

## **(FREE) WILL OF THE PEOPLE?: PERSONAL FREE WILL BELIEFS AND CRIMINAL LEGAL SYSTEMS**

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Do we have free will? There is no definitive answer to this question but studies can, and have, measured the impact of belief in free will on human attitudes and actions. This Comment investigates to what extent and in what ways personal notions of free will among a country's citizens affect their criminal legal systems. In studying the congruencies and departures from individual free will beliefs, I propose that countries with criminal legal systems that are responsive to public opinion on crime are more likely to align with the free will beliefs of their publics. This Comment begins by providing an overview on the debate between free will and determinism, provides a country-by-country overview of criminal legal systems and prevailing free will beliefs in those countries, and finally draws connections between individual free will beliefs, attributing moral blameworthiness, and the responsiveness of legal systems which reflect these beliefs.

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### I. INTRODUCTION

Are all the happenings of the universe—including you reading this sentence at this very moment—predetermined, or do we have free will? These questions have been considered and debated for centuries<sup>1</sup> and will not be resolved in this Comment. While there is not a definitive answer to the question of whether or not people have free will, studies can measure the impact of *belief* in free will on human attitudes and actions.<sup>2</sup>

Studies show that individuals encouraged to believe in personal agency are more likely to adopt a retributive mindset and support harsh sentencing for crimes.<sup>3</sup> Subjects primed to believe that we live in a deterministic world are less inclined to

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1. See generally MICHAEL FREDE, A FREE WILL: ORIGINS OF THE NOTION IN ANCIENT THOUGHT, 175–78 (A. A. Long ed., 2011) (noting that notions of free will first arose in first century and debates have continued since then).

2. See *infra* Section II.B for a discussion of studies about the effects of free will beliefs on attitudes toward criminal behavior.

3. See *infra* notes 4–7 and accompanying text for a discussion of the impact of priming on punishment recommendations. See also Emilie A. Caspar et al., *The Influence of (Dis)belief in Free Will on Immoral Behavior*, FRONTIERS PSYCH., Jan. 2017, at 1, 6–7 (finding that reading anti-free will passages led to fewer electrical shocks being administered by female participants).

attribute moral blameworthiness to criminal behavior.<sup>4</sup> They tend to be more lenient in criminal sentencing and less supportive of retributive punishment.<sup>5</sup> However, encouraging subjects to believe they lack free will has been associated with increased aggression, noncooperation, and antisocial behaviors.<sup>6</sup> Similarly, encouraging a belief in determinism has also been linked to a higher likelihood of cheating during problem-solving tasks.<sup>7</sup>

Studies examining the impact of free will beliefs on moral blame and punishment severity have focused on individual beliefs.<sup>8</sup> This Comment takes a departure by shifting its focus to the criminal legal systems within the countries where these study subjects reside. To what extent and in what ways do personal notions of free will among a country's citizens affect their criminal legal systems? To answer these questions, this Comment examines the extent to which people's free will beliefs (and their connection to attitudes about retributive punishment) align with criminal sentencing and the permissibility of the death penalty.

Studying similarities and distinctions between criminal legal systems around the world is a popular topic in comparative law.<sup>9</sup> This Comment considers these systems' congruencies and departures from individual free will beliefs and moral intuitions. On an individual level, people tend to believe in free will, attribute moral blameworthiness to crimes, and desire retributive punishment.<sup>10</sup> Countries with criminal legal systems that are responsive to public opinion are more likely to align with these individualized preferences, resulting in more punitive systems.<sup>11</sup>

This Comment begins by providing contextual information about the debate between free will and determinism, individual attitudes toward criminal behavior,

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4. Azim F. Shariff et al., *Free Will and Punishment: A Mechanistic View of Human Nature Reduces Retribution*, 25 PSYCH. SCI. 1563, 1567 (2014).

5. *Id.* at 1566.

6. See John Protzko et al., *Believing There Is No Free Will Corrupts Intuitive Cooperation*, COGNITION, Feb. 2016, at 7–8 (finding subjects became temporarily uncooperative and self-serving when primed with anti-free will passages); see also Roy Baumeister et al., *Prosocial Benefits of Feeling Free: Disbelief in Free Will Increases Aggression and Reduces Helpfulness*, 35 PERSONALITY & SOC. PSYCH. BULL. 260, 260–68 (2009) (finding subjects became less helpful and more aggressive when exposed to anti-free will messaging); see also Michael J. MacKenzie et al., *You Didn't Have to Do That: Belief in Free Will Promotes Gratitude*, 40 PERSONALITY & SOC. PSYCH. BULL. 1423, 1423–34 (2014) (finding subjects' gratitude diminished in favor scenarios where benefactor was perceived to have reduced free will).

7. Kathleen D. Vohs & Jonathan W. Schooler, *The Value of Believing in Free Will: Encouraging a Belief in Determinism Increases Cheating*, 19 PSYCH. SCI. 49, 53 (2008). *But see* Thomas Nadelhoffer et al., *Does Encouraging a Belief in Determinism Increase Cheating? Reconsidering the Value of Believing in Free Will*, COGNITION, June 2020, at 1, 11 (discussing failed replication of Vohs and Schooler's study because reading anti-free will passages did not alter subjects' cheating behavior).

