

## ARTICLE

# Studying Unrepresented Defendants in the Lower Criminal Courts

## Methodological Lessons Learned\*

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### Abstract

*This article focuses on the methodological lessons learned while conducting a legal research study of the lower criminal courts by gathering observational and interview data to understand why many defendants charged with misdemeanor or summary offenses proceed without counsel. The present study describes the socio-legal methodology employed and draws from project memorandums and research assistants' field notes gathered during court observations and written reflections following defendant interviews. The present article addresses the methodological obstacles and lessons learned from gathering complex data on rights waivers and focuses on how we might improve the legal study of the lower criminal courts and answer critical constitutional and procedural questions by improving our legal methods.*

**Keywords:** misdemeanor court, right to counsel, methodology, qualitative research.

\* This study is supported by GRANT NO. 2019-YA-BX-K001, awarded by the Bureau of Justice Assistance (BJA). BJA is a component of the Department of Justice's Office of Justice Programs, including the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crimes, and the SMART Office. Points of view or opinions expressed in this report are those of the author(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice. The authors would like to acknowledge and thank Bonnie Hoffman (NACDL) for early feedback on this article, and the research assistants who observed the court proceedings, took extensive field notes, and provided their insights on experiencing the misdemeanor court arraignment proceedings. Natalie Mousa was the research assistant who attended the most hearings; she participated for the entirety of the project and was instrumental in improving the methodological approach to gathering information. She was also the senior research assistant who trained and supervised other field researchers. We would also like to acknowledge and recognize the other participating field researchers: Alexandra Vieira, Tomi Adegbola, Tracy Guervil, Ariana Landes, and Caroline King.

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## 1. Introduction

Understanding misdemeanor or summary criminal courts, procedures, and law in action presents complications for several reasons. First, no nationwide organization is gathering lower criminal court data in the United States (Natapoff, 2018; Rich & Scott, 2022). Furthermore, the lower criminal court systems where misdemeanor or summary offenses<sup>1</sup> are prosecuted differ widely in process and structure in the United States and internationally (Anleu & Mack, 2017, pp. 23-29; Natapoff, 2018). Finally, some of the most critical yet understudied legal questions involving defendant decision-making require grueling observational and interview research (Anleu & Mack, 2009; Clair, 2020; Smith & Maddan, 2011; van Cleve, 2016). Legal methodology and design matters further complicate studying these research gaps to understand rights assertion (Smith, 2019, 2023). The present article addresses some of the design and data generation issues that arose, how our research team resolved those difficulties, and what we recommend for future studies on lower criminal courts and defendant-centric studies. We hope this article provides a guide for future legal research using mixed socio-legal methodologies to study the less accessible, highly routinized, and busy lower criminal courts, particularly in the context of misdemeanors and summary offenses.

Over the past ten years, qualitative studies on crime and justice in the United States, Europe, Australia, and China have boomed,<sup>2</sup> approaching questions that investigate “the shared meaning-making of human relatedness, and the storied sense-making of social consciousness that is vividly revealed through qualitative research” (Argyrou, 2017; Arrigo et al., 2022, p. 146; Copes, 2010; Copes et al., 2020; Faria & Dodge, 2023; Webley, 2012, 2016; Yeung & Leung, 2017). In two special issues, the *Journal of Criminal Justice Education* identified that trend and the importance of qualitative methods to

‘better conceptualize and decode how social life is performed, narrated, visualized, constructed, and experienced so we may extrapolate deeper significance from the events that shape and steer our lives’. (Anderson et al., 2020; Arrigo et al., 2022, pp. 146-147)

Qualitative legal research is an ideal vehicle for ‘reflect[ing on] the complexity of legal processes, and the complexity of the relationship between process and outcome’ (Baldwin & Davis, 2012 p. 891; Bhat, 2020, p. 364). Interpretive and narrative research emphasizes understanding the meaning and context to account

- 1 Defining what amounts to a misdemeanor or summary offense crime varies by state in the United States, and the diversity is also evident in international jurisdictions. Typically, crimes are considered misdemeanors in the United States. if they are subject to a sentence of one year or less of imprisonment (Mayson & Stevenson, 2020), and similarly, summary or lower court criminal cases in the U.K., Canada, New Zealand, and Australia concern criminal activities that result in no more than one year of imprisonment (Anleu & Mack, 2017, pp. 23-29).
- 2 Arrigo et al. (2022) date the emergent trend in the United States to a special issue devoted to qualitative methods that encouraged using and understanding qualitative research designs to answer law, crime, and justice questions.

for social rather than objective reality (Bhat, 2020, pp. 364-365) through three primary methods for collecting data: documents, observations, and interviews (Webley, 2012, p. 927). The practical difficulties of employing participant observations and interviews to uncover 'rich insights on how humans interpret [their] past events from situated present perspectives' and understand what informed the decision to proceed without counsel instigated the present research on unrepresented defendants (Anderson et al., 2020, p. 368).

