the crime, the social context, and the victims' social identities, and is based on findings from several ethnographic projects involving extensive observations of crime cases and interviews with criminal justice professionals. The research analyzes how victims' emotional expressions are scrutinized and interpreted within the context of Danish cultural norms, which favor "calm and quiet" behavior. Legal professionals define this behavior as specifically "Danish," and often contrast it to ethnic minorities' way of enacting emotions. Emotions are thus culturally and socially interpreted in courtroom settings, and I relate these findings to broader discussions about how emotions mediate, co-create and maintain systematic differences based on gender and ethnicity in legal decision-making. The study thus highlights the cultural and social dimensions of emotions in this legal setting and calls for greater awareness of how these factors influence the assessment of trustworthiness.

KEYWORDS

legal decision making, courtroom ethnography, law and emotion, intersectionality, cultural norms

Introduction

Evaluating trustworthiness constitutes a central yet difficult to articulate aspect of any criminal court case. Nevertheless, prosecutors and defence lawyers continuously negotiate the credibility of victims and defendants, while judges, for their part, often refer to trustworthiness in the judgments they deliver. This paper examines how legal professionals evaluate credibility based on the extent to which they perceive victims' emotional expressions to be aligned with the nature of the crime, the persons involved in it, the social environment in which it took place, etc. It specifically argues that the nature of the crime *and* the victim's social identities play a significant role in determining this credibility assessment based on emotions.[1] In doing so, it contributes to the growing interest in how victims are perceived in court, shifting some of the scholarly attention that has traditionally focused on defendants' emotional expressions during legal proceedings (see, for instance, Field and Tata, 2023).

Based on five different ethnographic projects conducted in Danish criminal courts, and observations of 63 cases of minor and aggravated violence as well as interviews with 102 legal

1 This article thus focuses on a defined aspect of "credibility." Credibility assessments in court of course rely on a number of other factors than emotions, such as criminal evidence, statements, the relative trustworthiness of the parties, witnesses etc., a point that will be elaborated in the section about the Danish criminal justice system.

professionals such as judges, prosecutors, victim's councils and defence lawyers, I analyse how Danish legal professionals expect victims to feel "appropriately" during trials. Interestingly, the Danish Institute for Human Rights recently found that victims with ethnic minority backgrounds more often experience the acquittal of their perpetrator than ethnic majority victims. It is not my intention, however, to link judges' impressions and statements with conviction rates or specific sentencing outcomes in each case, but to show a range of possible interpretations of the emotions and behaviors that victims display in a court setting. These interpretations are shaped by specific "emotion cultures" in crime cases which regulate what the victim "ought to be feeling" (Bandes, 2009, p. 7). These feeling rules are not only played out by virtue of the legal professional context but presumably also because of a legal and cultural tradition in which Danish emotional behavior is culturally understood as "calm and quiet" (Johansen et al., 2023). Legal professionals' perception of displayed emotions in the courtroom contributes to their understanding of cases and victims, but this understanding may itself be rooted in specific majority experiences and cultural self-descriptions. I show how prosecutors seek to translate the "incomprehensible" feelings of victims from ethnic minority or socially deprived backgrounds to the judiciary, while judges, for their part, are concerned with classifying and decoding the expressed emotions according to their own social and cultural knowledge.

The analysis thus seeks to merge several different but related theoretical approaches, drawing on emotion theory, cognitive anthropology, and intersectionality theory. Since emotions encode significant social information, they constitute a critical link in cultural interpretations of action and are likely to be actively used in the negotiation of social reality. Cognitive anthropology provides a useful framework for analysing how cultural understandings and meanings are constructed, while intersectionality theory can highlight the multiple identities at stake in the courtroom through the interweaving of different social categories.

Research on emotion and credibility in law

This subsection will outline key perspectives on how emotions influence the evaluation of trustworthiness in the courtroom, and is centered on the temporality of emotions, biased empathy, and gendered and racialized emotions in the courtroom.

The temporal perspective is pivotal for analysing emotions in criminal court cases. Firstly, victims' and defendants' emotional expressions are often recorded from the moment the crime is reported, usually by the police. The parties' immediate reactions to the crime are documented and constitute knowledge about them that is put into the case file that judges will receive prior to the court hearing (Johansen et al., 2023). Secondly, the parties in the courtroom are often asked to recount their experiences and emotions before, during and after the offence (Scheffer, 2010). This temporality of emotions is used to understand the emotional reactions of those involved and to place them in time and space (Johansen, 2023). Bladini et al. (2023), for instance, describe how legal professionals strive to present and explain their party's emotions before, during and after the criminal event as being normal, understandable or necessary, and conversely to present the opposite party's emotional reactions as incomprehensible, out of line etc. The legal professionals thus receive and consider information about the parties' emotions along the entire course of the case, which affects their judgment of lay people's credibility (Ellison and Munro, 2009; Field and Tata, 2023).

A third way in which the parties' emotions play a role in the courtroom relates to the actions in court as they unfold *during* the trial. This may be in the shape of anger directed at another witness or the prosecutor, or the fact that lay persons may not wish to or are unable to react as the court expects, and generally perform either too little or too much emotion (Rose et al., 2006). The behavior of the parties in the courtroom therefore often requires "translation," especially by the prosecutor and defence counsel (Flower, 2019; Törnqvist, 2022). This translation is driven by legal professionals' ability to demonstrate professional empathy, i.e., to try to understand the actions, feelings and motivations of others (Bandes and Blumenthal, 2012; Bergman Blix, 2019). In this way, empathy is used to manage the courtroom and any outbursts of emotion from the parties (Wettergren and Bergman Blix, 2016; Flower, 2019), as well as to elicit information and convey knowledge about the case and its parties (Rossmanith et al., 2018).

Christie's (1986) noted that victimhood is not objectively assessed but rather evaluated on a continuum of "idealness," but he did not explicitly consider what might constitute a victim's ideal *emotions* (Bosma et al., 2018). Victims are generally met with emotional expectations of being able to constrain their possible anger (Miers, 1990; Van Dijk, 2009), just as the specific performance of anger in the courtroom is sanctioned by the emotional regime of the criminal trial (see, for instance, Bosma et al., 2018; Rose et al., 2006; Schuster and Propen, 2010). It may influence the judiciary's impression of the victim if the victim does not react according to these expectations, affecting their sympathy toward these victims (*cf.* Törnqvist, 2022), and consequently, jeopardizing the victim's trustworthiness. These legal feeling rules are interactive and relational (Williams, 2009) in the sense that their meaning shifts according to social situations and expectations within specific institutions and are dependent on broader cultural values (Bandes, 2009; Minissale, 2023). They are also unevenly distributed, because gender, ethnicity and social class come into play and co-define the permissible emotions in the courtroom (Weenink, 2009). This interconnectedness between the "art" of empathy and the ability to translate the emotions of others into the courtroom context is therefore challenged by the fact that it may seem easier to empathize with and thus understand the emotions of the parties if they are "similar others" racially and demographically (Manne, 2017; Lynch and Haney, 2011). For instance, ethnic minorities may be described as reacting in specific ways according to their "culture" and are more easily dismissed as untrustworthy (Baillot et al., 2014; Johansen, 2019; van Oorschot, 2020). Legal professionals' evaluation of trustworthiness rests on their ability to translate information about people and events according to their own prior experiences and cultural knowledge that go far beyond the legal setting (Johansen et al., 2023).

Analysing legal professionals' own epistemic emotions (such as contempt, disgust, anger etc.) which they bring into the courtroom or feel during the case further deepens our understanding of the interplay between lay and legal parties and how emotions are co-constructed through this interaction (Anleu and Mack, 2023; Törnqvist and Wettergren, 2023), but lies beyond the scope of this article. Conversely, focusing only on legal professionals' *own* emotions may lead us to overlook the ways in which they categorize and interpret lay people's emotions according to assumptions about own and other "cultures." This is why I focus on the cultural conditions for the "decoding" of emotions in the analysis. The aim of the present study is thus to

contribute to the well-established research about how legal professionals' own emotions shape courtroom interactions and judgments by focusing on the issue of how *perceptions* of others' feelings influence evaluations of trustworthiness in court.

Cases and courtrooms

The Danish criminal legal system

Scandinavian law has been characterized as a separate legal system (Tamm, 2008), and as a system adhering to civil law, but with elements of common law procedure particularly concerning its adversarial mode (Anderson, 1992). Denmark does not have specialized investigating judges, and the Danish system of criminal and civil courts at the trial stage is simple and unitary. The prosecutor must be objective during the trial, and is required to provide information that is relevant to the defendant's guilt as well as information that speaks toward their innocence. Judges' assessment of evidence is free, and the judgment is based solely on the evidence presented at the hearing in court. The degree of proof is not codified, but certainty beyond reasonable doubt is settled practice, however, the defendant has a "burden of explanation" (Langsted et al., 2019).

Denmark has 24 district courts processing both civil and criminal cases. They form part of a three-level court system consisting also of a Higher and a Supreme Court. At the district court level, which constituted my level of inquiry, the prosecutor initiates the criminal proceedings in the courtroom by reading aloud the indictment. Afterwards, the defendant states whether they plead guilty or not. The defendant is then interrogated—first by the prosecutor and then by the defence counsel. The defendant is not obliged to make statements or answer questions, due to the right to be silent. Witnesses are then brought into the courtroom—victims first—and usually interrogated first by the prosecutor and then by the defence counsel. Victim impact statements are not accepted, at least formally. Usually, the prosecutor brings the victim and other witnesses into the courtroom. Victims of violence are offered free legal representation to assist them throughout the criminal justice process. The counsel's role includes supporting the victim during interrogations and court appearances, explaining legal proceedings, and aiding in claiming compensation for damages. The interviewed counsels described their role in violence cases as preparing victims for court and guiding them on how to communicate and act during the trial. However, not all victims, especially in less severe cases, utilize this opportunity. The present studies therefore do not address the variation in the appointment or role of counsel based on factors like gender or ethnicity since not that many counsels were appointed. If a victim's counsel has been appointed to the case, they will enter and leave the courtroom together with the victim(s). During the interrogation, which is always performed with the defendant or witness sitting at a desk in the middle of the room facing the judges, the counsel will usually sit next to the victim at the desk. In cases where victims do not have counsel, the prosecutor often takes on some of the responsibilities toward the victim.

If there are documents relevant to the case, such as a medical certificate or a criminal record, the prosecutor reads them aloud after all witnesses have testified. Finally, the prosecutor and defence counsel put forth their closing remarks in the case, discussing the question of guilt as well as proposing a sentence. At the end of the proceedings, the defendant has the opportunity to make a statement. The judges then leave the courtroom to deliberate. In the cases of violence I observed, where defendants had pled not guilty, and with a maximum penalty range of 4 years, a career judge and two lay judges would always participate. They have one vote each concerning issues of guilt as well as sentencing.

Methods and data

I have been collecting data for more than 15 years within this legal framework and involving courtroom ethnography in five different projects. The analysis in this article is based on these research projects in Danish court cases from 2007 until now. Not all of them aimed at studying victims and the way they are understood and treated in the courtroom, but my field notes and records from the courtrooms have naturally involved all professionals as well as victims and witnesses. There are several constants across the projects that make them suitable for inclusion within an overall analysis. Firstly, all projects have focused on simple and qualified violence, i.e., within the framework of offences against the person. The projects were based on qualitative methods in the shape of observations of criminal cases in the courtroom, just as they interviewed legal practitioners and their experiences of the cases. During these trials, field notes were taken of the judges' gender, age group, appearance and participatory role in the trial, including guidance to defendants, victims and witnesses, as well as (if any) reprimand of the parties, and how this was communicated both overtly and indirectly. Similarly, the appearance of defendants, witnesses and spectators was noted, as well as the treatment of defendants, witnesses and audience in terms of credibility, the way in which they are addressed, etc., by judges, defence counsel and prosecutors. Two of the projects have also had a processual perspective, in the sense that they have focused on how credibility and impressions of both defendant and victim are co-constructed along the entire criminal process from reporting at the police to legal decision-making (Johansen, 2015; Johansen et al., 2023). The purpose is to synthesize qualitative findings across this related, ethnographic research, identifying common themes, analogies, key metaphors, etc., but I do not strive to aggregate data (*cf.* Noblit and Hare, 1988).

I present the premises and purposes behind two of the projects from which I have chosen examples and citations, although my other projects serve as a contextualization of the data and findings in the paper. My PhD project 2008–2012 explored in broader terms what significance the defendant's "personal circumstances" as collected by the Prison and Probation Service and presented in the courtroom—and used during the deliberations—could have on the legal practitioners' understanding of the case, their involvement in the defendant and on the decision itself (Johansen, 2015). I observed 32 cases in court, and participated during judges' deliberation. After the court cases, the judges, defence lawyers and prosecutors in question were interviewed about their impressions of the particular cases, defendants, victims, witnesses, pre-sentence reports, etc. A total of 38 criminal justice actors were interviewed for this project.[2]

2 I use the name "criminal justice actor" in this paper to address a broader range of professionals such as the police and probation officers, whereas 'legal professionals' includes only people with formal legal training such as judges, prosecutors, etc.

Finally, together with colleagues (2017–2020), I investigated victims of violence and their way through the criminal justice system from reporting and until the case was closed (Holmberg et al., 2021). Part of this project studied the ways in which the professional actors interpreted and classified victims' emotional reactions based on both an overarching, legal institutional understanding, as well as on the basis of their specific roles as either police, prosecutors, judges, etc. (Johansen et al., 2023). We conducted 120 interviews with 59 victims, 37 legal professionals (judges, prosecutors, and defence lawyers), observations of 26 initial interrogations with the police, and 14 court cases.

All respondents across the projects have received information about the projects, how the data would be used, as well as their right to withdraw their participation in the project at any point. Data has been securely stored according to the guidelines of the Danish data protection authority, and all respondents have been anonymized, as well as identifiable details of the criminal cases in question.

The empirical examples in the analysis are chosen based on their general occurrence, implying that I have not chosen "outliers." I have also striven to use data from both projects, and from different cases and informants involved.

Culture, cognition, emotion: an analytical approach

In accordance with my theoretical choices as mentioned above, the subsequent analysis of my data focuses on eliciting the conceptual models that legal professionals use in this legal setting, rather than focusing on a description of their own behavior (Boster, 2011).

Although there is a general agreement that emotions form an integral part of decision-making in law (Bandes and Blumenthal, 2012), there is less consensus as to the boundaries or even connections between concepts such as emotions, language, body and cognition (Finkel and Parrott, 2006). For instance, Bergman Blix and Wettergren (2018) use the concept of an emotive-cognitive judicial frame that shapes legal professionals' perceptions and performance of their work as being predominantly rational. What I am referrring to in the following, however, are two theoretical traditions on cognition and emotion that originate outside the legal realm.

This article defines cognition as the way in which people process ideas, impressions, emotions, etc. through the relationship between individual and culture (Mukhopahay, 2011). My use of cognitive anthropology as one of several analytical approaches should therefore be understood to encompass the role of situated bodily practice in the courtroom and how people process and interpret their impressions of others' emotions (*cf.* Zajonc, 1980; Kronenfeld, 1996). Cognitive anthropology has dealt with issues such as the importance of emotions for both thought (Rosaldo, 1989) and decision-making (Gigerenzer, 2007), drawing on cognitive psychology in order to explain the relationship between culture and person (Holland and Quinn, 1987).

Although early cognitive anthropology—and cognitive theory in general—has been associated with thought and rationality and criticized for being reductionist because of its metascientific basis, behind the designation of the "cognitive" research field there is a wealth of diverse and complex research addressing a number of topics related to human consciousness such as learning, evaluation, emotions, motives, intentions, etc. As Anderson (2011) describes, researchers have also been actively engaged in integrating the field of cognition into emotion research since the 1950s, underscoring for instance how emotions and their cultural contexts influence the processing of social judgments (Forgas et al., 2003). In this research, the focus has been on the fact that people's cognitive engagement with their surroundings is context-dependent, and includes both sensation and intellection (Ellen, 2011).

Within cognitive psychology, prototype theory has shown that humans use categories to gather knowledge quickly and make decisions based on this information (Rosch's, 1978). Within a category, some examples are more illustrative than others and are called "prototypes" (*ibid.*). People's decisions rely on these distinctions between ideal and more peripheral examples, which in turn means that they rest on biases and preconceptions which allow them to be made quickly. Gigerenzer (2007) refers to this phenomenon as the sacrifice of accuracy in favor of efficiency, noting that it can be a necessity in many situations and may even fundamentally ensure survival. Forgas et al. (2003) links these responses to emotions, stating that we also categorize by using emotions, and that these emotional responses to a situation, a person or an object can be produced in a fast and automatic way. These perspectives are relevant for the legal practitioners in the courtroom, who must make decisions based on impressions gathered within a short timeframe. According to Lakoff (1987), when exposed to others' emotions, we use categories to make sense of them based on some joint cultural knowledge. Researchers have used terms such as cultural scripts, schemas, or models to describe these relations between self and society (e.g., Ewick and Silbey, 1998; Holland and Quinn, 1987; Sperber, 1996), of which I will use the terms models or schemas in the following. These are defined as joint experiences connected with the system of values shared by the majority of members of a certain ethnic or social culture, and they offer flexible templates for understanding a given situation or event in the sense that the interpretation of new situations is shaped by interpretations of past experiences (Ewick and Silbey, 1998).

Although research into cognition and emotions cannot be fully separated, the research traditions are nevertheless different. Some similarities include research showing that emotions are collective, historical and cultural phenomena (Williams, 2009), and may thus be studied as embodied thoughts (Nussbaum, 1996; Rosaldo, 1984). Differences between the theoretical approaches include the fact that emotion theory often analyses the role of emotions in relation not only to knowledge production (like cognitive theory), but also to the production of subjectivities (Harding and Pribram, 2009; Jaggar, 1989). Within sociology, studies of emotions have shown how they are socially construced and imbued with feeling rules and emotion management (Hochschild, 1983). Situating emotion reserach within the legal realm, research has discussed the role of emotions in sentencing and decision-making processes. For instance, Bandes and Blumenthal (2012) state that emotions are a set of evaluative and motivational processes that help categorize and interpret information, and influences how we evaluate the intensions and credibility of others, constituting dynamic processes integral to decision-making.

While the field of law and emotion thus explores the relationship between emotions, cultural expectations and decisions, emotion research has generally been criticized for overlooking the role of social positioning (Harding and Pribram, 2009). Emotional research that is situated within culture studies emphasizes topics such as power relations, and views emotions as communicative, intercorporeal, and intersubjective. The expression and perception of emotions are viewed as the convergence of physical, linguistic, and distinctly sociocultural dimensions (Harding and Pribram, 2009). They should be seen as part of power relations

between people, rather than as individual subjectivities (Burkitt, 1999; Williams, 2009), and as an embodied emotional experience that is created relationally and interactively. This approach to emotion thus bridges the field of law and emotion with that of intersectionality.

Intersectionality theory probing into junctions between age, gender, ethnicity, and class as formulated by Crenshaw (1989, 1991) and Collins (2009), can help to bring historical and political perspective to the study of emotion, e.g., in relation to the marginalization of, for example, women and people of color, who have often been considered "emotional" in a specific national and cultural context in the sense of being irrational, subjective etc. (Fricker, 2007). Intersectionality theorists highlight and recognize the multiple identities at stake in social situations through the interweaving of different categories (Collins, 2009; Lutz et al., 2011), which is highly relevant for understanding the ways in which legal professionals assess some victims as more trustworthy than others based on their displayed emotions. Bonilla-Silva (2019) describes how the category race is produced through and with emotions, because people experience and interpret racialized relationships emotionally (see also Denzin, 1984). Bonilla-Silva further argues that the emotions of the dominant race become authoritative since they are seen as the "correct" way of feeling, a point that situates the Danish feeling rule "calm and quiet" within a hierarchy of emotions connected to broader structural differences. This helps us shift attention from a definition of emotions as something people have or enact at the microlevel as part of their identities in courts or other settings to what emotions *do*, and how they as such are deeply rooted in broader structural productions of difference (Ahmed, 2004; Fricker, 2007). The intersectional dimensions of emotion are thus linked to a politics of inequality (McCall and Orloff, 2017). People are generally expected to express emotions in ways that align with their category membership: emotional expectations for women differ from those for men (Collier, 1998; Jaggar, 1989; Lutz, 1990), and ethnic minorities are often characterized as responding in specific ways based on their perceived "culture" (Baillot et al., 2014; Harding and Pribram, 2009). For instance, Fischer (2000) and Shields (2002) discuss how emotion plays a crucial role in constructing concepts of femininity and masculinity, such as the belief that women are more likely to express emotions like sadness, while emotions like anger are considered less acceptable for women to display. Furthermore, categories are constructed relationally in the sense that it may carry quite different meanings entering the courtroom as a white woman or a woman of color, or as a young woman versus as a middle-aged woman (*cf.* Bonilla-Silva, 2019; Harding and Pribram, 2009; Hooks, 1989).

In summation, cognitive anthropology offers a framework for analyzing how cultural understandings are constructed with and through emotions, while intersectionality theory sheds light on the multiple identities at play in the courtroom by examining the interconnections between various social categories. The social construction of emotions, viewed as cognitive evaluations that consider multiple subjectivities and cultural contexts, highlights how these dynamics shape legal professionals' perceptions and interpretations.

Analysis

The analysis takes its point of departure in a generalized understanding of different cases in which violence was perpetrated, and the accepted emotions that professionals link to them. I first introduce the broader Danish feeling rules that may help contextualize the legal settings and their interactions. This part focuses on "the ideal victim." The analysis then proceeds to show how these feeling rules are challenged by the perception of different "kinds" of victims depending on their gender, social class and ethnicity. Using an intersectional lens, I show how legal professionals classify the type of victim they associate with in the courtroom, and the credibility they believe can be deduced from different categories of victims' emotions. The analysis focuses on how victims are supposed to behave emotionally *in* court, and thus delimits itself from analysing victim emotions from a range of other temporal perspectives including expected emotions at the time of the crime.

"Calm and quiet" as a Danish feeling rule

This section describes a broader cultural context, in which criminal justice actors generally defined a "Danish" way of acting in court as "calm and quiet" and in opposition to, for instance, ethnic minorities' way of acting (Johansen et al., 2023). The intention is to analyse terms such as "calm and quiet" as cultural models or schemas, i.e., as expressions of the pragmatic interaction between individuals who communicate using public representations (Sperber, 1996). Ewick and Silbey (1998) use the concept of cultural schema to describe these relations between self and society. Cultural schemas offer flexible templates for understanding a given situation or event in the sense that the interpretation of new situations is shaped by interpretations of past experiences. However, it is not my intention to present understandings such as "calm and quiet" as culturally unique Danish understandings of appropriate emotions in specific institutional contexts such as courts (*cf.* Anderson, 2011), but to explore what it means for professional actors themselves that they meaningfully apply this understanding to assess victims' (credible) responses. Rather than treating "calm and quiet" as a cultural essence, I see it as an emotional expression of an ongoing construction of powerful majority relations at the expense of other identities in the courtroom and beyond (*cf.* Bonilla-Silva, 2019). Throughout the analysis, the notion serves a dual purpose: first, as a reflection of Danish legal and social values, functioning as a cultural descriptor; and second, as an analytical lens through which I study how victim performances in court are challenged by legal professionals based on this cultural self-perception.

A common thread surfacing in the empirical material from the different projects has been criminal justice actors' perception that some reactions from both defendants and victims could seem either too downplayed or too exaggerated, and that this seemed out of place both from the standpoint of a legal norm and from a broader understanding of Danish culture.[3] The meaning of this is analyzed in the following primarily on the basis of statements about victims, and observations from the courtroom. In the following examples (A-D) from interviews with judges and prosecutors, "calm and quiet" is used as a recurring, stable, linguistic phrase:

3 Since exaggerations seem to challenge the Danish feeling rule the most, I have prioritized these examples in the following, although I do analyse 'downplayed' emotional reactions elsewhere (Johansen et al., 2023).

> A. Prosecutor Sofia: I also think that they give an explanation quietly and…
>
> Prosecutor Erik: credibly…
>
> Prosecutor Sofia: If you feel they are affected, then it is also okay for them to be so. So an explanation… A victim who comes in calmly and quietly – you can be a little ill at ease, that does not matter – but it…. Just the fact that it's calm and quiet and you get the explanation, right? (Group interview 2019).

> B. Judge Camilla: But I also want to say that I agree with Emilie that, at least in my experience as a judge, that most of the time it works calmly and quietly for everyone. (Group interview 2019).