8. See *infra* Section II.A for a discussion of studies about personal free will beliefs.

9. See generally *Library Guide for Comparative Criminal Law*, DALHOUSIE UNIV., <https://dal.ca.libguides.com/c.php?g=257128&p=1716986> (last visited Oct. 18, 2023).

10. See *infra* Section II.B for a discussion of studies about personal free will beliefs and their effect on attitudes toward criminal behavior.

11. See *infra* Section III.A for background on the criminal legal systems of the United States, China, Japan, and Sweden and their administrative responsiveness to public opinions on crime.

and free will and the law in Section II. Section II also provides definitions for theories of punishment and the paper's methodological reasoning. Section III provides a country-by-country overview of criminal legal systems, the treatment of various types of crimes, and prevailing free will beliefs within those countries. The researched countries include the United States, China, Japan, and Sweden. Section IV includes an analysis of Section III, discussing the interplay between criminal legal systems, their responsiveness to public opinion and free will beliefs, and the resulting treatment of various crimes. Section V touches on the limitations and recommendations outlined in this paper. Finally, Section VI proposes that countries with criminal legal systems that are responsive to public opinion on crime are more likely to align with the free will beliefs of their publics. Because individual free will beliefs favor attributing moral blameworthiness to serious crimes, responsive systems reflect these beliefs via punitive legal systems. This Section also suggests that countries with criminal legal systems less responsive to public opinions on crime are more likely to employ theories of punishment independent of their citizens' free will beliefs.

## II. BACKGROUND

This section defines the terms "free will" and "determinism" and provides context to the free will vs. determinism debate and its relevance to criminal law. It incorporates studies on free will beliefs and their impact on individual attitudes toward criminal behavior. Additionally, it outlines various theories of punishment and the paper's methodological reasoning.

### A. *Free Will Versus Determinism*

"Free will" lacks a universally accepted definition<sup>12</sup> and instead encompasses various topics including:

(1) moral agency and responsibility, dignity, desert, accountability, and blameworthiness in ethics; (2) the nature and limits of human freedom, autonomy, coercion, and control in social and political theory; (3) compulsion, addiction, self-control, self-deception, and weakness of will in philosophy and psychology; (4) criminal liability, responsibility, and punishment in legal theory; (5) the relation of mind to body, consciousness, the nature of action, and personhood in the philosophy of mind and the cognitive and neurosciences; (6) the nature of rationality and rational choice in philosophy and social theory; (7) questions about divine foreknowledge, predestination, evil, and human freedom in theology and philosophy of religion; and (8) general metaphysical issues about necessity and possibility, determinism, time and chance, quantum reality, laws of nature, causality, and explanation in philosophy and the sciences.<sup>13</sup>

Of these considerations, this Comment focuses on free will as the freedom to exercise personal agency and autonomy especially as it relates to blameworthiness and criminal liability.

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12. Robert Kane, *Introduction: The Contours of Contemporary Free Will Debates*, in THE OXFORD HANDBOOK OF FREE WILL 2, 3–4 (Robert Kane ed., 2nd ed. 2011).

13. *Id.*

The question of whether people have free will is no longer exclusive to philosophy. Psychology, biology, neuroscience, and behavioral sciences have joined the fray in search of answers.<sup>14</sup> The debate about free will centers around two questions: (1) is the world deterministic? and (2) if it is, can we reconcile free will in a deterministic world?<sup>15</sup>

For the first question, determinism is the idea that events and human action are predetermined—be it by fate, the gods, or science.<sup>16</sup> Some scientific advances have cut against determinism.<sup>17</sup> For example, quantum physics has shown that there is a component of randomness in this world that can never be predicted beyond probabilities.<sup>18</sup> However, other sciences continue to cast doubt on subjective notions of free will.<sup>19</sup> These fields lend support to scientific determinism, suggesting that human actions result from an amalgam of our environment, biological constraints, and neurobiology.<sup>20</sup> Neuroscientific studies aim to consider the question of free will through an objective lens, independent of human perception.<sup>21</sup> While the results of these studies provide compelling insight,<sup>22</sup> they are far from settling the debate.<sup>23</sup> The same studies that have been interpreted as suggesting that free will is an illusion have also been criticized as inadequately conducted or simply misinterpreted.<sup>24</sup>

Concerning the second question of whether or not we can reconcile free will in a deterministic world, one view—aptly termed “compatibilism”—argues that free will is compatible with determinism.<sup>25</sup> There are various versions of compatibilism, but the classical approach asserts that free will remains intact as long as people have the ability to do what they want to do and lack constraints, internal or external, that

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14. *Id.* at 29.

15. *Id.* at 5.

16. *Id.* at 4.

17. *Id.* at 5–6.

18. *Id.*

19. *See id.* at 8 (discussing various fields’ arguments against notions of free will); *see also* Nathaniel E. Anderson & Kent A. Kiehl, *Re-Wiring Guilt: How Advancing Neuroscience Encourages Strategic Interventions Over Retributive Justice*, FRONTIERS PSYCH., Mar. 2020, at 1, 4–6 (noting discoveries in biology, neuroscience, psychology, psychiatry, social, and behavioral sciences continue to push back against free will despite indeterministic developments in quantum physics).