This investigation of practical issues in gathering observation and interview data and how they were navigated is critical because data interpretation and meaning are often influenced by data generation and positionality. 'Scholars have called for a more apparent uncovering of challenges occurring before, during, and after fieldwork' that influence interpretation, analysis, and findings (Mustafa, 2021, p. 177). Uncovering challenges involving relationships, positionality, and assumptions required many 'reflective moments' during the data collection process – from gathering information to the analysis (Subramani, 2019). Self-conscious reflection on the biases, subjectivities, and positionalities that influenced the research design and the reflections of and interactions with research assistants that persuaded changes during the data collection process are explored (Peshkin, 1988; Roulston, 2010, pp. 115-119). The present article fosters transparency and heeds the call for exposing design and data collection challenges by reporting methodological obstacles, successes, and lessons learned while gathering data from lower criminal court observations and interviewing defendants (participants) for the underlying qualitative and legal research project (Mustafa, 2021).

## 2. Objectives

The article serves three primary objectives.<sup>3</sup> The first objective is to guide lawyers and legal scholars in using mixed methodologies to study the less accessible, highly routinized, and busy lower criminal courts. By describing the present research plan and discussing the practical and methodological obstacles and lessons learned from gathering complex legal and court data, the present article identifies some methodological issues and reflects on how the present legal research study and methods might improve answers to questions that are critical to constitutional and procedural issues. The second objective of the article is to consider the practical methodological obstacles and lessons learned in gathering complex legal and court observational data from two lower criminal courts in the United States and, finally, to explore how interviewing hard-to-reach individuals in the legal system process might be improved.

3 Mustafa (2021) was used as the template for this article.

### 3. Method

The methodological issues emerged during an extensive and ongoing comparative case study<sup>4</sup> investigating (Yin, 2018) defendants' decisions to proceed without counsel.<sup>5</sup> The original design proposed to compare court observations and interviews of defendants after resolving more 'serious' misdemeanor or summary offense cases (e.g., criminal charges that carry up to a one-year jail sentence, like possession of marijuana) without counsel and recruiting them for future and paid interviews.<sup>6</sup> A previous study conducted only several years earlier identified several of the most common offenses, and those included possession of marijuana and paraphernalia (usually for smoking marijuana) (Smith et al., 2020). Policy changes, however, radically changed the types of cases prosecuted in these jurisdictions and forced us to reconsider the scope of our research. We also hoped to interview eighty participants over eighteen months from the two jurisdictions – an urban county and a rural county in a Southeastern American state. The expected number of interviews quickly became unlikely, with low qualifying and participation rates. As with many qualitative research designs, flexibility and adaptability to changing circumstances were critical, especially when the research is 'conducted in situ' – such as observing criminal court proceedings and interviewing defendants (Webley 2012, p. 931). We confronted complications and adapted.

The data generated for the project were gathered during three months of court observations and thirty-two interviews with unrepresented defendants who resolved misdemeanor or summary offenses. As many as six research assistants observed twelve judges during thirty-three urban court hearings and observed two judges during twelve rural court hearings, which also reflects the different sizes of the two counties. Observations took place in Spring and Summer 2022:<sup>7</sup> nine weeks in the urban courts<sup>8</sup> and six weeks in the rural courts.<sup>9</sup> Interviews occurred throughout December 2022.

Research assistants interviewed thirty-two unrepresented defendants immediately after they resolved their cases (nineteen from urban courts and thirteen from rural courts). They attempted to interview defendants one week, one month, three months, and six months later, but there was sizable attrition at every stage, and only four defendants participated through the entire six months of interviews. The research assistants were college graduates, and several were law students. Using research assistants allowed for gathering large complex data across two jurisdictions and limited the biases of the first author, who was a former public

4 The study's observational and interview protocols received human subjects' approval from Pearl IRB, <https://www.pearlirb.com/> (last visited on 6 February 2024).

5 Research assistants conducted court observations, collected administrative data, and interviewed misdemeanor defendants who resolved their cases without an attorney during arraignment proceedings in two adjacent county courts in the summer of 2022.

6 We expected to interview a total of eighty people (fourty from each of the two counties).

7 Observation data were collected from the week of 29 March 2022, through the week of 4 July 2022; interviews of defendants occurred during those weeks and continued through mid-August 2022.