> C. Prosecutor Kirsten: When I saw the witness in court, he was a nice guy who sat calmly and quietly… (Interview, 2010).

> D. Judge Lene: I think many of those who give evidence here give a calm and quiet explanation. Ehm but. But these are also common cases of violence. I do not remember having had an aggravated case of violence recently, at least. It may have been the case, but right now I cannot think of any. So it's ordinary everyday violence. (Interview, 2019).

There seems to be both a linguistic, a bodily and a spatial dimension to the term "calm and quiet." In example A, the victim enters the courtroom "calmly and quietly." Thus, the victim's physical actions in the room are taken into account. Examples C and D express ways in which the victim gives evidence, which, according to the actors, is predominantly calm and quiet. Moreover, in example B, the judges characterize the entire trial as being generally "calm and quiet for everyone." This denotes that both the case as an overall event and the parties involved in it are calm and quiet. As described in our previous study on victims (Johansen et al., 2023), the phrase "calm and quiet" was mentioned 27 times in 37 interviews with professional actors. It may seem very straightforward that the professional actors highlight—and prefer—a calm and quiet performance and explanation from the victim (and others). But "calm and quiet" might actually connote values both within the Danish legal system and more generally, just as it may serve to include as well as exclude certain kinds of victims. One way of showing what the concept connotes is by distinguishing its immediate opposite as expressed in the data. In a group interview, prosecutors expressed that it made their job easier if the victim had a certain behavior:

> Prosecutor Nanna: Who puts it forth calmly and quietly and… Yes, seems credible in the way they say it.
>
> Prosecutor Erik: And yes, just not overdramatizing or… there is… Sometimes it also really gets so inflated. Just quietly, soberly, right? (Group interview 2019)

In this quote, a quiet explanation is contrasted with an overdramatization, an exaggeration, just as it is associated with "sobriety," which, all other things being equal, connotes "credibility." It's precisely credibility that can be jeopardized by an overreaction, as stated by these prosecutors:

> Prosecutor Ingrid: But the aggrieved people who kind of uh overreact and stuff like that, they're kind of hard because you have to kind of explain to the judges why… Because it seems weird doesn't it? That it's not just for the fun of it that we're there and
>
> Prosecutor Diana: …A dog and pony show
>
> Prosecutor Ingrid: to explain, is it fantasy we're listening to, or is it real? (Group interview 2019)

According to these prosecutors, they must come up with an explanation when dealing with victims who react so strongly that judges may find the emotional reaction incomprehensible, or verging on incredible.

At first glance, the phrase "calm and quiet" seems like a distinctive way of handling emotions, and, by extension, as a way of characterizing (un)desirable emotions. Research has shown that this "value" may also be found in other institutional settings in Denmark such as in schools (Gilliam, 2014). I identify it as a cultural model, defined as joint experience connected with the system of values shared by the majority of the members of a certain ethnic or social culture (Sperber, 1996). Rosaldo (1984) shows, for instance, how social groups define themselves as "selves" through specific emotions, and that this therefore creates specific attitudes toward emotions. Theories of intersectionality, however, contribute to this understanding by elucidating how the phrase not only structures how emotional expressions are handled and interpreted in the courtroom or other contexts in Denmark, but also classifies undesired emotions along social and cultural divides (Harding and Pribram, 2009). "Calm and quiet" should thus be contextualized as an ethnic Danish, middle class model. The fact that other cultures and countries might share this idea of "calm and quiet" does not necessarily undermine its power to name and exclude in a Danish setting (*cf.* Ewick and Silbey, 1998).

Different kinds of cases and emotions

As shown in the previous section, victims' emotions are carefully monitored and evaluated in the courtroom according to broader understandings of appropriateness. I now proceed to map the ways in which *kinds* of cases, defendants and victims elicit different expectations vis - à - vis their reactions in the courtroom. The first distinction concerns offences against the person versus cases of fraud or theft, which was recurrently addressed by legal professionals in interviews, for instance by this prosecutor:

> Prosecutor Diana: I think it's quite natural that when it's something dangerous, you're present in a completely different way. You ask in a different way than if it's burglary, or I don't know what else it should be… something more material. Fraud, one's account that has been blocked, or a bike that has been stolen… I think you use your empathy and– at least when it's serious.

The quote corroborates that the kinds of cases in which one can be made a victim vary in nature. Dangerous crime leads legal practitioners to act differently toward victims, and several judges and prosecutors mention empathy in their approach to said victims. In addition, psychological experiments show that people expect different

intensity in victims' emotional responses according to what they have experienced (Rose et al., 2006). What I want to develop further here is the suggestion that some types of crime make specific professional understandings of the victim possible (Törnqvist, 2022; Wallin et al., 2021). Violence as a subcategory of crime sets the stage for certain emotional victim responses, depending on their victim status. If we look into this subcategory, the legal professionals further perceived differences within it which evoked an emotional dimension, as Judge Minna explains:

> Judge Minna: Yes, and then just the nature of the case, right. If it is someone who is on their way home alone and who has suddenly been attacked, it is a completely different situation you are in than if you had been arguing with one of your good friends, who you just got mad at in the queue down at the bar. It's a completely different situation then.
>
> Interviewer: Can you elaborate on how that might be?
>
> Judge Minna: Well, it is clear that… that for most people it is somewhat more traumatizing to be attacked on eh… when one walks unsuspectingly down the road, rather than when being part of a quarrel that develops between two more or less equal parties. (Group interview 2019)

This quote, in line with many other interviews, distinguishing between violence in private life, random street violence, and violence in the context of nightlife, reflects Christie's (1986) definition of "ideal" victims as innocent, unsuspecting, with no prior "history" with the defendant, etc. It also reflects a general view among legal professionals about certain victim-offender overlaps. What Christie may have overlooked, however, is how the ideal victim can express emotions that other "kinds" of victims may not (Bosma et al., 2018; Johansen et al., 2023), i.e., the right to feel something specific depends on a combination of the type of case, the victim's role in the violent episode, and the victim's other social characteristics.

As expressed in the last quote, the judge expects that the more "unsuspecting" the victim, the more they will be traumatized from the violence. It also suggests that the person would be expected to emotionally process this violent experience in other ways if he or she had played a different role in it. For example, among the judges we interviewed in 2019, some mentioned that victims can also sometimes contribute to fuelling a conflict:

> Judge Karen: There are also many who feel ashamed and find it embarrassing that they have gotten into this situation and who are, well… Again, there are always two sides to an issue, right? After all, it's… It may well be that there are some things they think are not so funny - or are not so nice to tell - it is rarely the *very very* sweet, *very very* young… (The other judges laugh)

Here some slightly different emotions are at stake. The judge references being embarrassed, feeling ashamed, and that as a victim you may not find it particularly amusing to recount the incident in the courtroom. This, of course, first and foremost suggests a form of "complicity" as expressed in the judge's concluding remark, in cases of violence you rarely meet very nice, very young victims, which can also be seen to imply very innocent or sympathetic victims. Where the first characterization of the unsuspecting victim suggests something traumatizing, the other feelings described are in a way more sordid. Being ashamed and embarrassed is qualitatively different from being traumatized by an incident of violence.

Although the quotes reflect the often-cited notion of the ideal victim, they categorize victimhood in relation to a particular type of violence case, based on a classification requiring prior knowledge of both. The quotes reflect the emotions that different kinds of victims might be expected to exhibit in the situation, whereas the display of other emotions would seem untrustworthy. The innocent victim will probably not feel embarrassment, and the complicit victim cannot credibly express trauma. They are both socially limited if they are to express an emotion that the judges find comprehensible.

In order to further develop the idea of the "ideal" victim, I will therefore return to Rosch's (1978) prototype theory. Rosch pointed out that when people categorize an everyday object or experience, they rely less on abstract definitions of categories and far more on a comparison of the given object or experience with what they consider to be the object or experience that best represents a category. There is a graded degree of belonging to a conceptual category, and some members are more central than others. Prototypes and gradations lead to an understanding of category membership not as an all-or-nothing sum, but as more of a web of interlocking and overlapping categories. The prototypical features of the victim category emerge from examples of cases of violence (in private life versus "gratuitous" street violence, for example). They were also expressed linguistically in how prosecutors and judges talked about victims depending on whether they were more or less "exemplary." The prosecutors mentioned a "criminal victim, an "impartial victim, a "certain clientele," "a victim that is actually a victim," "where the victim is not a real victim at all," etc. Categorizing in the way that legal practitioners do draws on broader assumptions about the victim. This is due to the fact that a set of associated meanings and values is activated which surpass the category of "victim" itself. When talking about "a certain clientele," for instance, prosecutors are also indirectly suggesting that this may be a group of people used to being involved in crime, whether as victims or defendants. For example, one prosecutor says that she does not make much of an effort to advise certain victims about the process of the criminal proceedings because they already know it well:

> Prosecutor Sofie: Because these practical questions about how it works, at least a certain clientele knows how it happens down in court, and then they may still be nervous about having to face their attacker, but at least they physically know where they're going; and who picks them up (in front of the courtroom) and so on. (Group interview 2019)

The physical confidentiality, or lack thereof, is thus in itself a sign of the person's impartiality and innocence. Earlier analysis in the field has investigated how the perception of a "criminal victim" can cause prosecutors not to take as much care of the victim (Johansen, 2015; Johansen et al., 2023). Prosecutors' self-perception as being professionally empathetic is thus contested by their more or less implicit categorization of "unworthy" victims.

Like prosecutors, judges also tried to get an overview of the victim and the case by trying to classify them through the attribution of different kinds of victim status. For instance, a number of judges stated that it could be uncomfortable to testify in court "if the person is really

a victim," which suggests other options for not being a victim. Examples of the latter emerged through statements such as "the alleged victim in question," "allegedly aggrieved," "who was actually the victim," "a possible aggrieved," "who is allegedly wronged here," "the one who claims to be the victim," etc. These phrases communicate objectivity as well as (im)partiality. As stated in a previous article (Johansen et al., 2023), they related to the judges' self-perception as members of a profession that must objectively decide on a case and therefore cannot reach a verdict on any person's "legitimate victimhood" until the very end of the judgment. Nevertheless, the following quote suggests that some (violent) emotions may be more justified if the victim's "status" within that category is taken into account:

> Judge Berit: There may also be someone who is actually seriously aggrieved and who is quite aggressive and annoyed by what has happened, right.

One might tentatively point out that, in the eyes of this judge, the victims who are "seriously aggrieved" may be somewhat more justified in exhibiting emotions such as anger or aggression. The judge does not elaborate on what she means by "serious," but it may be understood as an opposition to the otherwise common assumptions that some victims bring the situation on themselves, or have been part of the conflict, or that the case of violence does not seem very serious in itself.

Different kinds of victims—different kinds of accepted emotions

The previous section has shown how certain kinds of cases and victims are evaluated and judged on the basis of the emotions associated with them, and that legal practitioners similarly expect certain sets of emotions to be expressed by victims depending on their role in the violent episode. In this section, I explore these differences in more detail. Intersectionality theory is used to highlight the multiple identities at stake in the courtroom as social categories such as class, gender and ethnicity interact.

I will begin by looking at an example from a court case, showing how a woman victim of violence was understood through a combination of her explanations and feelings, which were expressed linguistically as well as physically. Theories about emotions have been criticized for not taking embodied social positioning into account (Harding and Pribram, 2009). Conversely, intersectional theories have focused on structural inequality and generally underplayed how social categories are also constituted through emotions (Lutz, 1990). The following example illustrates these different dimensions of embodied cultural knowledge:

> I am at the police station when victim Sandra comes to report some blows that her neighbor Rie has given her. The violence is the culmination of years of harassment, where, according to Sandra, the neighbour has thrown garbage in her garden, stalked her, cut open her car tires, etc. Sandra seems scared, and she does not dare to go outside her home. The police officer is very responsive to her and notes down. He also urges her to seek a restraining order. After a few months, the case goes to court, where I meet Sandra again. She must give evidence. Both Sandra and Rie are between 40 and 50 years old, Sandra a little older. Both are ethnic Danish. The prosecutor shows Sandra a lot of pictures of her bruises and asks about the blows, was she beaten with the right hand, left hand, etc. […]. Meanwhile, Sandra has become a bit agitated, not angry, but agitated, she speaks loudly, and when she gets questions about the blows, she gets up from the witness stand and shows where she was kicked, etc. She is very physical in her explanation. [I think if you don't know Sandra, you'll think she's a bit aggressive.] The court finds Rie guilty, she receives a 30-day suspended sentence, which is relatively lenient. The judge justifies this by saying that there "has been a conflict" between the two women. After the verdict, everyone leaves the courtroom, except the prosecutor and two attorneys from the Ministry of Justice, who were supposed to provide feedback on the prosecutor's performance. The judge also comes in briefly and talks to the new prosecutor. All three believe that both women probably had it coming. The two clerks say they would have "gone tougher" on both the defendant and victim. They thought Sandra sounded like she herself had been a big part of it, and like a type that could create a conflict. (Field Notes 2019)

My own perception that Sandra may appear aggressive in the courtroom turns out to be echoed by the other legal professionals, implying that my reflections during observation are not objective, but are shaped by our shared cultural schemas for what constitutes acting aggressively (Atkinson and Coffey, 2001; Johansen, 2019). The fact that Sandra appears quite physical, bordering on angry or aggressive, when giving her account is interpreted by the legal professionals as a sign that she herself has been part of the conflict and is thus a kind of "accomplice." They clearly do not expect this reaction from her, and their response is to suggest going "tough" on her. Her anger is not interpreted as an outburst, justified or otherwise, triggered by years of harassment, but as a sign of a conflict with two equal sides between two women. Sandra's "emotional purity" as ideal victim is contested by her apparent aggression, implying that emotionally "muddy" cases prompt the legal professionals to take into consideration both sides of the conflict to a greater extent than emotionally trustworthy victims. Constructing this kind of knowledge is thus a collective project since emotions exist in dynamic relationships between lay people, professional structures and specific cultural contexts (*cf.* Bandes, 2009; Kenney, 2004). They are continuously expressed and evaluated in the court's social interactions between a victim/offender and legal professionals (Anleu and Mack, 2023). The dismissal of Sandra's outburst can therefore be interpreted both as a consequence of her general status as a victim and as a manifestation of gender and age-based expectations. Victims are generally met with emotional expectations of being able to constrain any aggression they may be feeling (Miers, 1990; Van Dijk, 2009), and the specific performance of anger in the courtroom is sanctioned by the emotional regime of the criminal trial (Bosma et al., 2018; Rose et al., 2006; Schuster and Propen, 2010). A defence lawyer, for instance, stated in an interview that:

> "It may make a difference if the defence lawyer can get the victim a bit upset, and maybe make the victim appear a bit like one who has caused something, then they may win over the lay judges and the judge a bit" (Interview, 2019).

This lawyer explains a professional strategy for getting the victim "upset," and couples anger with issues of complicity and untrustworthiness, which is precisely what happens in Sandra's case.

Additionally, though, Sandra's case invites reflection on whether different expectations apply differently to women and men. Would her actions have seemed as similarly aggressive if she had been a man? The vast majority of violent cases I have observed included a male defendant, and in about half of the cases, a male victim. It often happens that one or both parties get annoyed or vocal. In one observed case, for instance, a male victim ran out of the courtroom in frustration. The case concerned an escalating street argument at night in Copenhagen. The judge dryly remarked: "an angry young man," and continued the trial (field notes 2011). No reference was made to a "conflict" between the two parties in the grounds of the judgment. The two examples come across differently in the sense that the "angry young man" fits better into an understanding of who is allowed to express anger as a victim. It is undesirable, but not incomprehensible for the man to express himself like this, and none of the legal professionals subsequently voiced any consternation about that incident in informal conversation.

Women, on the other hand, are expected to express anything but anger (Hochschild, 1983; Lutz, 1990). According to Shields (2002), the question of anger constitutes a fundamental paradox in the prototypical expectation for emotional female/unemotional male. Emotionality is associated with femininity, while anger as a prototypic emotion, is considered masculine. Women are expected to express emotions like sadness or empathy, while emotions like anger are socially restricted for them. Sandra may therefore be affected by the expectations placed on her both as a victim *and* as a woman. She appears more remarkable than the male victim because of the unexpected combination of her raised voice and standing up in the witness stand. This is an example of an embodied emotional concept of anger, in Lakoff (1987) words, which is clearly gendered. It also shows how emotions position individuals within structures of dominance and function as cognitive assessments and moral judgments of the individual's place in the world (Denzin, 1984; Jaggar, 1989).

Similarly, age is imbued with emotional meanings and positioning (Harding and Pribram, 2009). Within the legal system, there is an assumption that the younger a person is, the more immature and emotionally reactive (Johansen, 2019). Sandra's triple position as victim, woman, *and* middle-aged may place her reaction in a particularly negative light, since she is possibly also seen as too mature to show anger.

Things may play out differently in relation to sadness as an emotion, as noted by Shields (2002). Several judges stated that young men had fewer opportunities to show how sad and shaken they were after a violent case in which they were victims:

> Judge Helle: But a boy who has been beaten by someone, by two or more other boys, has to defend more than just himself. I think he feels, well, I'm a boy, I should be able to handle this myself. There is some pride that is different than if it were a girl who can afford to be sad. (Interview 2019)
>
> Judge Lisa: It is typically men who are subjected to violence in nightlife, so are also more subject to a convention that "If you go out – well, then you may get some blows." So they can't even… So they can't really go in and show how upset… That is, how shaken they are. They just cannot. (Interview 2019)

This attitude was also prevalent among prosecutors, some of whom even believed that men crying in court was "pathetic" (Field notes 2010).

When interviewed about their experience of different kinds of victims, as mentioned, prosecutors distinguished between cases and more or less worthy victims, but also between different types of reactions based on the victim's social environment, as in the following group interview (2019) with prosecutors:

> Sally: Well, it does matter if it's Susanne coming from the abuse environment, who is already piss-drunk when she shows up (in court), etc. And swearing and shouting, versus when old Grethe Jensen comes and has been beaten or has had her bag stolen, or whatever. So that is the ideal victim. That it's someone who is credible, that you trust her, that she wants to talk…And is affected… I feel like saying…
>
> Kirsten: Yes, it's okay if they cry a bit.

Here, shouting is considered an inappropriate behavior, and at the same time as associated with a social environment. Both victims are women, but one of them is from an abusive background, which is somewhat akin to prosecutors' assessment of victims as being from "a certain clientele." Susanne is not sad, she is angry and noisy, while the older woman is emotionally "affected," possibly crying. Conversely, a non-reaction from a victim of violence considered "foreign" to risky environments seems equally troubling, as the following example from an interview with a judge exemplifies:

> Judge Emma: […] sometimes when you… you may feel surprised that… that someone who is not part of such an environment comes and tells a VERY violent story and can still retain so much control over themselves, then you may sometimes think "hmm?". […] so it forms part of…an assessment of evidence, of course it does, how people they…
>
> Interviewer: it will seem less credible??
>
> Judge: Well, you may find yourself thinking "Oh, can this really be true?" (Interview, 2019).

Here, the victim's alleged socially healthy environment puts expectations on them to be very distressed about a violent episode that people from "a certain clientele" would be more used to and therefore less prone to be distraught at.

Every time we experience emotions, we use categories to understand and make sense of them (Lakoff, 1987), and in the past examples, intersections between gender, class and age are articulated. This insight can be used and developed to understand not only who behaves most ideally in the category of victim (*cf.* Christie's, 1986), but also that victims' different emotions are linked to social markers as purported by intersectionality theory.

The last perspective in the analysis concerns ethnic background. Legal practitioners mentioned that excessive reactions from ethnic minority victims could elicit feelings of untrustworthiness in the court. For example, one prosecutor expressed:

> Prosecutor Pia: A lot of the girls I've been down [in court] with, where it's some (break) foreigners, where it's actually victims I'm thinking about now, seem like the cultural differences mean that they're just far out, and they can't quite understand why you're asking them anything. They usually perceive that if you ask them

> something, even though they have explained it to the police once, and then when I ask again, they perceive it as if I do not believe them, and that is not the case, but they quickly become wronged in their way of acting.
>
> Interviewer: So also the witnesses, the victims?
>
> Pia: Both the witnesses and the defendant I think, and I think that's their culture, and that they may also feel that they are already feeling bad when they come, and it's a Danish judge and a Danish prosecutor and Danish defence counsel.
>
> Interviewer: You emphasize the girls?
>
> Pia: I certainly think, especially these fights, that they feel so wronged, and even though they are actually really victims in the case, then…– The specific case that I'm thinking of, well they ruined it for themselves in a way because they were chewing gum, and when I asked them, they responded like, "How would you feel if it were you, do you think?" And if they had told completely objectively how, or not objectively, they are of course allowed to be subjective and be emotional, but how it had happened, and just answered the questions, so yes, it would have had a different outcome.
>
> Interviewer: What was the outcome?
>
> Pia: They were acquitted, it was two guys, also foreigners, who were accused of violence against them, but the girls could not explain at all, yes all wound up […] One of them actually said, "Well, don't you believe me, and why are you laughing?" There was actually a lay judge who sat and laughed or something like that because her behavior was so upset, so completely disproportionate. But of course it was completely wrong that he sits and laughs. It must also be offensive to her. (Interview 2010)

According to this prosecutor, the two victims are somehow responsible for their alleged perpetrators being acquitted, since they did not behave in a way that was emotionally appropriate according to Danish cultural norms, acting disproportionately both in terms of language and aggressive behavior that seems unusual in this legal context (*cf.* Rose et al., 2006). Another prosecutor tried to explain an ethnic minority victim's allegedly excessive reaction by explaining to the judges that:

> I think we should take into account that we may all have specific ways of reacting to crime, and the victim is reacting according to her experiences. (Field notes 2010)

However, this explanation results in a delegitimization of "foreign" emotions, and the power to define appropriate behavior is exercised with emotions as a cultural "weapon." Abu-Lughod and Lutz (2009) similarly argue that emotions are used as an "idiom for communicating social conflict, and the ideal or deviant person," and thus function as socially contested evaluations of the world. Accordingly, the feelings of majority Danish people are normalized, whereas those of ethnic minorities are deemed untrustworthy, which produces hierarchies of feelings and emotional domination (*cf.* Bonilla-Silva, 2019). The rejection of trustworthiness based on identities such as race or gender, therefore, is not merely an issue of contestation at a local level, but functions as a structural exclusion, giving rise to systematic injustices (Ahmed, 2004; Fricker, 2007). In light of this, the prosecutor seems to explain legal injustice through the coupling of "culture" and emotion, entailing that this injustice is stabilized and attributed to another ethnic group and foreign culture, rather than recognizing that the courtroom and legal system are themselves co-producers of "ethnicity" as well as structural inequality. The two victims' emotional reactions might as well have been interpreted as a sign that they precisely perceive this institutional deligitimation, confirmed by one of the lay judges' dismissive reactions.

Trusted emotions: concluding discussion

It has been pointed out that legal practitioners may misinterpret communication with ethnic minorities, both in terms of different ways of explaining themselves, and different ways of expressing emotions (e.g., Gotaas, 2000; Shannon and Törnqvist, 2008). The behavioral codes may seem obvious to many legal professionals, and are therefore concealed from both themselves and the people who cannot decode the majority norms of language and behavior. The court's understanding of emotions such as anxiety, anger, or grief shows the legal practitioners' preoccupation with the victim, but this understanding is limited to certain accepted types of emotions, body language and social relations, which are further linked to the severity and situation of the case. As mentioned in the introduction, the Danish Institute for Human Rights is in the process of publishing a report which shows that victims from ethnic minority backgrounds more often experience that the defendant(s) are acquitted. As a quantitative study, it cannot explain why, but precisely because acquittals occur most often in the "ordinary" cases of violence, and not in rape cases or serious cases of violence, it seems fair to highlight the link that many legal professionals themselves make between trustworthiness and an incredibly strong emotional reaction in the courtroom in less serious cases.