20. *See* Farah Focquaert, *Neurobiology and Crime: A Neuro-Ethical Perspective*, J. CRIM. JUST., Nov.–Dec. 2019, at 1, 1 (acknowledging impact of brain structure and function, and hormone and neurotransmitter levels on criminal behavior).

21. *See* Kelly Burns & Antoine Bechara, *Decision Making and Free Will: A Neuroscience Perspective*, 25 BEHAV. SCIS. L. 263, 263–64 (2007) (discussing value of studying neural mechanisms to determine degree of personal autonomy).

22. *See* Kane, *supra* note 12, at 5–9 (discussing changing views on determinism in light of modern science).

23. *See id.* at 5–11 (discussing various doctrines’ views on debates regarding free will).

24. *See* Steve Taylor, *How a Flawed Experiment “Proved” That Free Will Doesn’t Exist*, SCI. AM. BLOG (Dec. 6, 2019), <https://blogs.scientificamerican.com/observations/how-a-flawed-experiment-proved-that-free-will-doesnt-exist/> (critiquing much-cited Libet study where EEG signals predicted participants’ movement before participants were subjectively aware).

25. Kane, *supra* note 12, at 9.

prevent them from doing so.<sup>26</sup> Compatibilist interpretations of criminal law assert that even though they are not responsible for the surrounding circumstances, criminals are still morally responsible for their actions.<sup>27</sup> One study found that laypeople are generally compatibilists: even when given hypothetical scenarios that take place in a deterministic universe, they still attributed free will and moral blameworthiness to criminal acts.<sup>28</sup>

Given the ever-evolving debate on free will and determinism, this Comment focuses on studies that approach free will from a different perspective. Instead of answering the question of whether people have free will, these studies measure the impact of people's *belief* in free will or determinism on human attitudes and actions.<sup>29</sup>

### ***B. Free Will Beliefs and Attitudes Toward Criminal Behavior***

Personal attitudes toward criminal behavior can be predicted by belief or lack of belief in free will.<sup>30</sup> A person who strongly believes in free will is more likely to support harsher punishments for criminals.<sup>31</sup> In fact, a person's belief in free will is a better predictor of support for criminal punishment than their religiosity.<sup>32</sup>

Although belief in free will is an indicator of intolerance for unethical behavior,<sup>33</sup> other factors also strongly impact attitudes toward unethical behavior.<sup>34</sup> One study concluded that countries with high "institutional integrity"—characterized by strong transparency in governance and uncorrupt public sectors—showed a correlation between free will beliefs and intolerance for unethical

26. *Id.* at 11–12.

27. See Adam J. Kolber, *Free Will as a Matter of Law*, in PHILOSOPHICAL FOUNDATIONS OF LAW AND NEUROSCIENCE 9, 10 (Dennis Patterson & Michael Pardo eds., 2016) (describing compatibilist view of criminal law from Stephen Morse and Paul Litton).

28. See Eddy Nahmias et al., *Surveying Freedom: Folk Intuitions About Free Will and Moral Responsibility*, 18 PHIL. PSYCH. 561, 566–68, 579–80 (2005) (reporting 76% of participants judged a man as acting of his own free will and 83% believed he was morally blameworthy when given hypothetical universe where supercomputers—that can predict all future actions with 100% accuracy—determine twenty years before a man is born that he will rob a bank; reporters found similar results where participants were given hypothetical scenario where one's beliefs and values are entirely caused by their genes and environment).

29. See *infra* Section II.B for a discussion of studies about the effects of free will beliefs on attitudes toward criminal behavior.

30. See Nathan D. Martin et al., *Free Will Beliefs Predict Attitudes Toward Unethical Behavior and Criminal Punishment*, 114 PROCEEDINGS NAT'L ACAD. SCI. 7325, 7329 (2017) (studying World Value Survey responses from 65,111 adults across forty-six countries regarding freedom of choice and self-determination that mirror FAD-plus questions).

31. *Id.* But see Cory Clark et al., *Free to Punish: A Motivated Account of Free Will Belief*, 106 J. PERSONALITY SOC. PSYCH., 501, 504 (2014) (finding that personal desire for retribution may cause individuals to support ideas of moral culpability and free will more strongly).

32. Martin et al., *supra* note 30, at 7326.

33. See *id.* at 7329 (distinguishing unethical behavior like tax fraud, government benefits fraud, transit fare avoidance, and bribery from behavior warranting criminal punishment).

34. See *infra* notes 35–39 and accompanying text for a discussion of other factors impacting attitudes towards unethical behavior.

behavior, where countries without these characteristics did not.<sup>35</sup> This suggests that countries with higher levels of corruption may “decouple” free will beliefs from their personal attitudes toward unethical behavior.<sup>36</sup> The reason for this may be that corruption-heavy countries tacitly incentivize citizens to rationalize unethical behaviors as a success strategy, or because widespread corruption may shift people’s “base rate” tolerance for certain unethical behavior, effectively normalizing it.<sup>37</sup> In general, high levels of institutional integrity and democratic institutions were associated with lowered support for harsher punishment.<sup>38</sup> This may be the case because democratic institutions tend to emphasize civil liberties and support the protection of criminal rights.<sup>39</sup>