8 Data were collected during the weeks of 29 March 2022 – to 23 May 2022.

9 Data were collected during the weeks of 30 May 2022 to 4 July 2022.

defender. Research assistants were younger and more approachable, but as college-educated and prelaw students, they were different from the unrepresented defendants in the lower criminal courts. Yet, they were also not attorneys, so they were also less like the members of the courtroom workgroup.<sup>10</sup>

The observed court hearings were arraignments. Arraignments are hearings held after prosecutors decide to file charges against defendants in the United States, and the trial judge is tasked with advising the defendant of those charges, providing defendants with the opportunity to obtain counsel and accept their pleas of not guilty, guilty, or no contest (the latter two resulting in resolving their case and sentencing). The hearings are typically held three to four weeks after arrest, and many defendants choose to resolve their cases at these hearings.

This article explores the difficulties during data collection, reflected upon during journaling; the principal investigators' personal project memorandums and research diary notes; the research assistant's observations and interview-reflection notes ( $n = 77$ ); team emails and conversations during project updates on the study's progress, which were reduced to written project memoranda ( $n = 25$ ). Each source was transcribed and saved in various computer folders during the project's progress. In what follows, we reflect on how the authors and team navigated design issues and adopted changes.

#### 4. Results and Discussion

The design methodology, data gathering, and information generation process were problematized, and the written project notes, diaries, emails, and memorandums coded for themes to uncover emergent issues. The primary themes that emerged on the practical challenges and successes concerned:

- 1 The recruiting and training of non-lawyers as observers and interviewers.
- 2 The unexpected research design changes and the (in)accessibility of data.
- 3 Difficulties in interviewing participants.

##### 4.1 *The Recruiting and Training of Non-lawyers as Observers and Interviewers*

The first step for the project was to recruit research assistants, train them, and account for the consistency and reliability of their participation in data collection and generation. The training and evaluating tasks were ongoing aspects of data collection and generation with practical expected and unexpected difficulties and complications. Few scholarly works or practical guides have been produced on 'how to find, recruit, train, and work with research assistants, and the range of associated ethical, conceptual, and theoretical issues that this entails' (Stevano & Deane, 2017, p. 3). Although the traditional qualitative research project 'has been done by individual researchers or by collaborating researchers of equal status' (Rogers-Dillon, 2005, p. 437), large and complex projects benefit from a hierarchical team-based approach that allows for divergent perspectives, leading to innovative and creative approaches to data generation and analysis (Morrison et al., 2015; Smith, 2022).

10 None had spent time in misdemeanor courts until working on this project.

Research assistants were employed as observers and interviewers to limit the unintended bias of the principal researcher, a long-time former public defender and current academic (Argyrou, 2017). Additionally, the practical time constraints of carrying out a large, complex project are reduced by using research assistants to gather data. Another added benefit of employing research assistants is that they are often perceived as ‘more approachable by participant defendants in court settings, open to asking questions, understanding, and learning without judgment about lived experiences’ of participants (Smith, 2022). They observed the court with less preconceived notions about procedures and questioned taken-for-granted court interactions, like uniformed police officers engaging with defendants before their hearings. They also provided suggestions that improved the project, like compensating defendants using electronic payment (e.g., Venmo) rather than mailed checks and shortening the timeframe for the study to increase response rates.

The research assistants were compensated for this project. Initially, the goal was to recruit and employ several research assistants trained in qualitative research to observe and take field notes on court proceedings, briefly interview and recruit defendants who resolved cases without counsel, and conduct follow-up telephone interviews with the recruited participants. The intention was to use a team of research assistants to gather multiple perspectives on procedures, processes, and interactions. This approach also permitted continued court observations while other assistants briefly left the courtroom to recruit and interview potential research participants.

The research study was undertaken as a consulting project, and the principal investigator’s university prohibited her from relying on university students or personnel as assistant researchers. The decision complicated the logistics of recruiting students with a background in qualitative research training and experience and resulted in delays. This early impediment was overcome by changing the approach, seeking students who were familiar with the courts, and training them on qualitative and field research approaches. Recent graduates (prelaw students) and current law students from a local historically black college/university (HBCU) law school were recruited. Prelaw students were referred by their former professor and moot court coach, and the law students were recommended by the HBCU clinical internship coordinator. Since the research assistants were recommended by professors, the students were interviewed and selected based on their availability to observe court proceedings and their interest in the project. While the students were not graduate students trained in qualitative methods, which would have been ideal for the position, and they required further training – discussed more below, the prelaw and law students had some working knowledge of the court process, the roles of the legal actors (i.e., judges, prosecutor, defense attorney, etc.), and legal language, which was advantageous and reduced that aspect of the training.

Given the lack of diversity in the misdemeanor courts (most defendants were black or Hispanic), recruiting from our local HBCU law school and prelaw graduates from our Hispanic-serving undergraduate program was beneficial because the recruited students had diverse backgrounds. The racial and ethnic diversity of the

research assistants also benefited the project by gathering diverse viewpoints on court observations and proved valuable in recruiting participants and building rapport.