While legal professionals may use empathy to understand different expressions of emotions, motivations, credibility and so on, this empathetic approach is challenged by unexpected or "matter out of place" emotions (Bladini et al., 2023). This suggests that "empathy" is neither a general nor a neutral entity. The analytical framework set out in this article has allowed me to go beyond issues of the (in)ability to empathize, and to explore the cultural assumptions that enhance or hamper this "empathy." I argued that the legal expectations put on victims to be "calm and quiet" constitutes a specific and pervasive cultural model or schema that affects their credibility. Social judgments thus involve a process of categorization, which prompts legal professionals to translate information about people and events according to prior experiences, knowledge structures, and values that reach far beyond the courtroom and the legal context and rely on broader systems of knowledge. Being "calm and quiet" is an expression that similarly appears in other Danish institutional contexts such as schools (Gilliam, 2014), and in Danish popular culture such as music, literature, and film.[4] When prosecutors and judges evaluate victims' credibility, this assessment should be understood in light of both the legal context *and* broader semantic representations of emotions, i.e., how our societies construct emotions, and the ways in which people think about emotions (Anderson, 2011).

4 For instance, the Danish folk and rock singer Kim Larsen wrote the song "calm and quiet," there is a Danish children's short movie, and a cartoon with the same title, just to mention some examples.

However, not all victims need to be equally "calm and quiet," since this cultural expectation is mediated by gendered, majority perceptions of behavior. Intersectionality theory refines the idea of cultural models by focusing on identity categories such as gender, race, class, age etc., revealing how expectations regarding victims' emotional reactions are also shaped by social identities constructed in specific locations and contexts (Yuval-Davis, 2006). This approach highlights the ways in which notions of own and others' (emotional) cultures within the courtroom and beyond are intertwined with racism and discriminatory practices against immigrants in Denmark. By focusing on emotional behavior rather than social structures and power relations, legal professionals consolidate "culture" as being monolithic, static, in short, culture as essence (*cf.* van Oorschot, 2023). My own discussion of legal professionals' cultural preconceptions similarly risks portraying "calm and quiet" as imperative cultural model. However, the analytical approach to knowledge structures does not imply that all people in Denmark think, feel or behave similarly, or that it is impossible to desist or raise awareness about specific cultural understandings. It might seem tempting to suggest that judges should raise their awareness about "other cultures," for instance through cultural sensitivity training. However, as discussed by Rossmanith (2023), this kind of training may lead to overconfident judges who feel they can "read" people from other cultures or social groups, based on generalized knowledge unintentionally reproducing stereotypes and biases. Rather than offering judges awareness training about *other* peoples' cultures, then, it might be more fruitful to suggest raising awareness about their own implicit categorizations as well as the cultural assumptions they are based on.

Data availability statement

The datasets presented in this article are not readily available for sharing. Requests to access the datasets should be directed to louise.victoria.johansen@jur.ku.dk.

Ethics statement

The studies involving humans were approved by the Datatilsynet, Copenhagen. The studies were conducted in accordance with the local legislation and institutional requirements. The participants provided their written informed consent to participate in this study.

Author contributions

LVJ: Writing – original draft, Writing – review & editing.

Funding

The author(s) declare that financial support was received for the research, authorship, and/or publication of this article. One of the projects was funded by Rådet for Offerfonden (16-910-00046).

Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

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frontiers | Frontiers in Sociology

TYPE Original Research
PUBLISHED 13 May 2025
DOI 10.3389/fsoc.2025.1461018

OPEN ACCESS

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RECEIVED 07 July 2024
ACCEPTED 14 April 2025
PUBLISHED 13 May 2025

CITATION
Bladini M (2025) From distance to embodiment—objectivity and empathy in Swedish rape trials. *Front. Sociol.* 10:1461018. doi: 10.3389/fsoc.2025.1461018

From distance to embodiment—objectivity and empathy in Swedish rape trials

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This article investigates how objectivity is performed and embodied in Swedish rape trials, where legal decisions often hinge on oral testimonies rather than technical evidence. Drawing on the sociology of emotions and feminist legal theory, the article challenges the positivist notion of objectivity as dispassionate detachment. Instead, it conceptualizes objectivity as a situated and emotionally regulated practice, co-produced through empathic translation and imagination. Based on ethnographic fieldwork—including observations, interviews with legal professionals, and analysis of 18 rape cases—the study shows how empathy serves as a critical epistemic tool in the courtroom. Judges and other legal actors must translate everyday experiences into legal logics while maintaining impartiality. Concepts such as himpathy and herasure (Manne), female fear, and male fear are used to explore how gendered norms shape credibility assessments and emotional orientations in rape trials. The article argues that empathy does not undermine objectivity, but rather constitutes its condition in cases where normative assumptions and lived experiences diverge. Harding's standpoint epistemology and concept of strong objectivity inform a model of legal reasoning that is reflexive, perspectival, and emotionally attuned. The study identifies how empathic trials—where legal actors actively engage with gendered perspectives—can counteract testimonial and hermeneutical injustice, thus fostering more equitable adjudication. Ultimately, the article advocates for a reconceptualisation of objectivity as embodied and relational, particularly crucial in the legal treatment of sexual violence.

KEYWORDS

law and emotions, criminal law, empathy, objectivity, rape trials, standpoint epistemologies, himpathy and herasure, male and female fear

Introduction

In the framework of liberal democracies, the judicial system stands as a pillar of governance, securing its public credibility through its commitment to impartial and transparent administration of justice. The principle of the rule of law ensures that all individuals are treated equally before the law[1].

Criminal law represents one of the most intrusive forms of state authority; thus, it is essential that criminal trials are both conducted fairly and seen to be fair, with judges maintaining impartiality to ensure justice for everyone. The question of objectivity has

1 Weber interpreted the development of modern law as intertwined with the processes of rationalization and bureaucratization. He distinguished between substantive law, which is influenced by ethos and emotion, and formal law, which operates on objective instrumental reason and administers justice impartially, treating all individuals equally and 'without regard to persons' (Weber, 1998: p. 214).

traditionally been dealt with as an ideal, embedded in the modern positivist ideal, particularly so in a legal scholarly debate (e.g., Rawls, 1999; Weber, 1998; Maroney, 2011; Nedelsky, 2011; Bladini, 2013). This ideal may be illustrated by Rawls (1999)' ideal judge placed under the "veil of ignorance" to become detached from context and relationships. The objectivity ideal is critical for securing societal trust and upholding the legitimacy of the judiciary. Objectivity has, in line with a positivist tradition, been understood as factuality, impartiality, and being achieved solely through reason, meaning being dispassionate and without engagement with emotions (Maroney, 2011; Bladini, 2013).

However, objectivity has, by scholars from various scientific fields, been showed to be far from unemotional and disembodied (Bladini, 2013; Bergman Blix and Wettergren, 2018; Lynch et al., 1995; Latour, 2002; Scheffer, 2010; van Oorschot, 2021). Bergman Blix and Wettergren (2018) highlight how judges often display objectivity as a non-emotional state, yet this display is the product of a sophisticated process of managing both their own and others' emotions. Lynch's research has demonstrated how scientific facts, truths, and objectivity are not merely discovered, but are actively constructed and *performed* through embodied practices in legal contexts (Lynch et al., 1995). This resonates with Latour's *actor-network theory* (ANT), which similarly challenges the notion of truth and objectivity as static or absolute, instead positioning them as the products of complex networks of human and non-human actors, material processes, and social practices (Latour, 2002).

Cases involving sexual violence in general, and rape in particular, challenge the traditional ideal of objectivity to its core. In these cases, lived experiences of victims and defendants, as well as embodied experiences, emotions and shared memories of legal actors are at play. Trials in these cases often focus on oral evidence, making the courtroom a site where empathy and objectivity intersect (Bladini et al., 2023; Wettergren et al., 2025).

Sweden, a hybrid legal system, as part of the Scandinavian legal culture, is internationally highly ranked in gender equality[2], and has a relatively newly implemented consent-based rape law (in 2018). Yet, there are challenges, and the legislation on sexual violence is the part of Swedish criminal law that has undergone the most reforms (Träskman and Wennberg, 2019) and consistently provokes criticism—both from those advocating for harsher penalties or broader legal provisions and from those who argue that its complexity undermines legal certainty (Leijonhufvud, 2015; Proposition, 2017/18:177). Despite extensive reforms, significant challenges remain, particularly when it comes to its application. The number of solved cases and convictions has historically been and still remain relatively low, compared to many other types of crime (Brå, 2025: p. 3). Moreover, the application of the law has frequently been criticized for being distressing or degrading for victims (Leijonhufvud, 2015; Proposition, 2017/18:177). Therefore, Swedish rape trials are of particular interest when scrutinizing the objectivity ideal and practice in criminal legal procedure.

This article examines how objectivity is performed in Swedish rape trials, with particular attention to the intersection of empathy and objectivity in judicial decision-making. The analysis draws on a combination of the sociology of emotions—focusing on concepts such as empathy, empathic translation and empathic imagination—and feminist theory, including notions such as himpathy, herasure, and male and female fear.

The aim is 2-fold: 1) to demonstrate how empathy operates as a tool for judges and other legal actors to translate or imaginatively relate everyday life experiences to legal logics in the performance of objectivity, and 2) eluminate how standpoint perspectives—especially feminist accounts such as the concept or female fear can serve as critical resource for empathic translation and imagination, thereby countering the effects of himpathy and herasure in legal contexts.

The article starts with a brief introduction to the Swedish legal context, followed by a short description of the theoretical and methodological framework including the material, then the analysis is presented in the section *Objectivity in Practice—Empathic translations and dispassionate encoding* and the article ends with concluding remarks.

The Swedish legal context

The legal systems of Scandinavia are frequently described as hybrid systems, founded primarily on codified law, yet incorporating aspects of prior case law. Situated between the civil law tradition of continental Europe and the common law system, these legal systems have historically, and in substance, demonstrated a closer alignment with the continental legal tradition than with common law (Bogdan and Wong, 2022: p. 10).

A key foundational principle within Swedish courts and government institutions is the principle of transparency and public access, which ensures that the public can access official records and, for instance, attend criminal trials (except when closed sessions are necessary to protect conflicting interests, which is regularly the situation in rape cases; Bogdan and Wong, 2022: p. 14).

Objectivity regulated

Objectivity in Swedish courts is regulated by sets of rules with different functions: establishing rules and granting rules. The first set of constituent rules establish a requirement that criminal proceedings be conducted objectively. The requirement of objectivity as expressed in the Constitution (RF 1:9; 2:11)[3], and in the European Convention of Human Rights (ECHR) and the Treaty of Lisbon's reference to it, which deals with the right to a fair trial.[4] The judicial oath can be understood as a mechanism that instills the requirement of objectivity not merely as an abstract principle, but as an embodied commitment in the professional conduct of every incoming judge (RB 4:11).[5]

In jurisdictions governed by the rule of law, merely establishing a requirement for objectivity in judicial activities is insufficient. The

2 https://eige.europa.eu/publications-resources/publications/gender-equality-index-2024-sustaining-momentumfragile-path

3 Regeringsformen [The Instrument of Government] (RF) Chapter 1 Section 9; Chapter 2 Section 11.

4 Article 6 in ECHR and article 47 in the Treaty of Lisbon.

5 Rättegångsbalken [Swedish Code of Judicial Procedure] (RB) Chapter 4, Section 11.

rules must also perform an executive function. The mechanisms designed to enforce judicial objectivity in Sweden can be categorized into two distinct groups: rules of competence and procedural rules. The former includes regulations concerning the independence of judges, their qualifications, and their ability to adjudicate. This category also covers provisions for the removal of judges from office, and oversight of their activities, including criteria for disqualification in specific cases. The latter group, procedural rules, addresses the conduct of criminal proceedings, the assessment of evidence, and accountability measures. Together, these rules form a comprehensive framework intended to uphold the integrity and impartiality of the judiciary (Bladini, 2013).

Striking for these both sets of rules are that they focus on the distance between the judge and the parties, and that the judiciary must be *seemingly* objective, but they lack discussion on *how* the requirement of objectivity shall be fulfilled.

The criminal procedure and rape legislation

The Swedish criminal procedure is based on adversarial and negotiation principles, structured around two opposing parties, and predominantly accusatorial in nature. However, the judge may assume an active role to ensure the thorough investigation of the case (Ekelöf and Edelstam, 2002). The only procedural element that is legally binding for the court is the description of the criminal act as stated in the charge, which also sets the parameters for the trial (RB 30:3).[6] The process is governed by the foundational principles of free admissibility and free evaluation of evidence (Ekelöf et al., 2009; Fitger, 2014; Holmgård, 2019).[7] The burden of proof rests with the prosecutor, and the standard of proof is set to a high threshold, i.e., the guilt must be proven beyond reasonable doubt (Ekelöf and Edelstam, 2002). Several key principles underpin Swedish criminal procedure: the principle of orality (cf. Bylander, 2006), the principle of immediacy (which requires that only evidence presented during the trial may be considered), and the principle of concentration, which stipulates that the trial should be conducted within a concentrated time frame (Wong, 2012; Ekelöf et al., 2009). Finally, as mentioned above, a fundamental principle worth mentioning is the principle of transparency and public access to judicial proceedings, which means that courtrooms are open to the public, including during criminal trials. However, due to the high sensitivity of rape trials—for instance, the classified nature of the proceedings and the confidentiality measures taken to protect the victim—such trials are usually held behind closed doors.

The Swedish rape legislation has gone through many reforms, the latest one in 2018 when the explicit requirement of non-voluntariness was introduced, together with the new crime, negligent rape. This is one of many consent-based models introduced in Europe and elsewhere, and the Swedish model falls under the affirmative consent model (Uhnoo et al., 2024a; Wegerstad, 2021). The legal change has been met with both hope and concern, and research indicates that while some of the intended effects of the reform have been achieved, the shift in norms is slow, and several challenges remain (Wettergren et al., 2025; Brå, 2025).

The legal professionals and parties in criminal cases

In Swedish trials the court consists of one legal judge and three lay judges in District Court, and three legal judges and two lay judges in Court of Appeal. All judges, legal and lay, have equal votes.[8] In the event of a tie in votes, the decision that results in the most lenient outcome for the defendant prevails.

Apart from the judges, three other legal professionals participate in the trials: the prosecutor, the defense lawyer, and the victim's counsel.

The prosecutor is bound by the principle of objectivity, not only during the pre-investigation, but also during the trial (RB 23:4 & 45:3 a).[9] A keyway to understand how prosecutors interpret and perform their role in court is hence through the influence of the objectivity principle. Prosecutors also appear to assume that facts speak for themselves. In our previous studies, many of the prosecutors seemed to rely on the assumption that the court, particularly the legally trained judges, can independently assess and interpret the presented facts without the need for extensive framing or contextualization. This reflects an underlying belief that judges, as legal experts, are capable of drawing conclusions from the evidence without significant narrative guidance from the prosecution (Bladini et al., 2023).

However, this approach may be less effective in rape cases, where the primary evidence typically consists of oral testimonies. In such cases, the nature of the evidence may demand a more nuanced presentation, compared to cases involving complex technical data, where prosecutors are generally more diligent in framing and explaining the facts. Nonetheless, there are some prosecutors who challenge this traditional objectivity, and perform a more active role in shaping the narrative, in line with a collectively embodied objectivity.

The defense lawyer is not bound by any ideal of objectivity, but rather represents a client and may therefore adopt a fully partial stance. Defense lawyers are often skilled in the rhetorical framing of evidence and are acutely aware that their efforts may influence the outcome of the case. In particular, they engage in strategic rhetorical and emotional framing (Wettergren et al., 2025), an aspect further explored below in the theoretical point of departure.

The victim's counsel is appointed by the court to support victims of serious crimes, such as sexual and violent offenses, by ensuring that their rights and interests are represented throughout

6 Rättegångsbalk [Swedish Code of Judicial Procedure] (RB) Chapter 30, Section 3.

7 These principles are not unlimited; the question of admissibility is constrained by considerations such as costs and efficiency, while the evaluation of evidence is guided by both legal doctrine and jurisprudence from the Swedish Supreme Court. While the Supreme Court in Sweden traditionally engaged in legal questions, but not evidential issues, this has changed since the 1980's.

8 Further reading on the Swedish system with lay judges, see e.g. Diesen (1996); Roos (2022).

9 Rättegångsbalk [Swedish Code of Judicial Procedure] (RB) 23:4 and 45:3 a.

the judicial process. This role involves providing essential legal advice and emotional support, thereby assisting complainants in navigating the complexities of the criminal justice system (Proposition, 1987/88:107; NJA II, 1988). Responsibilities typically include advising on legal matters, supporting the preparation and presentation of evidence, and advocating for the victim's rights, particularly in relation to compensation (Tham et al., 2011).[10] However, victim's counsel are often relatively junior lawyers, and since the prosecutor holds the primary responsibility for the criminal case, the remit of the victim's counsel can become indistinct—particularly concerning her capacity to mandate to engage with issues of guilt. At times this position has been characterized as operating in the shadow of the prosecution, relying heavily on the prosecutor's lead rather than pursuing an independent legal strategy.

The complainant is in general present during District Court (DC) proceedings but not during Appellate Court (AC) hearings. In the latter, video-recorded testimonies from the DC trial are used, eliminating the need for new examinations. The AC reviews these recordings instead of conducting new interrogations, which is considerate of the complainant's wellbeing, reducing additional psychological distress. This procedural distinction highlights the Swedish judicial system's compassionate approach, prioritizing the mental wellbeing and comfort of the complainant while maintaining the integrity of the legal process through recorded testimony. However, following the introduction of Sweden's consent-based rape legislation, the victim's counsel's right to be present in court during trial has been curtailed, now requiring special reasons for participation (Proposition, 2017/18:86). This shift introduces a potential imbalance in how the parties appear before the court.

While the defendant and defense lawyer are present, the complainant and her counsel is not.

Theoretical point of departure and methodological framework

The article builds on two strands of research: sociology of emotions and feminist theory. A fundamental understanding in this article is that emotions and cognitive reason are intertwined in legal decision making (de Sousa, 1987; Etzioni, 1988; Damasio, 1994; Barbalet, 1998). This is relevant for the understanding of objectivity, which is here understood, not as a state but a process, i.e., a doing of objectivity in practice. In this sense, the field of sociology of emotions is crucial. The embodiment of objectivity, inspired by Lynchs' work on embodied legal practice, will be scrutinized by combining Hardings standpoint epistemologies, and the emotive sociological concept empathy. One crucial point of departure is that objectivity is a constantly ongoing process where judges perform and do objectivity through an advanced work with emotion management, their own and others' as well as in cooperation with other legal actors in the court room, building on the work by Bergman Blix and Wettergren (2018).

This understanding will be combined with another objectivity ideal, that stems from feminist research, i.e., Hardings *strong objectivity* building on standpoint epistemologies. By combining empathy, a tool to understand someone else's perspective in the sociology of emotions theory, with two specific standpoint epistemologies, i.e., a female and male perspective of rape respectively, I will explore the challenges specific for rape cases mentioned above. The following concepts from feminist theory will also be used: *himpathy* and *herasure* as developed by Manne (2018), alongside the feminist concept of *female fear* which will be used together with the corresponding concept of *male fear*.

Sociology of emotions and empathy

Emotions are traditionally viewed as incongruous with such judicial processes. Nonetheless, it is widely acknowledged that a criminal courtroom is inherently laden with emotions: a nervous witness, a frustrated suspect, and an anxious victim, with testimonies that often move listeners to tears. Despite this, the judge is expected to maintain an impassive demeanor and remain neutral (Bergman Blix and Wettergren, 2018). The prevailing notion is that emotions are irrelevant to the role of a judge and can therefore be set aside. This belief is attached to the positivist ideal of objectivity, which posits that emotions and reason are antithetical. Consequently, emotions are perceived as intrusions that disrupt the rational processes of conducting trials, evaluating evidence, and engaging in deliberations. However, research in philosophy, neuroscience, social psychology, and sociology has demonstrated that emotions and reason are intertwined and collaboratively facilitate rational decision-making (e.g., Nussbaum, 1996; Damasio, 1994; Barbalet, 1998; Ask and Granhag, 2007; de Sousa, 2008).[11]

The expectations for how different actors express and manage their emotions can vary within the same context. Despite the deeply tragic testimonies that may affect everyone in the courtroom, judges have developed strategies to manage their emotions, ensuring these do not compromise their objectivity. Background emotions play a vital role in the knowledge-seeking process and are crucial for legal decision-making. Such emotions, integral to the pursuit of knowledge, are known as epistemic emotions. Epistemic emotions are essential to cognitive processes, providing information and motivating mental action (Arango-Muñoz, 2014), they contribute to knowledge acquisition by guiding attention, motivating action, and supplementing reason (de Sousa, 2008; Barbalet, 1998; Nussbaum, 1996). Commonly recognized epistemic emotions include certainty, understanding, curiosity, epistemic anxiety, and uncertainty (de Sousa, 2008). The feeling of not knowing is particularly prevalent among judges, and other legal

10 The role of the victim's counsel is somewhat ambiguous in relation to the prosecutor, see Wettergren et al., 2025.

11 The turn came with the research of the neuroscientist (Damasio, 1994). His studies on people who lost contact with their emotional parts of the brain, but had their cognitive capacity intact, after suffering from brain damage shows that these people had problems with decision making. Either they made risky decision or they got stuck in the process of reasoning: 'on the one had… but on the other hand…' the result of Damasio's analysis was that emotions are necessary for the ability to make decisions in the sense that one needs to feel the consequences of one's actions.

actors in rape cases. How this, and other emotions unfold in rape trials are further explored by Wettergren et al. (2025).

In a courtroom, legal actors follow an emotional regime that views emotions as disruptive to rationality and thus should be suppressed. However, in rape trails, it could be noted that male fear and himpathy are strongly embedded, intertwined with an anxiety of being biased with the complainant and to convict someone innocent (Uhnoo et al., 2024b; Wettergren et al., 2025).

Empathy is not an emotion like sympathy or compassion but a capacity to attune to others' emotions (Bandes, 2009; Basch, 1983). It involves imagining how others experience the world. Nussbaum suggests that judges should read a case as if reading a novel, employing empathetic identification alongside critical assessment (Nussbaum, 1996). Similarly, Del Mar advocates using imagination to understand different perspectives (Del Mar, 2017). While studies in the legal field have highlighted empathy as a potential source of bias (Fisher, 1987; Bandes, 2009), it remains a crucial tool for gathering information about a case. Judges need to use empathy, in terms of empathic imagination, to understand the actions and perspectives of parties and witnesses, and to evaluate credibility and trustworthiness. Additionally, other legal actors must be empathetic translators in court, converting the fuzzy everyday life narratives that needs to embody legal concepts into legal logic. Hence, they need to work with empathic translation. However, this process of encoding lay narratives into legal frameworks is tied to the requirement of dispassion (cf. Törnqvist, 2021; Bladini et al., 2023; Wettergren et al., 2025; Bergman Blix and Minissale, 2022).

Feminist theory

Harding critiques the positivist view of objectivity, calling it "weak objectivity" because it overlooks the values and perspectives taken for granted within the scientific community (or among judges). These underlying assumptions are embedded in the structures, practices, and language of science, and thus become invisible under traditional positivist objectivity, appearing as natural and necessary. Modern science, Harding argues, is shaped by certain values and interests, such as those of western, bourgeois, and patriarchal societies (Harding, 1992). She suggests that scientists—and by extension, judges—should critically examine their own values by considering perspectives from marginalized groups. This process, involving engagement with different perspectives, aligns with standpoint epistemologies (Harding, 1992). In legal contexts, Harding's strong objectivity and standpoint epistemologies can be linked to the concept of empathy, a key tool in the sociology of emotions, which allows individuals to understand others' perspectives and emotions (Basch, 1983; Bandes, 2009; Bergman Blix and Wettergren, 2016). In legal decision-making, especially in the presentation and evaluation of oral evidence like testimonies, empathetic imagination is essential. Objectivity in the courtroom is a collaborative effort, where the judge uses empathy to grasp the actions and perspectives of those involved. Other legal actors, such as defense lawyers and prosecutors, must translate clients' and witnesses' narratives into both legal logic and empathetic terms, bridging everyday life stories with legal concepts. This process of encoding lay narratives into legal logic is intrinsically linked to the requirement of dispassion (cf. Bergman Blix and Minissale, 2022; Bladini, 2013). This dual translation is vital for the judge to fully understand the reasoning and actions of the parties.

Harding's standpoint epistemologies may be of relevance for judges in their professional everyday life, in particular when understood in combination with the concept of empathy. To understand motives and intent, or the action rationality of complainants in rape cases, the judge needs empathic skills. They (judges) need to understand the perspective of the person that testifies before the court, and in this process the judge needs rather the embodied than the gods eye perspective.

The process of doing objectivity, as a situated emotive-cognitive process that necessitates emotional reflexivity (Törnqvist and Wettergren, 2023; Bergman Blix and Wettergren, 2018) may be connected to the objectivity ideal and standpoint epistemologies advocated by Harding, that includes the embodiment and empathic imagination.[12] The empathic translation and imagination that needs to be done in rape trials are and may be influenced by himpathy, herasure, male fear and female fear.

