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ARTICLES

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Gender, Crime, and Madness: Examining the Case of Battered Women's Syndrome to Uncover the Gendered Nature of the Defense of Insanity in India

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The defense of insanity has been met with numerous criticisms since its inception. One of the most significant criticisms has been that it is fundamentally sexist and patriarchal. In that, when a man commits an offense, he does it with logic and reason; however, when a woman commits the same offense (especially when it goes against existing cultural norms of the female sex role and expectations of womanhood), the underlying cause is supposed to be one of mental illness. Such stereotypes have been reinforced in cases involving defenses to crimes that cater to the feminine viewpoint, such as battered woman syndrome (BWS). Rather than considering the circumstances distinct to the alleged female offender, judges prefer to exonerate women of violent crimes on the basis of insanity induced by BWS, demonstrating society's reluctance in addressing women's problems unless they are explained as illnesses. In light of this, this article argues that, rather than attempting to include women-specific activities inside the insanity defense, the law should endeavor to comprehend the psychology behind the conduct of certain acts in cases when such subjective evaluation is required.

I. Introduction

Gender differences in criminal behavior and judicial outcomes have particularly emphasized the gendered nature of crime and punishment.[1] In general, men commit more heinous crimes per capita than women,[2] but women are increasingly engaging in violent

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[1] Clarice Feinman, Women in the Criminal Justice System (3rd ed. 1994); Alido V. Merlo & Jocelyn M. Pollock, Women, Law and Social Control (1995); Joan Busfield, Men, Women and Madness: Understanding Gender and Mental Disorder (1996); Elaine Showalter, The Female Malady: Women, Madness and English Culture 1830–1980 (1987).

[2] Ravinder Kaur, et al., *Sex Ratio Imbalances and Crime Rates,* United Nations Population Fund (2016).

behavior.[3] However, with every female imprisoned for murder in India, 23.2 men are put in prison.[4] This relative dearth of female defendants contributes to the perception that those indicted women are abnormal or criminally insane. To that end, the number of incarcerated women diagnosed with a psychiatric illness far outnumbers men, with PTSD and substance-abuse disorder being the most well-known.[5]

Although the insanity plea is very seldom used and scarcely successful, when used, women have a 9.5-fold edge over men in terms of being found not guilty by reason of insanity.[6] Grann came to a similar conclusion in a Swedish-based study of 1772 court-ordered forensic assessments that women, who made up about just 10 percent of the sample group, were 1.5 times more likely to be regarded as abnormal than men.[7] Moreover, in another case study on gender bias in legal insanity assessments, participants were more likely to document legal insanity if the accused were a woman (35 percent) than if the accused were a man (18 percent).[8]

What do these patterns appear to suggest? Is this merely a coincidence, or is there something wrong with the way judges interpret insanity defenses? To shed light on the elements that influence a judge's decision-making in cases dealing with the defense of insanity, it is

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[3] Ambika Pandit, *'4.3L Cases of Crime Against Women, up 15.3% Since 2020,' The Times of India* (Aug. 30, 2022; 9:41 AM), <https://timesofindia.indiatimes.com/india/4-3l-cases-of-crime-against-women-up-15-3-since-2020/articleshow/93865051.cms>; *See also* Susan Hatters Friedman, et al., *Commentary: Women, Violence, and Insanity*, 41 J. Am. Acad. Psychiatry & L. Online 523 (2013).

[4] National Crime Records Bureau, *Prison Statistics India* 48 (2018); *See also* E. Ann Carson & William J. Sabol, *Prisoners in 2011*, Bureau of Justice Statistics 2, 9 (2012). This article also demonstrates the high incarceration rates of men in comparison to women in the United States, where the ratio is 16.7:1.

[5] Tracy D. Gunter, et al., *Relative Contributions of Gender and Traumatic Life Experience to the Prediction of Mental Disorders in a Sample of Incarcerated Offenders*, 30 Behav. Sci. & L. 615 (2012); Pamela J. Taylor & Maria Dolores Bragado-Jimenez, *Women, Psychosis and Violence*, 32 Int'l J. L. & Psychiatry 56 (2009); Catherine Lewis, *Treating Incarcerated Women: Gender Matters*, 29 Psychiatric Clinics N. Am. 773 (2006).

[6] Bonita Veysey, *Gender Role Incongruence and the Adjudication of Criminal Responsibility*, 78 Alb. L. Rev. 1087, 1103 (2015).

[7] Jenny Yourstone, et al., *Evidence of Gender Bias in Legal Insanity Evaluations: A Case Vignette Study of Clinicians, Judges and Students*, 62 Nordic J. Psychiatry 273, 277 (2008).

[8] *Id.*

necessary to first investigate the beliefs and predeterminations about the insanity defense and how these perceptions are formed and retained.

The aforementioned statistics demonstrating a disproportional diagnosis of psychiatric illnesses suggest and reinforce the age-old stereotypical view that if a man commits an offense, he does so with logic and reason, however when a woman commits the very same offense (particularly when it is contrary to the current societal acknowledgment of the female sex-role and preconceptions of womanhood), the underlying reason is one of psychiatric illness.

Several studies on mentally disordered criminal offenders conducted around the world have concluded that due to stereotypes about how males and females are supposed to act, female criminals are more likely than males to successfully utilize the plea of insanity. Men are much less likely to be viewed as "insane" than women because mental disorders are generally associated with weakness, and men are not expected to be weak, whereas women are believed to be inherently irrational and emotional.[9] While violence is an accepted characteristic of manhood when a woman kills someone, she appears to violate the norms of womanhood: namely, nurturance, gentleness, and social conformity.[10] It essentially means that such offenses call into question the culturally held views on how women must act.

The legal system is unwilling to admit that women are capable of committing particularly heinous crimes.[11] Because women who commit these heinous crimes are "not close to the legal or social norm," rather than accepting that women are just as capable of horrendous crimes, "it's easier to make her psychiatrically ill or a victim of context."[12]

Such stereotypes have once again been strongly reinforced in cases dealing with defenses to crimes which cater to the feminine viewpoint, such as battered woman syndrome (BWS), postpartum

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[9] Olivia Goldhill, *Women Are More Likely to Successfully Use the Insanity Defense*, QUARTZ (Dec. 20, 2015), https://qz.com/578290/women-are-more-likely-to-successfully-use-the-insanity-defence.

[10] Jeffrey Cohen, Women in the Criminal Justice System: Tracking the Journey of Females and Crime 31-46 (Tina Freiburger & Catherine Marcum eds., 2016).

[11] *Id.*

[12] Goldhill, *supra* note 9.

syndrome (PPS), and premenstrual stress syndrome (PMS).[13] Rather than considering the circumstances distinct to the alleged female offender, judges prefer to exonerate women of violent crimes on the grounds of insanity caused by BWS, PPS, and PMS.

Against this backdrop, I would like to argue that, instead of trying to encompass women-specific actions inside of the insanity defense, the law must attempt to comprehend the psychology behind the performance of certain acts in situations when such subjective assessment is needed. To that extent, Section I has presented studies demonstrating that women are far more likely than men to be deemed insane for the purposes of criminal trials. Moreover, it also undertook a sociological analysis to determine why women are more likely than men to effectively use the insanity defense. Section II will discuss the evolution as well as the nuances of the defense of insanity in the Indian criminal justice system. Section III will explain why the legal system should recognize and value appropriate defenses to crimes which cater to the feminine viewpoint, such as BWS, PPS, and PMS. To that end, it will criticize the application of the insanity defense to these women-specific issues and propose amendments to the Indian Penal Code (IPC) that would incorporate women's concerns while accurately addressing the problem of the gendered nature of law and the exclusion of women from the criminal justice system.

II. Insanity as a Defense in India

For many years, criminal law assumed that anyone who is mentally sound and has adequate reasoning ability must be prosecuted.[14] Indeed, the concept that those deemed ‘insane’ could not be held liable had existed under common law for generations, with justifications evolving over time. However, the judgment in R v. M'Naghten[15] still continues to shape the definition of the insanity plea in India. M'Naghten held that “it must be clearly proved that at the time of committing the act, the accused was laboring under such a defect of reason, from disease

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[13] Divya Kumar, *Passion Crimes and the Gender Perspective*, The Criminal Law Blog (Jan. 5, 2019), https://criminallawstudiesnluj.wordpress.com/2019/01/05/passion-crimes-and-the-gender-perspective/.

[14] State of Madhya Pradesh v. Ahmadullah, (1961) 3 SCR 998 (India).

[15] R v. M'Naghten [1843] 8 Eng. Rep. 718 (UK).

of the mind, as not to know the nature and quality of the act or that it was wrong." Section 84[16] of the IPC appears to be largely similar to the M'Naghten ruling in that Sec. 84 also inquires about whether the defendant understood the nature of the act at the time of the commission of the offense.

To invoke the defense of insanity in India, the defendant must meet two requirements: medical insanity and legal insanity. Courts have defined medical insanity as "unsoundness of mind at the time of the offense" and legal insanity as the inability to know the nature of the act or that the act is contrary to law due to unsoundness of mind. However, medical insanity is only a threshold requirement under Sec. 84. To be successful, the defense must also demonstrate that the "unsoundness of mind" resulted in legal insanity, i.e., "not understanding the nature of the act or that it is contrary to law."[17]

Despite the skill with which Indian judicial discourse crafted this distinction, courts have struggled to develop a consistent or systematic approach to determining legal insanity. Although courts have accurately determined and established "unsoundness of mind," they have frequently presumed incapability or examined the surrounding factual information to draw the conclusion of legal insanity.[18] For example, in *Shrikant Anand Rao Bhosale v. State of Maharashtra,* the Supreme Court of India limited its inquiry to medical insanity and determined that legal insanity could be extrapolated ordinarily from the fact-circumstances.[19] The circumstances referred to here were the existence and nature of the mental illness, schizophrenia, and, as a result, it was determined that the defendant was too deluded to understand the nature of the act.

Courts generally consider the totality of the circumstances, such as the defendant's history of psychiatric illness and treatment and his or her conduct prior to the incident, when determining insanity.[20]

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[16] "Nothing is an offense which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."
[17] Amita Dhanda, Legal Order and Mental Disorder 114 (2000).
[18] Soumya AK, et al., *Shapeshifting and Erroneous: The Many Inconsistencies in the Insanity Defense in India,* 14 NUJS L. Rev. (2021).
[19] Bhosale v. State of Maharashtra, (2002) 7 SCC 748 (India).
[20] *Id*.

However, even by inferring from the circumstances, there is no coherent and universal assessment of insanity. While the court in some cases relied on the existence of a psychiatric illness,[21] the court in other cases relied on the defendant's normal discharge of daily activities.[22] This selective use of facts to infer someone's ability to comprehend the nature of the act has been particularly undesirable and unjustifiable.

The stringent definition of Sec. 84 has also made it difficult to keep up with advances in psychiatry. The judicial framework has traditionally relied on outmoded approaches to psychiatric ailments that are irreconcilable with recent advances in psychiatry, psychology, and other disciplines.[23] For instance, confining 'unsoundness of mind' to only mental illnesses ignores a wide range of problems emerging from specific neurological or endocrine abnormalities, which also have a significant impact on a person's cognitive and volitional capacities. To that end, many studies have shown how some endocrine disorders, such as hyperthyroidism/hypothyroidism, can have psychological symptoms that cause behavioral and cognitive abnormalities.[24] However, the existing rigid definition does not take such advancements into account.

Now that a basic understanding of the defense of insanity has been established, this article will proceed to analyze this defense in relation to battered women syndrome.

III. Battered Women Syndrome and Insanity Defense

Battered women are individuals who have experienced psychological issues as a result of emotional, physical, or sexual violence from their intimate partner. As the name implies, BWS is a psychological theory that explains why battered women stay in violent relationships and how they might feel inclined to murder their spouses despite having other options for escape.[25] Hence, recognizing that battered women may be coerced into

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[21] *Id*.
[22] Surendra Mishra v. State of Jharkhand, (2011) 11 SCC 495 (India).
[23] K.M. Sharma, *Defence of Insanity in Indian Criminal Law,* 7 J. Indian L. Inst. 325 (1965).
[24] Spencer H. Conner & Solomon S. Solomon, *Psychiatric Manifestations of Endocrine Disorders*, 1 HSOA J. Hum. Endocrinol. 7 (2017).
[25] Aman Deep Borthakur, *The Case for Inclusion of 'Battered Woman Defence' in Indian Law,* 11 NUJS L. Rev. 1 (2018).

killing their male partners as a result of domestic violence, courts around the world have recognized a number of defenses to protect these battered women: namely provocation,[26] self-defense,[27] and insanity.[28]

A. Battered Women Syndrome: How Did Courts Deal with It?

The inherent bias in the IPC's murder defenses has been highlighted by the way Indian Courts have provided an exception for attacks by men and decreased the punishment inflicted by admitting grounds such as "sexual jealousy and injured vanity"[29] as justifications for homicide. For example, Indian courts have used the defense of "grave and sudden provocation" to reduce the sentences of men who murdered their wives/spouses in order to maintain patriarchal values of honor, such as in the case of adultery.[30] However, the application of these defenses to murders committed by women varies significantly. Even when defenses are used, they are applied in a rather inconsistent and unpredictable manner.

Cases like *Manju Lakra v. State of Assam*,[31] in which the Guwahati High Court dismissed the charge of murder against a battered woman and instead convicted her of culpable homicide not amounting to murder, are rare and exceptional. Courts have usually refused to recognize the defense of provocation since it tends to exclude victims of domestic abuse who respond after a cooling-off period – an outcome of the failure of courts to read BWS theory.[32] Therefore, as the application of grave and sudden provocation fails to incorporate women's responses, particularly in relation to domestic abuse, many women would be forced to rely on the defense of insanity to mitigate their sentence.

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[26] R v. Chhay, (1994) 72 A. Crim. R. 1 (India).
[27] Ibn-Tamas v. United States, 407 2d Cir. 626, 634 (1979).
[28] R. v. Ahluwalia, (1993) 96 Cr App R 133 (India).
[29] Amruta v. State of Maharashtra, (1983) 3 SCC 50 (India).
[30] K. M. Nanavati v. State of Maharashtra, (1962) AIR 605 (India).
[31] Manju Lakra v. State of Assam, (2013) 4 GLT 333 (India).
[32] Keerthana Medarametla, *Battered Women: The Gendered Notion of Gendered Defenses Available*, 13 Socio-Legal Rev. 108 (2017).