Although the research assistants were racially and ethnically diverse, they were all young women – no men applied for the research assistant role. Given that most misdemeanor defendants are men (Cadoff et al., 2020, p. 16), the lack of gender diversity among the research assistants raised concerns. Although better than an older, white former attorney (i.e., the principal investigator)<sup>11</sup> conducting the interviews, it remains likely that an all-woman team impacted recruitment or data generation (Archer, 2002; Mellor et al., 2014; Underwood et al., 2010). The interactive effect of participants' and researchers' age, race, and gender is 'highly complex' and worthy of direct study, particularly involving sensitive topics (like criminal history) (Archer, 2002, p. 108).

A gender-related issue did arise during the interview recruitment phase. The female research assistants were confronted by flirting and romantic invitations to meet outside the study.<sup>12</sup> Safely researching 'hard-to-reach' populations, recruiting participants for study participation, and sexual harassment of researchers added to the difficulty of this research study.<sup>13</sup> A quick search uncovered that the issue of harassment was not uncommon in field research, and the literature on the sexual harassment of researchers, harassment as a methodological issue, and safety recommendations for field workers provided some insight into how best to address the issue (Green et al., 1993; Hanson & Richards, 2019; Sharp & Kremer, 2016). Unlike other studies, the harassment or romantic overtures arose only during the courthouse encounters. In response and based on the literature, we adopted several protocols advanced by other scholars, including recruiting participants in a safe space and creating safety protocols (Clawson, 2024, pp. 2-4). The research assistants were given the option to withdraw from the recruitment aspect of the project, but none did. Since the recruitment occurred at a safe and public place (outside of a busy courtroom) and the observations and recruitment were conducted in teams, the research assistants were advised to divert overtures by focusing on the interview guide questions. They were instructed to leave the courthouse together. Additionally, to ensure further protection of the research assistants, they did not give their last names to the participants or use their personal emails or phone numbers. The follow-up phone calls and text message communication with the participants were conducted by creating free Google voice numbers.

Using prelaw and law students as observers and interviewers allowed for some familiarity with the law but not legal training, which might bias observations and interviews. Research assistants were cautioned against providing legal advice –

- 11 The first author and research assistant who analyzed the data are also women. The entire research team was comprised of women who self-selected to participate in the project – men did not apply for any of the roles.
- 12 Several participants did not continue with the research study (failed to respond to subsequent phone calls) after their advances were rebuffed. It is unknown whether the two are connected, however.
- 13 I am grateful to Dr. Kathryn Roulston of the University of Georgia for her wisdom, support, and guidance in navigating these difficulties.

they were not lawyers, and this was a research project. None of the research assistants had previously spent time in misdemeanor courts, and this served as a learning experience for them and provided a 'lay' perspective for observing the proceedings; they were 'outsiders' to the data (Gee, 2014, p. 26). However, having some general legal background made training easier since the research assistants were familiar with legal language. None had qualitative research experience; hence, most of their working time was spent on field observation and interview training.<sup>14</sup>

The research assistants were provided copies of the research proposal, the observation guide, the interview protocols, and introductory chapters on observations and interviews from Merriam and Tisdell's (2016) introductory qualitative research text, *Qualitative Research: A Guide to Design and Implementation*. They were trained on how to approach potential participants, the importance of voluntary consent, asking for permission to record the interview (and not interviewing those participants if they declined),<sup>15</sup> and the importance of study exclusions (e.g., participants had to be over the age of 18 and English-speaking).<sup>16</sup> The initial recruitment interview was intended to gather some information about the court experience, but these were initially short and directed to ask for contact information (after explaining confidentiality) for participation in follow-up interviews.

The interview approach employed for the project was intended to capture participants' multiple realities with a 'specific but implicit research agenda' (Fetterman, 2008, pp. 290-291). Research assistants were explicitly trained to use a conversational approach, formulating individualized questions based on participant responses, drawing out stories, and asking questions to clarify meaning. They used a guide with lead-off questions and a list of possible follow-up questions but were directed to create their own, depending on the conversations. During individual meetings, research assistants were walked through the IRB forms and requirements for voluntary participation and confidentiality (assigning each participant a pseudonym of the participant's choice).<sup>17</sup> The research design was explained, and the principal investigator introduced the research assistants to the observation instruments and the interview guide, highlighting a flexible approach to encourage participants to offer rich, detailed responses akin to a structured conversation.

The week before the start of data collection, the principal investigator shadowed the research assistants, allowing them to attend court observations and conduct

14 The research assistants were compensated for their time during training and data collection.

15 For our project, recording the initial and subsequent interviews was essential for capturing the lived experiences and voices of defendants, and the later analysis.

16 The project was limited to English-speaking adults to reduce the challenges of consent and translation of an already complex initial project.