The concepts of *himpathy* and *herasure* are developed by philosopher Manne (2018). Manne has investigated the structural and cultural mechanisms underpinning misogyny. She argues that misogyny is not merely a matter of individual attitudes or actions but rather a systemic phenomenon that sustains patriarchal power structures. She introduces the concepts of himpathy and herasure, to offer an explanation for how gender-related injustices and acts of violence are addressed in society and the legal system (Manne, 2018). These concepts shed light on structural and cultural phenomena that can influence legal processes and outcomes.

Himpathy (sympathy with him) refers to the disproportionately high level of sympathy and understanding often extended to men, particularly those accused of sexual violence. Manne describes how this sympathy can lead to perpetrators being treated with greater leniency and having their actions excused or rationalized. It is important to note that this is especially true for privileged men or men who generally conform to the image of being respectable individuals. In a legal context, himpathy can manifest through lighter sentences, reluctance to prosecute, or a tendency to question the credibility of victims. This undermines the legal system's ability to function fairly and may contribute to continued leniency or impunity for perpetrators (Manne, 2018).

Uhnoo et al. (2024b) describe how sympathies for men accused of sexual violence are closely tied to what they term *male fear*—a shared fear among men of being accused of sexual violence or

12 Del Mar's concept of *perspectival imagination* aligns with Harding's standpoint epistemology by offering a practical means for judges to navigate multiple perspectives without compromising impartiality. Harding's idea that knowledge is socially situated underscores the need to recognize marginalized viewpoints, while Del Mar emphasises the importance of imagining diverse perspectives, including hypothetical ones, to avoid privileging any single narrative. This *imagining by feeling*, as Del Mar calls it, not only supports impartiality but is essential to it, presenting an embodied approach to objectivity where empathy serves as a tool for understanding, rather than a source of bias. By synthesizing these ideas, I analyse how legal actors can move toward a more embodied objectivity in practice.

assault. This fear paves the way for discourses shaped by himpathy, where sympathy for men accused of rape dominates, reinforced by concerns about wrongful convictions, the stigma of being labeled a rapist, or the potential destruction of their future. Such discourses are evident not only among defense lawyers but also among judges and prosecutors.

Himpathy permeates discussions about the legal handling of rape cases, and male fear is often strategically utilized by defense lawyers, appearing to influence judicial outcomes. While it is crucial in any legal system to ensure that no innocent person is convicted, in rape cases, the fear of false accusations seems to play a particularly prominent role, contributing to a system where few cases reach court and conviction rates remain lower than for other crimes (Manne, 2018; Brå, 2019, 2025; Uhnoo et al., 2024b).

The counterpart to male fear is *female fear*, a concept used by feminist scholars to explain women's behaviors and rationalizations aimed at avoiding sexual violence (Gordon and Riger, 1991; Smart, 1995; Cahill, 2001; Wendt-Höjer, 2002). In rape trials, defense lawyers often portray the complainant's behavior as irrational (e.g., 'Why did she stay? Why did she lie down in the same bed without trousers?'). Understanding female fear can help contextualize such behaviors (e.g., staying with an acquaintance may seem safer than walking home alone at night; Wettergren et al., 2025).

Another central concept from Manne's theory can also be useful here. *Herasure* describes the phenomenon in which women's experiences and narratives, particularly those concerning sexual violence, are erased or ignored (erasing her story and experiences). This erasure can manifest through the questioning of victims' testimonies, the defamation of their character, or the simple absence of space given to their stories in legal and public discourses (Manne, 2018).

Herasure makes it more difficult for victims to seek and achieve justice, which, in turn, can deter others from reporting such crimes. In courtrooms, women who have been subjected to sexual violence are given the opportunity to recount their experiences; however, the issue of a high proportion of acquittals persists. Even under the new legislation, the proportion of convictions remains at approximately 65%, significantly lower than in most other types of criminal cases (Brå, 2023).

This can be partly understood in the light of the high evidentiary requirements, which are particularly evident in the evaluation of the complainant's testimony in these types of cases. Such requirements are tied to legal presumptions that are supported by himpathy—sympathy for men accused of rape. Ultimately, this risks leading to herasure, that is, the erasure, neglect, or diminishment of women's stories and experiences.

Methodology

Field observations and interviews

The methods employed in the two research projects[13], utilizing the sociology of emotions, involved qualitative, ethnographically inspired approaches. The data was gathered through shadowing, court observations, semi-structured in-depth interviews with judges and prosecutors in both projects, and defense lawyers, and victim counsels in the project on rape. Written judgments were used in both projects. Observations, interviews, and judgments were linked to selected cases, a majority concerning rape (incl. attempted and negligent rape) but also murder, gross fraud and gross violation of women's integrity. We tracked these cases from prosecution to trial and judgment in the district court, and if appealed, in the appeals court. To identify patterns applicable across different empirical settings, cases were strategically chosen from at least three (out of six) courts of appeal and more than six district courts in various parts of the country, ensuring a balanced representation of male and female legal professionals.

Observation data and informal interviews were collected as field notes. The semi-structured indepth interviews and longer follow-up interviews were tape-recorded. Almost 30 cases yielded more than 100 interviews, including a few group interviews in the two projects. The field observations included trials and a large part of the deliberations. The analysis in this article builds mainly on the results from the project on rape cases.

Transcribed interviews and field notes have been analyzed using software for qualitative analysis. The analysis was done in two stages: open coding to organize texts into larger themes and selective coding for a focused and detailed examination of selected text segments. Codes were derived from a mix of inductive, empirically emerging concepts and deductive, theoretically informed concepts (e.g., background emotion). As empathy is the focus of this article, examples from empathic translation work performed by the legal actors in court, i.e., the prosecutor, the defense lawyer and the victim's counsel, will be at the center together with judges' empathic attunement.

Objectivity in practice—empathic translations and dispassionate encoding

Following along the lines of foundational work by scholars such as Lynch, Latour, Scheffer, van Oorschot and Bergman Blix and Wettergren, this analysis explores embodied objectivity within courtroom settings.

Previous research on professional emotions in the courtroom has demonstrated that objectivity is not a fixed state for the judge to inhabit, but rather a dynamic and relational process continually shaped through interactions. Building on these theoretical foundations, this section explores how the concept of empathy, understood as a tool rather than merely an emotion, can facilitate perspectival translation and imagination in legal practice. By engaging with multiple, situated perspectives and exercising empathy as a means of deeper understanding, legal actors are better equipped to embody objectivity in a way that transcends traditional positivist ideals. This section will examine how such an approach, embedded in the context of himpathy and herasure, through the standpoint epistemologies suggested by Harding as part of a stronger objectivity ideal allows for a more nuanced, equitable, and context-sensitive application of the law, ultimately enhancing the impartiality and fairness of judicial decision-making.

13 *Rape or consent - Effects of the new rape laws on legal reasoning and practice* (RJ P19-0515:1) and *Construction of Objectivity* (VR 2016- 01218).

The analysis, based on empirical material from 18 Swedish rape trials, is structured in three sections. First, the judges' perspectives on objectivity are examined, focusing on how objectivity is performed through emotional regulation and empathic engagement in the courtroom. The second section explores how entrenched gendered norms—particularly *himpathy* and *herasure*—challenge the enactment of objectivity in rape trials. It demonstrates how empathic identification with male defendants and the erasure of female complainants' experiential narratives can distort credibility assessments and reinforce structural bias. Finally, the third section turns to examples of *empathic trials*, illustrating how legal actors' use of empathic translation and standpoint epistemologies—especially through acknowledging *female fear*—can foster more equitable and context-sensitive legal reasoning.

Objectivity and the judge

This section focuses on how objectivity is demonstrated and managed by judges. Drawing on the idea of objectivity as a collective process performed by the legal actors, as suggested by Bergman Blix and Wettergren (2018), this section offers a few examples of the professional life of the judge in rape trials, exploring how empathy may function or be used as a tool to translate everyday life into legal logics as part of the professional role in embodying objectivity.

A crucial part of collecting information during the trial in rape cases includes listening to witness statements, including the parties' stories to decide on the question of voluntariness (Swedish decisive criterion in the consent-based rape law) and intent, or negligence. Empathy may serve as a tool to tune in with others, but it has a dual function, as the judges may also use empathy to establish trust and pave way for better testimonies (Bladini and Bergman Blix, 2022).

In the following Kattis, a victim's council (from case 18) describes how judges' display objectivity and empathy. She starts in the dispassionate ideal and ends with an example of the embodiment of an empathic objective judge:

> I experience many judges as uninterested. It is part of their role that they shouldn't sit and nod or agree, but rather be impartial and independent. However, one quickly notices when a judge is engaged, when they ask additional questions, when they want to clarify things, and this often stems from a type of curiosity about the clients or the case. It's like a performance—perhaps not in the Court of Appeal, but in the District Court—and when one is interested in it, it often helps the case. It also helps when the clients perceive that the judge is interested; that is the most important person, and it can mean a lot for many. Then, they also tend to share more.
>
> They might even speak more honestly (Interview with Kattis, Victim's Council in Case 18).

The example illustrates one form of embodying objectivity through active engagement. While remaining impartial and independent, a judge can still express empathy by asking thoughtful questions and demonstrating genuine curiosity about the case. This approach reflects a balanced form of objectivity—one that does not compromise fairness but instead enhances it. By engaging empathetically, the judge encourages openness and honesty from the parties, thereby enriching the quality of the testimony and ensuring a more thorough evaluation of the facts. In this way, empathy becomes a tool that complements, rather than undermines, the judge's objective role. Furthermore, a judge builds trust and legitimacy by ensuring that laypersons feel acknowledged, heard, and treated with respect. Studies indicate that the perception of fairness during a trial is shaped more by the experience of the legal process than by the final verdict (Tyler, 2008; Leben, 2019).

However, as suggested earlier, a judge's empathic ability may also help them understand the parties' perspectives, reasoning, and rationales for action, though it is a challenging task and carries the risk that empathy could turn into sympathy. Del Mar, for example, argues that legal reasoning requires an ability to imaginatively reconstruct the situations of others, and holds that compassion can enhance this imaginative process, whereas Nussbaum's concept of the judicious spectator represents a model for how empathetic understanding can be exercised without slipping into mere sympathy. Using the analogy of reading literature or watching a play, this figure embodies the ability to place oneself in another's position while maintaining a certain detachment. When reading, one becomes deeply involved in the characters' situations, yet remains aware that it is not personal. Nussbaum, inspired by Smith, explains that this balance of empathetic involvement and critical detachment is essential for evaluating the appropriate level of emotion the participants should experience (Nussbaum, 1996). It is worth noting that Del Mar suggests using imagination to understand different perspectives, which suits well with Harding's standpoint epistemologies, arguing that several perspectives offer a more nuanced knowledge.

Below an example of when Judge Bengt from one of the rape cases discusses the troubles of evaluating the evidence in rape cases:

> I've obviously thought a lot about this, and I think I can describe it as... part of it is that the stakes are unusually high. Of course, everyone who comes to court should be treated with the same respect, the same thoroughness, and so on, but in these cases, you very often have people who... have never had any previous contact with the justice system. You have a girl who has never been a crime victim before, who has never been to court, and then you have a defendant, a young man between 18 and 25, who has no prior convictions, who has never had any contact with the justice system. A medical student, or a carpenter, or a firefighter who's just starting adult life, and suddenly they are deprived of their freedom and are facing accusations which, if the prosecutor wins, as I imagine it in my head when I think about it, they will be branded for the rest of their life as a rapist. And that's a terrible burden to carry through life. You know it, 'I'm a rapist.' And they're going to sit in prison for 2 years, or two and a half years, minus parole. On the other side, you have the victim, and I myself have two daughters in their twenties. I care just as much about them as I do about this old notion of a second violation if they don't get justice in the legal process. In this way, the human stakes are very high. Then perhaps, as a judge, it's easier to identify with these people precisely because they're first-time offenders, they could be anyone. They're people who are studying at university or could be my own children. The other day, in the evening, some old friends from the past called. Their 25-year-old son,

> who's studying to be a doctor, is facing... I know that these are people similar [...], and that makes it feel closer. I think that this increased level of identification, as I imagine it, leads to it becoming painful... so you have the stakes for the individuals, you have the identification, but then there's also a damn difficult evidentiary situation on a more technical level. Eh... you don't have a lab report about the drugs or surveillance footage from the theft, but it's more like... yeah... like reading tea leaves.

The example from Judge Bengt's reflection illustrates the profound challenges that arise when judges must navigate the complex emotional and evidentiary landscape of rape cases. Bengt emphasizes the heightened stakes for both the accused and the victim, as well as the difficulty of remaining impartial while facing deeply human, often relatable situations. His comments align with the concept of empathetic detachment explored by Del Mar and Nussbaum. Bengt's ability to acknowledge the personal and emotional weight of such cases demonstrates the judge's struggle to maintain a balance between empathy and objectivity.

Here, empathy becomes a double-edged sword: while it aids in understanding the perspectives of individuals who have never before encountered the justice system, it also presents the risk of clouding judgment if it devolves into sympathy. This tension reflects Nussbaum's notion of the judicious spectator, who must engage empathetically with the individuals involved while preserving a critical distance. Bengt is discussing both the defendants' and the complainants' perspectives, which is in line with Hardings standpoint epistemologies. However, Bengt is highlighting the perspective of the defendant (young, not previously convicted, ruined future and the medical student (son of friends) more than the complainants (which he does by a reference to his daughters). This may be read as an expression of male fear and himpathy. By drawing on imagination and empathy, judges like Bengt can construct a more comprehensive understanding of the parties' actions and experiences, but they must also reflect upon their emotional attunement and engagement, which could compromise their objectivity when embedded in male fear and himpathy.

Furthermore, Bengt's struggle with the 'damn difficult evidentiary situation' highlights another critical point: empathy alone cannot resolve the technical challenges of legal reasoning. As Harding's standpoint epistemologies suggest, multiple perspectives provide a more nuanced understanding of truth, but this must be carefully balanced with rigorous, evidence-based analysis. Judges must therefore navigate a complex terrain, where both empathy and detachment are necessary tools for achieving justice. In rape cases, particularly, this balance is key to ensuring that all voices are heard and respected, while still adhering to the principles of fairness and impartiality. The difficult evidentiary situation, combined with the burden of proof, high evidentiary threshold (beyond reasonable doubt) and the presumption of innocence is also strengthening the tendency to tune in with him (himpathy).

In conclusion, Judge Bengt's reflections underscore the importance of integrating empathetic understanding into judicial reasoning but also shows the need for detachment through critical reflection. The ability to imaginatively engage with the parties involved, as advocated by Del Mar, can humanize the legal process, but it must be tempered by the judicious spectator's cautious, critical stance to ensure that justice is served both compassionately and fairly.

Trials troubling objectivity

Following the arguments of Lynch, the *embodiment* of objectivity occurs through routinized actions—like the handling of DNA evidence or the structured questioning of witnesses—which bring about what we consider 'truths' within the context of legal reasoning. He argues that the production of objectivity is thus tied to procedures, routines, and performances that lend credibility to certain knowledge claims. Lynch et al. (1995) draws on the idea of *embodiment* to suggest that scientific truths do not just exist as abstract entities but are enacted by human bodies engaged in material practices. In a legal setting, for instance, forensic scientists, lawyers, and even courtroom participants (judges, lay judges) all play roles in giving life to facts through their embodied actions. Rape cases are often characterized as 'word-against-word' situations, seemingly lacking hard (technical or forensic) evidence. However, this is not entirely accurate, as such cases frequently include various forms of technical evidence, such as DNA, text messages, and other digital traces (Wettergren et al., 2025; Smith, 2018). The challenge, however, lies in the fact that the key evidence regarding consent and intent typically remains oral testimony.

These situations, as previously discussed, highlight the importance of empathetic translation. However, they are also embedded in norms and assumptions about male and female sexuality, the "real" rape, and the ideal victim, all of which pose a particular risk for himpathy, i.e., when empathy turning into sympathy, particularly for the defendant. As shown by Uhnoo et al. (2024b), this may partly be explained by a worry to be too engaged in the complainant's perspective. This can occur when judges or other legal actors overly identify with the defendant's background or circumstances, like in the quote from Judge Bengt above.

Empathy shifting into himpathy

In the courtroom, judges and other legal actors are expected to maintain objectivity, navigating the emotional dynamics of a trial without allowing personal biases to interfere with the legal process. However, as Kate Manne argues in her work on gendered dynamics of sympathy, there is a notable tendency for empathy to shift into himpathy—the term Manne coined to describe the societal inclination to sympathize with men who are accused of sexual misconduct or assault. Himpathy refers to the disproportionate concern and empathy shown toward men, especially when they are perceived as being at risk of losing their reputation, career, or freedom due to allegations of sexual misconduct (Manne, 2018).

This phenomenon is particularly evident in cases involving young, previously un-convicted men, where the courtroom actors, including judges, may be drawn into a sympathetic understanding of the defendant's plight. This often manifests in statements such as "it could have been my son," where legal actors express concern for the young defendant's future, thus centering the trial on the impact the accusation may have on his life, rather than on the victim's experience (cf. Uhnoo et al., 2024b).

For example, in one of the case interviews, *Judge Bengt* reflects on the challenges of dealing with young defendants who face life-altering accusations: *"You have a young man, unconvicted, on the brink of adulthood, suddenly facing accusations that could brand him a rapist for life. It's a terrible burden to bear, and it's not surprising that this identification leads to sympathy."* Such expressions show how empathy for the defendant's potential loss of freedom and future prospects can overshadow the gravity of the crime itself and the harm caused to the victim.

There are also many examples of how the defense lawyer successfully describes the defendants' behavior as rational and logic, or if irrational, explained by a male fear defense. For example, when defendants denies everything during the first hearing, at an early stage of the investigation. He may deny that he knows the complainant at all, or denying that they have met, or at least denying that they have had intercourse. Then, when DNA evidence shows that they (the complainant and the defendant) did have intercourse, the defendant suddenly changes his story into a consent-defense. This change of statement is usually explained by the defense lawyer as a natural reaction due to male fear. The shared male fear of being innocently accused for rape or other sexual violence. The immediate reaction to deny is then logic and rational (cf. Uhnoo et al., 2024b).

Herasure: erasing the victim

In contrast, the victim's memories and experiences are often diminished or erased—a phenomenon Manne refers to as herasure. This describes the way in which women, especially victims of sexual violence, are rendered invisible in the narratives that arise during trials, as the focus shifts toward preserving the reputation and future of the accused (Manne, 2018). Herasure can be seen in courtrooms when victims' stories are dismissed as unreliable or when their trauma is downplayed in favor of a more sympathetic narrative toward the defendant. This erasure can further marginalize the victim, who may already struggle to articulate her experience within a legal system that demands objectivity but often fails to recognize the emotional and social contexts of sexual violence.

This dynamic has been explored through the lens of courtroom discourse, where the victim's testimony may be seen as less credible or is sidelined in favor of more "rational" or "logical" accounts that privilege the defendant's narrative (cf. Uhnoo et al., 2024b). This aligns with the idea that in many cases, the victim's emotional response is seen as less legitimate or too subjective, reinforcing a legal culture where women's experiences of trauma are systematically diminished.

For instance, in one case, a defense lawyer argued that the victim's inability to recall certain details was a sign of unreliability, whereas the defendant's shifting storylines were excused as the result of shame or confusion.

> She's not able to recall the precise events, which affects the reliability of her statement. Meanwhile, my client is young and deeply embarrassed about the situation, which is why he initially withheld details.

This highlights the tendency to cast the victim's uncertainty in a negative light, while offering more leniency toward the defendant's inconsistencies, further contributing to the erasure of the victim's perspective in the pursuit of a sympathetic narrative for the accused.

In light of these dynamics, trials involving accusations of sexual assault can reveal the tension between maintaining objectivity and the subtle ways in which empathy can shift into *himpathy* or lead to *herasure*. Legal actors must navigate this delicate balance, as empathy for the defendant's potential hardships should not result in a diminished focus on the victim's experience or the seriousness of the crime. Yet, as evidenced by both Manne's theoretical framework and the findings in Uhnoo et al. (2024b), this balance is often difficult to maintain, especially when societal norms continue to favor protecting the interests of men accused of sexual violence.

Empathic trials

> In one case (case 11), the female victim allowed her male friend and his friend to stay overnight as they were on a long journey and lived far away. Although she expected two guests, six people, including four unknown women, arrived in the middle of the night, drunk and wanting to continue partying. Upset, she asked them to leave, but one man (her friend's friend) requested to use the bathroom, and she let him in while the others left. Alone with this drunk stranger, she let him stay, lent him jogging bottoms, and offered him a bed. A crucial legal question was whether this situation could be interpreted as an invitation leading to voluntary sex.
>
> During the hearing, legal professionals created empathy to help judges understand the parties. The defense lawyer questioned the victim: "So he took off his clothes and lay down on your bed? And you didn't ask him to leave?" The victim replied that she texted her friend for help but didn't tell the defendant, instead asking him to move to the spare bed. The defense lawyer framed her behavior as irrational: "This sounds a bit strange to me. You are telling us that you slept, woke up, got a kiss from [the defendant] that you didn't ask for, but you didn't ask him to leave?" The prosecutor countered, arguing her reaction was reasonable given her emotional involvement with the defendant's friend, suggesting she tried to protect that relationship by seeking help discreetly.
>
> The victim's counsel frames her actions as "correct (normal, natural, reasonable and rational)" by referring to common responses among women fearing sexual assault. She asserts:
>
> "If a male stranger got into my home, I would have acted with caution. I'm not so sure a woman would dare to resist, if she was unsure if she would be able to overpower the other person. As women, we always fear sexual assault. Wherever we are and wherever we go. Her way of dealing with the situation was completely correct."

This plea illustrates the struggle between legal actors over defining rational and logical behavior in specific situations.

The defense lawyer seeks to depict the complainant's actions as irrational or inconsistent with the behavior of someone not interested in sex, thereby undermining her credibility. In contrast, both the prosecutor and the victim's counsel work to render her actions comprehensible and situationally rational, aiming to establish that her participation was not voluntary.

The District Court hearing exemplifies the interpretive struggle over voluntariness and credibility, where legal actors engage in empathic translation, mobilizing different frameworks to either support or discredit the complainant's narrative. The defense lawyer relies on normative assumptions and portrays her actions as illogical, thereby casting doubts on the veracity of her narrative. Meanwhile, the prosecutor and the victim's counsel strive to translate her actions and behavior to be intelligible and coherent, framing it in a way that affirms her credibility. The victim's counsel, in particular, explicitly draws upon a logic of female fear to explain the rationality behind the complainant's actions.

In this context, empathy becomes a crucial interpretive tool, enabling legal actors to navigate shared experiences and memories that differ by gender. The dynamic between the female victim's counsel and the male prosecutor and defense lawyer underscores how gender mediates the interpretation of actions and intentions. Empathic understanding, grounded in standpoint epistemologies, plays a key role in evaluating testimony and determining voluntariness—particularly when conventional legal reasoning may fail to account for gendered logics.

In many trials, defense lawyers attempt to depict the complainant's behavior as irrational, abnormal and thus untrustworthy, just like in the example above. Common strategies include posing questions such as: *Why did you stay at an older acquaintance's home in the middle of the night? Why did you not call a taxi that late evening? Why did you not take a tram home at 4 a.m.?* All of these questions can be answered through the lens of female fear logics: it may appear safer to remain in a private space with someone vaguely familiar than to risk exposure to potential threats in public spaces (such as a deserted tram stop) or with unfamiliar men (such as a taxi driver). However, unless this logic is made explicit, the complainant's actions may be perceived as irrational.

Additional questions posed by defense lawyers often follow a similar pattern: *Why did you sleep in the same bed if you did not intend to have sex? Why did you remove your trousers before going to bed next to someone you were not sexually interested in?* These questions rely on normative assumptions rooted in a male-coded logic of sexuality and consent, where physical proximity or partial undressing is interpreted as evidence of sexual interest. Unless this logic is challenged and placed in the context of female fear—which may inform seemingly contradictory behavior—such questions risk undermining the complainant's credibility by rendering her actions irrational. One strategy observed among young women to navigate or resist unwanted sexual expectations is the performance of everyday normalcy, such as watching a film together even in the same bed under a shared blanket. This can be understood as an attempt to maintain social coherence while avoiding escalation into a sexualized situation (Wettergren et al., 2025 in print).