A similar trend has been observed in the United States and the United Kingdom, where an increasing number of women are approaching the courts and claiming insanity as a defense to reduce their punishment for crimes committed as a result of BWS,[33] PPS,[34] or PMS.[35] Even in India, the defense of insanity was accepted in *Kumari Chandra v. the State of Rajasthan*,[36] in which the judge allowed the defendant to claim the defense of insanity if she could demonstrate she was suffering from a severe PMS-induced disorder. Following this, other studies have advocated for adopting the defense of insanity, albeit in a somewhat modified form, to address the issue of BWS's exclusion as a defense.[37]

In light of this comparison, it is understandable why BWS defenses have had less success in India than PMS and PPS. To me, the causes and symptoms of PMS and PPS appear to be more amorphous and more closely tied to a genetic disposition than those found in disorders such as battered women psychosis. Defendants suffering from PMS and PPS can and have harmed anyone. Likewise, such defendants might pose a recurring threat to society. When it comes to BWS, however, the blame is centered on the man, and this defense particularly faults men and criticizes them in a more apparent way. Therefore, in keeping with the patriarchal nature of the criminal legal system, courts in India have very conveniently denied BWS defenses.

For the same reason, the use of the defense of insanity for battered women hasn't been assessed in India, and neither am I in favor of using insanity as a defense in these kinds of cases. However, courts in the United Kingdom have used the insanity-equivalent defense of diminished responsibility to protect battered women who kill their husbands.[38]

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[33] Robinson v. State, 308 S.C. 74 (1992); Ahluwalia, 96 Cr App R at 133.
[34] People v. Skeoch, 96 N.E.2d 473 (1951); People v. Massip, 271 Cal. Rptr. 868 (Cal. Ct. App. 1990); State v. White, 456 P.2d 797 (1969).
[35] Regina v. Craddock [1981] 1 C.L. 49 (UK).
[36] Kumari Chandra v. State of Rajasthan, 2018 SCC Online Raj 1899 (India).
[37] Jessie Manchester, *Beyond Accommodation: Reconstructing the Insanity Defense to Provide an Adequate Remedy for Postpartum Psychotic Women*, 93 J. Crim. L. & Criminology 713 (2003).
[38] Medarametla, *supra* note 32.

In the UK, for instance, *R. v. Kiranjit Ahluwalia*[39] was the first case in which the diminished responsibility defense was utilized to defend a murder by a battered woman. When Kiranjit Ahluwalia didn't use the plea of diminished responsibility, the trial court initially found her guilty of murder. However, after reviewing a large number of medical reports detailing her mental status, the appellate court concluded that her psychological competence was lessened at the time of the murder, thus rendering the diminished responsibility defense valid.

Similarly, in the 1977 case of Francine Hughes in the US, a battered woman attacks her husband by setting fire to his bed after being humiliated, raped, and beaten by him for 13 years.[40] Her insanity plea was accepted even after that, and she was found not guilty by reason of temporary insanity. This decision was justified on the grounds that ". . . the basic premise of such a defense [temporary insanity] would be that the defendant, at the time of the killing, suffered from severe stress and an impaired mental state as a result of the battering relationship, and that this impaired mental state caused her to kill the batterer. The causal link between the woman's impaired mental state and the killing can be established by showing that the woman viewed her predicament from a psychologically distorted perspective and thus was unable to perceive her options accurately, or by showing that the 'woman was driven to the breaking point by the circumstances of her situation and therefore was substantially unable' to conform [her] conduct to the requirements of law."[41]

Therefore, a cursory glance at these cases may give the impression that using insanity as a defense against homicide for battered women is justifiable because it guarantees an acquittal if proven in court. However, it is a double-edged sword that has been harshly criticized by some feminist scholars.

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[39] R. v. Ahluwalia, (1993) 96 Cr App R 133 (India).
[40] William Grimes, *Francine Hughes Wilson, 69, Domestic Violence Victim Who Took Action, Dies,* N.Y. Times (March 31, 2017), <https://www.nytimes.com/2017/03/31/us/francine-hughes-wilson-dead-burning-bed-defendant.html>
[41] Rocco C. Cipparone, *The Defense of Battered Women Who Kill*, 135 U. Pa. L. Rev. 427 (1987).

IV. The Defense of Insanity: A Double-Edged Sword

The seriousness of the repercussions of using the insanity defense is demonstrated by the fact that women who effectively plead to this defense may be labeled "mentally ill" and detained in a mental asylum.[42] This is bitterly ironic since victims of domestic abuse may not exhibit symptoms of PTSD and may go about their daily lives without fear of harm. Conversely, even if she is acquitted and not sent to a mental asylum, the woman may still face the stigma of being labeled as "insane." As a result, such women could be thought to possess a permanent psychological illness that renders them incapable of nurturing and raising their children and could be viewed as dangerous to their dependents, untrustworthy, and hopeless in terms of rehabilitation.[43]

The primary concern with using the insanity defense is that, rather than exonerating the battered woman, it effectively forces her to admit to being a mentally ill person. This essentially reflects the aforementioned male-centric approach of the judicial framework, in which men are portrayed as victims of irrational situations and women as offenders. The excusatory nature of the insanity defense ignores a woman's social conditions and attaches a stigma to mental disorders. This also reflects the government's clinical approach to combating domestic violence, which focuses on incarcerating the woman offender instead of recognizing and tackling the wider issue of domestic violence.[44]

Moreover, as a consequence of the insanity defense, women are stereotyped as "bad or partially mad,"[45] which leads to their "syndromization" and labeling as "emotionally driven and irrational."[46] As Claire L'Heureux Dubé J rightly said: "By emphasizing a woman's 'learned helplessness,' her dependence, her victimization, and her low

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[42] Elizabeth Kenny, *Battered Women Who Kill: The Fight against Patriarchy*, 13 UCL Juris. Rev. 17 (2007).
[43] Aishwarya Deb, *Rethinking 'Insanity' Defence in the Light of Kumari Chandra v State of Rajasthan: Are Female Murderers 'Abnormal'?,* 61 J. Indian L. Inst. 350 (2019).
[44] Medarametla, *supra* note 30.
[45] Lenore Walker, Terrifying Love: Why Battered Women Kill and How Society Responds 106 (1990).
[46] Alafair Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. Rev. 211 (2002).

self-esteem, in order to establish that she suffers from 'battered woman syndrome,' the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such an emphasis comports too well with society's stereotypes about women."[47]

V. Reforms Suggested to the Indian Penal Code

Following the realization that the criminal law is in essence "from top to bottom, preoccupied with male concerns and male perspectives,"[48] many feminist theories have been proposed to craft alternative approaches concerning how women offenders must be fully integrated into criminal laws. The two most impressive and intriguing approaches, however, are the accommodationist and acceptance approaches.

1. The Accommodationist Approach: A Critique

The accommodationist approach recognizes gender differences and gives women preferential treatment.[49] This preferential treatment encompasses a "special defense" for women, which essentially means having separate legal provisions for postpartum and battered woman psychosis such that women can be accommodated specifically in a male-centric legal framework.[50] To clarify, preferential treatment would include a gender-specific defense in the IPC stating that, "a killing arranged or performed by a battered woman may constitute self-defense, depending on her subjective state of mind and motive, provided that the act is objectively justifiable and is hence a complete defense to a charge of murder."

This approach, however, has a number of weaknesses in that it fosters the belief that women are inherently different, therefore marginalizing the idea that gender inequalities are created by the law itself. The first point of contention is the stereotypification and

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[47] R. v. Malott, [1998] 1 SCR 123 (Canada).
[48] Stephen J. Schulhofer, *Feminist Challenge in Criminal Law*, 143 U. Pa. L. Rev. 2151 (1995).
[49] Manchester, *supra* note 37.
[50] *Id.*

generalization of gender-specific defenses. Some observers note that the defenses of PMS, BWS, or PPS are demeaning or prejudicial to women.[51] According to them, acknowledging a correlation between these syndromes and crime, for example, might prevent women from progressing in their careers since employers could very well anticipate regular cycles of mood swings or misbehavior.[52]

Some also argue that prosecutors could use these defenses to incriminate rather than exonerate defendants.[53] For instance, in *Tingen v. Tingen*,[54] the plaintiff argued that the court must take into account his ex-wife's PMS as a factor in granting him child custody. Similarly, some observers note that judges will eventually regard PMS as an aggravating condition instead of a minimizing one. One day, it might rationalize a husband murdering his PMS-affected spouse, or a judge's decision that a PMS-affected woman must be capable of predicting, and thereby preventing, the ramifications of her monthly condition.

Dorothy Roberts cautions that gender-specific defenses "risk misdiagnosing the causes of some women's crimes."[55] In the specific instance of infanticide, for example, the English law automatically assumes that mothers who murder their kids inside a year are mentally unstable and thus reduces the punishment. However, Dobson and Sales, for instance, assert that not all mothers who commit infanticide are mentally unwell based on a comprehensive research study that they conducted on women's psychological disorders in infanticide cases.

Hence, now that it has been established that the accommodationist approach does indeed perpetuate more problems for women, let us examine the acceptance approach.

2. The Acceptance Approach: The Way to Go

The acceptance theory is a flexible theory that suggests incorporating both male and female standpoints inside the criminal

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[51] Deborah Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. Crim. L. & Criminology 80 (1994).
[52] *Id.*
[53] Christina L. Hosp, *Has the PMS Defense Gained a Legitimate Toehold in Virginia Criminal Law - Commonwealth v. Richter*, 14 Geo. Mason U.L. Rev. 427 (1991).
[54] Tingen v. Tingen, 446 P.2d 185 (Or. 1968).
[55] Dorothy Roberts, *The Meaning of Gender Equality in Criminal Law*, 85 J. Crim. L. & Criminology 1 (1994).

justice system.[56] It emphasizes the individual defendant and the circumstances of their life when determining criminal liability. The amendments that I propose to the IPC fall within the acceptance approach theory. This approach would enable courts to more effectively evaluate overall cognitive competence by introducing provisions for sustained provocation that take into account the unique circumstances of these battered women rather than labeling them as insane or incapable of committing crimes.[57]

However, prior to actually proposing any statutory changes, we must first examine the UK Coroners and Justice Act of 2009, as well as the subsequent Law Commission report,[58] which attempted to incorporate certain battered women syndrome-related elements. According to Section 5 of the Act, a "qualifying trigger" is defined as things said or performed that constitute incredibly serious circumstances and give the accused a reasonable sense of being seriously wronged,[59] including instances such as sexual infidelity,[60] incitement,[61] and so on. Furthermore, the Law Commission of England proposed that the trigger of "fear of violence" be included. Essentially, this trigger acknowledges the recurring and episodic character of the batterer's violence and accounts for a female's perception of the fear of harm.

To that end, drawing on the UK's statutory regime on the subject, I propose the following amendments to the Indian Penal Code to address the concerns of women:

a) **Exception 1 to Section 300 of the IPC –** Given the cyclical nature of battering violence, the exception of grave and sudden provocation must be amended to include "sustained provocation." The clause may be phrased as, "If the defendant has been subjected to long-term bodily and mental assault, then the entire period of abusive behavior could be considered a period of provocation." This not only ensures

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[56] Manchester, *supra* note 37.
[57] *Id.*
[58] Law Commission of United Kingdom Rep. No. 177 (2005).
[59] Joshua Rozenberg, *Battered Women Who Kill to be Main Beneficiaries as Homicide Law Changes*, The Guardian (Sept. 30, 2010, 4:00 PM), <https://www.theguardian.com/law/2010/sep/30/murder-law-reform>.
[60] R v Clinton [2012] EWCA Crim 2 (UK).
[61] R v Johnson [1989] 1 WLR 740 (UK).

that a woman-centered defense is included, but also that it is beneficial for individuals other than battered women.

b) **Section 100 of the IPC –** This section, which deals with the right to private defense, could also be amended to include the respective explanations – (1) An "apprehension of danger" could be justified even if founded on recurring incidents of battering; and (2) In the accused's opinion, the accused's response should be proportionate to the apprehended act. These two requirements would effectively allow for the determination of whether the act was proportionate, as well as the need of immediacy from the standpoint of the person invoking this defense.

VI. Battered Women Syndrome and the Insanity Defense

This article has shown, via several case laws from around the world, how judicial systems fail to admit that women are capable of committing heinous crimes. Based on many empirical investigations undertaken by experts all around the world, it is safe to conclude that murders committed by women are more often than not a defensive response to certain long-reverberating abuse. A logical conclusion to this would be that female criminality is much more logical and reasonable than male violence, which is characterized by random acts of violence. To that end, the primary point this article seeks to drive home is that just because the judicial system has failed to provide a clear understanding of women's socio-economic conditions does not grant it the right to label her as "mentally unsound."

The broader aim of this work, however, was to contribute a female-centric perspective to criminal law discourse. The situation of the victims of domestic abuse falls within this framework because the sensitivities of battered women's experiences are neglected when laws are formulated from an andro-centric perspective. This limitation in the legal and judicial framework raises concerns about the law's credibility, fairness, and universal applicability. Hence, this article argued for reducing the unjustified culpability enforced by the IPC on victims of domestic abuse. To that end, it proposed legislative restructuring of the defense of provocation by integrating the idea of "sustained

provocation," as well as the defense of self-defense by taking into account the experiences of victims of domestic abuse who retaliate, as well as why they retaliate. Therefore, while this may not be a panacea for all of the issues that women face in the criminal justice system, acknowledging BWS could be the first step towards addressing the problem of recognizing women as irrational humans incapable of committing crimes and bringing women's issues and lived perspectives to the forefront.

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Getting the Last Word: A Shift from Martin-Quinn Scores to Word Scores

Robert Gao

The measurement of judicial policy preferences plays a significant role in the study of judicial politics, especially as a foundational component in both the attitudinal and strategic models of judicial decision-making—whether judges determine cases strictly according to their personal political ideologies or make calculations about what actions their colleagues on the bench might take in order to end up as close to their private preferences as possible, respectfully. As the academic literature has grown, researchers have developed many models for analyzing judicial policy preferences, including Martin-Quinn scores, which place justices on a contextless continuum based on how often they vote in common with their colleagues to affirm or reverse. Despite the current popularity of Martin-Quinn scores, such techniques lead to issues such as limits on interpretation of judicial ideology, empirical incongruities, and case selection bias. The latter especially necessitates a unique approach to measuring judicial preferences, especially at the level of the United States Supreme Court, as factoring in the case selection process introduces additional concerns to the current interpretation of case facts and outcomes. One such method of measuring judicial policy is the Wordscore procedure, a computer application that conducts content analysis of judicial opinions by counting and comparing the frequency of specific words in the texts without assigning any ideological meaning to the words on its own. By studying opinions at a more granular level, the Wordscore procedure is better able to interpret the actual substance of justices' written reasoning, avoiding the questions that stem from attempting to attach a liberal/conservative dichotomy in case outcomes directly to justices themselves. I argue that, due to its granular analysis of opinion content, the Wordscore procedure, though not without its faults, is an excellent tool for extensive use in judicial policy preference research.