17 Institutional Review Board (IRB), a board that reviewed research projects to ensure the protection of the rights, safety, and well-being of human subjects, caused a delay in data collection and the start of the project. Since the project was consulting, my home university did not permit me to rely on their IRB approval for the pilot project that preceded the funding and consulting project. The documents were recreated and submitted to Pearl IRB Services, an independent and private institutional review board (pearlirb.com), and the project was approved.

interviews with support, ask questions, and develop their skills. This initial week and the subsequent weeks involved training by doing, and it did not take long for the research assistants to develop strong participant observation and interview skills. Research assistants were also asked to write reflections on their experiences, which allowed them to contribute to the ongoing research process, highlight any concerns, and participate in the ongoing data analysis (Stevano & Deane, 2017, p. 10). Their reflections became instrumental aspects of the project, contributing to some of the improvements in the research design and informing the present study of methodological strengths and limitations.

Court observations and preliminary recruitment interviews began in mid-March 2022. Based on previous research by the first author (e.g., Smith & Maddan, 2011; Smith et al., 2017) and the large number of misdemeanor cases prosecuted in the United States (and elsewhere) (Anleu & Mack, 2017), we expected to have all data gathered in eight weeks, that is, observations of a dozen judges' courtroom proceedings and preliminary interviews with eighty misdemeanor defendants. As will be developed more in the next two sections, difficulties with data collection and participant interviews resulted in changes to the design and timeline of the project.

Since the study extended into the summer months, several of our research assistants (and all law students) left the project for summer employment. The study had one consistent research assistant (the co-author of this article), who took to the training and expectations, supervised the other assistants, and reliably provided feedback and data during the many months of the study (including continuing to complete the follow-up phone calls while she was attending her first year of law school). Without her, this project would have taken longer, requiring the recruitment of new research assistants to complete it. Additionally, she provided insight into the project, recommended the reduced timeframe for the study to increase participation, and became an excellent interviewer who encouraged participants to provide rich insights into their lives and experiences.

With several research assistants, it was inevitable that some were unreliable (failing to show up for observations) or inconsistent (inadequately conducting interviews or probing follow-up questions to obtain rich information for the study). There were more advantages, however, of employing research assistants to conduct observations and interviews over the six months than disadvantages. The diversity of their perspectives outweighed the few experiences with inconsistent or unreliable research assistants, the hours required to conduct the study, and their approachability and accessibility, which encouraged interview participation. Using multiple (two to three) observers and interviewers per court session reduced the negative impact of research assistants who did not show up or dropped out of the project.

#### *4.2 The Unexpected Research Design Changes and the (In)accessibility of Data*

The judicial assistant for the Chief Judge was contacted to advise her of the undertaking of the court study, and she arranged a meeting for the principal investigator and the Chief Judge, the Administrative Judge, and an Associate Administrative Judge of the misdemeanor court. The meeting with the three judges

went smoothly; they mostly wanted to understand what would be expected of them. It was explained that the project focused on unrepresented defendants, so only access to the public courtrooms was necessary. The judges' concerns about interviewing defendants with pending charges were allayed by explaining that only misdemeanor defendants who resolved their cases would be recruited for interviews.

During the meeting, the principal investigator asked about the availability of criminal court dockets, which are daily lists of cases scheduled for court. The judges advised that the dockets should be readily available. But this was only the case for the rural (and smaller) jurisdiction. For the rural courts, the arraignment dockets were available in advance through the clerk's website; they were not available in the urban (and larger) jurisdiction. The courthouses were in two adjacent counties with clerks who operated separate websites, with information accessed differently. Differences in accessing information from the lower courts are relatively common (Kohler-Hausmann, 2019; Natapoff, 2018; Smith & Maddan, 2011; Smith et al., 2017).

Initial information about the courts was obtained through contacts in both locations' public defender and prosecutor offices. The dockets, dates of arraignment hearings, and directions on how to access information about cases were made available by the same employees, which was beneficial because the clerk's offices did not return our phone calls. Unlike other research studies, public records and information were readily and electronically available in these local jurisdictions (Kohler-Hausmann, 2019; Natapoff, 2018; Smith & Maddan, 2011; Smith et al., 2017).

Courts are open to the public. If interested in court-focused research, it is critical to observe court proceedings. Even though accessible, often the urban court bailiffs asked questions ranging from 'Why are you in court?' to 'Why are you taking notes?'<sup>18</sup> Since the Chief Judge knew about our project, the research assistants explained that they were engaged in a research project, and the Chief Judge was aware. This answer was accepted, and on return visits, bailiffs often allowed the research assistants into the courtroom early to sit in the back.