Beyond merely observing existing layperson, free will beliefs, experiments designed to reinforce certain beliefs about free will can influence participants’ attitudes.<sup>40</sup> Reading scientific or philosophic passages that reinforce certain beliefs about free will results in increased participant cooperation and gratitude, but also a desire for retributive justice.<sup>41</sup> Similarly, reading scientific or philosophic passages that discourage free will beliefs and encourage determinism results in increased aggression in cooperative tasks, but also a leniency toward criminal behavior.<sup>42</sup>

Being faced with real instances of serious criminal behavior can also influence free will beliefs.<sup>43</sup> Outside of the laboratory environment, a higher incidence of homicide and other types of crimes is associated with stronger free will beliefs.<sup>44</sup> This suggests that greater exposure to crime taps into personal feelings of moral accountability and a corresponding desire for retribution.<sup>45</sup> In another study, even where participants indicated deterrence as an objective for punishment, their suggested sentences for hypothetical offenders did not reflect this belief.<sup>46</sup> Instead, participants’ decisions were consistent with prioritizing retributive punishment and the assignment of moral blameworthiness over deterrence of future crimes.<sup>47</sup> Although deterrence and retribution are not incompatible theories of punishment,<sup>48</sup> participants supported lengthier sentences even when informed that a shorter

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35. See Martin et al., *supra* note 30, at 7328 (noting that free will beliefs were not correlated with intolerance for unethical behavior in countries with lower institutional integrity).

36. *Id.*

37. *Id.* at 7325.

38. *Id.*

39. *Id.*

40. See *supra* notes 4–7 and accompanying text for a discussion of experiments that use participant reading to study effects of determinism and anti-free will beliefs.

41. *Id.*

42. *Id.*

43. Clark, *supra* note 31, at 507–08.

44. *Id.*

45. *Id.*

46. Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY SOC. PSYCH. 284, 295 (2002).

47. *Id.*

48. See *infra* Section II.D for a discussion of theories to justify punishment.

sentence would act as a sufficient deterrent for future crimes.<sup>49</sup> These studies provide insight into the malleability of free will beliefs and their impact on human behavior.<sup>50</sup>

### *C. Free Will and the Law*

The law does not generally make explicit reference to free will.<sup>51</sup> Instead, personal agency and responsibility associated with free will are implicit in crimes that require conscious and voluntary acts.<sup>52</sup> Specific intent—knowingly committing a crime with intent to cause a particular result<sup>53</sup>—is an element of many crimes.<sup>54</sup> Crimes that require specific intent are viewed as more morally blameworthy than crimes that involve mere negligence or recklessness.<sup>55</sup> Crimes with a specific intent element that are considered especially morally reprehensible—e.g., murder, rape, robbery—are punished severely. This is partially explained by psychology and the retributive theory of punishment.<sup>56</sup> Humans, beginning from when they are toddlers, seek retribution for wrongs committed.<sup>57</sup> There is a universal inclination to make the criminal “pay” for their wrongdoing.<sup>58</sup> Severe punishment for these crimes can also be explained by the utilitarian theory of punishment.<sup>59</sup> Severe punishment can also act as a specific deterrent for the offender, a general deterrent for others, and a public safety measure by incapacitating the offender.<sup>60</sup>

If people lack free will, what are the implications for criminal legal systems? Compatibilists, who believe that a deterministic world is compatible with moral responsibility, argue that retributive punishment is justifiable even without free

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49. Carlsmith et al., *supra* note 46, at 295.

50. *Id.*

51. Kolber, *supra* note 27, at 6–7. *But see* Wiebke Melcher, Free Will in Psychological Research: Considerations on Methodic Procedure and Reproducibility of Results (Mar. 18, 2019) (Ph.D. dissertation, Leuphana University of Lüneburg) (ResearchGate) (noting that free will is explicitly mentioned in German civil law).

52. Kolber, *supra* note 27, at 9.

53. *Specific Intent*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/specific\\_intent](https://www.law.cornell.edu/wex/specific_intent) (last visited Dec. 1, 2023).

54. Allan McCay & Michael Sevel, *Introduction in FREE WILL AND THE LAW: NEW PERSPECTIVES* 1, 2 (Allan McCay & Michael Sevel eds., 2020).

55. *Mens Rea*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/mens\\_rea](https://www.law.cornell.edu/wex/mens_rea) (last visited Dec. 1, 2023).

56. See *infra* Section II.D for a discussion of the overlap in theoretical justifications for punishment.

57. See Katrin Riedl et al., *Restorative Justice in Children*, 25 *CURRENT BIOLOGY* 1731, 1731–35 (2015) (discussing child-based study in which subjects frequently sought retributive punishments over other consequences and highlighting that notions of justice centered on harm to victims emerges early in life).

58. See *supra* Section II.B for a discussion of studies about the effects of free will beliefs on attitudes toward criminal behavior.

59. Steven A. Koh, *Geography and Justice: Why Prison Location Matters in U.S. and International Theories of Criminal Punishment*, 46 *VAND. J. TRANSNAT'L L.* 1267, 1303–04 (2013).