Moreover, such lines of questioning may contribute to forms of testimonial injustice, whereby the complainant's account is dismissed or devalued, especially when the adjudicating perspective lacks access to, or fails to acknowledge, the gendered standpoint from which the complainant speaks.

Such moments of empathic translation are central to what may be described as *empathic trials*—legal proceedings in which all actors engage in efforts to understand, translate, and legitimize the experiential logic of the complainant. In cases involving sexual violence, this often requires the prosecutor and the victim's counsel to actively foreground a standpoint shaped by *female fear*, making visible the embodied risk assessments and protective strategies that underpin seemingly contradictory behavior.

Through such translation work, they counteract the effects of *himpathy*—the tendency to empathize with male defendants and dismiss the credibility of female complainants—and instead contribute to a more balanced and context-sensitive assessment of guilt. In this way, empathic trials not only facilitate procedural fairness, but also create space for epistemic justice within the courtroom.

Conclusion

This article set out to explore how empathy functions within legal proceedings, particularly in rape trials, and how it interacts with judicial ideals of objectivity. While recent legal reforms in Sweden aim to strengthen women's bodily and sexual integrity—most notably through the introduction of consent-based legislation—these efforts unfold within a legal and societal context still deeply embedded in structures of *himpathy* and *herasure*. These embedded norms risk undermining the practical impact of reforms by framing women's actions as irrational or unreliable and by disproportionately empathizing with male defendants. Against the backdrop, the article has demonstrated that objectivity is not undermined by empathy; rather, it is co-produced through emotional management and empathic translative and interpretive labor among legal actors (c.f. Bergman Blix and Minissale, 2022; Bladini and Bergman Blix, 2022).

Empathy emerges as a critical epistemic tool that enables judges and other legal professionals to grasp the situated rationalities of those appearing before them. The study shows that legal actors engage in *empathic translation* to render the complainant's actions intelligible within a legal framework—particularly as many of those actions are shaped by gendered logics. Such translation work must therefore be grounded in gendered standpoint epistemologies, recognizing that actions shaped by fear, risk awareness, and social vulnerability are intelligible only when viewed from within the situated knowledge frameworks of those who live them. This translation work is vital for countering forms of *testimonial* and *hermeneutical injustice*, ensuring that credibility assessments are not distorted by normative assumptions about rationality and behavior.

The courtroom is revealed as a site of emotional labor and epistemic negotiation, where objectivity is enacted collectively—through narrative framing, embodied responsiveness, and

affective attunement. Rather than compromising neutrality, empathy strengthens the foundations of a more *reflexive* and *inclusive* legal process. Legal actors, including prosecutors and victim's counsels, play a particularly important role in making visible the complainant's standpoint, especially when her actions reflect the logic of *female fear*—a perspective that might otherwise be dismissed as irrational or inconsistent with voluntariness.

Building on Sandra Harding's concept of *strong objectivity*, this article demonstrates how standpoint epistemologies can be operationalised in legal settings (Harding, 1992; Bladini, 2013). The gendered logics of *female fear* and *male fear* function here as situated epistemic standpoints that shape how actions and intentions are interpreted in rape trials (Wettergren et al., 2025). Rather than viewing objectivity as detachment, Harding's framework—as applied in this study—emphasizes reflexivity, positionality, and the inclusion of marginalized experiential knowledge as necessary conditions for more just and reliable legal reasoning.

This argument is further supported by Bergman Blix and Wettergren's (2018) conceptualization of the *doing of objectivity* as an emotionally regulated practice, and by Del Mar's (2017) notion of *imaginative legal reasoning*, which recognizes the central role of empathy and perspective-taking in judicial work. Together, these perspectives challenge traditional positivist ideals of legal reasoning and offer an alternative model grounded in emotional engagement, contextual sensitivity, and epistemic plurality.

While the shift to consent-based legislation in Sweden aims to address the structural roots of sexual violence and to safeguard the sexual autonomy of women, this study suggests that deeply embedded legal assumptions continue to pose challenges. Normative logics aligned with *himpathy* and *male fear* may be subtly reinforced through principles such as the presumption of innocence and the high burden of proof. Although these principles are foundational to criminal justice, they may also obscure the lived realities of complainants unless counterbalanced by empathic, gender-aware interpretation (Wettergren et al., 2025).

Ultimately, this article argues for a more embodied, relational, and reflexive model of objectivity in legal practice—one that recognizes empathy not as a threat, but as a condition for fairness. In cases of sexual violence, where fear, power, and asymmetries of experience shape every aspect of testimony and interpretation, such an approach enables a more human-centered and epistemically just legal process.

Data availability statement

The data analyzed in this study is subject to the following licenses/restrictions: the article consist of three datasets, the first public material from legal doctrine, legal documents and judgments. The second and third from two research projects, one finished and one not yet finished. The data collection, storage and analysis is described in the article. Requests to access these datasets should be directed to moa.bladini@law.gu.se.

Ethics statement

The studies involving humans were approved by Regionala etikprövningsnämnden i Stockholm and later Uppsala. The second project were approved by (Etikprövningsmyndigheten). The studies were conducted in accordance with the local legislation and institutional requirements. The participants in the first project were providing informed consent orally on tape recordings, and participants in the second project (cited in this article) provided their written informed consent to participate in the study.

Author contributions

MB: Conceptualization, Data curation, Formal analysis, Funding acquisition, Investigation, Methodology, Project administration, Resources, Software, Supervision, Validation, Visualization, Writing – original draft, Writing – review & editing.

Funding

The author(s) declare that financial support was received for the research and/or publication of this article. The article builds on two projects Rape or Consent—Effects of the new rape laws on legal reasoning and practice, funded by Riksbankens Jubileumsfond (RJ P19-0515:1) and Construction of Objectivity funded by (VR 2016-01218). This work was funded by the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme awarded to Bergman Blix (grant agreement no. 757625).

Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Publisher's note

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frontiers | Frontiers in Sociology

TYPE Conceptual Analysis
PUBLISHED 22 May 2025
DOI 10.3389/fsoc.2025.1552706

OPEN ACCESS

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RECEIVED 29 December 2024
ACCEPTED 22 April 2025
PUBLISHED 22 May 2025

CITATION
Tait D and Rossner M (2025) Imagining the metaverse court: a conversation between science fiction and Shakespeare.
Front. Sociol. 10:1552706.
doi: 10.3389/fsoc.2025.1552706

Imagining the metaverse court: a conversation between science fiction and Shakespeare

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This article explores the concept of a metaverse courtroom by engaging in an imaginative dialogue between Shakespeare's *Hamlet* and Neal Stephenson's *Snow Crash*. Using Connolly's method of juxtaposing distinct intellectual traditions, the analysis examines key aspects of justice processes—presence, facework, movement, adversarialism, and evidence presentation—in virtual spaces. Drawing on insights from dramaturgy, the sociology of emotions, and science fiction, the article considers how the performative and symbolic dimensions of physical courtrooms might translate to the metaverse. By imagining the metaverse courtroom as a space for innovation and interaction, this article seeks to illuminate how literature, sociology, and technology can collaboratively inspire the reimagining of justice in virtual environments.

KEYWORDS

emotion, rituals, metaverse, courts, justice, virtual

Introduction

This article introduces a thought experiment in which we bring together two quite different literary pieces and put them into an imaginary conversation about something new to both of them. It uses a method developed by political philosopher Connolly (2002), aimed at producing insights and innovations by drawing on literature to inspire scientific practice. The focus of this conversation how to design and run a courtroom in the metaverse. We organize the conversation around issues relevant to a justice process: managing spaces, organizing participants, producing respect, organizing an adversarial process and handling evidence.

The "metaverse" refers to an alternative world located online. It is an imaginary world: what participants see in front of them are simply pixels on a screen (or via a headset), arranged to mimic the continuous visual world. These configurations of pixels are converted into electrical signals by the retina of the eye and transmitted through the optic nerve to the brain, where they are interpreted as an image. The word "metaverse" was invented by Neal Stephenson in his 1992 science fiction novel, *Snow Crash*. The plot involves a virus ("snow crash") that interrupts the process of transforming the pixels on the screen into an image—not only does the image on the screen turn into a field of snow, but the user's brain is also scrambled and the person starts talking nonsense. The story follows the hero (named Hiro Protagonist) as he seeks to rescue the world from a plague that is both physical and digital, with participants operating at the same time in two worlds—Reality and the Metaverse.

The other partner in the conversation, Hamlet, is a stage play in which the protagonist takes his time working out how to get justice for his father. There are many lessons it provides about staging, managing actors, and connecting with an audience. It also provides a creative approach to obtaining evidence and arranging equality of arms between combatants.

Approaches to technological change

We have been interested in exploring the ritual, procedural, and symbolic implications of the use of virtual technology in justice spaces (authors' own). The shift to virtual technology in courts and tribunals is well documented, which presents a range of challenges and opportunities (Legg and Song, 2021; authors' own). While courts hearings that involve video technology are widely used, we anticipate the incorporation of more immersive virtual spaces. As such, we want to explore in this article what such a space could look and feel like. We call this space a metaverse courtroom. By metaverse we mean a collective, virtual shared space, created by the convergence of virtually enhanced physical reality and online environments, where users can interact, socialize, work, and play.

Developing a metaverse court could begin by modeling it after existing court hearings, whether traditional in-person settings or virtual courts like those using video conferencing software (e.g., "Zoom court"). Replicating essential features of physical courtrooms—such as lighting, acoustics, and participant spacing—can make the digital environment feel familiar to regular court users. Enhancements like elegant furnishings and wood paneling can add gravitas, while efficient processes for the movement of people and documents can improve functionality.

This digital reconstruction also offers an opportunity to address shortcomings of physical courtrooms. For instance, we can avoid confining defendants to docks or boxes that may imply guilt (see authors' own) and prevent witnesses from feeling isolated (Rowden et al., 2013). Adjustments like modifying the judge's bench height, improving sightlines between participants, and incorporating symbolism that reflects contemporary values can enhance the courtroom experience.

While video conferencing technology might increase access to justice by reducing travel costs and limiting unwanted encounters between parties, it has limitations. In a "zoom court" where participants appear on a screen "gallery style," they often cannot make eye contact, appear in separate boxes with varied backgrounds, and experience sound from a single source, making it hard to identify speakers. The absence of a shared environment can hinder the development of empathy and the exercise of authority, enhance vulnerabilities and impact the assessment of witness credibility (Bandes and Feigenson, 2021; McKay and Macintosh, 2024).

A metaverse platform can address these issues by placing participants in a shared virtual space where they can make apparent eye contact and receive directional sound cues. In our initial development of an immersive virtual court—which achieved eye contact through multiple cameras—we found that the realism of the hearing matched that of face-to-face settings. However, the authority of the judge and the credibility of witnesses were rated significantly lower (authors' own).

An incremental approach to metaverse courtrooms—making gradual technical adjustments—aligns with how innovation often develops. For example, it took nearly a thousand years to advance from block printing in ninth-century China to Stanhope's cast-iron printing press in 1800. However, another strategy takes inspiration from literary sources, particularly science fiction, which imagines the future before it happens (Michaud, 2017; Michaud and Appio, 2022; Bucher, 2019). When law engages with technology, Tranter (2011, p. 817) argues "science fiction is its speculative jurisdiction." Extending this principle to literature or the arts more generally, several literary forms can be brought into conversation with one other.[1] This approach recognizes that innovation may result from networks of information rather than just a single source (Hargadon, 2003).

This synergistic approach resonates with Connolly's (2002) idea of bringing together distinct "tributaries" of knowledge—different fields, thinkers, or practices—into conversation. Connolly, as a political philosopher, juxtaposes perspectives to explore questions like the "ethics of cultivation." For example, he combined Foucault's analysis of authority and surveillance, Nietzsche's focus on performing ideas, and Derrida's emphasis on media, showing how each thinker corrects and complements the others.

Connolly extends this idea further by connecting philosophy, neuroscience (examining brain and body processes behind intellectual ideas), and film (expressing ideas through performance and emotion). His aim is not to predict the future but to make its possibilities "shine more brightly" (Connolly, 2002, p. 22). By engaging the imagination, he creates new ways to explore and understand potential futures, even if they don't materialize.

Inspired by this approach, we return to the original conceptualization of the metaverse, originating in science fiction. We also engage with a more ancient literary approach to creating justice, *Hamlet*. By bringing together these two unlikely sources, we hope to draw out the key concepts and elements of a metaverse court.

Science fiction as inspiration for technological change

The first "tributary" to be considered, *Snow Crash*, operates within a genre that has long been associated with scientific discovery. Science fiction has long inspired technological innovation and anticipated future developments (Jordan et al., 2018). While writers like H.G. Wells, Jules Verne, and Isaac Asimov are often credited with influencing inventions such as liquefied rocket fuel, submarines, and driverless cars (Winter, 2008; Poluhowich, 1999; Höltgen, 2025; Asimov, 1968),[2] it is Mary

1 Science fiction is not of course the only form of knowledge that can be argued to have inspired innovation. A similar argument has been made for mathematics, for example in the way perspective in Renaissance art directly drew on Indian mathematics, transmitted through the Arabic world. See Dalrymple (2024).

2 Not all technological advances foreshadowed in science fiction are cast as beneficial. Ray Bradbury's *Fahrenheit 451* in 1953 foresaw a future in which the population spent much of their time mindlessly watching television. Add a camera to a TV set and in George Orwell's *1984*, the devices could be used to watch the citizenry. Smartphones, a prototype of which appeared in Star Trek, can be used for not only to monitor people and track their movements. As well as raising questions about the dangers posed by new technologies, science fiction has provided a platform for examining the social order of the present, by transferring the issues to a distant planet or unfamiliar environment. This might involve the "colonial gaze" in which the

Shelley who stands as one of the earliest and most influential figures in the genre.

Shelley, immersed in both science and literature, drew from the works of leading scientists like Erasmus Darwin, Benjamin Franklin, and Humphrey Davy (Freedman, 2002), as well as her exposure to Shakespeare, particularly *Hamlet* (Shelley, 1992). Part of a circle that included Percy Shelley and Lord Byron, she famously wrote *Frankenstein, or The Modern Prometheus* (1818), a story born from a shared challenge to write ghost stories. Her tale explored the dangers and possibilities of pushing scientific boundaries by creating intelligent life, foreshadowing ideas of artificial intelligence and the concept of computers (Patowary, 2023). In this, Shelley exemplifies how science fiction can mobilize networks of knowledge—science, literature, and philosophy—to generate new ways of thinking about technology and its consequences. This is a vivid example of the synergistic approach later outlined by Connolly.

The two sources

We propose to use an approach similar to both Shelley and Connolly, bringing together art and social science to imagine justice in the metaverse. We start with science fiction—the genre that Shelley contributed to developing—providing a close reading of *Snow Crash* by Neal Stephenson, the science fiction story that, as noted above, introduced the concept of the metaverse, as well as bringing to life the concept of the avatar.

We put this into conversation with Shakespeare's *Hamlet: Prince of Denmark* (Jenkins, 1982). On the surface these have little to say to each other. One is a stage play, a revenge tragedy, about a prince seeking to avenge his father's death by killing the uncle who poisoned his father and then married his mother. Meanwhile *Snow Crash* is a novel, a satirical form of cyberpunk, a warning about how the US may collapse into anarchy. One is a finely polished work of art that is widely thought to have perfected an age-old story by giving all the characters depth and complexity. The other is a speculative venture into a technology that was about to emerge in which the characters are lightly sketched in. However, we are not comparing their genre, character development, major themes or contribution to world literature. We are putting them into a conversation about issues that are specifically relevant to justice processes: how presence and participation is established, the role of face and demeanor, how the setting and participants interact with each other and are managed, and how evidence is produced and presented.

Stephenson's (1992) *Snow Crash* is a satirical vision of a dystopian future in which the US is fragmented into a range of warring fiefdoms controlled by greedy tycoons, while the environment teeters on the brink of collapse. To escape this bleak reality, people turn to the metaverse, an immersive virtual world Stephenson invents and names. Borrowing the term "avatar" from the Vedic scriptures, he populates the metaverse with digital identities who inhabit their own plots of virtual land connected by "The Street," a boulevard that extends around the virtual world.

The story follows Hiro Protagonist, a freelance hacker living on society's margins, and YT, his 15-year-old courier friend who often bails him out of trouble. The plot centers on a mysterious virus, *Snow Crash*, which uniquely bridges the digital and physical worlds. The virus damages the brains of individuals who interact deeply with computers—effectively synchronizing their minds with machine operating systems. Others are infected by the virus through an addictive drug or contaminated blood provided by a radical Pentecostal church.

As the digital and physical realms become increasingly intertwined, Hiro uncovers the truth about the virus and its origins. In the climactic finale, one of the main oligarchs—who controls the fiber-optic infrastructure of the Metaverse—is killed, two others are gravely injured, and those infected by *Snow Crash* are freed from its grip.

Hamlet is one of Shakespeare's most celebrated tragedies. Like the dystopian world of *Snow Crash*, the world is "out of joint." Here, the disruption stems from the untimely death of Hamlet's father, the rightful king, whose brother Claudius murders him by pouring poison into his ear. Claudius seizes the throne and marries Hamlet's mother, Gertrude, compounding the disorder.

Haunted by his father's ghost, who urges him to avenge the murder, Hamlet grapples with doubt, moral uncertainty, and the burden of duty. After a period of hesitation and confirming Claudius's guilt, Hamlet finally kills the usurper in a final scene of chaos and violence, leaving nearly all the central characters dead.

This analysis brings together these two "tributaries"—Hamlet and Snow Crash, to reimagine justice in the metaverse. Both sources, though separated by centuries and genres, offer powerful insights into the dynamics of presence, authority, and interaction, making them compelling foundations for conceptualizing virtual courtrooms. Additionally, we incorporate relevant computer games and films that address related issues or offer further perspectives or practical illustrations of how the metaverse might function. We also draw on scholarship from the sociology of emotions and performance, literatures that we have argued are particularly well-suited to provide insights into designing and researching virtual courts (authors' own). Concepts such as facework, dramaturgy, and framing are particularly relevant to understanding how participants interact, manage impressions, and negotiate authority in both physical and virtual settings. By applying these concepts to the metaverse, we aim to highlight the social and emotional dimensions of virtual justice, which are often overlooked in technologically focused discussions. This includes an analysis of the management of presence and visibility, the staging and choreography of movement and interaction, and the role of performative elements in establishing authority and legitimacy in court settings.

Being there: double presence

A metaverse courtroom fundamentally reshapes our understanding of presence in legal proceedings. Unlike traditional

imperial adventures of European powers are made more palatable by being transferred into the colonization of distant planets inhabited by savages, or the transformation of Captain James Cook, the British explorer, into Captain James Kirk of the *Starship Enterprise*. It could be more overtly political as in HG Wells' parable about the genocide of Australian Aboriginal peoples in *War of the Worlds*, or indeed the critique of anarcho-capitalism—a world torn apart by oligarchs and faced with climatic disaster—in *Snow Crash*.

courtrooms where participants occupy a single, shared physical space, metaverse environments enable what we call "double presence"—the ability to simultaneously exist and operate in multiple spaces. This dual existence creates new possibilities for how participants engage with the court, access information, and interact with others. Both *Snow Crash* and *Hamlet* offer unique perspectives on this concept, demonstrating how individuals can navigate between public and private domains, physical and virtual realms, while maintaining meaningful engagement in both.

Virtual reality games aim to give players the experience of "being there," an illusion of presence enhanced when the environment and other players provide confirmatory cues (Heater, 1992; Lombard and Ditton, 1997). The goal of the games designer, as with a filmmaker, is to get the participants or audience to suspend disbelief, to become fully immersed in the fiction created for their entertainment. While metaverse courts similarly aim to create a convincing experience of "being there" they also need to ensure that participants are able to operate fully in their local environment. This double presence (authors' own) allows judges and lawyers, to engage fully with participants or documents both in local and remote locations.

In *Snow Crash* participants live in two realities. There is Reality, as it is called, which is chaotic and violent. Some people live in this world in comfortable surroundings, such as gated communities, protected by bodyguards; Hiro lives in a storage shed. The second reality is the metaverse, a virtual realm accessed through computers, goggles, and a shared fiber-optic network. Hiro's interactions often occur in both spaces at once, blending Reality and the Metaverse:

> *"Where are you?" Hiro says. "In Reality or the Metaverse?" "Both. In the Metaverse, I'm on a plusbound monorail train ...." "Where are you in Reality?" "Public terminal across the street from a Reverend Wayne's," she says.* (p. 233)

In *Snow Crash*, people move fluidly between virtual and physical spaces, though nobody entirely forgets their place in Reality. While *Snow Crash* predates immersive platforms like Second *Life* or *World of Warcraft*, its depiction of double presence resonates with later explorations of digital interaction. Notably, the Metaverse in *Snow Crash* remains imperfect—freezing and re-rendering under strain—reminding us of the technological limitations that must be considered.

Both worlds are deeply unequal, reflecting social divides. Reality is dominated by warlords and oligarchs, while ordinary people are marginalized and need to align themselves with a powerful patron to survive, for instance Hiro works in a mafia-run pizza franchise. Similarly, in the metaverse technological disparities determine access. Hiro enjoys well-developed avatars in full color with advanced tools. Others have to use a public access sites, appearing as low-resolution black-and-white renderings.

In *Hamlet*, Shakespeare similarly presents two worlds. There is the visible, physical world experienced by the play's characters—Elsinore Castle and its surroundings—and a hidden world, accessible only to Hamlet and his confidants, where the ghost of his father reveals unsettling truths. Hamlet operates across seven primary physical settings, including public and private spaces: the battlements, royal chambers, private chapels and closets, and a graveyard. A pirate ship—not shown on the stage—rescues Hamlet. Additionally, Shakespeare introduces a "stage within a stage" through the *play within a play*, expanding the layers of presence and performance.

Hamlet and select friends have access to a spirit world, where the ghost of Hamlet's father embodies this dual presence, appearing in both visible and hidden spaces. It gestures for Hamlet to follow it to secure privacy, recalls an orchard where Claudius poisoned him, and later speaks from *beneath* the stage, urging secrecy. The ghost disrupts the boundaries of space and presence, much like digital interventions in the Metaverse.

A metaverse court allows for similar movement. Judges and lawyers could shift between physical sidebars and virtual meeting rooms, or hearings could occur in dynamic environments, such as virtual pirate ships or open orchards inspired by *Snow Crash* and *Hamlet*.[3]

Participants might operate simultaneously in public and private spaces, much like Hiro and YT's layered conversations. Public hearings could occur in physical or virtual courtrooms, while private deliberations take place backstage or in parallel virtual spaces. Drawing on Hamlet's ghost—appearing from unexpected locations—participants could "disrupt" proceedings to emphasize accountability or moral obligation, adding performative layers to court processes.

The 2024 film *Grand Theft Hamlet* demonstrates the potential—and challenges—of staging performances in a metaverse environment. Attempting to perform *Hamlet* within the open-access game *Grand Theft Auto*, two actors face an unanticipated challenge: random audience members enter the virtual space, disrupting the play by killing the actors' avatars. This "play within a play" parallels Shakespeare while highlighting the unpredictability of virtual settings.

This experiment reveals the emerging maturity of metaverse platforms for hosting dramatic, emotional interactions—key components of justice processes—while warning that unplanned disruptions remain a risk. A metaverse courtroom, like *Hamlet*'s stage, would require careful design to balance formal procedures with flexibility, ensuring justice remains at the center of the performance.

Facework: self-presentation, authenticity, authority

The effectiveness of justice processes depends heavily on the management of identity, authority, and respect among participants. Drawing on Goffman's concept of facework (Goffman, 1967)—the strategies individuals employ to present themselves and maintain dignity in social interactions—we can better understand how participants in a metaverse court might navigate their self-presentation through avatars while preserving the authority and legitimacy essential to judicial proceedings.

In a metaverse court, the face can take on a new meaning with the introduction of avatars. Avatars can serve as digital extensions

3 The idea of designing a building to reference a pirate ship comes from another visual source, a factory in Berlin in the Steiner system that supports people with disabilities. See https://www.feddersen-architekten.de/portfolio/werkstatt-fuer-behinderte-in-berlin-zehlendorf/.

of a participant's identity, but they also require careful design to convey authority, respectability, and authenticity. With this comes a new "frame"—new sets of cues guiding participants in how to act, how to feel, and how to interpret the behavior of others (Goffman, 1974). In both *Hamlet* and *Snow Crash*, characters engage in negotiations of identity and authenticity, offering insights into how faces and facades operate in contexts where traditional social cues are disrupted or transformed.