The downside to advising the courts in advance about the project is the potential effect of judges changing their behavior because they know they are being observed. Since data were gathered over many weeks, it became evident that the judges and court personnel began treating the research assistants with greater familiarity.<sup>19</sup> It is unlikely the judges radically changed their behaviors. Still, we did not directly account for or study behavior changes related to the judges knowing they were being observed and studied (i.e., the *Hawthorne* effect) (Gottfredson, 1996; Oswald et al., 2014).<sup>20</sup> Additional administrative data were gathered on misdemeanor prosecutions. The administrative records will reveal patterns and

18 Other scholars have identified the same issues. See Townend and Welsh (2024).

19 For example, the research assistant/co-author was, after a couple of visits, permitted to enter the courtroom through a door used by court personnel for one of her observations.

20 'The Hawthorne effect is when there is a change in the subject's normal behav[ior], attributed to the knowledge that their behav[ior] is being watched or studied' (Oswald et al., 2014, p. 53).

baseline data on judicial behaviors concerning critical decisions for the project, including how often attorneys were appointed for indigent defendants. So, although not directly examining the *Hawthorne* effect, the administrative data should shed some light on whether the observed judges changed the rate of appointing (or not appointing) the public defender's office to represent misdemeanor defendants.

Permission by or notice to the judges, courts, clerk, or bailiff is not required; explanations beyond 'we are court observers' should not be necessary. Research assistants were, however, advised that if questions emerged or they are excluded from the courtrooms, they should leave and report the incident to the principal investigator, and the principle investigator would speak with the Chief Judge or other court officials about access. This did not occur during court observations. Often, and surprisingly, when bailiffs or judges were made aware of the observers, they took time at the end of the proceedings to have conversations, address questions, and the like. Researchers should always take these opportunities when they arise.

More common and yet more challenging for court observations than even courtroom access is poor acoustics. Courtrooms may lack sufficient microphones to ensure sound can be heard clearly in the gallery or proceedings may be conducted at the bench. Making pre-data collection observations of the court proceedings is essential to ferreting out this difficulty and exploring alternatives to resolve it. Observers might have to sit in the front row or coordinate with the court staff to be closer to ensure they can hear the proceedings. Additional steps to consider when doing court research include accessing court dockets, which list defendants' names and case information. These can prove to be vital in gaining sufficient information for researchers to locate the cases through public records and identify how each case was resolved. Other considerations include the potential need for funding to obtain transcripts of courtroom proceedings to uncover the public but not easily heard court interactions.<sup>21</sup>

During pre-data collection and observation training, it became evident that some expected misdemeanor patterns did not hold, including possessing marijuana and paraphernalia cases dominating the dockets. Training visits made it clear that the number of court cases was smaller than expected, and no marijuana or paraphernalia cases were being prosecuted. The Associate Administrative Judge who presided over the training-week docket confirmed the changes. After completing his arraignment docket, the judge called the principal investigator to the podium for a conversation and advised that since he had joined the criminal bench (just a few months before), he noticed the number of criminal cases was shrinking, and civil cases were ballooning. During the first few weeks of court observations, the research assistants observed few defendants charged with

21 Not all courts create records of their proceedings. In some states, lower court proceedings, including those for misdemeanor cases, are held in courts that are not courts of record and for which no recordings or transcripts of proceedings will be available. It is important for researchers to explore ahead of time whether there are dockets and whether those dockets are public, and if public, whether they are accessible. In some places, dockets are not available or court clerks will not provide them to the public. In those instances, researchers may not have access to case outcomes.

possessing marijuana or paraphernalia, which in previous studies were the most common crimes prosecuted. Later, a spokesperson for the prosecutor's office explained that new evidentiary requirements for proving the amount of THC<sup>22</sup> (tetrahydrocannabinol) that distinguished between *legal* hemp and *illegal* marijuana possession resulted in reduced prosecutions. This was also consistent with national trends showing reductions in prosecuting marijuana possession.<sup>23</sup> Second, increases in the number of pre-trial and pre-arrest intervention programs reduced how many cases were prosecuted, and it was observed that many previously unrepresented defendants were appointed counsel at first appearance or arraignment. For example, domestic violence (considered a serious misdemeanor) resulted in nearly universal representation by counsel at first appearance. Our project did not include cases resolved by non-arrest diversion programs or those resolved during a person's initial (first) appearance (typically held within 48 hours of arrest.) The latter were excluded because first-appearance proceedings are held at the jail. Gaining access to the jail provided obstacles that would have resulted in further delays, and even though the hearings are accessible via live-streamed video, the streaming quality is poor. The camera focuses only on the defendants, not the entire courtroom or other legal actors, providing a myopic view of the proceedings. However, it must be acknowledged that focusing on recruiting participants at arraignments (which occur after prosecutors formally file charges) missed essential groups, including those who were not arrested but permitted to participate in a diversion program or individuals who resolved their cases shortly after arrest at their first court appearance (within twenty-four to forty-eight hours of arrest). Most cases were, however, captured by the administrative collection of data.<sup>24</sup> Finally, in the urban county, driving crimes<sup>25</sup> were separated from other misdemeanor arraignments; this was not the case in the rural county. Given the changes from our expectations, the research design was reconfigured to include *any* individual who resolved their case without counsel in the lower criminal court. Even with this design change, fewer individuals met the criteria for inclusion in the