I. The literature pre-Martin-Quinn scores

To understand and predict how justices make decisions, one must first understand their policy preferences. Spaeth argues in favor of the attitudinal model, which holds that "justices decide their cases on the basis of the interaction of their ideological attitudes and values with the facts of a case. … [The] justices vote as they do because they want their decisions to reflect their individual personal policy preferences."[62] This view also contends that these policy preferences typically lie along a liberal-conservative spectrum. Judges often receive nominations to the Supreme Court by presidents who share the ideological leanings they supposedly bring to bear in their decisions: Republican presidents nominate judges with conservative bodies of work, and the same goes for Democrats. In contrast, Epstein and Knight advocate for the strategic model, observing that for a justice "to set policy as close as possible to his ideal point, strategic behavior was essential. … [He] needed to act in a sophisticated fashion, given his beliefs about the preferences of the other actors and the choices he expected them to make".[63] Justices, who may indeed have liberal or conservative preferences, engage in a strategic calculus that includes assumptions about the preferences of their peers on the bench in order to implement their true policy goals. But regardless of whether one falls in the attitudinal or strategic camp, the necessity of understanding justices' policy preferences still remains. As a result, it is no surprise that an extensive literature has emerged to attempt to answer the question.

Static and relatively straightforward measures of ideology and/or preferences—including descriptions of Supreme Court nominees in newspaper editorials,[64] justices' personal biographical characteristics,[65] party affiliation of the appointing president,[66] and Judicial Common Space scores influenced by the NOMINATE scores of home-state senators and appointing president.[67] These measures are powerful in their simplicity but generally only capture specific

[62] (Spaeth 1995, 305)
[63] (Epstein and Knight 1997, 56)
[64] (Segal and Cover 1989)
[65] (Tate and Handberg 1991, 463)
[66] (Sunstein et al. 2006, 4)
[67] (Epstein et al. 2007, 306)

moments in a justice's personal jurisprudence and in the broader political landscape, overlooking potential changes in preference over time. Epstein et al. (1998) seek to answer whether such changes can be seen in time series data, specifically with regards to civil liberties cases, examining "the voting records of the 16 justices who sat on the Court for 10 or more terms and who began and completed their service sometime between the 1937 and 1993 terms."[68] Controlling for changes in the cases and civil liberties issues themselves by accounting for the changes within each justices' individual records, the authors find that nine of the sixteen examined justices' voting preferences did indeed change over their careers. However, the experiment is limited by the relatively small body of jurisprudence among just sixteen justices, which could increase the likelihood of error. Furthermore, the authors examined a time period when the United States underwent a wider national transformation regarding attitudes toward civil liberties, indicated by historical developments such as the civil rights movement and the Burger Court, raising questions about the endogeneity of changes at the individual level for justices. Also, Martin and Quinn critique additional aspects of the research design, including the failure to incorporate case-by-case parameters when controlling for changes among the cases that appear before the Court and the assumption that justices' ideal preference points, which should mostly look similar over time, are independent and identically distributed.[69] .

In seeking to answer the issue of measuring judicial preferences, Martin and Quinn (2002) created an innovative model that has become one of the most popular approaches to judicial analysis.[70] The authors developed a Bayesian dynamic item response model using Markov chain Monte Carlo methods. In practice, this technique enables researchers to place the Supreme Court justices along a unidimensional continuum without assigning ideology. The authors clarify that, "Substantively, the model cannot determine which direction is liberal or conservative."[71] Just by tracking data on whether each justice votes to affirm or reverse in a case, and which justices vote with each other

[68] (Epstein et al. 1998, 809)
[69] (Martin and Quinn 2002, 136-137)
[70] (Spruk and Kovac 2019)
[71] (Martin and Quinn 2002, 139)

in what circumstances, the Martin-Quinn model can order the justices between two extremes—with no ideological connotations—according to their ideal points. This formula thus allows observers to predict relative voting patterns. The authors, applying the assumption that each case before the Supreme Court results in either a conservative or a liberal vote, then assign "conservative" or "liberal" preferences to the ends of the spectrum. One of the primary benefits of this research is its dynamism. Each justice's ideal point can change for each vote they make, allowing for the observation of how a Supreme Court justice's preferences shift relative to the other justices over time. To that point, though Martin and Quinn originally studied Supreme Court decisions up to 1999, the authors have extended the model to include the current Supreme Court.[72]

II. Potential Issues with Martin-Quinn scores

Although Martin and Quinn originally developed a novel, dynamic model to understand judicial policy preferences, some have commented on its potential weaknesses. Notably, Farnsworth comments that "the relationship between the spectrum generated by the authors' model and the spectrum of policy decisions in the real world is a matter of guesswork. There is no inherent relationship between them."[73] . As Martin and Quinn (2002) themselves acknowledge, the unidimensional continuum they developed is not inherently ideological in nature. Instead, the liberal/conservative dichotomy seems to be assigned based on already-established voting coalitions within the Court. Farnsworth provides the example of how Justices Clarence Thomas and Antonin Scalia find themselves at the same extreme, which thus becomes recognized as the conservative pole, while Justices Stephen Breyer and Ruth Bader Ginsburg, together at the other end, become the liberal wing.[74] Thus, the interpretation of Martin-Quinn scores as a measure of ideology appears to rely on the circular idea that the grouping of Thomas and Scalia becomes the conservative wing because they are already known to have conservative preferences. This assumption depends on an *ex ante* knowledge of the ideological

[72] (Martin and Quinn 2021)
[73] (Farnsworth 2007, 151)
[74] (Farnsworth 2007, 145)

breakdown of the Court. Farnsworth suggests that "The positions of the Justices on the spectrum the authors present—and the poles at either end of that spectrum—could reflect combinations of policy preferences, interpretive approaches, judicial philosophies, and perhaps other qualities."[75] There could be multiple reasons, beyond mere political ideology, why certain justices vote together. After all, if one asks the justices themselves about their coalitions with their peers, they will likely answer in terms of judicial philosophies like "originalism" and "activism." Thus, I am hesitant to receive Martin-Quinn scores as a perfect measure of ideology on the Court.

Farnsworth also questions whether the Martin-Quinn model can fully account for situations in which justices have nuanced understandings of liberal or conservative issues that change with each case[7677] or when the makeup of the Court shifts.[78] An example that Farnsworth provides is of Justices Kennedy and Rehnquist, the former of whom often voted in support of the government in criminal procedure cases and against in free speech cases, while the latter supported the government in both categories. If a term with more criminal procedure cases than free speech cases was followed by one that featured more free speech cases, Martin-Quinn scores would erroneously determine that Kennedy had shifted further left relative to Rehnquist, when that ostensible movement was in reality more circumstantial.

Also, Martin and Quinn (2002) weigh each case equally, without regard to the level of public interest or relevance.[79] Many lesser-known cases on more procedural matters are decided 8-1 or 7-2, and many cases involve justices breaking ranks with their typical coalitions. Perhaps Martin and Quinn (2002) actually underestimate the intensity of the justices' preferences on more important or controversial issues by doing so.

Bailey also re-examines some of the assumptions made by Martin and Quinn (2002), especially focusing on one of their findings

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[75] (Farnsworth 2007, 146)
[76] (Farnsworth 2007, 148-149)
[77] (Bonica and Sen 2021, 102)
[78] (Farnsworth 2007, 149)
[79] (Farnsworth 2007, 150)

that "the Court median was at one of its historically conservative peaks in 1973."[80] The author finds this outcome surprising, given the conventional perception of the Court under Chief Justice Warren Burger as liberal, as well as the liberal decisions that protected the right to abortion in *Roe v. Wade* (1973) and invalidated the death penalty in *Furman v. Georgia* (1972). Bailey attributes this concern to the assumptions made by Martin and Quinn (2002) that cases and case characteristics remain constant over time[81] and that each case can be neatly divided into liberal and conservative votes[82], among others. Bailey continues on to develop his own model, building on Martin-Quinn scores, including bridge observations, which control for the Court's potential agenda change and outside political influences (i.e., positions from members of Congress). For the former, the temporal bridge observations used by Bailey involve "positions taken by justices on cases decided by earlier courts"[83] — for example, when a justice called a previous case "wrongly decided" or explicitly endorsed a past decision—in order to identify how the Court's understanding of issues changes over time. However, considering the principle of *stare decisis*, I question whether it would be fruitful to control for agenda change using something that is, at least nominally, intended to be a factor in the Court's decision-making process. Perhaps more importantly, though, the technique presented in Bailey (2013), only studying the voting outcomes of Supreme Court cases, is just as vulnerable to case selection bias as Martin and Quinn (2002).

III. The Problem of Case Selection Bias

Kastellec and Lax (2008) draw attention to an issue with dramatic implications for the foundations of the study of judicial politics: case selection bias. In most studies of judicial politics, case selection bias is introduced before the data—Supreme Court case outcomes—used in these studies even come to pass. The authors explain that "The Court's docket is now nearly completely discretionary. The Justices themselves choose which cases they will

[80] (Bailey 2013, 822)
[81] *Id.*
[82] (Bailey 2013, 824)
[83] (Bailey 2013, 826)

hear, and it is universally recognized that they eschew less weighty cases, choosing instead to take hard, important, or controversial cases."[84] The Supreme Court may act politically or ideologically even before hearing oral arguments, thereby already influencing the justices' voting patterns to affirm or reverse that are fundamental to many of the models in the literature. Kastellec and Lax note that, "Over the 20th century, the reversal rate on the U.S. Courts of Appeals in published decisions was roughly 30 percent. … In contrast, the Supreme Court reversed around 60 percent of cases it heard in the same period." Kastellec and Lax explain that it is likely the "Justices use their discretionary docket to select cases to reverse, while appellate court judges frequently hear routine cases."[85] If Kastellec and Lax are correct in that Supreme Court justices select cases with the express intent to reverse previous decisions, the entire basis of Martin and Quinn in measuring the frequency of votes to affirm or reverse may be moot.

Kastellec and Lax seek to observe the existence of case selection bias by running a series of simulations on data consisting of a random sample—copied ten times—of search-and-seizure cases from Courts of Appeals from 1960 to 1990.[86] By applying conventionally-accepted estimates of fact weights—which include location of the search, extent of the search, presence of a warrant, and more (Kastellec and Lax 2008, 423)—the authors can measure "(1) the significance of particular case facts and (2) the correct classification of out-of-sample case outcomes (liberal or conservative)."[87] The authors conducted a mock-case selection process, which included estimating the significance of case facts and predicting the outcomes of selected cases. Kastellec and Lax then compared the estimated significance of case facts and resulting predicted outcomes to the true significance and outcomes. The authors utilized three strategies to imitate case selection—close cases with about a 50% probability of being conservative, anomalous cases that seem like they should be decided conservatively but are liberal in actuality (and vice versa), and selection based on the presence of

[84] (Kastellec and Lax 2008, 407-408)
[85] *Id.*
[86] (Kastellec and Lax 2008, 416)
[87] *Id.*

specific case facts.[88] The authors reach a number of significant conclusions. For one, they determine that the case selection process, including which selection strategy is utilized, interferes with the estimation and/or identification of true fact weights.[89] More relevant to the measurement of judicial policy preferences, case selection leads to ideological bias when using more simple ideology metrics.[90] The authors are careful to note that the effect of selection bias may be unclear for Martin-Quinn scores, due to their dynamism over time, but add that, "To the extent they do not completely account for such dynamics, changes in case selection might bias ideal point estimates or make it seem like preferences had changed over time."[91] Thinking in conjunction with Farnsworth, a situation could potentially emerge where a shift in the composition of the Court could lead to different priorities for the Supreme Court docket and which cases to select. This sea change might go unnoticed by the Martin-Quinn model but affect the appearance of preferences. Additionally, Kastellec and Lax find that, "depending on the Court's selection strategy, our inferences about the true decision in the out-of-sample cases, according to our estimations from the in-sample cases, are likely to be off in anywhere from 18 to 72 percent of cases."[92] This result calls into question any predictions made by even the most attentive Court-watchers and our understanding of the justices' decision-making processes.

Kastellec and Lax summarize by stating, "we cannot simply take the Supreme Court's docket of cases, apply fact pattern analysis, and draw fully reliable conclusions about compliance, doctrinal substance, changes in the law, or the effects of ideology."[93]The judicial politics literature should consider alternative models of judicial policy preferences, seeing as case selection by the Supreme Court may completely disrupt the fundamental premise of conventional measures of justices' ideology, the vote to reverse or affirm. Instead, a more rigorous analysis of judicial preferences could include a more granular analysis of the written opinions themselves.

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[88] (Kastellec and Lax 2008, 419-420)
[89] (Kastellec and Lax 2008, 424-431)
[90] (Kastellec and Lax 2008, 431-432)
[91] (Kastellec and Lax 2008, 433)
[92] (Kastellec and Lax 2008, 435)
[93] (Kastellec and Lax 2008, 436)

> One way of thinking about the selection bias problem is to note that analyses based only on case outcomes do not make use of all information observable from a sample of cases. Studies that focus more closely on substantive policy content might avoid selection issues. To be sure, this would require reading opinions more closely (as, indeed, lower court judges do when dealing with Supreme Court decisions).[94]

For example, a close reading of published case opinions may indicate to the researcher what the justices are looking for in the cases they accept and therefore implicitly what they are not. This in turn could inform how to control for and mitigate selection bias. Specifically, Kastellec and Lax mention that "a promising new approach is that of McGuire and Vanberg, who score the policy positions of written opinions using the 'wordscore' method (Laver et al. 2003)."[95]

IV. The Wordscore Method

Laver et al. re-imagine political texts "not as discourses to be read, understood, and interpreted for meaning—either by a human coder or by a computer program applying a dictionary—but as collections of word data containing information about the position of the texts' authors on predefined policy dimensions."[96] After deriving data on word frequencies from familiar texts, researchers can then apply this information in comparison to word frequency patterns in unknown texts in order to estimate their policy positions. By quantitatively analyzing texts as data samples consisting of words, Laver et al. are able to calculate confidence intervals and thus draw conclusions about statistical significance with regards to differences between texts. The authors go on to use the Wordscore Stata statistical software to study the policy positions of British, Irish, and even German political parties—the non-English-language analysis made possible by Wordscore.[97] The new technique is not only able to replicate results from more human-intensive methods but, even in shifting political landscapes, is still consistent with traditional estimates that require hand

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[94] (Kastellec and Lax 2008, 438)
[95] *Id.*
[96] (Laver et al. 2003, 312)
[97] (Laver et al. 2003, 312)

coding over the course of 20 years by trained human analysts, and demonstrates its potential effectiveness to the broader discipline of political science by substantially streamlining textual policy analysis.