In *Hamlet*, the struggle to maintain face in a fractured environment contributes to much of the play's tension. The political and moral order of Denmark is "out of joint," and Hamlet repeatedly challenges the self-presentation of others, exposing their hypocrisies and hidden truths. His interactions are often laced with mockery, undermining the public personas others strive to maintain.

For instance, Hamlet humiliates Polonius by pretending to mistake him for a "fishmonger" and accusing him of dishonesty, mockery that escalates when Hamlet casts aspersions on Polonius's daughter's chastity and age (Act 2, Scene 2). The ultimate affront comes when Hamlet kills Polonius, saying, "I took thee for thy better," a cold comfort for the man mistaken for the king.

Hamlet's attack on face—literal and metaphorical—extends to his love interest Ophelia in his comment:

> *"God hath given you one face, and you make yourself another."*

On the surface, this line critiques women's use of cosmetics, referring to the lead-based makeup popular in Elizabethan England. Scholars often interpret it as a misogynistic jibe (Mullaney, 1994), but within the broader context of the play, Hamlet's statement connects to themes of artifice and deception. Claudius, for instance, earlier delivers a striking self-condemnation, likening his "painted words" to a prostitute's painted face:

> *"The harlot's cheek, beautied with plastering art, Is not more ugly to the thing that helps it Than is my deed to my most painted word."* (Act 3, Scene 1)

Claudius's metaphor acknowledges his guilt, hidden beneath a veneer of polite words, while Hamlet's critique of Ophelia's "two faces" reveals a similar frustration—men, seduced by superficial appearances, are complicit in their own self-deception. Hamlet's subsequent reflection on his own offenses ("more offenses at my beck than I have thoughts…") suggests that his critique of Ophelia is as much self-directed as it is accusatory. This duality—holding others accountable while revealing his own failings—demonstrates Hamlet's awareness of the performance inherent in self-presentation.

Hamlet operates within layers of performance: public and private, visible and hidden. He exposes the painted faces of others while struggling with his own dual identity—one for the court, one for his inner self. This conflict culminates in soliloquies and asides, spaces where Hamlet can temporarily drop the mask and express his true thoughts to the audience. Lawyers in contemporary court cases can adopt the opposite strategy, putting on a "stoneface" to hide their true feelings, distancing themselves from their clients (Flower, 2018, p. 124). Such a practice is also common amongst judges (Bergman Blix and Wettergren, 2018).

In *Snow Crash*, facework takes on a new dimension in the Metaverse, where avatars replace physical selves. Unlike Hamlet's world—where face reflects dignity and authenticity—avatars are human creations that can be endlessly modified and recreated. This fluidity both empowers and destabilizes identity.

Hiro Protagonist reflects on the significance of face when he meets a receptionist daemon who matches his ethnicity:

> *"If a white man had stepped off the elevator, she probably would have been a blonde."* (p. 449)

Here, face is not authentic but adaptive, designed to match the expectations of the viewer. Hiro himself admits to underestimating the importance of facial expressions when coding avatars. While he focused on body movements, his colleague Juanita developed the crucial facial coding that enables avatars to convey emotion and nuance:

> *"Nobody thought that faces were all that important… She was just in the process of proving them all desperately wrong."* (pp. 65–66)

Hiro later critiques the male-dominated coding culture for failing to recognize the significance of face, paralleling Hamlet's self-reflection on men's complicity in superficial judgments.

In the Metaverse, avatars also challenge conventional ideas of dignity and permanence. Sword fights, for example, may leave avatars humiliated—"red-faced and sweating"—but such failures are fleeting. Dead avatars are quickly cleared, and participants can log back in with renewed faces. As Hiro observes, avatars can appear differently to different viewers, adapting their appearance as needed.

The tension between authentic and constructed faces in *Hamlet* and *Snow Crash* has clear implications for a metaverse courtroom. In virtual justice settings, participants might manage their avatars to present different faces depending on the audience or context. For example:

- A defendant might appear as a neutral, featureless avatar or might present a sympathetic face.
- Avatars could be programmed with gestures and movements that simulate respectful interactions—such as bowing or nodding when addressing the judge—to reduce the risk of disinhibition often associated with virtual spaces.
- Judges might shift between stern avatars for formal hearings and approachable visages for mediation.
- Audience members could opt for ghost-like anonymity or avatars that signal group affiliations or messages.

This adaptability mirrors the layered performances in *Hamlet*, where public and private faces coexist, and participants manage their self-presentation for different audiences. It also reflects the ephemeral nature of facework in *Snow Crash*, where avatars can be reset or customized as needed. The question, then, is whether a metaverse court should encourage

participants to reveal their "true" faces or allow them to construct strategic avatars.

Ultimately, a metaverse courtroom could embrace the dynamic potential of avatars, allowing participants to switch between public and private "faces," much like Hamlet navigating Elsinore or Hiro shifting identities in the Metaverse. By rethinking facework, virtual courts could balance the performance of authority with spaces for authentic dialogue and emotional expression.

Goffman reminds us that maintaining face involves strategic and collaborative acts, tied to social cues and demands of a particular encounter. In *Hamlet's* court and the metaverse of *Snow Crash,* faces are not fixed; they adapt to shifting frames and contexts, requiring effort and intentionality to uphold. A metaverse courtroom, drawing from these insights, would need to account for the strategic, relational, and performative nature of face. Avatars and their mutable appearances could enrich interactions by providing opportunities to express authority and authenticity, acknowledge the emotional complexity of justice, and foster respectful engagement. Face in a metaverse court takes work to achieve but opens up new possibilities for rethinking identity, interaction, and authority in justice spaces.

Movement, choreography, and staging

Movement and spatial organization are integral to the choreography of justice in physical courtrooms. From the formal entrance of the judge to the positioning of witnesses and defendants, these movements and arrangements communicate power, authority, and procedural structure. A metaverse courtroom presents both challenges and opportunities for reimagining this choreography, allowing for new forms of movement, interaction, and spatial design that may enhance or transform traditional court dynamics. *Hamlet* and *Snow Crash* both feature distinctive approaches to movement and staging that can inform how we conceptualize navigation and interaction in virtual justice spaces.

Journeying to court

In physical courtrooms, movement is an integral part of the proceedings, shaping the flow of interactions, reinforcing authority, and maintaining the formality of the space. Judges enter the courtroom to the call of "All rise," lawyers stand and sit as needed, witnesses take their turn in the stand, and defendants often remain seated, observing the process. Lawyers might walk over to confer with clients, place a reassuring hand on a shoulder, or pause to sip water. Members of the public shuffle in and out, monitored by attendants. These physical cues and movements choreograph the courtroom's rhythm, creating a sense of order and structure.

In a metaverse courtroom, replicating these physical interactions raises challenges. For instance, in *Snow Crash*, avatars avoid physical contact, as the absence of tactile feedback "reminds you that you're not even really there" (p. 253). However, some actions, such as serving virtual drinks or receiving a shoulder rub, enhance the immersive illusion. Carefully designed protocols—like ensuring avatars cannot pass through walls or materialize arbitrarily—reinforce the metaphor of presence:

> *"You can't just materialize anywhere in the Metaverse, like Captain Kirk beaming down from on high. This would be confusing and irritating to the people around you. It would break the metaphor."* (p. 43)

Currently, virtual justice platforms like Zoom rely on participants "beaming in" and "out," a convenience that sacrifices realism. Introducing more deliberate movements—such as walking or teleporting into the courtroom—could elevate the experience, grounding participants in a shared virtual space. Considering the experience of appearing at court consisting of a "journey" to the courtroom can enhance the solemnity and legitimacy of proceedings (authors' own).

Managing people: movement and ghosts

In *Hamlet*, choreography reflects the interplay between public and private worlds. Characters frequently move across different spaces—public chambers, private closets, and the outdoor graveyard—mirroring their shifting roles and relationships. Movement often emphasizes power dynamics: Claudius delivers commands from the audience chamber, Hamlet soliloquizes in isolation, and confrontations unfold in intimate settings like Gertrude's closet.

The characters in *Snow Crash* are constantly on the move, often using vehicles like scooters, motorcycles, helicopters, and trucks. Even in the Metaverse, Hiro's hypersonic motorbike highlights how movement retains symbolic and practical importance, even without physical constraints. Navigation reinforces presence and interaction, making the virtual world feel immersive and dynamic rather than static or disconnected. Movement, real or virtual, is central to engaging with the world and asserting one's role within it.

Coordinating group movement within a metaverse is particularly challenging. In *Snow Crash*, avatars in public spaces like The Street often walk through each other, a pragmatic solution to the technical demands of rendering multiple avatars simultaneously. However, this disrupts the illusion of physical presence:

> *On the Street, avatars just walk right through each other… When things get this jammed together, the computer simplifies things by drawing all of the avatars ghostly and translucent so you can see where you're going.* (p. 47)

Private spaces like the Black Sun club offer a more realistic experience. Here, avatars are rendered solid, collisions are prevented, and access is limited to ensure smooth interaction:

> *"In The Black Sun, avatars are not allowed to collide. Only so many people can be here at once, and they can't walk through each other."* (p. 63)

In *Hamlet*, the ghost of Hamlet's father further complicates staging, appearing in both visible and invisible forms. Sometimes the ghost is seen only by Hamlet, while at other times its presence is indicated through sound effects, such as knocking from beneath the

stage. These techniques blur the boundaries between physical and metaphysical spaces, offering inspiration for managing presence and interaction in a metaverse courtroom.

A metaverse courtroom could adopt similar strategies, designating areas with varying levels of immersion or realism. For instance, the well of the court could operate like the Black Sun—solid and orderly—while public gallery spaces could adopt the translucency of The Street to accommodate higher numbers of avatars.

Staging soliloquies and asides

Hamlet employs soliloquies and asides, creating layers of engagement. Soliloquies allow characters to speak directly to the audience, revealing inner thoughts and motivations, while asides provide confidential commentary amid public scenes. These devices enhance the audience's understanding while maintaining the illusion that other characters remain unaware.

Application to a metaverse courtroom

Drawing inspiration from *Snow Crash* and *Hamlet*, a metaverse courtroom could innovate movement and staging in ways that enhance both functionality and symbolism. Avatars could be rendered invisible or translucent when not actively participating, much like ghostly figures on The Street in *Snow Crash* or hidden characters in *Hamlet*. Protected witnesses could also be made visible only to judges and lawyers, maintaining anonymity while enabling selective interaction. Audio could be layered to allow private sidebars between lawyers or confidential exchanges with clients, echoing whispered conversations in physical courts or asides in *Hamlet*.

Participants might move "onstage" or "offstage" depending on their role, with soliloquy-like "backstage" opportunities for defendants or witnesses to share reflections privately with the judge or jury (Goffman, 1959). Judges could summon participants into the well of the court for specific interactions, recreating the formal entrances and exits typical of physical courtrooms. Virtual spaces could also be adapted to suit different proceedings, ranging from realistic courtroom settings to more symbolic environments, such as an amphitheater for public deliberations or a private chamber for mediation.

Incorporating these elements into a metaverse courtroom requires balancing technical feasibility with the symbolic and performative aspects of justice. *Snow Crash* highlights the importance of managing group dynamics and maintaining the illusion of presence, while *Hamlet* demonstrates the power of staging and movement to convey authority, conflict, and reflection. Together, these sources suggest that a metaverse court need not simply replicate physical courtrooms but can reimagine justice as a dynamic, layered performance, blending visibility, movement, and interaction to create a series of spaces where participants are both present and empowered.

Adversary and action

A defining feature of many courtroom processes is the adversarial structure, where two sides confront each other to present their case and challenge the evidence of their opponents. In English common law, this tradition originates in the accused's right to physically "confront" their accuser, a principle that evolved into a contestation of words. Modern trials are typically managed by professional lawyers, who engage in verbal duels through oral arguments, written submissions, and the examination and cross-examination of witnesses.

This adversarial tradition is deeply rooted in the historical practice of trial by combat, where disputes were settled, and "truth" determined through physical confrontation. Although trial by combat largely disappeared after the Fourth Lateran Council of 1215 prohibited clergy from participating in such practices, its language and metaphors endure in contemporary courts. Lawyers are said to "attack" or "ambush" witnesses, "confront" discrepancies in testimony, or engage in "onslaughts" during cross-examination. Even the concept of giving both sides "equality of arms" harks back to the days when physical weapons decided justice.

A metaverse court offers new possibilities for reimagining how adversarial processes might function when freed from physical constraints while still maintaining procedural fairness. Both *Hamlet* and *Snow Crash* feature confrontations and conflicts that illuminate different dimensions of adversarial interaction, suggesting innovative approaches to balancing opposition with fairness in virtual environments.

In *Hamlet*, adversaries clash with both words and swords. Hamlet himself acknowledges the potency of words as weapons: *"I will speak daggers to her, but use none."* Yet he often resorts to literal violence, as when he impulsively stabs Polonius through a curtain or leaps onto Ophelia's grave to fight her brother, Laertes. Ultimately, the play culminates in a duel between Hamlet and Laertes, orchestrated by the manipulative Claudius, which ends in the deaths of nearly all the main characters.

In *Snow Crash*, Hiro engages in combat both physically and virtually. As the programmer who wrote the Metaverse's sword-fighting code, he is undefeated in his virtual battles, culminating in a final confrontation with Raven, the novel's antagonist, in which Hiro triumphs by decapitating him. Unlike Hamlet, Hiro survives his adversarial encounters, but both characters navigate worlds where conflict is inevitable, and the stakes are high.

In a courtroom context, physical combat is replaced by verbal argumentation, but the adversarial structure persists. A metaverse courtroom might extend this tradition by offering new ways to embody or visualize these confrontations. For instance, the principle of "equality of arms" could be reinforced by placing opposing parties at the same level, facing each other, as seen in Scandinavian and German courtrooms. By contrast, the common law practice of seating both parties at the same table might undermine the visual metaphor of an adversarial contest.

The metaverse also allows for innovative ways to immerse participants and audiences in the dynamics of a trial. For example, as in *Hamlet*, soliloquies and asides provide the audience with privileged access to characters' thoughts and motivations. A metaverse court could replicate this through immersive first-person perspectives, allowing jurors or judges to momentarily

"step into the shoes" of different participants. This could provide a deeper understanding of conflicting viewpoints by letting the audience experience the trial from multiple perspectives. For the disputants, new rituals and a "just distance" between the parties could encourage them to recognize the humanity of the other (Ricoeur, 1995; Garapon, 1997).

While traditional courtroom proceedings rely on verbal exchanges, a metaverse court could incorporate visual and interactive elements to make these interactions more engaging. Lawyers and judges already use visual aids in trials; expanding this to include three-dimensional reconstructions or immersive experiences would be a natural progression. For example, participants might use avatars to visually demonstrate arguments or evidence, creating a more dynamic and memorable experience for jurors.

Despite these possibilities, any metaverse courtroom would need clear rules to ensure fairness and preserve the adversarial nature of the process. As seen in *Hamlet* and *Snow Crash*, conflicts are most compelling when the playing field is level. In the metaverse, this could mean controlling how participants present themselves and interact, ensuring that all parties have equal access to tools and representation. Allowing one side to manipulate the rules or gain an unfair advantage, as Laertes does with his poisoned sword or as Hiro avoids through his coding expertise, would undermine the legitimacy of the process.

The comparison between *Hamlet*, *Snow Crash*, and modern courts highlights both the drama and limitations of adversarial proceedings. While courtroom disputes are rarely as action-packed as sword fights or virtual battles, the metaverse offers an opportunity to bridge this gap by combining the narrative power of storytelling with immersive technologies. By integrating dynamic visuals, first-person perspectives, and equitable staging, a metaverse courtroom could transform the adversarial contest into a more engaging and accessible experience while staying true to its foundational principles.

Gathering and presenting evidence

A key feature of contemporary trials is the identification, presentation, and assessment of evidence. Evidence can take the form of written documents, oral testimony, or increasingly, video and audio recordings. Regardless of its format, evidence must be rigorously tested to confirm its relevance and reliability. This fundamental process is mirrored in both *Hamlet* and *Snow Crash*, where the protagonists adopt creative strategies to uncover and verify truth.

In *Hamlet*, the titular character initially receives evidence about his father's murder through oral testimony, albeit from a ghost. Recognizing the need to test the ghost's account, Hamlet devises an innovative approach: he commissions actors to perform a play mirroring the alleged murder of his father, complete with the distinctive detail of poison poured into the king's ear.

> *. . . I'll have these players*
> *Play something like the murder of my father*
> *Before mine uncle: I'll observe his looks;*
> *I'll tent him to the quick: if he but blench,*
> *I know my course. . .*

Hamlet's goal is to provoke a reaction from Claudius, whose guilt would confirm the ghost's testimony. To maximize the play's impact, Hamlet instructs the actors to "hold, as 'twere, the mirror up to nature," creating an authentic performance designed to elicit an emotional response. The strategy works: Claudius storms out during the poison scene, betraying his guilt and validating Hamlet's suspicions. This moment demonstrates how an interactive and realistic simulation can bring hidden truths to light.

However, not all evidence-gathering techniques in *Hamlet* are equally effective. The final duel between Hamlet and Laertes, sanctioned as a formal trial by combat, fails to yield a satisfactory resolution. Both combatants die, as does the king, leaving the dispute unresolved. This outcome reflects historical critiques of trial by battle as an unreliable means of discovering truth.

Meanwhile, Hamlet himself becomes the subject of evidence-gathering. Claudius deploys a network of spies to determine whether Hamlet knows of his father's murder and is plotting revenge. Hamlet's feigned madness serves as a strategy to obscure his true intentions, buying him time to develop his plans. This interplay of surveillance and deception highlights the complexity of evidence collection, where motives and interpretations can be clouded by misdirection.

In *Snow Crash*, Hiro's evidence-gathering mission parallels Hamlet's, though it is driven by technology rather than theater. Tasked with uncovering the origins of a deadly virus, Hiro relies on an AI assistant called the Librarian to access and compile vast amounts of information. The Librarian traces the virus's origins to ancient Sumer, its spread through neurolinguistics and Pentecostal Christianity, and its suppression by linguistic diversity following the Tower of Babel. Despite its speed and breadth of knowledge, the Librarian admits its limitations:

> *The connections are elaborate. Summarizing them would require both creativity and discretion. As a mechanical entity, I have neither.* (p. 245)

Hiro must interpret and synthesize this information himself, demonstrating that even advanced AI cannot fully replicate human judgment or creativity. Unlike Shelley's Frankenstein's monster, the Librarian does not evolve into a self-aware entity but remains a tool dependent on human agency.

Both *Hamlet* and *Snow Crash* show that evidence-gathering requires not only tools and techniques but also human insight to interpret and act on the information. These lessons have direct implications for the design of a metaverse courtroom. Advanced AI systems, akin to Hiro's Librarian, could assist in processing and organizing evidence, while immersive simulations could mirror Hamlet's play within a play, allowing participants to test and visualize allegations. In addition, AI could facilitate language interpretation, enabling seamless communication between participants speaking different languages, or help construct dynamic re-enactments to examine evidence from multiple perspectives.

In a metaverse court, these tools could enhance the accessibility and reliability of evidence, but their use must be carefully balanced with human oversight. Just as Hamlet's performance relied on Claudius's reaction to confirm its validity, and Hiro's investigation depended on his ability to connect disparate threads, evidence in

a metaverse court must ultimately be scrutinized and evaluated by human participants. The integration of AI and simulations offers immense potential, but it also demonstrates the enduring necessity of creativity, discretion, and critical thinking in the pursuit of justice.

How issues facing video courts might apply to metaverse courts

The purpose of this Article is not to provide a blueprint for improving current ways of operationalizing virtual courts but, following Connolly, to unsettle established knowledge and challenge assumptions about what (in this example) justice processes might look like. This could be to take advantage of the opportunities offered by metaverse technologies, or more broadly re-think justice rituals and spaces. Nevertheless, to make some of the ideas more concrete it is useful to sketch out briefly how some of the issues associated with virtual courts using video conferencing technology might apply to metaverse courts.[4]

Accessibility

Accessing a video hearing typically requires a basic computer with an adequate broadband link. Taking part in a metaverse court hearing requires more expensive gear: a gaming computer with a fast CPU and a high-quality graphics card. This could be a barrier for potential users. Such technology might be made available in communication pods within public facilities like town halls, public libraries or lawyers' offices (as well as facilities within courthouses). Some of Hiro's colleagues had access to such a facility even if their avatars appeared in a simpler form. Providing such infrastructure requires more planning and investment than allowing people to take part in a video court hearing from a smartphone in a car or from a tablet in their bedroom. But insisting on minimum standards for the remote environment is likely to provide greater privacy for the user, fewer distractions for others in the hearing, more dignity and less chance of network dropouts. Such communication pods could of course be also used for video hearings. For people living in regional and remote areas either technology would provide enhanced accessibility compared to driving long distances to physical courtrooms.

Procedural fairness

Fairness is a central concern in any justice hearing. Equality of arms was the fairness principle violated in Hamlet's final sword fight with Laertes. In both the video court and the metaverse court ensuring the defense has equally good access to suitable technology will be the challenge. The presumption of innocence meanwhile is routinely violated for defendants in physical courts in the UK, Canada, France, and most Australian states by placing them in docks, even sometimes in glass cages (author's own). Showing the accused on a screen alongside their lawyer can avoid this problem (author's own). Effective access to counsel can be an issue in any form of distributed hearing, but if client and lawyer are co-located (whether in a courtroom or elsewhere) this can enable effective communication between them, even if it makes it more difficult for the two parties to communicate. Metaverse courts would be no different in this respect. Vulnerable witnesses meanwhile can be intimidated or even placed in danger if they are visible during a hearing. This is solved in international tribunals by pixelating the vulnerable witness being video streamed; a metaverse court addresses the problem differently by having everyone appear as avatars, drawing less attention to the form of the witness. If a virtual jury trial is held (as some were during the pandemic), it is hard for jurors to get spatial and audio cues if the faces of the active participants are framed in boxes in a gallery looking forward. A metaverse court would provide a more comprehensive approach by showing all the (other) participants embedded in a shared environment.

Security

Occasionally video hearings have been disrupted by outsiders engaging in what has been dubbed "Zoom bombing," not unlike what happened in *Grand Theft Hamlet*. Most video conferencing systems now have multiple layers of security so even if random visitors do manage to break into a virtual hearing (which is usually public anyway), they can usually enter only the video streaming room (without participant privileges) or if they venture further, they can be quickly excluded by the presiding officer. Metaverse courts pose more of a security threat—gaming platforms can be used as a back end for malicious users to gain access to a computer network. For this reason, metaverse applications (whether for courts or anything else) tend to require the very high security environments of cloud servers.

Empathy

Reduced possibilities for empathy is one of the limitations identified for video hearings (Bandes and Feigenson, 2021). It is possible that seeing the avatar of a person is even less likely to evoke empathy than seeing the person's video image in a video hearing. On the other hand it is expected that seeing fuller bodily gestures from participants framed within a courtroom setting rather than a Zoom gallery, observing interactions including how others respond to a statement and feeling part of a shared environment—these together could counter any disadvantage associated with seeing a person in the form of an avatar. Even if a metaverse setting or the avatar appearance has little observable impact on empathy, it might improve the ability of decision makers to listen carefully to the evidence without distraction, something that is arguably key to producing just outcomes from a judicial process. These are empirical claims that could be tested by experimental studies.

4 We are grateful to an anonymous reviewer for suggesting this section, and identifying the issues that should be examined.

Inclusiveness and reduction in intimidation

Garfinkel's critique of some (in-person) courtroom interactions as degradation rituals does suggest that the bar for inclusiveness in justice processes is fairly low (Garfinkel, 1956). Courts are not places where people generally feel comfortable. The bar is potentially even lower for remote participants who at present rarely get a comprehensive view of the court. They are in effect visually excluded, seeing only the judge and lawyers, so are limited in their ability to assess the impact of their presence or their evidence. This is not a flaw inherent in the technology, indeed it is entirely possible for the witness or defendant to see the audience, jury (if there is one) and both parties, which in experimental studies has been shown to have a positive impact on the satisfaction of the remote participant (Rowden et al., 2013). In a metaverse court on the other hand active participants would all see and be seen throughout the hearing as if they were physically co-present (albeit in avatar form). While the number of audience members who can be shown is restricted by bandwidth, live streaming of hearings for both video courts and metaverse courts can allow for larger audiences than traditional face-to-face hearings. For people who come from a stigmatized minority or have body image issues being able to choose an avatar that they feel comfortable with could make a court appearance feel less threatening and more welcoming.