- 22 Defined by *Merriam-Webster Dictionary* as 'either of two physiologically active isomers C<sub>21</sub>H<sub>30</sub>O<sub>2</sub> from hemp plant resin, especially: one that is the chief intoxicant in marijuana.' <https://www.merriam-webster.com/dictionary/THC>.
- 23 The Cato Institute reported on legalization efforts, <https://www.cato.org/policy-analysis/effect-state-marijuana-legalizations-2021-update>, and the Pew Center reported significant decreases in marijuana prosecutions, <https://www.pewresearch.org/short-reads/2020/01/22/four-in-ten-u-s-drug-arrests-in-2018-were-for-marijuana-offenses-mostly-possession/>.
- 24 Further spotlighting the need for further study, the preliminary analysis of the administrative data suggests that many of the people who resolved their cases at first appearance were transients, and they resolved their cases without counsel.
- 25 In these jurisdictions, criminal traffic infractions included driving with a suspended license and driving under the influence. Less serious traffic infraction is prosecuted in the county courts when there are criminal traffic violations charged as well. Otherwise, traffic infractions are usually resolved by paying a traffic ticket, attending driving school, or appearing in a civil traffic court.

study than expected, and it took longer to identify willing participants for interviews.<sup>26</sup> This issue is discussed in the last section.

#### 4.3 *Difficulties in Interviewing Participants*

As mentioned in the previous section, changing patterns in the lower criminal courts resulted in modifying the research design (though not the research questions) for the project. To recruit participants, the research design was tweaked to spend many more weeks observing. The inclusion category was broadened beyond the ‘serious’ five most common misdemeanors<sup>27</sup> to include any misdemeanor defendants who resolved their cases without counsel at arraignment.

Most (nearly all) defendants who arrived for arraignment hearings were out of custody. This is good progress, but it also posed several obstacles to recruiting participants and conducting follow-up telephone interviews. Quite a few qualifying participants agreed to the short (five-to-ten-minute) interviews just outside the courtroom after the arraignment hearing. There was some variation, however, among those who consented. In the urban county, the arraignments lasted for several hours. The longer it took for defendants’ cases to be called and resolved, the less likely they were to participate in the post-arraignment interviews. Likewise, in the rural county, observers described one of the judges as harsh and bureaucratic. Several research assistants noticed and commented separately that fewer defendants from his courtroom agreed to participate in the post-arraignment hearings. The research assistants sensed that the longer the arraignment or if treated harshly, the more the defendants simply wanted to leave the courthouse and not stay around for interviews.

Furthermore, there was significant attrition between post-arraignment participation and the agreement to participate in the later compensated telephone interviews and additional attrition among those who agreed to the later interviews and those who participated. Initially, we had projected the interviews for one week later, then one month, six months, one year, and eighteen months after arraignments. The most common reasons participants provided for initially declining were that the compensation (\$20/interview) was not worth their time, the shortage of time to participate, and a lack of interest in either the project or talking about their experiences. Additionally, many individuals who agreed to participate did not answer their phones when called, their phones were disconnected, or when they answered, they declined to participate.

The lead research assistant (and co-author of this article) was consulted early in the project. She gathered the most comprehensive information on declinations. She observed that the payment method for the telephone interviews complicated participation and impacted potential confidentiality. Initially, participants were asked for contact information to send payments by check. The other impediment

26 This was more the case in the urban county as compared to the rural county, and the latter dockets were smaller and arraignments hearings were staggered, rather than all participants showing up at the same time.

27 Possession of cannabis (i.e., marijuana), resisting an officer without violence, petit theft, trespass, battery, and possession of drug paraphernalia. We had excluded traffic offenses, but in the revised design included them (Smith et al., 2020, pp. 60-61).

was that the long-term nature of the project (interviews over eighteen months) reduced the perceived value of payments.

Several aspects of the research design were modified to increase interview participation, ensure confidentiality and timely payments, and increase data generation. First, rather than conducting interviews over eighteen months, the timeframe was shortened to four interviews over six months – one week after arraignment, then at one month, three months, and six months. Second, the interview compensation method changed to CashApp or Venmo (or some other electronic payment identified by participants). Electronic payments ensured anonymity and immediate payment. Participants were not compensated for their initial post-arraignment interviews for the present study. Compensating participants for the recruitment interview and increasing the payment amount might increase participation in future projects. Finally, the initial post-arraignment interview span was lengthened because people were more willing to participate in the post-court conversation than to commit or complete later interviews. Still, we continued to conduct follow-up interviews to measure and account for the unintended consequences of resolving cases without counsel. Over time, a rapport developed between the research assistant and participants resulting in richer descriptions of participants' lived experiences that informed their decisions to proceed without counsel and revealed the consequences of entering a plea to a misdemeanor on the quality of their lives.