60. See *id.* at 1303–04, 1308–09 (describing deterrence and incapacitation theories of punishment).

will.<sup>61</sup> This is the dominant legal perspective,<sup>62</sup> reasoning that criminal responsibility is a practical response to an individual's subjective experience of personal agency— independent of the metaphysical debate surrounding free will.<sup>63</sup> Philosophers John Martin Fischer and Mark Ravizza offer a variation of compatibilism in criminal law, suggesting that a person's mental capacity and ability to think rationally are the relevant prerequisites for moral responsibility, not whether they have free will.<sup>64</sup>

Those who argue that the absence of free will would preclude moral responsibility are incompatibilists. Incompatibilists argue that in a deterministic world, a criminal legal system that relies on retribution as a rationale for punishment is inherently flawed.<sup>65</sup> However, even without free will, accountability for crimes is justifiable on non-retributive grounds.<sup>66</sup> For example, punishment can act as a deterrent for undesirable behavior and incarceration may be warranted on public safety grounds.<sup>67</sup>

#### **D. Theories of Punishment**

Justification for punishment generally falls into two camps: consequentialism and retributivism, with the most compelling criminal legal systems incorporating elements from both.<sup>68</sup> Consequentialism focuses on the outcomes of crimes and the effects of punishment in order to preserve social order.<sup>69</sup> Utilitarianism is a form of consequentialism that prioritizes maximal societal happiness.<sup>70</sup> Consequentialist and utilitarianist objectives typically include preventing future crimes by the offender (specific deterrence), deterring others from committing crimes (general deterrence), protecting the public from offenders (incapacitation), and treating offenders so they are less likely to reoffend (rehabilitation).<sup>71</sup> Rehabilitation emphasizes treating

61. See Kolber, *supra* note 27, at 10 (noting that individuals can be punished as responsible for their actions, even if they are not responsible for causes that make them act).

62. Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON 1775, 1777 (2004).

63. See Ariane Bigenwald & Valerian Chambon, *Criminal Responsibility and Neuroscience: No Revolution Yet*, FRONTIERS PSYCH., 1, 3 (2019) (arguing that debates regarding free will are irrelevant to questions of criminal responsibility).

64. See generally JOHN MARTIN FISCHER & MARK RAVIZZA, RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY (Gerald Postema ed., 1998) (overviewing theory of moral responsibility outlined by various philosophers).

65. See Greene & Cohen, *supra* note 62, at 1777 (outlining arguments incompatibilists make regarding moral responsibility and free will).

66. See *id.* at 1783 (acknowledging consequentialist approaches to punishment do not require belief in free will).

67. *Id.*

68. See MATTHEW C. ALTMAN, A THEORY OF LEGAL PUNISHMENT: DETERRENCE, RETRIBUTION, AND THE AIMS OF THE STATE 84 (2021) (finding best theories of punishment should incorporate both approaches).

69. See *id.* at 84–87 (detailing theories of legal punishments including consequentialism).

70. See *id.* at 2 (outlining theory of utilitarianism as derivative of consequentialism).

71. See *id.* at 1–2 (listing consequentialist methods for reducing crime); see also ROGER HOPKINS BURKE, PUNISHMENT IN MODERN SOCIETY 149–50 (2011) (specifying deterrence, incapacitation, and rehabilitation as utilitarian justifications for punishment).

offenders with the objective to reintegrate them back into society.<sup>72</sup>

Whereas consequentialism is forward-looking, retributivism looks backward.<sup>73</sup> In retributivism, blameworthiness makes the offender deserving of punishment.<sup>74</sup> With this “just deserts” approach, the offender’s guilt—not the injury caused—is sufficient to justify punishment.<sup>75</sup> Retributive punishment can also serve a utilitarian function by acting as a channel for public disapproval.<sup>76</sup> Beyond consequentialism and retributivism, victim-focused theories concentrate on repairing the harm caused by crimes through restorative justice, which “bring[s] together victims, offenders, and community members in order to address their different needs and attempt to repair the harm that was done.”<sup>77</sup> However, just as most criminal legal systems are a mix of consequentialism and retributivism, restorative justice includes characteristics of both.<sup>78</sup>

Multiple theories may justify the same form of punishment.<sup>79</sup> For example, capital punishment can be reasoned as a deterrent on consequentialist grounds and can likewise be justified as retribution by punishing an offender in proportion to their wrongdoing.<sup>80</sup>

### ***E. Methodology***

This Comment discusses the criminal legal systems and free will beliefs of the United States, China, Japan, and Sweden. It includes these countries based on the following characteristics: availability of studies on free will beliefs, cultural emphasis of collectivism or individualism, and types of political systems. These countries have available studies and commentary about cultural free will beliefs, some including Free Will and Determinism Plus (FAD-plus) scale criteria<sup>81</sup>—a tool commonly used for studying free will beliefs today.<sup>82</sup> Their emphasis on

72. See IAN MARSH ET AL., *CRIMINAL JUSTICE: AN INTRODUCTION TO PHILOSOPHIES, THEORIES AND PRACTICE* 17–18 (2004) (providing overview of rehabilitation).

73. See ALTMAN, *supra* note 68, at 84 (detailing differences between consequentialism and retributivism).

74. See MARSH ET AL., *supra* note 72, at 12 (outlining philosophical justifications for theory of retribution).

75. *Id.* at 13.

76. See ALTMAN, *supra* note 68, at 84 (explaining that punishment can express community’s reactive attitude of resentment).

77. *Id.* at 239; see also ROSS LONDON, *CRIME, PUNISHMENT, AND RESTORATIVE JUSTICE: FROM THE MARGINS TO THE MAINSTREAM* 315–16 (2011) (advocating for criminal justice reform to prioritize restoring material and nonmaterial losses caused by crime).