McGuire and Vanberg contribute to the study of judicial politics by applying the Wordscore method to the United States Supreme Court. The authors find that the literature mainly focuses on the preferences of justices at the individual level. However, there is much space for research into the Court's true policy outcomes as the actualization of justices' preferences by taking advantage of the oft-overlooked contents of full written opinions.[98] They provide a simplified example of how Wordscore would look when applied specifically to the Supreme Court, as "The words 'rational,' 'legitimate,' and 'intent,' for example, appear frequently in the opinion of the conservative justice, but only once in a while in the other opinion. The words 'strict,' 'discrimination,' and 'equality,' on the other hand, are more frequent in the liberal justice's opinion but hardly appear in the other opinion."[99] An unfamiliar observer can then compare these reference texts to completely new documents and, with the help of Wordscore, begin to notice patterns and/or contrasts.

Looking to study civil liberties cases, which have captured the attention of the Court and the general public, McGuire and Vanberg focus specifically on cases
about religion and search-and-seizure, which provide large bodies of jurisprudence fit for Wordscore use.[100] They ultimately find that Wordscore usually matches well with what a more traditional approach would estimate across multiple cases from each category.[101] Wordscore can thus serve as a useful tool in understanding and estimating the policy preferences and outcomes of judicial opinions.

In order to understand the viability of Wordscore in the literature on judicial policy preferences, the strengths and weaknesses must be analyzed. For one, McGuire and Vanberg acknowledge "the underlying assumption that (a) texts expressing different ideological positions make use of systematically different language, and (b) texts

[98] (McGuire and Vanberg 2005, 4-5)
[99] (McGuire and Vanberg 2005, 8)
[100] (McGuire and Vanberg 2005, 14)
[101] (McGuire and Vanberg 2005, 19, 23, 28)

that are similar in the language they use do, in fact, represent similar ideological positions."[102] In response, one of the strengths of Wordscore is its reduction of the costs facing the researcher. Instead of conducting exhaustive analyses of every single Supreme Court decision, one can quickly plug in electronic documents, including many opinions from lower state and federal courts as well, and receive data about policy content. Because the method is so efficient and essentially limitless, a researcher could repeat the process to create a large enough universe of decision word data to reach high confidence in the similarities and differences between the texts of opinions.

Additionally, McGuire and Vanberg inherit a complication from Martin and Quinn. They write, "even in the absence of understanding the meaning of any of the words in the documents, one could make use of the similarity in word use in documents whose positions one *does know* (referred to as 'reference texts') to draw inferences about the likely position represented by the texts whose position one *does not know* (referred to as 'virgin texts')." [103] Just as their predecessors in the literature did, they essentially presuppose knowledge about justices' policy preferences. To compare reference and virgin texts, one must first associate the reference texts — for example, previous court cases addressing the same legal question that use similar language — with a specific ideology. However, I find a subtle but important distinction between the two. To understand McGuire and Vanberg in terms of judicial preferences, one can look at the tangible policy consequences of reference decisions and then identify actual political outcomes correlated with certain words and justices, especially considering that Wordscore is inherently a more holistic examination of written opinions. For example, the authors contrasted two opinions as their reference texts for cases concerning the free exercise of religion. *Church of the Lukumi Babalu Aye v. City of Hialeah* [104], which struck down a city ordinance limiting religious rites of animal sacrifice, was designated as liberal, while *Employment Division v. Smith* [105], upholding laws that punished the use of illegal

[102] (McGuire and Vanberg 2005, 12-13)
[103] (McGuire and Vanberg 2005, 8-9)
[104]
[105]

narcotics by Native American religious practitioners, was denoted as conservative by virtue of their substantive outcomes. In contrast, though, Martin and Quinn, by assigning the members of the Supreme Court to a strict affirm/reverse binary void of context, necessitates assumptions of preferences based on the justices alone. Considering also that the greater emphasis on opinion content in McGuire and Vanberg both alleviates concerns about case selection bias and enables more nuance in placing cases along the liberalism/conservatism scale, the Wordscore method merits legitimate consideration to become the prevalent practice in the judicial preferences literature.

For example, Rice builds upon the work that McGuire and Vanberg started in uniting a computational linguistics approach with the field of judicial politics. Rice designs a series of structural topic models, which "incorporate document-level covariates affecting the estimation of topics. For instance, one common covariate affecting the estimation of topics is time; in our context, the Supreme Court is well-recognized as having an agenda that shifted markedly over time." [106] Using a dataset consisting of every majority opinion in the history of the Court — efficient collection of large datasets being an aforementioned benefit of McGuire and Vanberg — Rice examined fourteen topics, named according to "the three most representative terms by topic." [107] This design allows the author to illustrate changes in amount of attention the Supreme Court pays to an issue over time, [108] correlations between different topics, [109] case complexity and its (minimal) effect on defection, [110] and the association between public attention on the Court's actions on a specific issue and the Court's subsequent prioritization of that issue. [111] For example, the author shows that the number of cases that included the words "criminal, conviction, crime" skyrocketed during the 1930s and 1940s, while the topic of "vessel, the vessel, ship" has drastically diminished in frequency since the early 1800s. In presenting so many diverse and interesting findings, Rice offers a glimpse of the potential avenues for

[106] (Rice 2019, 112)
[107] (Rice 2019, 113).
[108] (Rice 2019, 116)
[109] (Rice 2019, 118)
[110] (Rice 2019, 121)
[111] (Rice 2019, 123)

future research in a literature centered on the computational textual analysis approach championed by McGuire and Vanberg.

V. Conclusion

The issue of measuring judicial policy preferences lies at the heart of both the attitudinal and strategic models of judicial decision-making, giving rise to an extensive literature attempting to answer the question. Early, more-straightforward models, such as those studying media coverage and the appointing president, failed to allow for changes in judicial preferences over time. Martin and Quinn developed an innovative, dynamic model tracking Supreme Court justices' voting patterns and coalitions. However, a few notable criticisms of Martin-Quinn scores have emerged, including of their lack of inherent ideological association. [112] Even more importantly, the cloud of case selection bias, as described by Kastellec and Lax, hangs over any study of case outcomes. [113]McGuire and Vanberg provide an effective solution by applying the Wordscore method developed by Laver et al. to the U.S. Supreme Court, matching traditional notions of the Court but also opening interesting possibilities for future research to explore. One issue, which was raised by McGuire and Vanberg as a potential caveat to their model but also serves as a potential research question, is about their fundamental assumption that judicial opinions definitively use different language from those expressing a different ideology and the same words as copartisan texts. How has the language of American conservatism and liberalism changed over time? Is there a certain grammar of compromise common in 7-2 and 8-1 decisions, and is it replicable?

[112] (Farnsworth 2007)
[113] (Kastellec and Lax 2008)

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Criminal Culpability through the Lens of Christianity in the United States

Anna Garrison

Mass incarceration and the expansion of punitive "tough on crime" policies have proven to be ineffective, costly, and destructive in the United States. This has led to the formation of the "smart on crime" counter-philosophy that is proven to be more cost-effective and productive, relying less on punitive measures and instead addressing the root of crime in order to prevent it before it happens. However, though many people are concerned with the state of America's criminal justice system, there is a considerable hesitance in adopting these research-backed smart policies due to their lack of dependence on punitive responses to crime. This lack of punishment violates the moral ideologies of many Americans, especially religious Christians. This study addresses the question of why many Christians tend to be more punitive by aiming to discover how different factors in their religious belief systems influence their views of criminal culpability. The findings of this study reveal that more prevalent religious identities and stronger beliefs in individual responsibility both correlate with stricter views of culpability. Within Christians who have the most prevalent religious identities, Biblical literacy and Biblical application correlate to less harsh views of punishment and outsiders. This information may inform future "smart on crime" policy that can better appeal to religious Christians in America.

I. Incarceration and Crime in the United States

The United States has the largest prison population in the world,[114] holding 25% of the world's prison population despite making up only 5% of the world's total population.[115] We also have the

[114] (World Prison Brief n.d.)
[115] (Collier 2014)

highest incarceration rate in the world, meaning the United States imprisons a larger percentage of its citizens than any other country.[116]

"This is not because the United States is the most violent country, nor do we have the highest crime rate. In fact, out of the 137 countries whose crime indexes are available, the U.S. has the 56th highest crime rate.[117] This discrepancy between our crime rate and incarceration rate often provoke arguments regarding the immorality of mass incarceration, a term for the U.S.'s tendency to imprison massive populations of its citizens. However, a less discussed argument with more persuasive potential is that of its practicality. This dependence on incarceration is costly. Each prisoner incarcerated in the U.S. costs an average of $14,000 to $70,000 a year, depending on the state.[118] These steep costs per prisoner, coupled with the exorbitant number of prisoners incarcerated in the U.S., yields astounding total annual costs across the country and results in burdensome taxes for American citizens. American taxpayers spend about $182 billion annually to sustain the U.S. prison system."[119]

Though these tremendous costs of punishment may seem necessary as a means of public safety, further incarceration statistics reveal that much of this money is spent locking up a considerable number of non-violent offenders. "This is not because the United States is the most violent country, nor do we have the highest crime rate. In fact, out of the 137 countries whose crime indexes are available, the U.S. has the 56th highest crime rate.[120] This discrepancy between our crime rate and incarceration rate often provoke arguments regarding the immorality of mass incarceration, a term for the U.S.'s tendency to imprison massive populations of its citizens." A report from the Bureau of Justice Statistics shows that, at the end of 2019, only 8% of federal prisoners and 55% of state prisoners were incarcerated for committing a violent crime.[121] Additionally, studies on recidivism rates, or the rate of reoffending after being released from jail, show that the measures of incarceration that the U.S. spends this

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[116] (World Prison Brief n.d.)
[117] (World Population Review 2021)
[118] (Vera n.d.)
[119] (Wagner and Rabuy 2017)
[120] (World Population Review 2021)
[121] (Carson 2020)

bulk of its money on are not effective at reducing repeat offenders. Sixty eight percent of people released from prison are arrested again within three years, and 83% are rearrested within nine years.[122] A study of reconviction rates in the 31 states with adequate available data revealed that more than half of those who are released from prison are reconvicted and return to prison to serve a new sentence within five years.[123]

II. Smart vs Tough on Crime

Other ways to implement this approach are reducing prison sentences and removing mandatory minimum sentences. Mandatory minimum sentences are sentences for which the length is predetermined for certain crimes instead of decided on by a judge, thus removing the judge's ability to use discretion based on possibly mitigating factors of a case. Longer sentences not only increase the cost of imprisonment and drain resources, but they also contribute to more crime; longer incarceration times provoke higher recidivism rates due to incarceration's tendency to exacerbate the root problems of crime.[124] Additionally, long sentences desensitize offenders to punishment, also contributing to recidivism rates.[125] This, coupled with the findings that longer sentences do not reduce crime or have any deterrence effect,[126] and that most people age out of crime between 30 and 50 years of age,[127] proves longer, harsher sentences to be defective and unproductive. Taking away mandatory minimum sentences and reducing sentence lengths in general would not only save money, but it would be more productive for offenders and the community, rather than solely serving as harsh punishment for punishment's sake to satisfy a 'tough on crime' ideology. The overreliance on incarceration as a way of dealing with almost every type of crime, regardless of its nature. The crippling cost of this reliance, and its ineffectiveness at serving any purpose beside punishment, has inspired alternatives to incarceration in the interest of

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[122] (National Institute of Justice 2019)
[123] (Durose and Antenangeli 2021)
[124] (Green and Winik 2010)
[125] (National Institute of Justice 2016)
[126] *Id.*
[127] (Haas 2017)

being “smart on crime” as a response to these “tough on crime” measures. One of the most promising alternatives to incarceration is problem solving courts. These are specialized courts that address specific crimes by focusing on treatment over punishment, with the aim of fixing the cause of the crime and reducing recidivism. This is in the interest of the offender as well as public safety. These courts employ experts and social workers who work closely with a judge or parole officer, instead of relying solely on law enforcement agents, to supervise and lead the offender through the court to rehabilitation. There are different problem solving courts designed to address different crimes, but the most prevalent is the drug court, whose low costs and high efficacy boast a 221% return on investment."[128]

III. Influence of Religion on Politics

In the United States, Christianity has had the most significant influence on positive law and policy. Though Christian scripture advocates for forgiveness and compassion, Christians in the United States tend to support harsher punishment for criminals, and many use their religion to justify these more punitive attitudes toward punishment. David Garland, a crime and punishment sociologist, explains that attitudes about punishment are largely influenced by the culture of a country, in which religion plays a critical part. Garland notes that due to the strong evangelical influence on American punishment ideology, certain crimes and behaviors are often seen as deserving of harsher punishment.

IV. Significance of the Issue

Decades of putting trust and resources into ineffective, expensive, and counterintuitive responses to crime with the goal of punishment instead of problem solving has put a strain on the United States. There are multiple research-informed, evidence-based methods of rehabilitation, alternatives to incarceration, and reform that could ease this strain and benefit those on both sides of the criminal justice system. However, the moral opposition to the shift from a predominantly punitive response to crime that many Christians in the

[128] (Bhati, Roman, and Chalfin 2008)

United States advocate for maintains resistance against this progress. Christian traditions have influenced the affairs and ideologies of the United States from its conception; thus, Christian values also influence the United States and many of its voters who may not necessarily identify with the religion. Because of this influence on moral ideology, politics—and therefore policy—are also influenced to reflect these sentiments. A study from 2020 found that within the religious community, 68% of American Christians and 89% of white evangelical Protestants believe that the Bible should influence laws "at least some." Regarding Americans in general, 49% of Americans believe that the Bible should "have at least some influence on U.S. laws" and 23% believe it should "have a great deal of influence." This study reveals that a significant portion of Americans—not just Christian Americans—not only want U.S. laws to be influenced by Christian religion but also acknowledge this desire. Additionally, 68% of white evangelical Protestants and about 50% of black Protestants believe that "the Bible should take precedence over the people … even if that means going against the will of the American people." Thus, research on Christian view of criminal punishment policy is valuable to advocacy for "smart on crime" policies and changing the way people think about punishment, its goals, and alternative responses to crime in the United States.

