International Journal on Responsibility

Volume 6
Issue 1 *Criminal Justice Agents and Responsibility*

Article 6

2023

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Recommended Citation

Kaplun, Kateryna (2023) "Do Judges Understand Technology? How Attorneys and Advocates View Judicial Responsibility in Cyberstalking and Cyberharassment Cases," *International Journal on Responsibility*: Vol. 6: Iss. 1, Article 6.
DOI: https://doi.org/10.62365/2576-0955.1103
Available at: https://commons.lib.jmu.edu/ijr/vol6/iss1/6

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

Kateryna Kaplun[1]

Abstract

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

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

Introduction

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

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

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

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

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

Cyberstalking & Cyberharassment

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

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

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

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

Effects of Victimization

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

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

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

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

Cyberstalking & Cyberharassment Practitioner Views

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

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

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

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

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

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

Factors Affecting Judicial Decision Making

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

Legal Realism

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

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

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

New Legal Realism

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

Law on the Books & Law in Action

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

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

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

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

Methodology

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

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

Participants

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

Table 1. Counts of Categorical Variables by State

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

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

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

Note: Standard deviations are in parentheses.

Data Collection

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

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

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

Analysis & Coding

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

Findings

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

Positive or Neutral Evaluations of Judges

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

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

Judges as a Barrier

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary of Findings

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

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

Discussion

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

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

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

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

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

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

Limitations

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

Conclusion

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

About the author

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