78. Compare ALTMAN, *supra* note 68, at 239, 240 (acknowledging restoration’s compatibility with retributive justice goal of communal renunciation of crime) with MARSH ET AL., *supra* note 72, at 23 (classifying restorative justice as rehabilitative practice).

79. See ALTMAN, *supra* note 68, at 84 (explaining that consequentialist and retributivist theories often arrive at similar punishments).

80. See *id.* at 213–37 (summarizing deterrence and retribution arguments in support of capital punishment and corresponding critiques).

81. See *infra* Section III.C for a discussion of country-specific studies on free will beliefs.

82. See Martin et al., *supra* note 30, at 7329 (explaining methods used to measure free will beliefs and moral judgments).

collectivism or individualism offers context to potential differences in personal free will beliefs per country. Their political systems provide a factor beyond personal notions of free will that influences national criminal legal systems.

When assessing free will beliefs for a given country, three factors will be considered: (1) legal, philosophical, and sociological research and commentary about free will beliefs, (2) laws regarding the permissibility of the death penalty and other punishments for violent crimes, nonviolent crimes with victims, and victimless nonviolent crimes, and (3) the studies regarding free will beliefs in the country, particularly those using the FAD-plus scale.<sup>83</sup> The first factor provides breadth, context, and support for legal analysis, and the latter two offer more objective metrics to anchor any commentary and conclusions to criminal proceedings and free will beliefs in practice. The crimes considered under the second factor include burglary, importing illegal drugs, and murder. The third factor includes studies on free will beliefs and the FAD-plus scale, a twenty-seven item questionnaire used to measure attitudes toward “free will and [three] closely related constructs: scientific determinism, fatalistic determinism, and unpredictability.”<sup>84</sup> The FAD-plus scale includes statements like “[m]y future has already been determined by fate,” “[p]eople must take full responsibility for any bad choices they make,” and “[b]ad behavior is caused by bad life circumstances.”<sup>85</sup> In this paper, alternative metrics for free will beliefs are examined where FAD-plus studies are unavailable.

### III. COUNTRY CRIMINAL LEGAL SYSTEMS AND FREE WILL BELIEFS

This section provides a country-by-country discussion of the United States, China, Japan, and Sweden. Each country’s subsection begins with a brief overview of the history, procedure, and ideological foundations of its criminal legal system. Second is a sampling of the criminal legal system in practice—specifically how that country punishes various types of crimes. The final subsection for each country summarizes and discusses the studies examining citizens’ free will beliefs.

#### A. Criminal Legal Systems

Criminal procedure in most of the world is a derivation or combination of the inquisitorial (civil law) system and the accusatorial (common law) system.<sup>86</sup> These systems are rarely seen in their extreme traditional models, with countries often taking characteristics from both.<sup>87</sup> The inquisitorial system involves one or more judges determining the guilt of the accused after an impartial investigation.<sup>88</sup> The accusatorial system involves an adversarial trial where the state attempts to prove

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83. See generally Delroy L. Paulhus & Jasmine M. Carey, *The FAD-Plus: Measuring Lay Beliefs Regarding Free Will and Related Constructs*, 93 J. PERSONALITY ASSESSMENT (2011) (describing development of FAD-plus scale for measuring lay beliefs).

84. *Id.* at 96.

85. See *id.* at 98 (using Table 1 to outline findings using FAD-plus scale).

86. CRIMINAL PROCEDURE: A WORLDWIDE STUDY xvii (Craig M. Bradley ed., 2nd ed. 2007) (overviewing two main approaches to criminal procedure).

87. See *id.* (detailing approach many countries take regarding criminal procedure).

88. See *id.* (outlining inquisitorial system of criminal procedure).

the defendant's guilt to an impartial party: a judge or jury.<sup>89</sup> Where the inquisitorial system is more efficient than the accusatorial approach,<sup>90</sup> it is criticized as offering government officials too much power in determining guilt.<sup>91</sup> Where the adversarial system provides defendants with a jury of their peers and additional procedural protections, the burdened system often requires defendants to waive their right to trial and resolve cases via guilty plea deals.<sup>92</sup> On a global scale, the trend is a convergence between the two models.<sup>93</sup>

### 1. United States

The United States has an adversarial justice system derived from English common law.<sup>94</sup> Alleged offenders are charged by the state, with the state compiling a case to prove the defendant's guilt beyond a reasonable doubt.<sup>95</sup> The criminal legal system in the United States ultimately varies by jurisdiction, with both state and federal laws and procedures.<sup>96</sup>

Of the countries discussed, the United States has the largest proportion of its population incarcerated, with 505 per 100,000 people incarcerated as of 2020.<sup>97</sup> The U.S. prison system has a population of 1.7 million, with more than one in five incarcerated persons being pretrial detainees.<sup>98</sup> The large proportion of non-convicted incarcerated persons is due to pretrial detention procedures, bloated court systems, and trial delays.<sup>99</sup> Despite its adversarial ideals, the burdened court system necessitates that most cases not go to trial.<sup>100</sup> Instead, defendants waive their right to trial by pleading guilty to a crime and negotiate a sentence with the prosecutor, pending court approval.<sup>101</sup> Often, a prosecutor with a weak case will offer a "highly favorable" plea bargain for a defendant—having them plead guilty to a lesser crime

89. *Id.*

90. *See id.* at xvii–xviii (noting inquisitorial approach does not require jurors, defense attorneys, or live witnesses).