V. Methods

To gain insight on how Christians perceive criminal culpability, I interviewed Texas legislators, asking them questions about their views on criminal punishment policy and their religious beliefs. Out of 27 requests, I secured three interviews, one with a Republican representative on the corrections committee, another with a Democrat representative on the corrections committee, and a final one with a Democrat representative on the criminal jurisprudence committee.

Each legislator was asked these questions:

1. What kinds of criminals deserve harsher punishment and what kinds deserve leniency, reduced punishment, or even forgiveness?

2. What is the relative importance of a criminal act and the culpability or responsibility of that act?
3. Which kinds of laws need to be upheld in the strictest manner?
4. Obedience is an important theme in the law. What kinds of situations, if any, would make it okay for one not to obey the law? Are there any extenuating circumstances?
5. Do you consider yourself religious? If so, do you identify with a certain denomination?
6. Do you think the Bible (or your religious text) is up for interpretation or is everything it says literal (or somewhere in between)?
7. In achieving salvation, is it more important to be obedient to God and his commandments or to have a relationship with him?
8. To what extent do you think your religious beliefs influence your views of criminal punishment policy?
9. What types of crime are most offensive to your values?

VI. Findings

The three legislators that I interviewed differed in religiosity and in adherence to traditional ideals of their respective political parties. The first legislator was a non-denominational Christian Republican. For the purpose of keeping their identity confidential, I will refer to this legislator as "RR" for "Religious Republican." The second was a Democrat who identified as a non-denominational Christian member of the Church of Christ. I will refer to this legislator as "RD" for "Religious Democrat." The last was also a Democrat, not religious but still spiritual, and a member of the Methodist church. I will refer to this legislator as "SD" for "Spiritual Democrat."

When asked which kinds of criminals deserve harsher punishment and which kinds deserve leniency, RR explained that those who commit crimes that "deprive lawful citizens of their life and property" deserve harsher punishment while crimes that do not "directly impact someone else" or deprive one of their "life or liberty"

should be seen as "lesser offenses." The goal is to protect "individual liberty."

SD answered similarly, stating that victim crimes—crimes such as murder, sexual assault, and robbery—are more punishable because the goal of punishment is to "protect other life" by incapacitating harmful individuals in the interest of "community safety." SD explains that "issues of arrest and mitigation (of punishment)" should be considered with regard to leniency, giving the example of a crime of passion being different in nature than a murder in cold blood. Thus, these two crimes should be handled differently when deciding appropriate punishments for them.

RD answered that there certainly need to be consequences for "crimes committed against humanity" but that this was a complex question because, from a religious point of view, "'deserve' is a pretty striking word" because no one gets exactly what they deserve due to salvation and grace. There must be reasonable, established laws to hold offenders responsible for their crimes, but administering punishments according to what they truly "deserve" is a deeper and more complicated question.

When asked which was more important, a criminal act or the criminal responsibility or culpability of that act, RR responded that generally the most important thing is to first determine if the offender committed the crime, but it is then important to evaluate the mens rea to find out if there was "really an intent and a culpability to violate a law." RR gave the example of a hiker encountering a sudden blizzard and accidentally walking through a preserve. The hiker's disorientation and lack of knowledge that he walked through a preserve means that he did not have a criminal "state of mind" and was not aware that he was breaking the law or intended to do so. This state of mind is something that "should be highly, highly considered."

RD stated that the two are "tied to each other." Because "an individual must be accountable for what they do," their culpability for committing the crime is "something that we all have to accept." However, RD acknowledged that there are instances in which people are unaware that they are committing a crime and "consideration should be given for that if it (can) be proven that it was not something they intended to do" or "premeditated." RD also brought up how one

can be affected by their environment, including their childhood and the home they grew up in, but maintained their point that these factors "should be considered; however, culpability and the actual criminal activity, the deviant act, must be addressed as well" because "someone has to take ownership for it." Thus, despite these possibly mitigating factors, the offender still must be criminally responsible for their act because, "at the end of the day, we cannot, as a society, punish (parents) for things that their adult children have done."

SD answered that the responsibility of the act was more important than the act itself and acknowledged the difference between an offender whose perception of other people is dangerous because they "(do) not have consideration for other life." This differs from an offender who commits an act such as murder for which the reason is "totally different," such as a crime of passion or self-defense, or a battered woman that has "finally lost it." The responsibility of the crime comes down to mitigating factors and reasoning for committing it, defining the importance of, and the need for, punishment in each specific case.

Regarding the laws that need to be upheld in the strictest manner, RR mentioned the 3G crimes in the Texas criminal code, which include "murder, assault, manslaughter, sexual assault, (and) human trafficking," statutes that "directly result in—possibly mentally but at least physically—having (one's) right to life" or "property impaired by the offender."

RD used this question to voice their concern about the United States' challenge of having "judgment in which there is disparity within sentencing for individuals." They explain that "all laws are important, but disparity in sentencing is even more important" because our laws cannot be just if the way that we administer them are not just. Due to biased judgment, "(ensuring) that our sentencing is consistent" is something we "really have to focus on" to prevent individuals from being subjected to harsher sentences because of the type of person they are. RD also mentioned the importance of "(seeing) humanity in" the individuals that are unjustly sentenced in this way.

SD equated this question to the concept of "strict liability," where an offender is held liable despite any extenuating circumstances, mitigating factors, or intent. SD said this should work in the interest of

"victim protection," specifically vulnerable victims, and apply to crimes such as human trafficking and child abuse.

When asked what kinds of situations, if any, would make it okay for one not to obey the law, RR said it would be morally acceptable to disobey a law if it was unconstitutional, due to the law's unlawful and thus immoral nature. However, this disobedience would still come with the cost of punishment until the offense could be adjudicated in court.

RD brought up the fallibility of the law once again, stating that "the law can sometimes be imperfect, so we need thoughtful people" establishing laws that "really comport with the spirit of humanity." Humanity is defined here as "a respect for the origins of the almighty" so that "we can live according to that spirit."

SD said again that there absolutely are extenuating circumstances that should be considered, explaining that there are two different kinds of law: Malum Se and Malum Prohibitum. Malum Prohibitum is an administrative law such as requiring one to stop at a red traffic light. Malum Se is a crime of "moral turpitude," such as laws that prohibit "stealing, beating your parents, (and) murder." SD stated that administrative law is important, but one should be able to use their judgment in obeying these laws, giving the example of running a red light to get to a hospital if one's mother had a stroke in the car. These kinds of extenuating circumstances are "the reason that we have discretion within prosecution." SD argued that in prosecuting offenders of any law, one must take into account the intent of the law and decide whether prosecuting the offender would "effectively serve justice."

For the fifth question about religious identity, RR simply answered that they were a Christian that did not currently identify with a denomination. SD answered that they were Methodist but did not consider themselves religious. They explained that they were spiritual, however, and that they were not "driven by" religion or church but rather by their personal faith and relationships with other people. RD stated that they were non-denominational and a member of the Church of Christ but explained that the book of James talks of how "true religion is taking care of the orphans," "visiting those in prison," and "taking care of the widows." RD then equated a person proclaiming

their religiosity to proclaiming their humility, stating that if you have to tell people, then you are probably not truly religious or humble; "one's activities" and "practices in life would define that."

The next question was "Do you think the Bible is up for interpretation, or is everything it says literal?" RR answered, "I think it's literal. Not up for interpretation." RD explained that if one is to be completely obedient to God and his word, then they cannot be the judge of how to interpret the Bible. On the other hand, SD said that it is "totally up for interpretation" and that messages of the Bible "can be manipulated by the wrong folks for the wrong reasons."

Following on from the previous question, I asked each legislator "In achieving salvation, is it more important to be obedient to God and his commandments or to have a relationship with him?" RR took a long pause before answering and finally stated that these things are "one in the same," but then said, "I would say a relationship (is more important.)" RD referenced a story in the New Testament in which Jesus was talking of the importance of obeying God's commandments and gave the conditional clause of what love is, saying those who love him will keep his commandments. Thus, RD stated that "a relationship with Christ is incumbent to (loving him)" and that they are "interconnected." "You cannot keep his commandments and not love him, and you cannot love him without having a relationship with him." SD only answered, "I think probably a combination of both."

When asked to what extent the legislators thought their religious beliefs influenced their views of criminal punishment policy, RR said "I think it influences it greatly." RD explained that their religious beliefs influence their views of criminal punishment policy from a perspective of trying to be more preemptive—loving people enough to try to keep them from having to experience punishment and deal with the consequences of disobeying laws before it happens.

SD said that their moral teaching, rather than their religious beliefs, influence their views of criminal punishment policy and that faith, teachings from parents and grandparents, right and wrong, personal experiences, and lessons from church all "factor into a moral compass." They also claimed that age changes one's moral compass, as their "beliefs and judgements" are "totally different" than they were at 25. Thus, "your life experience is also key to your interpretation of criminal justice."

To the question of "what types of crime are most offensive to your values," RR answered crimes against children, crimes against

those who cannot protect or defend themselves, crimes against senior citizens, and crimes against the physically or mentally challenged.

Similar to RR, SD answered that "true offenders of vulnerable individuals or animals" and "offenses against vulnerable humans" were most offensive to their values. However, SD mentioned the possibility of sympathy in sentencing, stating they "have little room for" the sexual assault of a child. Although, if the offender was also sexually abused as a child, SD has some level of compassion for a person who is "both a victim and offender." In cases such as these, it may be more beneficial to handle the offender and their punishment in a different way.

	RR	**RD**	**SD**
Abortion	Against	In favor	In favor
Death Penalty	Supports death penalty but advocates for reform • Advocated for increased funding for quality defense representation • Advocated to let spiritual advisors in execution chamber	N/A	N/A
Drugs	• Voted to expand services for substance use disorders • Voted to decriminalize marijuana for personal use	• Voted to expand services for substance use disorders • Voted to decriminalize marijuana for personal use	• Voted to decriminalize marijuana for personal use
Homelessness	Voted to criminalize homeless camping	Voted against criminalizing homeless camping	N/A

Immigration	Voted for a law that increased enforcement of immigration	N/A	N/A
Same sex marriage	Against	In favor	In favor
Gender	Voted against bill requiring equal pay for women	N/A	N/A
Religion	Signed bill allowing child welfare services to turn away adoption seekers based on religious beliefs or being LGBTQ	N/A	N/A
Increasing Penalties	• Voted **to** deny bail to offenders accused of violent crime • Voted **to** inflict penalties on cities that reduce police funding • Voted **to** increase criminal punishment for "knowingly blocking an emergency vehicle" • Voted **to** increase penalties for	• Voted **against** inflicting penalties on cities that reduce police funding • Voted **against** increasing criminal punishment for "knowingly blocking an emergency vehicle" • Voted **against** increasing penalties for pipeline protesting	• Voted **against** denying bail to offenders accused of violent crime • Voted **against** inflicting penalties on cities that reduce police funding • Voted **against** increasing criminal punishment for "knowingly blocking an

	pipeline protesting • Voted **to** increase penalties for misrepresenting a child's identity at port of entry	• Voted **to** increase penalties for misrepresenting a child's identity at port of entry	emergency vehicle" • Voted **against** increasing penalties for pipeline protesting • Voted **against** increasing penalties for misrepre-senting a child's identity at port of entry.

VI. Discussion

RR claims to be religious and that religious views influence their criminal punishment policy "greatly." However, this is not entirely evident. They answer that the crimes most offensive to their values are those against people who cannot defend themselves, and they believe that criminals that "deprive lawful citizens of their life," "property," and "liberty" deserve harsher punishment, stating that the goal of law and punishment is to preserve "individual liberty." RR claims that disobedience of the law is justified if the law is unconstitutional. Thus, according to their answers, RR's views of policy are more aligned with traditional American values and ideologies of the Republican party than they are with concrete religious principles. This could be the result of conflating religious principles with American principles, including those of the Republican party, which would corroborate previous research on the influence and amalgamation of Christian and Republican or American ideologies. Furthermore, RR answers questions in terms of the law instead of moral principle. They also answered the question of what kinds of laws need to be upheld in the strictest manner with the lawful answer, which is Texas' "3G crimes." RR cites the law and their political ideologies, claiming that religion "greatly" influences them, without explaining how or why it does, leaving this link somewhat arbitrary.

They seem to primarily use Christianity to justify their views of law and punishment, but they are not necessarily directly influenced by it, or inextricably linked as they are in RD's approach.

RD is the most religious participant based on the information I gathered from the interviews, involving religion regardless of whether the question asks about it. They are firm in their faith , while still being open to the possibility of these beliefs changing as they learn and grow. They claim that Christianity influences and inspires their views of criminal punishment policy and their work as a legislator. RD's policy is largely inspired by this spirit of "true religion" rather than political ideologies. However, RD acknowledges that it is not possible to stop all crime before it happens, so in practice, there must be punishment.

To SD, the purpose of punishment is incapacitation with the goal of public safety. In determining punishment, they ask the question of who the community needs to be protected from, and whether incapacitation will be productive for the community and for the offender. SD takes a more practical stance on punishment than the other two legislators. This could be becauseSD is less guided by theoretical moral codes and ideologies from religion and political party affiliation, and more so by logic, experience, and useful pieces of religious doctrines. Thus, SD uses punishment to uphold the value of public safety by relying on the benefit of incapacitation.

The aim of this discussion is to identify trends within these three legislators' answers, assessing how the similarities and differences between their answers relate to their beliefs of religion and punishment, legislation they have supported and opposed, and previous research on the subject. Though the following trends are not generalizable, they may serve as a framework or inspiration for future studies.

The three legislators included in this study fell on a religious and political spectrum. RD seemed to be the most religious, SD was the least religious (rejecting the term religious altogether and labeling themself as only spiritual), and RR fell in the middle of the two. SD was the most left-leaning in terms of policies they supported and leniency. RR, the only Republican, was the most right-leaning, and RD fell in the middle of the two. These placements do not reflect the

findings of previous research that indicate that more religious Christians tend to be the most punitive; if this were true, RD would be more punitive. This is not the case, however, as RD voted against increasing penalties for almost all offenses surveyed. RD also voted for the decriminalization of marijuana for personal use and voted against criminalizing homeless camping. However, RR voted in favor of increasing or inflicting penalties for offenses in every bill included in the chart with the exception of their vote to decriminalize marijuana for personal use. Therefore, if the participants' punitiveness is influenced by their religion in any way, there must be another factor within their religious views that has a stronger effect on their views of punishment policy and culpability than degree of religiosity.