Efficiency and cost

Metaverse platforms would be more expensive to run than virtual courts using video conferencing. Apart from the higher cost associated with fast graphics cards within the computers used, higher quality cameras and monitors would be required to take advantage of the technology, and a secure server would be essential. Any efficiencies in cost of running courts would likely be derived from transfer of hearings from physical hearings to either form of online hearing. Where a metaverse platform has already begun to lead to real savings is in the design of physical court spaces—architects can simulate alternative configurations and allow their clients to identify optimal sightlines, distances, and relative heights.

Privacy

Virtual courts during the pandemic faced several privacy challenges. Live streaming of cases could potentially allow viewers to secretly record and distribute selected extracts from open hearings, regardless of any judicial warnings. Meanwhile vulnerable participants (such as in mental health hearings) might have personal information about them disclosed to random strangers (Scarlett, 2020). Adding password entry procedures, court participants retiring to breakout rooms for confidential discussions, and using initials rather than names were introduced as a way of reducing the risk of breach of privacy. In relation to privacy from inappropriate audience activity a metaverse court could face similar risks and could adopt similar safeguards. However, any form of open court could allow disclosure of embarrassing information, such as unseemly conflict over a family trust or uninhibited statements made during a night of revelry. Streaming a hearing, whether of a video or a metaverse court, could increase the risk of mass dissemination of what court users might consider private information. A metaverse court could shield participants from visual exposure, while pseudonyms could reduce the chances of identification.

Adaptability to contemporary legal needs

Whether metaverse justice hearings could replace other hearing modes for some types of case on some occasions is an empirical question. Complex commercial cases where parties and witnesses are dispersed seem particularly suitable. Evidentiary hearings before criminal trials might be another possible application, including when proposed evidence is in a three-dimensional form (such as a virtual walk-through of a crime scene). Most companies offering video conferencing systems are already developing more immersive environments with the goal of supporting various forms of virtual co-presence, so the difference between a video image and a high quality avatar's appearance is likely to become increasingly narrow.

Conclusions

In exploring how a metaverse court might function, we have drawn from the seemingly disparate worlds of *Hamlet* and *Snow Crash*. This dialogue of perspectives, inspired by Connolly's method of juxtaposing intellectual tributaries, has revealed new ways to conceptualize justice as both a practical and performative process. Each text contributes unique insights into key courtroom dynamics—presence, face, movement, adversarialism, and evidence—while offering complementary critiques of their limitations.

At its core, the metaverse court challenges us to move beyond static, traditional notions of justice spaces. The concept of "double presence," exemplified by both Hamlet's ghost and Hiro's dual realities, suggests that participants can operate in layered spaces—public and private, real and virtual—offering a richer, more dynamic understanding of engagement. This layering reflects not only the spatial hybridity of the metaverse but also the emotional and social complexities of a justice encounter. Managing one's role, dignity, and interactions in relation to others—concepts central to facework and framing—becomes essential to maintaining both authority and authenticity in virtual justice environments.

The performative insights of *Hamlet* resonate in this context. Hamlet's soliloquies and asides offer a model for creating private, reflective spaces in a public courtroom setting, while the "play within a play" demonstrates how re-enactments can reveal hidden truths. Similarly, *Snow Crash* shows the importance of movement and presence in virtual settings, as seen in Hiro's hypersonic motorbike journeys. The embodied actions of avatars—whether navigating between spaces, adopting different forms, or engaging with evidence—become a vital part of asserting agency and fostering interaction. Indeed the forms of interaction that may develop in the new environment may go beyond simply replicating

traditional practices, they are likely to create new practices (Dumoulin and Licoppe, 2009).

This analysis reminds us that justice spaces are deeply emotional and interactive spaces (Bergman Blix and Wettergren, 2018). Shelley's *Frankenstein* exemplifies the blending of science and art to explore the ethical and emotional dimensions of creation. Her work provides a reminder that technological spaces, including the metaverse, must grapple with the social and emotional consequences of the worlds they generate.

The documentary *Grand Theft Hamlet* serves as both an inspiration and a cautionary tale. It demonstrates the potential for metaverse spaces to host emotionally charged, dramatic interactions that resonate deeply with participants and audiences. At the same time, it highlights the risks of unplanned disruptions and the challenge of maintaining order in open, interactive environments.

By bringing these sources into conversation, we are enabled to see the metaverse court as more than a replication of physical proceedings let alone an enhanced version of the "Zoom court." It emerges as potentially a layered, flexible, and performative space. Or rather "spaces"—participants can move between a range of customized locations, with adjustable visibility settings. Faces can be "painted" according to either court conventions or individual choice. Following Connolly's invitation, designing a metaverse court is not about predicting the future but making its possibilities vivid, tangible, and meaningful. It is possible that the conversation would have taken a different turn if we had included a different set of sources. The risks of technological innovation might have assumed greater prominence if we had followed Mary Shelley's creation further down its path of self-destruction. Or we might have been less accommodating of judicial authority if we had used Spartacus as our model rather than Hamlet. However, the frame that Connolly provides of juxtaposing two apparently unrelated literary pieces acts to unsettle "normal science" and linear assumptions about progress. Just as Hamlet's ghost disrupts both the emotional security of the play's protagonist and the assumption of a two-dimensional stage, so the device of bringing diverse sources together allows us to disrupt the way we think about metaverse courts.

Author contributions

DT: Writing – original draft, Writing – review & editing. MR: Writing – original draft, Writing – review & editing.

Funding

The author(s) declare that no financial support was received for the research and/or publication of this article.

Conflict of interest

The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Generative AI statement

The author(s) declare that Gen AI was used in the creation of this manuscript. Generative AI was used for general editing and refining of text, and preparation of reference list.

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frontiers | Frontiers in Sociology

TYPE Original Research
PUBLISHED 08 July 2025
DOI 10.3389/fsoc.2025.1435354

OPEN ACCESS

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RECEIVED 20 May 2024
ACCEPTED 30 April 2025
PUBLISHED 08 July 2025

CITATION
Amietta SA (2025) Making legal sense: on jurors' discovery of objectivity in Argentina's experience of lay participation in criminal trials.
Front. Sociol. 10:1435354.
doi: 10.3389/fsoc.2025.1435354

Making legal sense: on jurors' discovery of objectivity in Argentina's experience of lay participation in criminal trials

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This article stems from a broader research programme on the recent incorporation of lay decision-makers into the historically professional-only criminal justice systems in Argentina. It draws on ethnographic data from courthouse observations and in-depth interviews with ordinary citizens who served as lay jurors in the mixed tribunal of the Province of Córdoba, the first one in the country to introduce lay participation. The article deploys the conceptual framework of relational legal consciousness to examine jurors' perceptions of their own role and experiences within the courthouse, vis-à-vis legal professionals and their deployment of legal knowledge. It argues that jurors' stories of the use of the law, its language and formalities complicate their perception, in conventional and scholarly wisdom, as bearers of emotions and common sense—a realm opposed to the one imagined and reserved for legal professionals, the sphere of uncontaminated application of legal rules and principles. The article contributes in this way to broader debates on the place and impact of lay decision-makers on state judicial adjudication and on the role of emotions and extra-legal reasoning therein.

KEYWORDS

lay participation, legal consciousness, jurors, objectivity, justice, emotions, Argentina

1 Introduction

Criminal jury trials have been incorporated in every version of Argentina's National Constitution since its transition to formal postcolonial independence in the first half of the 19th century. Until the 1980s, however, the implementation of lay participation in criminal trials was rarely addressed in spheres of authorized legal discourse (Hendler, 2008; Bergoglio, 2010; Bergoglio et al., 2019). With the return of democratic rule following the last civic-military dictatorship (1976–1983), a process of legal and judicial reforms ensued. These reforms included profound modifications to the federal and provincial criminal procedure systems—decisively shifting from an inquisitorial to an adversarial style, and from written to oral proceedings. While lay participation was not central to this wave of reforms, discussions about its introduction gained visibility. In 1991, the Province of Córdoba passed the first system (a mixed tribunal of German inspiration, with two laypeople and three professional judges) and introduced a new one in 2004, with expanded lay participation. In its current form, eight lay people[1] are summoned to take part in the decision of a

1 In this article I use the terms 'lay juror', 'juror', and 'lay person' to refer to the members of Córdoba's mixed tribunal without legal education who are summoned for a single case. Reasons to choose the term 'juror' over other options (notably 'lay judges') are several. 'Juror' is the closest translation for jurado,

single case (the most serious murders and cases of public officials' corruption), sitting with three judges and deciding the verdict by the majority.

This article draws on interviews with individuals who participated as jurors in the first decade of Córdoba's majority-lay mixed tribunal to examine their perceptions of their own role and the ways 'objectivity' is deployed in the judicial setting. It looks at stories of their use of legal and extra-legal knowledge to define their own sense of justice. Empirical 'law and emotions' studies that focus on adjudicators tend to look at the "subtle and repeatedly negotiated relations between legal thinking and ideas of detachment and disinterest in judicial decision-making contexts, on the one hand, and emotions and their expressions or recognition, on the other hand" (Vaisman and Barrera, 2020: 813, see also Roach Anleu and Mack, 2019). This tendency has special implications in the case of lay jurors who are professionally and ethically less constrained than judges to leave emotions aside. They are ambiguously situated both in the spaces and routines of courthouses and at the intersection of the taken-for-granted divide between legal reasoning and common sense (Amietta, 2019, 2021). Bringing relational, affective, and emotional factors on board complicates this ambiguity further, as put by Hastie:

There is an apparent contradiction between the conception of the ideal juror as a logical reasoning machine and as a source of community attitudes, sentiments, and moral precepts. Robert Solomon noted this discrepancy when he commented that "[the idea that justice requires emotional detachment, a kind of purity suited ultimately to angels, ideal observers, and the original founders of society, has blinded us to the fact that justice arises from and requires such feelings as resentment]" (Hastie, 2001, pp. 991–992).

Given this uniquely ambiguous status of lay decision-makers, it is not surprising that questions of the weight of emotions in their decision-making have been commonplace in lay participation research since long before the emergence 'law and emotions' as a scholarly field (Maroney, 2016). Ever since the inception of socio-legal research on juries through Kalven and Zeisel's (1996) *The American Jury* (1966), the question of emotions has remained explicitly or implicitly central to a field that has primarily aimed to empirically establish the true nature of lay decision-makers' contributions to state justice systems (see, for example, Diamond and Rose, 2005; Eisenberg et al., 2005; Ellison and Munro, 2010; Gastil and Weiser, 2006).

The aim of this article differs from this line of analysis for methodological and epistemological reasons. Methodological reasons are straightforward. I refrain from trying to identify "paths of emotional influences" or "measuring emotional effects" on jurors' decisions (Feigenson, 2016), in part because I did not have access to the deliberations of mixed tribunals. While in Córdoba's system, the votes of both professional and lay members are made public with a motivation written by the presiding judge—a document that makes for an original and interesting legal artifact, they provide only a very limited glimpse of the process. I resort, instead, to interviews with individuals who are among the first few thousand to have taken part in criminal adjudication in a historically professional-only justice system to explore a different question: how do jurors discover, relate to, understand, and deploy (or choose not to deploy) law's own brand of objective decision-making? I investigate how they act in the face of it, and what this means for their experience of participation.

My focus on the relationship of lay adjudicators with legal institutions, their uses of law and legal knowledge and the affective dimensions of the experience in and beyond courthouses is underpinned by literature on legal consciousness. The relationship of common citizens with law and legal institutions has been, for at least three decades, especially in the USA, the object of much socio-legal scholarly attention. Interested in decentering capital-L 'Law' in law and society scholarship, studies of legal consciousness emerged in the 1980s searching for common people's deployment of legal practices and meanings outside and beyond the workings of legal institutions, within myriad 'everyday life' settings (Greenhouse et al., 1994; Silbey, 2005; Williams, 1993). While much has been argued about the definition, actual ontological substance, and empirical and critical possibilities of the concept (Silbey, 2005), there seems to be some level of agreement that legal consciousness studies look at these phenomena from a critical point of view, but one situated in the middle ground existing between overwhelming arguments of structural, legal hegemony and the naïve individualism of Western legal formalist approaches. Consciousness is, in this subfield, "participation in this collective, social production of ideology and hegemony, an integral part of the production of the very same structures that are also experienced as external and constraining" (Silbey, 2005, pp. 333). Ordinary people, as they go about making legal claims, talking about law and rights, taking or choosing not to take legal action, reproducing or resisting those interventions in their own lives, do indeed make law.

In their book *The Common Place of Law* (1998), still the most influential theory-making effort in legal consciousness to date, Patricia Ewick and Susan Silbey criticized previous work looking at ordinary people's relation to the legal system for treating legal consciousness, whether solely as attitude or as a mere epiphenomenon. Whereas the first conceptualization, reminiscent of liberal ideals, focused on individuals' ideas and attitudes and ignored the structural constraints, the latter one, evocative of structural anthropology and Marxist structuralism, treated legal consciousness as a by-product of the operations of the social structure, leaving no space for any creative role of social actors

which is the expression used in provincial legislation as well as in media, emerging common parlance and academic publications on Córdoba's 2004 mixed tribunal (jurado popular is indeed the most common expression). The discussion dates back to 1987, when the Province's constitution was first reformed to allow for lay participation, and the spokesperson for the proposing party said explicitly the term would make it easier to understand and accept, due to familiarity through US-influenced popular culture. Other authors have also used the expression in English for systems of lay participation other than the traditional 12-member juries (see, for example, Hans and Germain, 2011, on the French Cour d'assises, one of the inspirations of Córdoba's tribunal). 'Lay judges' seems to be more common in systems where citizens without legal education are appointed for an extended period of time – like German Schöffen and similar systems in Sweden or Denmark -; Córdoba shares the Civil Law tradition of these Continental systems, but its lay decision-makers are appointed for a single case, much like in classic jury systems.

who partake in the (re)production of social structures. Ewick and Silbey proposed instead an understanding of legal consciousness as a cultural analysis of legality that reciprocally integrates human action and structural constraint (1998: 34–43). Interpreting the way lines such as normativity, capacity, constraint, or time/space appeared in the narratives of their New Jersey interviewees, they theorized three underlying schemas into three forms of legal consciousness, or "commonplace stories of law" (Ewick and Silbey, 1998, pp. 223). Whereas in one schema, legality was displayed as a reified source of grandeur and principles (*Before the Law*), in another one, it appeared as a game to be strategically played in the pursuit of certain aims (*With the Law*), and finally as an oppressive force to be resisted against, largely through scarcely perceivable tactical maneuvers (*Against the Law*). This article follows and expands on these schemas, treating them not as a typology or set of rigid categories but as a springboard to expand this collective theory-making effort both conceptually and empirically.

With some notable exceptions (Fox, 2020), jurors have not been the usual protagonists of legal consciousness research. In their attempts to take the spotlight away from state law, authors in the field have largely identified ordinary citizens with the elusive notions of the 'everyday' and the 'society' as opposed to the sphere of official legal systems and institutions—'The Law' (Sarat and Kearns, 1993). Encompassing legal anthropology's concern with dispute resolution, such identification is maintained when ordinary people choose to mobilize state legal systems' apparatuses to solve their conflicts (Sarat and Kearns, 1993). As a result, when the loci have been sites of formal decision-making (Merry, 1990, Yngvesson, 1989) or other state agencies (Levi, 2009; Sarat, 1990), the focus has remained on the receiving end of the law–society divide: common citizens and their meaning-making processes upon encounters with such institutions as users of lower courts, mediation centers or state welfare agencies. While the introduction of lay participation is usually conceived by reformers and jury scholars as a way of bringing 'society' or 'common sense' into judicial decision-making, the identification of ordinary people with the 'everyday' and 'society' by legal consciousness studies seems to cease when it comes to jurors. The negative constitution of the everyday against the law (Valverde, 2003) situates jurors at the other extreme of the continuum, essentially delinked from *everyday* times, spaces and practices while they serve at the courthouse. When summoned as adjudicators, ordinary people become a constitutive part, if not an epitome, of the state legal systems that legal consciousness scholars define as their counterparts (Marcus, 1993; Sarat and Kearns, 1993; Silbey, 2005). The same reason that made jurors interested in *law and emotions* debates even before it developed as an autonomous socio-legal field accounts for the lack of scholarly attention to lay participation in judicial decision-making as a site for legal consciousness research. This article contributes to filling this gap.

Emotional and affective components of ordinary people's relationship with the law have traditionally been part of the varied definitions of 'legal consciousness' in empirical socio-legal research (Harding, 2011; Marcus, 1993, Merry, 1990, Yngvesson, 1988). However, it is only recently that explicit bridges to the literature on law and emotions have been built by the wave of 'relational legal consciousness' studies that emphasize the affective factors involved in the constitution and performance of legal consciousness (Abrego, 2011, 2019; Wang, 2023; Wood, 2018; Young and Chimowitz, 2022). This perspective emphasizes the situated and fluid nature of legal consciousness along a number of lines, including people's relationships and interactions with significant others (Liu, 2023, pp. 214). This article highlights this relational element in its discussion of the legal consciousness of jurors, and it puts the focus on jurors' narrations of their relationship with legal professionals, in particular judges with whom they sat together in Córdoba's mixed tribunals.

The discussion that follows is based on ethnographic research conducted in criminal trial courts in four locations of the Province of Córdoba—the Capital city and three smaller cities and towns. The research included an initial 7-month fieldwork conducted between October 2012 and April 2013, followed by two additional field visits in 2016 and 2023. Data collection consisted of a total of 62 interviews with officials from courts and other judicial offices, judges, prosecutors, lawyers, pro-jury activists, lawmakers, and individuals who served as jurors; close reading of documents (including case files and decisions, laws, draft laws, and transcripts of constitutional and legislative debates); and observation of courthouse routines and proceedings with and without lay participants. Interviews and archival research were also conducted in Buenos Aires and La Plata. This article relies mainly on semi-structured interviews I conducted with lay members of Córdoba's mixed tribunals ($N = 33$) and my ethnographic field notes.[2] These interviews navigated through a wide

2 The research project and procedures for the selection and recruitment of participants and observations at courthouses were approved by the University of Manchester Research Ethics Committee and were conducted in accordance with the agreed ethical protocol. For the recruitment of jurors, I used a combination of purposive, random and snowballing sampling. I relied on lists of jurors provided by the Jurors' Office of the Judiciary (JO) to contact specific individuals (for example, those who had been part of dissenting decisions). This was complemented with randomly chosen individuals, selected by their order in the JO lists via online random list generators. I relied on telephone calls to initiate contact. I introduced myself to the listed person and immediately made clear how and why I had got their numbers. I proceeded to explain my work and the reason for my call. If the person refused to participate in an interview, I apologised and guaranteed they would not be contacted again, and their data would not be used for any other ends. If the person expressed willingness to participate, I asked for an email or postal address to send a formal invitation and information letter. I suggested any potential participant to read the documents carefully, take time to think about their participation and contact me to ask any questions or arrange the interview if they were still willing to do so, in no less than two weeks' time. This was considered an ethically satisfactory procedure considering that my first contact would occur through telephone. In locations smaller than the capital city, court officials often accepted to hand copies of my invitation and information letters to jurors at the end of cases to contact me afterwards if they were interested in being interviewed. Snowballing was also used for juror recruitment: I contacted one juror through common acquaintances, and three others through referrals from judges or court officials (again, mostly in small towns). Finally, also in a small city, a juror who had accepted to be interviewed asked whether her friend who had also served as a juror could join the interview. After making sure both were properly informed and freely giving consent, I interviewed those two jurors together. This was

range of topics, including jurors' experiences with legal institutions (before, during and after serving as decision-makers), their relationships with legal professionals at the courthouses, and their feelings during and after the proceedings. The analysis I present in this article focuses on jurors' narratives of their understanding, uses and circulation of law, legal knowledge, and legal professionals. I argue that, as jurors discover the often intriguing and fluid workings of (legal) objectivity in court, most of them retreat to a position of awe and respect. Others, however, actively engage with this new understanding of the materiality and practice of objectivity, striving to embody and perform it in their roles and demanding it from legal professionals. This appropriation muddles the distinction between 'common sense' and 'legal knowledge' that is foundational to systems of lay participation and their socio-legal study. The findings are organized into two sections. In section 2, I discuss jurors' understanding of their role, situation and status vis-à-vis the law and legal institutions—I will argue that jurors tend to situate themselves in generally passive positions in the face of the majesty and apparent complexity of the law and its processes. In section 3, I shift to stories of jurors consciously using, subverting, or going beyond legal mandates to pursue their agendas in ways that, I argue, problematize the law/common sense, lay/expert, and emotion/reason dichotomies. The concluding remarks discuss the article's contributions and the implications of its findings.

2 Jurors, common sense, and an idea of justice

During the juror selection hearing for a murder case in the Capital City of Córdoba, a woman from an apparently lower socio-economic background requested to be exempted from serving. She was employed in two informal jobs and would have trouble keeping them if she missed a whole week. In addition, she had already served in one trial. Such requests are recurrent in the initial stages of the process and are usually adjudicated by court clerks informally depending on the number of jurors available and the reasons provided. "At the end of the day," she told me aloud as the group waited in silence, "they already have everything done and bring us here just to help with the last little bit." Amidst the indifference of other potential jurors, the middle-aged man working in car retail sitting next to me turned and quietly said, "just ignore her, she has not got a clue; good thing she is not staying." The woman was, in fact, making a legally sound statement. Córdoba's jurors are legally expected to serve only one time and her description of the jurors coming in to help with the last stage of the complex and often lengthy process of state punishment. However, in the view of another prospective juror, she was not in the know, which was a good reason for her to leave.

This ethnographic vignette provides some clues as to jurors' relation to law, legal knowledge, and performances of objectivity, as well as the affective and relational dimensions of their experiences in the courthouse. Jurors' stories convey a sense of ambiguity. On the one hand, law is and remains primarily a remote realm, detached from everyday life and burdened with hard-to-understand technicalities. Jurors' 'law talk' overwhelmingly reproduces the conception of the law as an authoritative and predictable sphere separate from that of ordinary life. Put it in terms of Ewick and Silbey's schema of legal consciousness, jurors I interviewed tend favor 'Before the Law' descriptions (Ewick and Silbey, 1998, pp. 47). Participation, as much as it implies commitment, knowledge and responsibility, is experienced by jurors as an invitation to witness (and bear witness to) the grandeur of 'capital-L' Law.

This distant working of the law emerges first, as embodied by judges and other legal professionals. Lay jurors in Córdoba's mixed tribunals are accorded by the law, and for the duration of trials, they have equal status, with judges as members of the tribunal. They are granted the same protection and (symbolic, if not material) entitlements. For jurors, however, attributes such as knowledge of the law and experience adjudicating complex cases cement jurists' authority and constitute an insurmountable difference to their own status in the courthouse. It is not unusual for them to express feelings of respect and occasionally of awe and deference during interviews. Consider the following excerpt from my interview with Julia, the owner of a bakery in a small city:

> What one feels is that one is like a pupil, a disciple, in a certain way in an inferior position in the sense that [judges], obviously, are people who studied so much. They also have a lot of experience in their roles, and for us it is the first time, obviously. We are newcomers, we are nothing or nobody in the sense that; I mean this in relation to their professional position, not as persons. Then, beyond having the freedom to say guilty or innocent, one knows that, ultimately, they are the ones who are in the know.