91. *See id.* at xviii (noting in United States, where citizens often mistrust government, adversarial nature of trial is considered fairer); *see also id.* at xxiii (noting that adversarial system characteristics are gaining traction as societies become more diverse due to mistrust of government treatment of minority groups).

92. *See id.* at xviii–xix (detailing adversarial system in practice).

93. *See id.* at xxi (describing adversarial characteristics of traditionally inquisitorial systems and adoption of criminal procedure codes—inquisitorial characteristic—in most countries).

94. *Id.* at xviii; *see also The Justice System*, BUREAU J. STATS. (June 3, 2021), <https://bjs.ojp.gov/justice-system> (providing context for criminal justice system in United States).

95. *See The Justice System*, *supra* note 94 (detailing sequence of events in criminal justice system in United States).

96. *Id.*

97. *See United States of America: World Prison Brief Data*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/united-states-america> (last visited Oct. 15, 2023) (providing overview of incarceration statistics in United States).

98. *Id.*

99. *See CRIMINAL PROCEDURE: A WORLDWIDE STUDY*, *supra* note 86, at xviii–xix (discussing weaknesses of adversarial approach).

100. *See id.* at xix (detailing issues in adversarial system).

101. *See CATHERINE HEARD & JESSICA JACOBSON*, SENTENCING BURGLARY, DRUG IMPORTATION, AND MURDER 8 (2021) (detailing United States sentencing process).

than the one alleged.<sup>102</sup> These prosecutorial charging practices leverage overcriminalization to obtain guilty pleas.<sup>103</sup>

Incarceration in the United States has increased drastically over the last forty years.<sup>104</sup> By the mid-1970s, the criminal legal system in the United States shifted focus from a utilitarian view of incarceration to a punitive model involving “a mixture of deterrence, incapacitation, and retribution.”<sup>105</sup> This is partly due to the “political responsiveness” of the American criminal legal system.<sup>106</sup> Elected legislators are responsive to their constituents’ opinions on crime rates.<sup>107</sup> Similarly, at the state level, most judges and prosecutors are elected district-by-district, allowing for a “popular responsiveness” with little government control.<sup>108</sup> This responsiveness is why the U.S. criminal legal system “lacks the procedural mechanisms for moderating interest-group influence” from the public and prosecutors seeking punitive justice.<sup>109</sup>

## 2. China

China is typically considered a collectivist country that emphasizes community over the individual.<sup>110</sup> As of 2018, the World Prison Brief estimated a prison population of at least 2.3 million, which corresponds to 165 incarcerated persons per 100,000.<sup>111</sup> Unlike the United States, which has both state and federal laws and procedures, China is unified under one criminal law code and one criminal procedure

102. See CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 86, at xix (recognizing, although prosecutors must dismiss cases for defendants believed guilty, weak prosecutorial cases often proceed by offering defendants plea deals with lesser crimes and lighter sentences).

103. See *id.* (outlining result of prosecution practices in United States).

104. See Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 328–31 (2004) (finding U.S. incarceration levels were about 700 inmates per 100,000 population, compared to 110 per 100,000 population from 1900–1970).

105. See *id.* at 329 (detailing a turn towards punitivism in United States); see also Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1423–25 (2002) (discussing shift in mainstream scholarship, politics, and public opinion toward more punitive and retributive incarceration policies).

106. See Brown, *supra* note 104, at 329 (detailing lack of political responsiveness in European nations as compared to United States).

107. See *id.* at 330 (comparing United States and European legislators responsiveness to public concerns regarding crime).

108. See *id.* at 329–30 (detailing further systems in United States that promote political responsiveness).

109. See *id.* at 330 (outlining repercussions from having political responsiveness in United States).

110. See Liza G. Steele & Scott M. Lynch, *The Pursuit of Happiness in China: Individualism, Collectivism, and Subjective Well-Being During China’s Economic and Social Transformation*, 114 SOC. INDICATORS RSCH., 441, 450 (2013) (detailing collectivism in China); *But see also* Erica Brindley, *Individualism in Classical Chinese Thought*, INTERNET ENCYCLOPEDIA PHIL., <https://iep.utm.edu/ind-chin/> (last visited Oct. 15, 2023) (noting divide in scholars when considering impact of individualism in Chinese philosophy).

111. See *China: World Prison Brief Data*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/china> (last visited Oct. 15, 2023) (overview of incarceration statistics in China).

code.<sup>112</sup>

In China, the Criminal Procedural Law (CPL) is modeled after the civil law system of continental Europe<sup>113</sup> with “strong Soviet influence.”<sup>114</sup> The Chinese Communist Party adopted the initial 1979 CPL, which was criticized as being procedurally ambiguous and subjugating the rights of the accused.<sup>115</sup> The revised 1996 CPL implicitly incorporated a presumption of innocence,<sup>116</sup> limited compulsory interrogation to twelve hours (though extended maximum pretrial detention from two to seven months),<sup>117</sup> limited prosecutorial discretion,<sup>118</sup> and expanded the accused’s right to counsel.<sup>119</sup> The 2012 revision to the CPL implemented further protections for the rights of defendants, victims, defense lawyers, and witnesses.<sup>120</sup> Despite reforms, the CPL continues to prioritize crime control over the rights of the accused.<sup>121</sup> In an anti-corruption effort, the 2018 Constitutional Amendments established the National Supervision Commission, a supervisory group which is “not subject to the legal constraints on investigative powers stipulated in the Criminal Procedure Law” when investigating and penalizing public officials.<sup>122</sup>

112. See Ira Belkin, *China’s Criminal Justice System: A Work in Progress*, WASH. J. MOD. CHINA 61, 62 (2005) (detailing China’s criminal justice system).