Previous research found that one's perception of God is an important indicator of their attitudes toward punishment; a loving and forgiving view of God predicted a forgiving attitude and a harsh, judgmental view of God predicted a punitive attitude. The findings of my study did not fully reflect this relationship; none of the participants had a harsh view of God, so this could not be the reason for any punitive attitudes. However, RD had the most loving view of God, citing God's love and grace multiple times. SD stated that they view God as "loving, patient, kind, (and) forgiving," while RR only viewed God as "forgiving" and never mentioned the concept of love or grace throughout their interview. The two legislators with the more loving views of God held more forgiving and lenient attitudes toward punishment. However, these findings do not corroborate previous research, as the legislator with the most loving view of God was not the most lenient or forgiving.

The concepts of "us vs. them" and "the other" may play a role in the views of the legislators, but not how previous research exactly anticipated. RD, the most religious participant, did not see any other group or group's values as against theirs, with the exception of fellow Christians who do subscribe to this "us vs. them" ideology by using their religion to justify judgment toward people unlike themselves. However, the other religious participant, RR, did show signs of this ideology in their voting patterns, as they voted to criminalize homeless camping and increase penalties for immigration offenses. They also voted against a bill requiring equal pay for women and they do not

support same sex marriage. Most significantly, they signed a bill allowing child welfare services to turn away families seeking to adopt based on reasons of conflicting religious beliefs, including subscribing to another religion or identifying as a member of the LGBTQ+ community, even though they claim their aim is to support "individual liberty." The least religious participant, SD, did not show any signs of this ideology. Because this ideology is only present in a religious participant but does not apply to both of them, there may be merit to this finding, but there must be some factor that differentiates the two religious participants, making one more inclined to hold a harsher view toward outsiders.

One factor that differentiated the religious participants from the non-religious participant was biblical literalism. This has been found in previous research to strongly predict more punitive attitudes. SD thought that the Bible was "totally up for interpretation," while the other two thought that it should be taken literally, seemingly affirming this finding as this belief separates the least punitive legislator from the two more punitive legislators. However, though RD is more punitive than SD, they are still significantly less punitive than RR, even though RD and RR both make an equal claim that the Bible should be understood literally. RD may even arguably take the Bible more literally, as their values are drawn directly from the Bible and less influenced by outside ideologies, as are those of RR. Therefore, there must be a deeper, more explanatory factor within the concept of Biblical literalism that explains the difference between the two religious participants who claim to value this factor.

Another important factor from previous research that this study corroborated is the Christian importance of individual responsibility. This refers to the responsibility of the individual to refuse sin and atone for sin when one commits it. It is an individual's responsibility to answer for an offense, rather than a flaw in a system or institution, an adverse situation, or other outside influences. This concept also separates the religious participants from the non-religious, as SD cited many times the shortcomings of laws and institutions, along with the idea that there are many crimes for which it may not be productive to hold the offender responsible. They asserted that it was the "responsibility of the act" and "not the act itself" that was more

important, and what determined responsibility for an act was practical assessment of mitigating factors, extenuating circumstances, and productivity of punishment regarding not only public safety but also what it would do for the offender. However, RD and RR disagreed. RD explained the need for just laws and institutions and stated that mitigating factors such as a difficult childhood should be considered, but still they maintained that "deviant behavior should not be acceptable" and "an individual must be accountable for what they do," because "at the end of the day, we cannot as a society punish (parents) for things" that their children have done themselves. The only exception to this responsibility is if the offender had a lack of mens rea, being "unaware" that they committed a crime. RR never considered mitigating factors or extenuating circumstances outside of complete lack of mens rea or based on unconstitutionality. They provided the example of a hiker encountering a blizzard and unknowingly walking through a preserve as an answer to when a person should not be held responsible for a crime, which is an instance of lack of criminal intent that is very easy to agree with. This is considerably different from SD's mention of mitigating factors that, for many people, are tougher to sympathize with, such as factors that would excuse a murderer or thief from responsibility. RR only mentioning concrete mens rea indicates that, to them, the question of responsibility lies in the question of mens rea; otherwise, a person who commits a crime is criminally liable for it, reflecting the view of RD. Thus, responsibility of the individual does appear to be an important principle held by the more religious that seems to directly influence their views of criminal culpability.

In assessing each legislator's beliefs regarding the purposes and goals of punishment, along with which offenders and crimes they believe are more deserving of punishment and leniency, I found that rather than having one view of culpability, each legislator's explanation implied two forms that transcended the bounds of the theories of culpability and deviance cited in the literature review. These implied forms were a theoretical form regarding culpability in principle, and a realistic form regarding culpability in practice. I will call these two forms theoretical culpability and functional culpability.

In theory, how RR views culpability relies on whether the offender actually committed the crime or not. Thus, their view of theoretical culpability is that a person is responsible for a crime if they committed it. However, in practice, RR asserts that mens rea should be "highly, highly considered" to determine if there was "really an intent and a culpability to violate a law." Therefore, RR's view of functional culpability is that a person is responsible for a crime if they meant to commit it. In other words, to RR, functional culpability is the same as mens rea.

Theoretical culpability is less important to RD. When addressing "crimes committed against humanity," RD stated that this is a "complex question" because "the operative word is deserve," and coming from a religious point of view, "deserve is a pretty striking word" because no one gets exactly what they deserve due to "salvation and grace." Therefore, one cannot determine exactly what a person deserves because God's grace ensures that we know too little about this concept. To RD, every human deserves a punishment that we have not and will not receive. RD also mentions consideration of mitigating factors that employ a sense of sympathy but does not assert that they can be appropriately used to avert punishment in practice. As far as RD is concerned, we can only focus on functional culpability. Thus, like RR, RD's view of functional culpability is that one must answer for their offense if they committed it and intended to do so.

To SD, theoretical culpability is simply a question of whether one intentionally committed a crime, as this is how they see the spirit of laws "in a perfect world." However, because man-made laws cannot account for every possibility or uphold the spirit of justice in every situation, in practice, determining culpability is something different entirely. Thus, SD's view of functional culpability is that one is to be held liable for a crime if their disposition that led to the crime is a continuous threat to the public, and if their incapacitation would do more good than harm, satisfying the reason that the law was written in the first place.

SD's view of theoretical culpability is both RR and RD's view of functional culpability. This means that, when adjusted for practicality, the more religious participants' views of culpability become the less religious participant's view of culpability before this

adjustment. Thus, the more religious participants believe that, in practice, one must be punished for whatever offense they knowingly committed, regardless of any outside mitigating factors, and the less religious participant believes that these mitigating factors are more important to consider than any lack of disobedience. Besides views of functional culpability, the other values that the religious participants share are the importance of Biblical literacy and individual responsibility, both values that the less religious participant does not claim. Thus, the findings of this study indicate that more prevalent religious identities and stronger beliefs in individual responsibility both correlate with *stricter* views of culpability. Within those who had the most prevalent religious identities, higher Biblical literacy and Biblical application correlated to less *harsh* views of punishment and the other.

VII. Policy Recommendations

Each legislator involved in this study voted on at least one form of criminal justice reform in the interest of alleviating mass incarceration and senseless punishments for low-level crime. Though religious ideologies and the political ideologies they relate to may conflict with some of the logistics of "smart on crime" policies, each of the legislators' wishes that currently coexist with their religious beliefs would be satisfied through these smarter, less punitive policies. RR's goals of punishment, protecting individual liberty and the defenseless, would be honored by the implementation of "smart on crime" policies through the reduction of recidivism and future crime, along with the lessened burden on taxpayer spending. Smart on crime policies would also satisfy RD's wishes of stopping crime and preventing punishment before it happens, along with ensuring that those who do experience harsher punishment are the small percentage who are most fit for it and cannot likely benefit more through any alternative methods. SD's wishes of practicality and utility of punishment would be satisfied by "smart on crime" policies inherently. Based on the findings of this research, in order to more productively advocate for "smart on crime policies" to religious Christian populations, the point of future obedience, individual liberty, and

victim protection through the reduction of recidivism may be successful.

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Injustice by Design: Voluntary Intoxication in American Sexual Assault Litigation

Sarah McCathey Morton

This research projects finds that, as of 2022, twenty-nine of the fifty-one American jurisdictions analyzed (all fifty states and the District of Columbia) allow their courts to treat voluntary intoxication as an invitation to rape. This is due to the fact that, in the criminal justice system, there is a tendency to conflate the perceived decorum of the victim with the innocence or guilt of the perpetrator. This tendency produces a systemic failure to provide equal justice under the law to women who fall outside of the bounds of societal codes of propriety. This thesis demonstrates how, within current laws, there remain vestiges of the ancient objectives of rape laws, which were to protect women only insofar as they represented the violation of men's property. These sexual assault laws then interact with current societal rape myths and prejudices in ways that reinforce these biases and, in turn, perpetuate their inclusion in legal processes. This research finally demonstrates the ways in which the inconsistencies in states' laws and court decisions yield large inequities between the fifty-one jurisdictions and the ways they endeavor to protect victims of rape who voluntarily consume alcohol.

I. Introduction

On March 24, 2021, the American justice system failed. On this day, the Minnesota Supreme Court reversed a rape conviction and remanded the case for a new trial. Rape cases are indicted and then prosecuted based upon specific, often alternative, statutory language and the circumstances of the assault, which may include the age or capacity of the victim. A Minnesota jury had found the perpetrator guilty of rape "where the actor knows or has reason to know that the complainant is mentally impaired, mentally incapacitated, or physically helpless," a conviction that carries a sentence up to 15 years in prison, fines up to $30,000 and registration as a sexual offender. The conviction

was upheld by an appellate court.[129]However, the Minnesota Supreme Court reversed the case because the victim had voluntarily consumed alcohol before the crime.

The facts of the case were not disputed by either party. On the night of May 13, 2017, J.S. and her friend S.L. traveled to a local bar, where J.S. was denied entry by a bouncer due to her intoxication level. Khalil, along with two other men, then approached the pair outside of the bar and invited them to a party. After driving the group to a house across town, the girls arrived to find that there was no party. Due to her intoxication level, J.S. lay down on the living room couch and fell asleep upon entering the house. She woke up later to find Khalil raping her. She said, "No, I don't want to," to which he responded, "But, you're so hot and you turn me on." J.S. shortly, again, lost consciousness and woke up in the morning to find her shorts around her ankles. She found her friend in another room and the two contacted a rideshare to take them home.[1] During the car ride, J.S. confided in her friend about what had happened, and later that day, she went to a local hospital to a have a rape kit performed.

A few days later, J.S. contacted the Minneapolis police department to file a report. Following an investigation, the State charged Khalil with one count of third-degree criminal sexual conduct involving a mentally incapacitated or physically helpless complainant under Minnesota statute 609.344 subdivision 1(b).[1]At trial, the district court provided the jury with a possible finding of fact and a definition of "mentally

incapacitated": Mr. Khalil knew or had reason to know that [J.S.] was mentally incapacitated or physically helpless.

A person is mentally incapacitated if she lacks the judgment to give reasoned consent to sexual penetration due to the influence of alcohol, a narcotic, or any other substance administered without her agreement. During deliberations, the jury asked for clarification on the mental incapacitation component of criminal sexual conduct. The jury presented two potential readings of the definition of mentally incapacitated. The first interpretation defined mental incapacitation in a way that required J.S. be under the "influence of alcohol [J.S.]

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[129] State v. Khalil, 956 Minn 126 (2021).

administered herself or [the] influence of [a] narcotic J.S. administered herself or a thing administered [without] her agreement." The second interpretation required that J.S. be under the influence of "alcohol, narcotic or another substance [,] none of which having been administered with her knowledge."

Therefore, the jury questioned whether it was sufficient under the statute that J.S. had voluntarily consumed alcohol or whether Khalil (or someone else) had to have administered the alcohol to her without her agreement in order for her to meet the requirements of a mentally incapacitated person under Minnesota Statute 609.341 subdivision 7.[130] Despite the defense's objection, the district court indicated that the first definition was correct, asserting that "you can be mentally incapacitated following consumption of alcohol that one administers to one's self or narcotics that one administers to one's self or separately something else that's administered without someone's agreement."

The jury found Khalil guilty of third-degree criminal sexual conduct. Khalil appealed based upon the argument that the district court's definition of mental incapacitation was incorrect. In a divided opinion, the court of appeals rejected Khalil's argument and affirmed his conviction. Khalil appealed again and the case went to the Minnesota Supreme Court centered on the question about the meaning of "mentally incapacitated." The Minnesota law states: *"Mentally incapacitated" means that a person under the influence of alcohol, a narcotic, anesthetic, or any other substance, administered to that person without the person's agreement, lacks the judgment to give a reasoned consent to sexual contact or sexual penetration.* [131]

The Court was asked to determine if a person can be mentally incapacitated if they voluntarily consume alcohol. The state argued that "administered" only applied to the immediately preceding phrase "any other substance." Based on deliberation on the placement of a comma between "substance" and "administered," the Minnesota Supreme Court held that mental incapacitation requires that a person is "under the influence of alcohol…administered to that person without the person's

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[130] *Chapter 11 - MN Laws*, Minnesota Legislature, https://www.revisor.mn.gov/laws/2021/1/11/
[131] *Chapter 11 - MN Laws*, Minnesota Legislature, https://www.revisor.mn.gov/laws/2021/1/11/

agreement." Based on this holding, the Court reversed the decision made by the court of appeals and remanded the case back to the district court for a new trial based on this newly affirmed interpretation of mental incapacitation.[132]

In August 2021, Khalil avoided a retrial by pleading guilty to a fifth-degree criminal sexual conduct charge for "non consensual touching" of an intoxicated person's inner thighs and breasts with "sexual intent," which is a gross misdemeanor that only allows for up to one year of incarceration, instead of the felony charge that allows up to 15 years. As a result of this plea, he was released from jail.[133] The "mentally incapacitated" legislative framework exemplifies an injustice that has long been prevalent in sexual assault laws, processes, and outcomes in the American legal system and which, this thesis will show, remains pervasive in 29 of America's 51 jurisdictions (all states and the District of Columbia).