In one way or another, most of jurors' narratives transpire a sense of ambiguity (Amietta, 2021). On the one hand, they are *in situ*, in direct contact with the workings of law at one of its very powerhouses, and invited to take part in its gearing mechanisms. On the other hand, even after having saved the spatial and temporal distances that separate their ordinary lives from the law, jurors are made to remain alien to much of its rationale and working principles. Behind these feelings is the law's very ability to present itself as ahistorical and immutable in the face of the petty actions of individuals. Legal professionals' skills to turn those individuals' stories into judgable legal artifacts (Bergman Blix and Minissale, 2022) with a performance

the only group interview I conducted with jurors. I conducted all interviews personally and obtained informed consent from all participants. All juror interviews took place during the first period of fieldwork. Interviews lasted between 50 min and 2 h and 45 min, and all of them were completed in a single encounter. Most of them took place in public spaces of mutual convenience, like cafes. Some were done in an office facilitated by a research center from the National University of Córdoba, and in the houses or workplaces of interviewees. Although criminal trial hearings are public in Córdoba, I sought permission to observe hearings from presiding judges, informed parties of the nature of my role and the reason for my presence, and handed summary information letters to individuals involved whenever possible, including jurors, clerks, and police officers. I also informed parties that I would not conduct any observation if they objected to it, although this was never the case. Permission to conduct observation in public and certain private spaces of courthouses was, as is often the case in institutional ethnographic research, a dynamic and ongoing process. Informal conversations and other interactions in the courthouse were used for this research only after consent from the participants was obtained *via* summary information letters.

of objectivity (Bourdieu, 1987, 2003) mark their separation from the sphere of the law. The distant law works, in this sense, as a convenient counterpart that helps jurors locate themselves and their role in legal proceedings when they recall it in their interviews. Pitting their own trajectories against this understanding and performance of law, jurors readily identify with the 'common sense' realm. Natalia, who works in real estate in the Capital City, put it in these terms:

> How would I describe being a juror? I think it's the view of the people, the point of view of the people. It's not one of the theoretical knowledge or the formality of the process but it's to see how those two points of view can eventually come together. A person who […] has nothing to do with the justice or with the law, a person who never took part of something like this in their life, can end up having the same opinion as a judge […]. It is, for me, the point of view of the people, of common people.

Jurors' perception of the law as distant and their self-identification with common sense does not mean that they do not make use of proper legal resources. Jurors use legal jargon, and their narratives convey their efforts to make legally informed decisions—embracing the legitimizing claim to objectivity and attachment to legal proceedings that is commonplace for legal professionals. This was best illustrated in their narratives about justice, where the language of the law appeared recurrently and much more so than any reference to substantial fairness more closely associated with a commonsensical understanding of justice (Finkel, 2001). The very jurors, who identified as representing 'common sense' in the courts, readily evaluated the outcomes of cases, resorting to conceptions of justice infused with legal jargon and arguments. The emphasis was on procedural correctness, even in cases where they did not agree with the substantive outcomes of the case. Consider the following excerpt from the interview with Julio, an IT specialist and owner of a shop in a small town:

> Positively, surely yes [justice was made]. Because I repeat, it doesn't matter if a person is guilty or not. If the evidence is not enough [for a guilty verdict], it means the justice system acted correctly. It isn't about judging whether the person committed the crime or not. But if all the evidence presented, the testimonies and everything that comes with it, condemn someone, then they must be convicted. And if there are doubts, like in this case there were many doubts, then they must be acquitted.

I followed Julio's assertion by asking if justice could be said to have been served after the crime had gone unresolved. Julio went on: "Well, that is the thorn I'll always have in my flesh. Because I have not had news, I did not try to find out either, nor did I research on the Internet, if at some point the culprits were found." The law can be said to have proved useful in providing jurors with a sense of justice and the idioms to narrate their own (often dispassionate on this point) stories of making justice, even if incomplete and burdened with the limitations of the law's content and proceedings. This sense of justice works to set the boundaries between a legitimate force, that of the law, and the force that is mere violence, the force of the criminal (Derrida, 1992, pp. 6–7), see also Valverde 1999. When overtly spoken about by jurors, justice is largely a retributive force that reflects the ideals of modern liberal law in terms of proportional deserved punishment. Importantly, jurors do not only *legitimate* the law's own violence through their very participation in the decision (Sarat, 1995). They also enthusiastically deploy the legal version of justice as proportional, legally defined, objectively assessed and impartially inflicted retributions as they go about telling their stories and making sense of them. The law is distant and inaccessible, but it provides tools to deal with matters of subjectivity making, relationality and emotions, as a prop to conveniently locate power and violence in that authoritative but remote source—and it does so equally for legal professionals and laypersons.

3 Jurors making legal sense: with, against or beyond the law?

For most of the jurors I interviewed, the law remained a remote, if respectable, source of authority—authority that can, in turn, be readily used to shield oneself from difficult questions on a difficult decision. Juror's participation, even if marked by a commitment to attentive involvement, is rarely perceived as one that left an imprint on, engaged with, or resisted against the previously patterned paths of legal workings. But jurors also told stories of engaging in the creative games of the law, and of consciously using, subverting or going beyond legal mandates to pursue their agendas in ways that problematize the law/common sense, lay/expert and emotion/reason dichotomies and complicate the task of empirically discerning the contours of judicial objectivity in practice.

Let me begin illustrating this point with the case of Norma, a businesswoman who took part in the divided decision of a murder trial. The case considered a police officer who killed a teenager with a supposedly non-lethal gun. The victim was from a very low-income family living in an area of the Capital City that faced multiple challenges and deprivation. He had a history of conflict with the criminal law linked to substance use disorders and had been institutionalized in the past - mostly in relation to petty theft and assaults. His family had called the police as he was on the roof of the house, wielding a knife and shouting threats. After the police asked the boy to come down, he jumped from the roof toward one of the officers, who shot him in the chest with a rubber bullet, ultimately causing his death. Consider the narration of Norma:

> At that moment, after listening to the witnesses from both sides, I wasn't judging a person. I was judging an institution. Because I put myself in [the police officer's] shoes. He gave this person, who was high on drugs, a warning. He was armed with a barbeque fork and knife. […] I don't know if he just wanted to come down, he was high on drugs, and I don't know about drugs […] I don't know the smell of drug, but drugs make me desperate. This was a young man, he jumped on him; he shot the rubber bullets gun, with such bad luck that the reverberation ripped his heart. Then I put myself in his shoes. I told the judges 'I'm not judging a person; here I am judging an institution. If I condemn him, what will the police as an institution do when I call them because they are robbing me, or they are raping my daughter? They'll go around the block ten times, and then they'll come, once they're gone, because they'll be afraid of shooting, they'll be afraid of proceeding. Then I am judging an institution.' 'But Norma, you can't', the judge insisted. 'Let's give him a minimal punishment

> but give him a punishment because he killed a person'. But I didn't want that, and I voted that way. They didn't manage to change mine or two other jurors' opinion, because I'm judging an institution, I can't declare him guilty. He didn't shoot with a fire gun, he shot with what the police told him to shoot, with the rubber bullets gun. Then I said: 'Innocent'. Do you know what the judges said to me? 'Norma, this can't be done, he's been in prison for two years, what do we do with those two years?' Look at the influence of that. They gave him the minimum sentence, he'd be released in a month, but they didn't want to discharge him due to those two years they had him in. I didn't care about that.

Carlos, a retired history teacher and a member of the mixed tribunal in this trial, took the opposite stance but also did so by stretching the limits of what he considered the proper legal outcome. Complaining about jurors who wanted to "blame the dead one," he voted guilty. He did, however, recognize that he did so because the family of the victim was poor, and a guilty verdict would secure them "an economic compensation, at least," the costs of which would be "in charge of the Province, as [the defendant] was a police officer." He described this as "a Solomonic thing, the man was in prison for that time, and the family gets recognition of the economic part."

The monolithic image of the law as distant and immune to non-legal influences fades in these jurors' stories. Closer to what Ewick and Silbey theorized as 'With the Law' legal consciousness (Ewick and Silbey, 1998, pp. 131–132), these narratives point toward the deployment of legal and extra-legal resources to engage in knowledge games that imply an understanding of the law itself as flexible and accommodating to political struggles. Norma advanced her own agenda, which went well beyond the case being decided. She resisted against legal professionals' position with a mix of arguments that blended police officers' shooting training with her concerns about security and fears of future victimization. Norma's case could readily be coded as an example of commonsensical justice's flexibility in remedying the objectively legal outcome (Finkel, 2001, pp. 319–330). But her story is not one of a clash between two forms of making justice. She does resist against an outcome that is unfair due to too inflexible an application of the law. Quite the opposite, she denounces the judges for being in control of law's *plasticity* and *totality* (Latour, 2010) and, as such, being able to negotiate a more convenient outcome by means of the manipulation of law's technicalities. For Carlos, in his turn, the decision was not a place where emotions did not belong. The process involved his dislike for reactionary political ideas and his empathy with a grieving poor family in need of relief. From opposing political stances, both acted tactically and, with the resources at hand, tried to make use of their opportunity to curb the direction of a decision they saw could be unfair. The affective components of legal decision-making were at the forefront of their story of 'making justice', but neither of them situated the judges' decisions in the place of the objective 'legal' resolution of the case against which they resisted. In fact, they seem to imply that such a resolution probably did not exist.

Ewick and Silbey complete their well-known triptych of the cultural schema of citizen's relationship with the law with overt contestation and resistance—what they term 'against the Law' legal consciousness. Instead of respectful deference or tactical maneuvering, ordinary citizens stand here "up against" the law (1998: 180). Jurors I interviewed experienced situations they deemed unfair or hard to understand, but overt opposition to the law does not capture what they describe as their stance in such instances. They did not intend to "[pass] the message that legality can be opposed" (Ewick and Silbey, 1998, pp. 49). On the contrary, most open contestations in our interviews came in the form of demands for the law to fulfill its promise: to act as an objective, predictable set of rules—even when jurors do not necessarily know what these rules are. I will term this stance *beyond the law*. Let me start illustrating this point with an excerpt from my interview with Camila, a university student and retail worker in her thirties who participated in two cases. Camila insistently described her perplexity with some of the workings of the law during her time at the courthouse:

> Camila: Beyond [the outcome of the trial] being logical, I mean, there was no other choice, but there wasn't evidence to say 'yes, it was [the defendants]'. You know what I mean? I mean, they were supposed to be guilty, so, from five defendants, they convicted three. But they didn't sentence them to many years [in prison], because they did… Look at what [the judges] did: they judged that two of [the defendants] went [to the murder location] already determined [to kill] and the third one was just accompanying. Because otherwise if they ruled that three of them came there with the intent to kill, it would have been… premeditated, is it?
>
> SA: Possibly that you conspired to kill someone?
>
> Camila: And then it would have been life imprisonment, wouldn't it?

The strategic use of legal technicalities by judges here is not dissimilar to the ones attempted by the judges in Norma and Carlos's story. Camila's feelings and reactions, however, were different. She did not openly contest the maneuver but dissented, voting for the innocence of one defendant for whose participation in the murder she thought there was no evidence. She felt, and repeated through the interview, that "cases are already half solved" and that the mixed tribunal is just "a sort of formality," only to "close a case saying, 'but the people also participated, the jury'". Her doubts about the law's mandates and how they do or do not determine the outcome of trials were recurrent throughout our conversation. She had paid thorough attention to details and kept asking me about fine-grained legal rules. The idea of perjury as an offence, for instance, puzzled her:

> For example: they say "nobody can lie because otherwise afterwards…" And you see that people lied, that finally the decision was in a way that meant that they didn't believe in what those people said. But nothing is done about that. Why do they say that? Why do they tell them they can't lie? The only one who can lie is the defendant, if I'm not mistaken, but the witnesses shall not lie, and they lie and then the decision says that they lied and… What happens there? Nothing. Then why do they do that? It's like sometimes it's not clear.

Camila's mobilization of her (admittedly limited) legal knowledge is telling in that she calls for the law to fulfil its promises of rule attachment and predictability against the very actual workings of the law. The plasticity of the law's operation is not, in her view, necessarily unfair or biased, and she did not imply a hidden agenda or undue external influences. Yet the ambiguity is puzzling even if it works

toward a fairer decision. The central argument of this article is that this problematizes jurors' depiction as champions of versions of justice linked less to objectivity and procedural impeccability than to substantive outcomes. I will try to illustrate this point further by discussing at some length the story of Ana, who served in a murder trial where the defendant and victim were friends and had been experiencing homelessness. "To me, this created some sort of a contradiction, to take part of something I did not have any kind of competence for," Ana started the narration of her feelings as she arrived at the courthouse to serve as a juror. She continued:

> It seemed to me pretty terrible. I didn't see why I or any other citizen would have the right to judge someone… it's as if I had the right to do surgery on a person. I thought it was meddling in a terrain where one has no formation. There are specific courses for one to be able to fulfil specific tasks. In this case, there is an education in law that makes you qualified in law, presumably, and teaches different bodies of knowledge which qualify you to assess evidence and to judge a case. And I didn't have any formation in that sense.

A philosophy university teacher and doctoral researcher, Ana was an expert in a different field and identified criminal justice as a space that should also be expert-led. This shaped not only her impressions as to the pertinence of lay participation but also the direction of her contestations as she grew increasingly discontented with the way the trial progressed. In line with her ideas, she demanded that judges exercise their pedagogical authority upon jurors:

> In my opinion it should have been a task of the judges to make people who are not very much aware of how they should behave, behave as they are supposed to behave. But many of the other jurors said: "well, although I actually don't know if this is certain or not, it won't be bad for him to be in prison instead of being in the streets and have the chance to reform and get education; so yes, I consider him guilty". And then the judge, in my conception, should have functioned as an instructor and said "no, listen to me, our constitution says something else. You have to acquit him, if you don't have conclusive evidence you should vote against, shouldn't you?" But no, they didn't say anything. They took note of their vote and it was registered in the decision. […] Everything turned upside down. Their function should have been to explain [the law] to the lay people there who have no formation or knowledge.

The knowledge-ignorance logic of Ana's argument was not without breaches. Although she put herself on the lay side and repeatedly insisted on not knowing how things were, she argued for what she considered would make the proceedings legally correct. Consider her discussion with judges about deliberation, access to the case file and guilty pleas:

> [Prior to the deliberation] you were supposed to see only the two or three pages [of the case file] that were marked by them as relevant evidence, to what I explicitly responded: "you will excuse me but until I don't read the whole file, I cannot make a decision". [A judge] got quite annoyed with this and said: "but how can you say that". "Well, it is my right to see all of this before I can say what my opinion is". Meanwhile the judge told me: "but he already pleaded guilty", to which I replied: "In the little leaflet you give us says that if the defendant declares themselves guilty that's not evidence of anything. So, what do you mean by 'he pleaded guilty'? I don't care how he pleaded". So, it was a bit tense.

The argument between Ana and the judges resulted in a delay in the deliberation while she took the next morning to study the file—something, in fact, banned by the law. The exchange of legal and quasi-legal knowledge between Ana and the judges is telling. Ana's 'resistant' stance against legal experts carries the paradox of 'law' being brandished by a lay member of the tribunal—even if not with strictly correct arguments—against professional judges. The jurist, in their turn, abandons the default neutralizing distance of the "juridically regulated debate" (Bourdieu, 1987, pp. 812–13) and lets go of their emotions of annoyance. What is most puzzling for Ana and Camila are situations in which the law is perceived as not doing things *legally* enough (Latour, 2010). This is not in the sense of the legal-illegal dichotomy (neither of them is accusing judges of strictly unlawful or biased behavior), but as in the myth of law as an objective, rule-bound, predictable justice-making machine where knowledgeable agents put the proper rules into action and discipline others into doing so as well. Ana's demand of legal professionals was not to act fairly but to retreat into their particular brand of objectivity so she could herself go back to the status she belonged in. Ana concluded her narration jokingly: "when I arrived, I thought 'what am I doing here'. By the end of the trial, I was like 'what are all these others doing here? I should be deciding this on my own'.

Jurors going *beyond* the law, asking for the law to behave more legally than it does, or it can, has been the most common form of contestation among my interviewees and an interesting component of their making (legal) sense of their experience. These *beyond the law* positions do not always take the form of open contestation. Let me return to Julio's story to illustrate this. He served in a homicide case, and as we saw above in this section, he was certain about the fairness of the defendant's acquittal. But there was a particularity in the decision of the case. After the hearings finished, the trial prosecutor stated in his final allegations that not enough evidence had been collected and asked for the defendant to be acquitted. The judges informed the jurors that no deliberation or voting was required and that the defendant would be automatically acquitted. Julio was satisfied with the substantive decision and did not have any objections to the procedure. He had perfectly understood the technical intricacies of the situation, and his response to it had been devoid of much emotional load. His reaction to the unexpected denouement, however, entailed the creative use of his own take on legal technologies:

> [The deliberation] was quite explicit, quite fast, because when the prosecutor does his allegation and admits that the evidence presented is not enough, practically there was nothing else to say. All of that with the consent of the judges who gave the same opinion. There was no need to issue a verdict as a public jury […] Anyhow, I presented a document where… As I was updating my diary on a daily basis and my opinions were continually going there, I presented it [to the court] because it was done, and I also wanted to prove that I was committed to what I was doing, and I wanted my opinion to be known. I submitted a copy to the judge. The judge made it public to the rest of the jurors. So, we didn't need to issue a verdict, but I gave my opinion anyway.

Julio gave me a copy of his written decision, a four-page document introducing the facts of the case, analyzing the evidence, weighing the credibility and pertinence of the testimonies, and reaching a non-guilty conclusion. It could, in substance and, with minor tweaks, in form, have well passed off as a judicial decision. It had a signature, a printed name and an ID number, and below Julio's name, it read *Jurado Popular* (lay juror). Argentina's criminal justice systems' slow transition to oral procedures has been a matter of much debate (Bergoglio, 2010; Hammergren, 2007). It is well beyond the scope of this article to engage in those discussions, but Julio's use of this mechanism of inscription deserves some reflection. The use of a durable vehicle, a document that is archivable and certified with his signature, is a testimony to his deference to the law's forms, his commitment to an objective assessment of the evidence, and his devotion to his function as a juror. Just as the use of legal jargon—which abounded in Julio's interview and his written verdict—the deployment of a properly legal inscription device was a way of leaving his imprint in the detached times and spaces of the law. In adding an extra layer of formality to the process with the submission of a written verdict, he also went *beyond* the law. He stretched legality past his legal obligations, which had ceased long before, and was happy and moved about this.

4 Concluding remarks

This article aimed to empirically discern the place of law, legal knowledge and judicial objectivity in jurors' experiences of participation. I argued that such an examination tells us something about the complex cognitive and affective process of developing relational legal consciousness—understood as a set of situated, contextual, experiential understandings of and relationships with the law built at least partially in interactions with others (Nielsen, 2024). The analysis showed, first, that jurors readily embrace common parlance in academic and conventional understandings of lay participation and resort to the shorthand *common sense*, as opposed to the overly bureaucratized, expert-controlled, rule-bound 'law', to define their role and place in criminal justice proceedings. As such, they tend to describe themselves as remaining external to that reified, distant world of legality, in what Ewick and Silbey, evoking Kafka's famous parable, have called a "Before the Law" legal consciousness scheme (Ewick and Silbey, 1998, pp. 74–77). Jurors tend to take the legal networks they are exposed to (and particularly, their promises of formality and predictability) very seriously—more seriously than legal professionals. Jurors speak of an engagement with the law germane to what Valverde described, referring to lay witnesses of North American appellate court proceedings as "a more black-letter manner than senior state lawyers and Supreme Court justices" (Valverde, 2005, pp. 421). It is the law's plasticity in the hands of legal professionals, not its majesty and complexity, that jurors tend to experience as most puzzling.

This does not mean that jurors do not speak about engaging in playful or resistant involvements with the law and with the professionals who are supposed to guard it. Jurors tell stories of openly challenging this authority to pursue alternative agendas, and they do so in terms that can be readily coded as bringing 'common sense' to the—overtly political in these cases—decision of criminal cases. However, in instances in which conflict is talked about, it was more common to hear them speaking about their deployment of legal and quasi-legal knowledge and insisting that the law more thoroughly performs its brand of objectivity. Open contestations mostly took the form of calls to reinforce the law's neutrality and formalism—to rescue it, not necessarily from illegality, but from the law's own elasticity. As such, I have argued that jurors' stories of the use of legal knowledge and technologies occasionally show them going *beyond* the very obligations (and possibilities) of the law. Jurors told me many things they do with the law—even breaking it—but often with the aim of sustaining the value of a sense of justice bound by legality.

A closing note needs to be made about a point that was not covered in detail in the article. It has to do with the protagonists of the stories I told, particularly the ones of the most active, engaged, and resistant involvements with law and legal professionals. As it emerges from the cases that illustrate my arguments, the chances of telling stories of subversion, creativity, or simply advancing challenges to legal professionals' stances appear to be related to socio-economic and educational background. In Bourdieusian terms, it is the relationally defined forms of capital attached to these traits that create the conditions that make such interventions possible (Bourdieu, 1977). It is the university graduates, doctoral students, politically engaged educators and businesspeople of my admittedly small sample who mobilized alternative uses of legal and quasi-legal knowledge and reframed judicial objectivity in ways that altered, if not the outcomes of cases, at least the decision-making process. This crucially draws attention to the need to remain vigilant in the discrete contexts of our empirical explorations to the uneven opportunities to deploy both affective and cognitive tools for political action. The point is especially relevant when discussing a very powerful legitimizing idea as *participation*.

Data availability statement

The datasets presented in this article are not readily available because of ethical reasons. The author is happy to be contacted by any researchers interested in other materials, such as interview or observation protocols. Requests to access the datasets should be directed to SA, s.amietta@keele.ac.uk.

Ethics statement

The studies involving humans were approved by The University of Manchester Research Ethics Committee (project reference 12218). The studies were conducted in accordance with the local legislation and institutional requirements. The ethics committee/institutional review board waived the requirement of written informed consent for participation from the participants or the participants' legal guardians/next of kin because cultural norms in the research context make it inappropriate to require a signed document at the start of a conversation. Consent to participate and record interviews was obtained orally and recorded at the beginning of every interview.

Author contributions

SA: Conceptualization, Data curation, Formal analysis, Funding acquisition, Investigation, Methodology, Project administration, Writing – original draft, Writing – review & editing.

Funding

The author(s) declare that financial support was received for the research and/or publication of this article. The research presented in this article was funded by the University of Manchester's School of Law PhD Scholarship and subsequent Research Support Awards for travels and fieldwork. The author also received funding from the project 'La consolidación de estrategias participativas en la Justicia Penal: Consecuencias sobre la administración de justicia y su relación con los ciudadanos' of the Secretariat of Science and Technology, National University of Córdoba (SeCyT, Res. 162/12). The ERC project JUSTEMOTIONS led by Prof. Stina Bergman-Flix (Uppsala University) generously funded the presentation of an earlier version at the 'Just Emotions' symposium in Stockholm (September 2023) and the APCs.

Acknowledgments

I would like to thank the Juries Office of Córdoba's Judiciary and the individuals who shared their working times, spaces, and experiences with me. Many of the ideas in this paper were first conceived in discussions within research teams led by María Inés Bergoglio at the Centre for Legal and Social Studies, National University of Córdoba, Argentina. For this and many other things I am indebted to her. I am grateful for the comments of attendees of the symposium "*Constructing Objectivity – Emotions in Legal Decision-Making*" of the JustEmotions ERC Project (Stockholm, September 2023) and in particular to Meredith Rossner for her detailed reading. Leticia Barrera, Stina Bergman Blix, Vanessa Munro, Hannah Quirk, Sharyn Roach Anleu, Ezgi Taşcıoğlu, Mary Vogel and the two reviewers for *Frontiers in Sociology* have provided invaluable feedback and support at different stages.

Conflict of interest

The author declares that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Publisher's note

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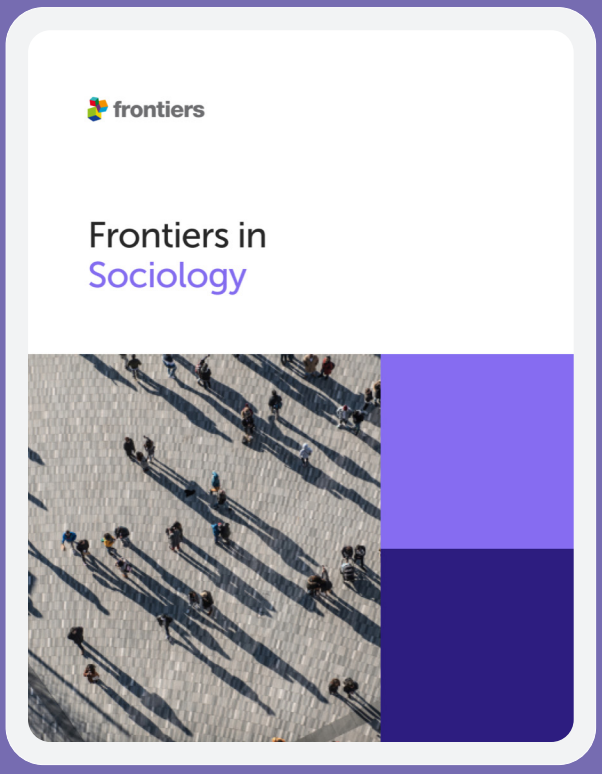

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