Nevertheless, fewer individuals participated in the follow-up interviews than we had hoped. Their lives are complicated, and the financial burdens of their court cases take a toll; some participants did not return calls, others had their phones disconnected, or they changed their phone numbers. Their life circumstances made gathering the interview data difficult. But it also sheds light on our findings that many court-involved and hard-to-reach individuals have limited financial resources, are caught in the cycle of poverty, and are overwhelmed by their life circumstances, worsened by their court fees, fines, and costs.

To bolster the number of interviewed individuals, the research assistant/co-author undertook cold-calling people identified through the administrative list of cases prosecuted in both counties. Few individuals had listed phone numbers, and even those with phone numbers rarely participated in the one-time telephone interview to discuss their experience. Still, several did participate, and their interviews, along with the data generated during post-arraignment and follow-up interviews, provided deep, rich insight into the lives of people prosecuted for misdemeanor offenses and how they come to resolve their cases without (and with) counsel.

## 5. Conclusion

As with any project, many lessons were learned, some obstacles were overcome, and other difficulties impeded data gathering and generation. Despite the difficulties in observing courts and interviewing participants, qualitative methodologies offer the best opportunities to uncover more profound

understandings of the lived experiences that shape complex constitutional and legal decisions. Future studies might be guided by some lessons learned from the present research study experiences. For legal researchers considering a lower criminal court study, it is recommended that they first conduct a preliminary set of observations noting:

- Courtroom access.
- Courtroom acoustics and the ability to hear the proceedings.
- Availability of dockets and other related materials such as transcripts or court notes.
- Availability of public records of case outcomes.
- Accessibility, costs, and obstacles to accessing court and case information.
- Proceeding length and judicial demeanor.
- Other relevant court policies and procedures.

Even if research has been previously conducted in the same or similar court, it is essential to know what has changed. Policies, programs, and procedures can change quickly, especially in the lower criminal courts.

Identifying and training research assistants to work on large and complex projects is essential. Research assistants bring time and perspective; it would have been impossible for the principal investigator (a full-time college professor) to accumulate the court observations and conduct interviews over the year. Research assistants bring diverse perspectives and are perceived (in many cases) to be more approachable by research participants. Initial and ongoing training is essential. The training includes reading resources on the legal systems under study, qualitative field research, and interview techniques. In-court practice that involves supervised observations and interviews with constructive feedback is critical. Ensure that research assistants are confident, remain flexible, and expect the unexpected during ‘in situ’ field observations and interviews to gather as much information as possible. Ongoing meetings between the principal investigator and the research assistants, including debriefings after each observation and interview, are helpful in building confidence, identifying issues, and making changes when necessary. Here, the principal investigator also reviewed the interview transcripts and provided constructive feedback to the research assistants that improved future and follow-up interviews. For the final six-month interviews, the principal investigator and the third author updated and individualized the guides for each participant.

Moderating expectations for this type of project is critical. Recruiting participants for long-term and telephonic interviews is challenging, and it requires compromise and flexibility, including changes to the gathering of information during post-arraignment-hearing interviews and adding cold-call interview data. Even with a low response rate, in-person recruitment interviews proved more effective in identifying folks than through administrative data and cold-calling people on the phone. Particularly effective in building trust and rapport was relying on the same research assistant to conduct the in-person, post-arraignment participant interviews and the later follow-up interviews with the same

participants. Paying participants for the initial post-arraignment-hearing interviews by electronic payments is strongly encouraged to improve response rates. In hindsight, it might have encouraged greater participation in future interviews if participants were compensated for the initial recruitment interviews and immediately paid for the interview, especially if the compensation was more substantial (i.e., more than \$20/hour).

Additionally, future research should consider several other avenues of data collection, especially in triangulating findings and filling gaps. Ordering arraignment transcripts to identify the alignment or misalignment of defendants' understandings of their cases with what was announced in court. Examining administrative data and observing cases at first appearance or by civil citation might capture differences in types of cases and how decision-making is different between misdemeanor defendants who resolve their cases with and without counsel. Cases resolved at first appearance likely involve more transient individuals who resolve their cases early, and civil citation cases are most likely issued to first-time offenders. Relying on different qualitative and quantitative methodologies is helpful in understanding the complex decisions made in the busy and routinized lower criminal courts by defendants charged with misdemeanors or summary offenses and defendants who elect to use an appointed defender, hire private counsel, or represent themselves. Legal scholarship on these critical decisions should be further examined to deepen understanding of how decisions are made and the short- as well as long-term consequences of these early decisions on outcomes, perceptions, and consequences.

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