In the United States, rape is a crime governed by state law. Prior to the codification of state laws, the common law, developed by American courts, governed rape trials. Many of these courts treated intercourse with a victim who had been incapacitated by alcohol or drugs to be rape.[134] As states codified this common law into statutes, most state legislatures required that in order for drugs or alcohol to negate consent, they had to be administered rather than voluntarily consumed. In effect, a person gave blanket consent to any sexual penetration by engaging in the act of voluntary self-intoxication. Starting in the 1990s, state laws began to change, adopting in various forms of language the principle that an intoxicated person could not give valid consent to intercourse, no matter whether the intoxication was self-imposed or imposed by another person. These revised laws recognize what Minnesota law, as interpreted by that state's Supreme Court did not: that five shots of vodka and one pill of a prescription narcotic that are ingested voluntarily alter the mind and body in the same ways as they do if administered by another individual, and that the

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[132] *Thissen, J.* State of Minnesota in the Supreme Court. https://mn.gov/law-library-stat/archive/supct/2021/OPA191281-032421.pdf
[133] *Thissen, J.* State of Minnesota in the Supreme Court. https://mn.gov/law-library-stat/archive/supct/2021/OPA191281-032421.pdf
[134] *Thissen, J.* State of Minnesota in the Supreme Court. https://mn.gov/law-library-stat/archive/supct/2021/OPA191281-032421.pdf

victim's ability, or rather her inability, to consent to sexual intercourse is the same in both situations. However, in 2002, most states still had various forms of language to the effect that a person who voluntarily consumed alcohol or drugs to the point of incapacitation had deprived herself of the right to deny consent to sexual intercourse. The thesis reviews the current statute law on rape in 51 American jurisdictions to show that, in 2022, the injustice of voluntary intoxication equaling consent to sexual intercourse has persisted in 29 of those jurisdictions.

Part I contextualizes the paper's findings with a historical narrative of sexual assault law from its ancient origins to its modern application. In Part II, the paper reviews the influences that drive statutory variations through a socio-political lens, detailing how the influence of rape myths and gendered prejudices map onto the innerworkings of court cases and subsequently mold their unfortunate outcomes. Part III provides an evaluation of current rape law and if/how each state contends with voluntary intoxication within a sexual assault context. It will categorize states according to their varying methods and demonstrate how the histories and cultural views discussed in the first two sections continue to influence legal processes and outcomes so that they fail to effectively disincentivize sexual assault and ultimately deprive certain victims, particularly women, of justice.

Furthermore, the paper applies feminist theoretical frameworks that position sexual assault statutes as a consequence of misogynistic systems of belief and will therefore frame this phenomenon in light of women's attempts to interact with the legal justice system on par with their male counterparts. Thus, this thesis centers on situations of male-toward-female sexual misconduct and follows its analysis through this dichotomy. Although women and girls experience sexual violence at particularly high rates, men and boys are also impacted by sexual violence. Transgender and nonbinary individuals are especially vulnerable targets of sexual assault and research in this field is currently evolving to include more research into this area.[135] Hence, female presenting individuals are by no means the only targets of sexual violence, but given other groups' historical underrepresentation in societal framing of sexual assault, the shaping of sexual assault law is

[135] *Thissen, J.* State of Minnesota in the Supreme Court. https://mn.gov/law-library-stat/archive/supct/2021/OPA191281-032421.pdf

arguably guided by this same female-male dichotomy. Attention to the ways in which men and non-binary individuals experience American sexual assault law is integral to achieving a truly equitable justice system, but this paper pinpoints the implications of the female-male dynamic as the fundamental underpinning of the current condition of sexual assault law.

II. A History of Rape

Historical evidence demonstrates that sexual assault laws originated not to protect women as humans but to protect men's property rights in women, a fundamentally different legal objective.[136]

Therefore, an impediment in achieving truly protective moral rape State derives from the fact that the framework through which modern society contemplates sexual assault and its possible legal ramifications has been shaped by centuries of precedent antithetical to an unbiased, gender-equal form of criminal prosecution of men who sexually violate women.

Despite the recent evolution of rape laws, the prejudices that plague the justice system today are tied to rape's archaic legal origins. The first known rape law emerged in Babylon circa 1900 B.C.E. within the Code of Hammurabi. It instructed that "if a man force the betrothed wife of another who has not known a male and is living in her father's house and he lie in her bosom and they take him, that man shall be put to death and that woman shall go free."[137]Scholars Sally Gold and Martha Wyatt note that the phrase "and that woman shall go free" has interesting implications because the fate of the victim of an offense is not prescribed anywhere else in the Code. They argue that, in coordinated analysis alongside the two other instances in which this phrase appears, "shall go free" suggests that as the person to whom the goods – her virginity – were entrusted, is initially suspected of said crime. The true victim of the crime is the betrothed husband, as he is the rightful proprietor of the woman, and therefore that which he was

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[136] "Victims of Sexual Violence: Statistics." RAINN. Accessed April 19, 2022. https://www.rainn.org/statistics/victims-sexual-violence.

[137] "Sally Gold & Martha Wyatt. The Rape System: Old Roles and New Times. 27 Catholic Uni. L. R. 4, 696 (1978)

promised – a virgin bride – was stolen from him.[138] Because her actions in this scenario vindicate her of complicity, she is allowed to go free.

This trend appears approximately one thousand years later in a set of laws concerning rape outlined in The Book of Deuteronomy of the Old Testament. It states: If there is a girl who is a virgin engaged to a man, and another man finds her in the city and lies with her, then you shall bring them both out to the gate of that city and you shall stone them to death; the girl, because she did not cry out in the city, and the man, because he has violated his neighbor's wife. Thus you shall purge the evil from among you. But if in the field the man finds the girl who is engaged, and the man forces her and lies with her, then only the man who lies with her shall die. But you shall do nothing to the girl; there is no sin in the girl worthy of death, for just as a man rises against his neighbor and murders him, so is this case. When he found her in the field, the engaged girl cried out, but there was no one to save her.[139]

The woman raped in the field, like the woman in Babylon, can go free.[140] It was assumed that she screamed – her obligation in proving that it was indeed rape – and no one else was close enough to have heard her and intervened. It has been interpreted as giving her "the benefit of the doubt,"[141] language that again reinforces the notion that her complicity is assumed unless the conditions under which she was assaulted exonerate her of her suspected guilt. In contrast, the woman who was raped in the city is not given the same "benefit of the doubt" because the burden of whether a crime was committed against her rests within her responsibility – "she has the burden of proving her innocence."[142] Therefore in both of these contexts, the victim of sexual assault is put in a position where she has lost that which is owned by her legal possessor – her betrothed, her husband, her father. They are the victims, and it must then be decided whether she was complicit in this theft or not.

Centuries later, English common law, from which American law was later developed, shaped the legal concept of rape in strikingly

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[138] *Id.*
[139] "Deuteronomy 22:23-27." In *New American Standard Bible*, 1995.
[140] Gold & Wyatt, *supra* note 9.
[141] *Id.*
[142] *Id.*

similar ways to that of the ancient world. Rape was viewed as a crime against property rather than a person. It was established to protect the economic interests of men. The woman's reproductive ability, contingent upon her chastity, was considered property that was fundamental to the system of patriarchal inheritance.[143] Therefore, it was property to be passed from father to husband so as to create progeny that could continue the family line and thus inherit wealth.

Therefore, rape was still viewed as theft of property, with any violation of the woman extraneous.[144] From this system, American law established that rape consisted of male-female penetration by the use of force, which was proof that it occurred "against her will" and would later be defined as "lack of consent." In order to determine it was indeed against her will, the use of force needed to be established but also her resistance to said force had to be shown.[145] Like in the Book of Deuteronomy, evidence of her resistance (her scream and then physical abuse) is central to the jurisprudence. And as is present in the Code of Hammurabi, Deuteronomy, English Common Law and American law, focus on the actions of the woman – valuable in the appraisal of her purity in regards to morality, religion, or economic interests – is central to the fundamental understanding of the legal concept of rape.

This understanding further evolved from a common dismissal of the female voice due to women being viewed as property and without legal agency to consent or to have her word carry legal significance. This mistrust of the female voice also derives from a "centuries old" view of male and female roles in society as described by Michele Dauber, a law professor at Stanford University. The treatment of the two victims – and so many other sexual assault victims- in court is "a centuries old problem" of how men and women are viewed by society. It's indicative of the viewpoint that somehow men can't help themselves from committing sexual violence in certain circumstances. That the situation, that alcohol, that scantily-dressed women causes sexual violence – not predatory behaviour…In general our society has typically

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[143] Carol E. Tracy et al. *Rape and Sexual Assault in the Legal System* (2012).
[144] *Id.*
[145] *Id.*

seen women as temptresses and men as unable to contain their sexual impulses.[146]

Because of these biases, several procedural anomalies distinctive to rape developed. It required immediate complaint to law enforcement and that the victim's testimony be corroborated by objective testimony and/or proof of significant bodily injury. Because a woman's word lacked legal significance, the justice system needed additional proof. A review of the legal history of rape shows that the justice system expanded a woman's a lack of legal significance to a general lack of credibility and finally to distrust. Therefore, the legal system allowed for information about the character and past sexual history of the victim to be admitted as evidence and indorsed the act of providing "cautionary instructions"[147] to the juries before the start of a trial so as to warn them of the supposedly high rate of false rape accusations, which preset an atmosphere in the courtroom of her untrustworthiness. It is evident that despite progressive alterations to rape law, its history as a crime against property had shaped the way society could view rape. Cultural biases against women obviously originated the ignominious legal concept, but laws such as these perpetuated those beliefs and ingrained them in society as the legitimate, just way to handle the phenomenon. The fact that these special rules and requirements were unique to rape cases reinforced the obviousness that the actions of the victim were necessary in determining the guilt of the defendant.

For example, a judge in a 1977 Wisconsin sexual assault case commented about the victim's dress and its purported provocation of a 16-year-old girl's rape.[148] At trial, the judge declared that women should "stop teasing" and called for a "restoration of modesty in dress."[149] He further stated that "whether women like it or not, they are sex objects. Are we supposed to take an impressionable person 15 or 16 years of age and punish that person severely because they react to it normally?" Due to evidence of the defendant's guilt, the judge had to issue a conviction;

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[146] *Rachel Sharpe. How Drew Clinton shows Attackers still Favored.* The Independent (2022).
[147] *Id.*
[148] *Judge in Wisconsin Calls Rape by Boy 'Normal'.* The New York Times (1977).
[149] Theresa Lennon et al. *Is Clothing Probative of Attitude or Intent - Implications for Rape and Sexual Harassment Cases.*

however, because of his sympathy that the boy was simply reacting "normally," the judge only sentenced him to probation. Therefore, despite the centuries separating this Wisconsin rape case from those prosecuted under ancient Babylonian or English Common Law, the reasoning that women are objects naturally possessed by men and the rationalization that any perceived negligence on her part to properly comport herself in deterrence of males' possible aggression is a relevant, if not vital, element to the determination of a man's guilt persists explicitly today.

The Model Penal Code (MPC) is a further example that notions of rape from thousands of years ago have persisted and are present in legal theory as recently as 60 years ago. The MPC is a code that was drafted by the American Law Institute (ALI) to rationalize criminal law within the context of modern society and to create a logical structure through which criminal offenses should be defined under a consistent body of general values.[150] Published in 1962, the MPC defined rape as "sexual intercourse with a female not his wife" through force or the threat of serious harm. Under the MPC definition, rape did not constitute a felony in the first degree if there was not severe physical harm or if the victim had a voluntary social relationship with the defendant and had previously engaged in "sexual liberties."[151] Similar to ancient law, a woman's relationship to man, in this case her husband, was the relevant factor in denying any criminal culpability of her husband, and in the case of the "female not his wife," *her behavior*, evaluated with moral underpinnings, was viewed as a determinant in whether he indeed committed a serious crime. As in English Common Law, men's interests are protected.

Through an argument based on her past sexual history, he could not – or at least his guilt is lessened to a lower degree or perhaps even excused – because the actions that she had taken before the assault gave him the right to take those liberties with her again. As if her agreement to previous sexual contact implied a property-like right to her later, even if the advances then were unwanted. In robbery, a person may have previously extended generosities to another individual (perhaps to a friend/ voluntary social partner), but that person's generosity may stop,

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[150] *Model Penal Code Definition & Meaning.* Merriam-Webster (2022).
[151] Tracy et al. *supra* note 15.

and the receiver cannot claim further bounties without permission. If the previous recipient attempts to secure them anyway, it is defined as theft, which is the "appropriation of property…without the owner's effective consent."[152]

Society has advanced to the point where women are no longer supposed to be seen as property, which means that, instead, she is the possessor of both her body and consent, both of which she has the right to revoke. Implying that a previous agreement of an exchange negates the ability to commit theft breaks consistency with other legal models, which the MCP avowed to provide under the promise that such consistency characterized logical legal theory.

This is significant because the MPC is intended to influence state legislation.[153] Its sex crime frameworks are taught in law schools as the preferred common outline for drafting state laws and interpreting sex crimes.[154] Therefore, many state legislators – former law students– use the legislative theories behind specific statutory language proposed in the MPC to draft and promote similar language in proposed and supported legislation. Furthermore, the MPC is then used by judges – all former law students- to interpret and apply the language of state criminal codes.

However, the Model Penal Code has made significant, but incomplete, improvements in the last few years. For example, the 2021 MPC defines "Sexual Assault in the Absence of Consent" in Section 213.6 as when:

a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and
b) the other person does not consent to that act; and (c) the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present. Under this model, rape is no longer defined in

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[152] *Penal Code Title 7. Offense Against Property*. https://statutes.capitol.texas.gov/Docs/PE/htm/PE.31.htm.
[153] Lawrence K. Furbish et al. *Model Penal Code Sexual Assault Provision.* OLR Research Report (1998).
[154] Tracy et. al. *supra* note 15.

relation to the victim's legal relationships with men (i.e., husband or father).[155] However, the MPC does still outline

Sexual Assault of an Incapacitated, Vulnerable, or Legally Restricted Person (Section 213.3) in ways that are reminiscent of the same mindset that produced past laws – rejected now by much of academia and society – but still found in some state laws. The section currently (as of 2022) states that a person is guilty of sexual assault of an incapacitated person when:

a) the actor causes another person to submit to or perform an act of sexual penetration or oral sex; and
b) he act is without effective consent because at the time of the act, the other person:
    i. is sleeping, unconscious, or physically unable to communicate lack of consent; or
    ii. lacks substantial capacity to appraise, control, or remember the person's own sexual conduct or that of anyone else because of a substance administered to that person, without that person's knowledge or consent; and the actor administered the incapacitating substance for the purpose of causing that incapacity or knows that it was surreptitiously administered by another for that person; and
    iii. the actor is aware of, yet recklessly disregards, the risk that the circumstances described in paragraphs (a) and (b) are present (emphasis added).

The section's Comment declares that an actor falls under Section 213.3, which includes incapacitation, vulnerable, and legally restricted, because the actor is aware of and disregards a substantial and unjustifiable risk that the specified circumstances are present. Proof of the conditions described in Section 213.3 make consent by the other person ineffective, even if that person's words or behavior, or the totality of the circumstances, would otherwise signify apparent consent as defined by Section 213.0(2)(e). As a matter of law, a person in one or more of the conditions described by this Section – such as sleep,

[155] The MPC also now uses gender neutral language to recognize that both men and women can be either the perpetrator or victim.

unconsciousness, physical or mental incapacity, or custodial status – lacks the capacity to give valid, effective consent.[156]

Therefore, Section 213.3 is concerned with those situations where the condition of the victim renders them unable to consent and, with one exception, does not require the defendant to have taken any additional action to ensure that the victim fell under this condition. The actor need not cause the victim to become "[asleep], unconscious, or physically unable to communicate lack of consent;" however it is a stipulation in 213.3(1)(b)(ii) that for intoxication to be protected under this statute, that intoxication had to have been administered "without that person's knowledge or consent." This same specification resulted in the injustice of the Minnesota case, *State v. Khalil*.

This thesis argues that this "administered" requirement, the consequence of gender discrimination against women, is grounded in thousands of years' worth of rape law. The concept of rape is inseparable from the fact that, even today, the woman's actions before, during or after the act often determine the guilt of the perpetrator, a feature of criminal law that is unique to sexual assault. The persistence of these biases and rape myths impacts how first responders, prosecutors, juries and judges enforce and interpret laws as well as how legislators choose to write them.[157]

III. Alcohol in American Rape Law

Alcohol plays a significant role in American social life. Even those who do not partake in its use are inundated with the images of the practice through social settings, television, and social media. It is widely consumed throughout college campuses, bars, house parties, the military and high school.[158] Specifically, romantic outings are often associated with some sort of alcohol consumption and a study by the University of Buffalo and University of Missouri found that couples drinking together "is clearly good for relationships." It reasoned that "individuals who drink with their partner report feeling increased

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[156] Ibid., 148
[157] Tracy et. Al. *supra* note 15, at 9
[158] Michal Buchhandler-Raphael. "The Conundrum of Voluntary Intoxication and Sex." *Brooklyn Law Review* 82, no. 3 (March 22, 2017). http://rd8hp6du2b.search.serialssolutions.com.,1038

intimacy"[159] because alcohol works as a mood enhancer and reduces social and sexual inhibitions.[160] Following this line of thinking, it is not surprising then that alcohol use has also become indelibly entwined with the widespread social context of "hookup culture," where individuals engage in sex casually with others without a committed relationship. One study even found that 64% of uncommitted sexual encounters followed alcohol consumption.[161]

Alcohol's omnipresence throughout social practices and norms occurs alongside, and is contrasted with, the generally accepted perspective and widespread media coverage of the negative effects of alcohol. This negative view of alcohol, especially the perception that excessive consumption of alcohol is inconsistent with the civility expected of a chaste woman, leads to the erroneous conclusion that voluntary intoxication is inconsistent with a lack of consent. Similar societal misperceptions about women, voluntary intoxication and consent affect perpetrators. Jennifer Hirsch and Shamus Khan, in the most extensive college campus study of sexual assault to date (conducted at Columbia University) found this same phenomenon. When Hirsch and Khan conducted focus groups with men and women, they noted a stark difference in the way the two understood assaults. When imagining rape, men thought of situations where the woman was screaming "no" and using intense force to fight him off.[162] Therefore, it was likely difficult to understand that the sex they had with a partner could have also been rape if she was too intoxicated to have consented. When women operate outside of the alcohol-free, chaste woman framework and embody their sexual agency, it can be mistaken by their partners as consent.[163]

These same erroneous perceptions of voluntary alcohol consumption and consent to sex also affect victims of rape. Hirsch and Khan tell Luci's story, which reflects the mindset of a girl who began college with the intention of breaking loose of the very sheltered life she had at her elite boarding school in Thailand. She started her freshman

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[159] Kathleen Weaver. "Alcohol and Romantic Relationships: A Good or Bad Mix?" University at Buffalo, December 7, 2010.
[160] Buchhandler-Raphael, *supra* note 33, at 1034
[161] Ibid., 1038
[162] Ibid.,11
[163] Ibid., 8

year eager to lose her virginity, meet people, and party. After being raped by a senior that she met a bar, she admitted to blaming herself, along with him, for what had happened. Perhaps if she had not gotten drunk "maybe then he wouldn't have been so cavalier about how it was 'ok'?".[164] It can be argued that Luci's self blame is the consequence of a complex system of gender expectations, solidified by thousands of years of sexual assault law that focuses on her actions in the assault.

If Luci had come forward about her experience, her voluntariness to drink, coupled with her willingness to engage with some of his advances, likely would have been perceived as evidence against her allegations and in favor of consent. According to Michal Buchhandler Raphael in the article, "The Conundrum of Voluntary Intoxication and Sex," a widespread perception of the alleged effects of intoxication on a person's inclination to have sex is the belief that alcohol enhances sexual arousal and relaxes sexual inhibitions. Consequently, the perception is that people intentionally drink in order to achieve those effects and therefore intoxicate themselves with the intention of having sex.[165] These factors create the perilous conditions in which consent is viewed as having already been given with their decision to become intoxicated.[166]

Research confirms that women who choose to consume alcohol are perceived to be more sexually promiscuous than those who do not, which on one hand makes them targets for sexual assault, but is also seen as proof that they wanted to have sex and therefore their experience could not be labeled "assault." Every person is shaped by the beliefs and norms that circulate throughout their communities and so men are influenced by these socially propagated perceptions of alcohol, women and sexuality. Those men who choose to embody these beliefs are what cause this endemic. The moral judgment that should occur should not be on the fact that a person chooses to drink, but that a person would take advantage of a person who is drunk.

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[164] Ibid., 7

[165] Buchhandler-Raphael, *supra* note 33, at 1042

[166] Peter Giancola, Cheri Levinson, Michelle Corman, Aaron Godlaski, David Morris, Joshua Phillips, and Jerred Holt. "Men and Women, Alcohol and Aggression." Experimental and Clinical Psychopharmacology. U.S. National Library of Medicine, 2009.

However, these pervasive misconceptions, not only cause societal error in blame placement, but also cause police, prosecutors, judges and juries to do the same within the legal sphere. Antonia Abbey et al., in their work "Alcohol, Misperception, and Sexual Assault: How and Why Are They Linked?" argue that shared, pre existing belief and manner of sexual assault. Specifically, stereotypes and expectations around voluntary intoxication with alcohol or drugs, specifically by women, influence and are influenced by, how people, including those in the criminal justice system, perceive their peers.[167] And this is not an equally distributed influence, but one that accumulates as it moves up through the legal process. One major failure intersects at the moment a survivor of sexual assault makes the brave decision to report their experience to law enforcement.

There is a significant measure of discretion given to police officers in deciding which reports of sexual misconduct involve criminal conduct and therefore how many accused are even charged with sexual assault.[168] According to the Rape, Abuse & Incest National Network (RAINN), this number is as low as 16 percent.[169] Tracy et al. describe how police officers are allowed to interrogate those who come forward about sexual assault as if they are suspects. For instance, they can have them take undependable and often demeaning polygraph tests, and arrest or threaten to arrest them for alleged false accusations. This ingrained suspicion of false sexual assault reports originates from a history of rape where the initial assessment begins with the assumption that the woman, especially one that is voluntarily intoxicated, must have consented and thus must present proof to the contrary.

Then, prosecutors have the right to choose which cases are taken to court.[170] Scholars are particularly concerned by the ability of these

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[167] David M. Buss, Neil M. Malamuth, Antonia Abbey, Lisa Thomson Ross, Donna McDuffie, and Pam Mcauslan. "Alcohol, Misperception, and Sexual Assault: How and Why Are They Linked?" Essay. In *Sex, Power, Conflict: Evolutionary and Feminist Perspectives*. New York, New York: Oxford University Press, 1996.

[168] "The Criminal Justice System: Statistics." RAINN. Accessed March 24, 2022. https://www.rainn.org/statistics/criminal-justice-system.

[169] Peter Giancola, Cheri Levinson, Michelle Corman, Aaron Godlaski, David Morris, Joshua Phillips, and Jerred Holt. "Men and Women, Alcohol and Aggression." Experimental and Clinical Psychopharmacology. U.S. National Library of Medicine, 2009.

[170] Tracy et. al. *supra* note 15.

biases to come through because their "discretion is unconfined, unstructured, and unchecked."[171] Buchhandler-Raphael argues that this level of discretion allows for extralegal considerations to be made in prosecutors' policy-based decisions about which cases move forward to prosecution. Therefore, the aforementioned societally ingrained misconceptions about women and sexual assaults involving voluntary intoxication influence these decisions beyond a strict understanding of statutes and procedures, molding their part in the legal system in ways that find sexual assault victims' allegations to be deemed "unfounded" or "unsubstantiated." *45*

However, these biases not only affect law enforcement officers and prosecutors, but also the way that judges and juries view these types of cases. Studies find that jurors often perceive victims of sexual assault who had voluntarily been drinking with cynicism and tend to question the validity of their assertion that they did not consent to the sex. They also tend to hold the belief that voluntarily intoxicated victims had simply participated in sexual acts that they then regretted once sober and that these women were looking to "save face" for regretful sex rather than actual sexual assault. In *Rape Narratives in Motion*, Ulrika Andersson describes this type of phenomenon in which women who come forward after assault are perceived to be "cry[ing] rape' to conceal their own immorality" and thus "the position of the ideal victim presupposes ideas of 'worthiness,' where some groups are by definition afforded more authentic claims of victimization over others."[172] Gary Lafree and his colleagues conducted a study on 360 jurors and found that in cases in which there was a debate about whether the victim consented to sexual activities, any indication of alcohol, drug use, or sexual activity outside of marriage on the part of the victim caused jurors to doubt the defendant's guilt.

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[171] Buchhandler-Raphael, *supra* note 33, at 1044

[45] Ibid.

[172] Ulrika Andersson, Monika Edgren, Lena Karlsson, and Gabriella Nilsson. "Introductory Chapter: Rape Narratives in Motion." *Rape Narratives in Motion*, 2019, 1–16.

IV. Conclusion

As has been demonstrated throughout this paper, alcohol carries a complex set of implications in society and when overlayed by the long history of discriminatory practices in sexual assault cases (often imagined to be a female victim), a distinctly disturbing phenomenon arises. The "mentally incapacitated" legal category, when defined by a differentiation between voluntary versus surreptitious intoxication, exemplifies the vestiges of long outdated notions of both women and sexual assault. The prejudice that inhibits women from gaining their due justice inundated so many more facets of the criminal justice system than just the law; however, the law sets an example by which the rest of the justice system in a given jurisdiction must follow. The alterable characteristic of law embodies how the prejudice against women who have been sexually assaulted is not an unfightable, inevitable reality. During public outcry at the

Minnesota Supreme Court's decision in *State v. Khalil*, the Minnesota legislature changed its definition of "mentally incapacitated" to include under its protections of voluntary intoxication of rape victims. The American justice system did not fail in the Khalil case solely because it neglected to provide J.S. with justice, but because the outcome of this case exemplifies the consequences of a system in which certain women are not viewed as equally deserving of justice as others under the law. J.S. voluntarily consumed alcohol and her intoxication, and therefore the effects it had on her ability to consent, were seen as somehow leaving her less vulnerable than intoxication caused by the defendant without her knowledge. Although the outcomes of these situations are the same – the rape of an individual too intoxicated to be able to consent– the legal system concluded that the actions she took prior to meeting him lessened the intensity of the crime that he committed.

The focus on the behavior of the victim prior to the crime is a practice not applied in the prosecution of other criminal offenses. For instance, the crime of robbery is founded exclusively upon the perpetrator's actions and intent. Any conditions of the victim at the time of the crime, which may or may not have made her more vulnerable to targeting or achievement of the robbery, are not viewed as relevant in

the case.[173] However, this protection is not afforded to sexual assault victims. In fact, the legal system has a long history of putting emphasis on the character, behavior and words of a sexual assault survivor in order to determine if she did indeed somehow consent to the act and thus if a crime was actually committed.[174]Therefore, in a case attempting to determine whether or not the defendant is guilty of the accused crime, the victim finds herself on trial alongside him.[175] But, these laws have gone through several phases of change over the past few decades and have significantly improved since the archaic definition of criminal rape was first codified. And yet, vestiges of its antiquated origin as well as enduring influences of patriarchal and misogynistic views remain. Women who choose to drink and then are sexually assaulted are seen as partially culpable of the malice inflicted upon them. Thus, a woman who falls outside the patriarchal bounds of a perfect victim, a female who legally consumes alcohol on par with her male counterparts, a woman who fails to comport herself in a societally contrived civilized manner, is deemed less deserving of equal justice under the law.

All the above data demonstrates how, in the criminal justice system, there is a deeply ingrained mindset that the dichotomy between complainant and defendant is one in which there is an undeniably culpable offender and an "innocent victim, free of contributory fault or moral blame."[176] Under this system, structured by legal precedent that uniquely concentrates on the actions of sexual assault victims, the vast majority of women cannot exercise their right to a fair trial because they are held to a higher standard of victimhood that is determined by a gendered estimation of morality rather than by supposedly indiscriminatory law. Due to the knowledge that this prejudice exists both within the law and those meant to interpret it, many prosecutors have been disinclined to take on cases where the victim has failed to embody conventional perceptions of the blameless "perfect victim" that

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[173] *Penal Code Title 7. Offense Against Property*. https://statutes.capitol.texas.gov/Docs/PE/htm/PE.31.htm. [66]Tracy et. Al. *supra* note 15, at 5

[174] Gold & Wyatt, *supra* note 9, at 695

[175] Tracy et. Al. *supra* note 15, at 5

[176] Buchhandler-Raphael, *supra* note 33, at 1044

has fallen prey to an unsympathetic predator.[177] This shows a systemic failure to provide "equal protection of the laws"[178] to women who fall outside of the bounds of societal codes of propriety. Therefore, because these women are not only denied their justice but are often subjected to humiliation, skepticism and intense criticism, sexual assault law in this way works as a state-sponsored mechanism for the moral policing of women.

When women brave the many structural obstacles that attempt to bar them from holding their assaulter accountable, they should not make it over that grueling peak only to be met with unyielding, discriminatory legislation. In fact, ensuring that the law does not set a precedent of moral policing sets an atmosphere for the rest of the system to do the same. It is true that law is influenced by society, but society is also influenced by law. The research and theory have been demonstrated by many scholars to show that these biases exist and shape these types of laws and that both are frighteningly ubiquitous across the United States. Now it is time to change the laws to allow for society to continue to progress toward gender equity. The change in Minnesota's mentally incapacitated statute, in response to a societally recognized egregious outcome of outdated code, demonstrates that this change is indeed possible.

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[177] Id.

[178] "The Constitution of the United States," Amendment 14