113. See Mike P. H. Chu, *Criminal Procedure Reform in the People’s Republic of China: The Dilemma of Crime Control and Regime Legitimacy*, 18 UCLA PAC. BASIN L.J. 157, 166 (2000) (providing history of China’s Criminal Procedural Law); see also JIANFU CHEN, CRIMINAL LAW AND CRIMINAL PROCEDURE LAW IN THE PEOPLE’S REPUBLIC OF CHINA: COMMENTARY AND LEGISLATION 5 (Suiwa Ke trans., 2013) (detailing European influences on China’s Criminal Procedural Law).

114. See CHEN, *supra* note 113, at 5 (detailing Soviet influences on China’s Criminal Procedural Law).

115. See Chu, *supra* note 113, at 166–68 (chronicling origin, criticism, and subsequent revisions of 1979 CPL).

116. See *id.* at 173–74 (noting circumstantial support for presumption of innocence in 1996 CPL with express condemnation of presumption of guilt).

117. See *id.* at 177–78 (detailing content of 1996 CPL); see also Zhonghua renmin gongheguo xingshi susong fa (中华人民共和国刑事诉讼法) [Criminal Procedure Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., July 1, 1979, rev’d Mar. 17, 1996) art. 124, 126–27 P.R.C. LAWS (dictating that initial pretrial detention of two months may be extended with additional approval).

118. See Chu, *supra* note 113, at 178 (preventing procuratorate from acting as one-stop investigator, prosecutor, and adjudicator, which enabled conviction without trial).

119. See *id.* at 180–81 (describing expansion of right to counsel during investigatory phase); *But see id.* at 200–05 (highlighting continued lack of lawyer involvement post-revisions due to defendants’ unwillingness to pay for counsel assuming small chance of acquittal and noting that criminal lawyers are expensive due to risk of being prosecuted for offering evidence contradictory to prosecution).

120. See Wang Zhenhui, *The Development and Main Reform of Criminal Procedure Law in China*, 4 CHINESE STUD. 20, 21–22 (2015) (providing list of 2012 CPL reforms, including ability for lawyer intervention during investigatory phase, implementing exclusionary rule for coerced confessions, and increased attorney-client confidentiality).

121. BJÖRN AHL, POST-2013 REFORMS OF THE CHINESE COURTS AND CRIMINAL PROCEDURE: AN INTRODUCTION 22 (Björn Ahl ed., 2021).

122. *Id.* at 19.

Chinese criminal procedure is investigation-focused rather than trial-centered.<sup>123</sup> The first stage in Chinese criminal procedure is investigation, where officials gather evidence, interrogate suspects, collect confessions, and interview witnesses.<sup>124</sup> Defendants are interrogated within twenty-four hours of arrest<sup>125</sup> and are compelled to respond to all questioning truthfully.<sup>126</sup> Following investigations, the procuratorate considers the evidence collected in interrogation to determine whether to prosecute.<sup>127</sup> The prosecutor must verify that the evidence meets the requisite standard of proof<sup>128</sup> before proceeding to trial.<sup>129</sup> During trial, judges consider the prosecution's evidence, often without any additional evidence for conviction.<sup>130</sup>

Authoritarian governments reject popular demands that could jeopardize their stability.<sup>131</sup> However, China's long-standing stability is attributable in part to its "responsiveness authoritarianism"—that is, its practice of monitoring public opinion and considering public opposition in policy changes.<sup>132</sup> Regarding criminal law, the Chinese government prioritizes "enhancing the legitimacy and credibility of the regime and controlling dissent and crime through the use of criminal law."<sup>133</sup> To this end, one policy requires Chinese courts to consider public opinion and decide cases so as to generate support and "preserve social stability."<sup>134</sup> As a result, public

123. *See id.* at 23 (detailing stages of Chinese criminal procedure).

124. *See id.*

125. Criminal Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, rev'd Mar. 17, 1996) art. 133, P.R.C. LAWS (China).

126. *Id.* art. 45.

127. *Id.* art. 34.

128. The standard of proof within the CPL prior to 2012 was "the facts are clear, and the evidence is reliable and sufficient." Elisa Nesossi & Susan Trevaskes, *Procedural Justice and the Fair Trial in Contemporary Chinese Criminal Justice*, 2 BRILL RSCH. PERSPS. GOVERNANCE & PUB. POL'Y CHINA 1, 41 (2017). In 2012, the CPL supplemented the standard with "beyond a reasonable doubt." *Id.* at 42. Long Zongzhi has designated this addition as merely a theoretical construct, leaving the standard of proof largely unchanged in practice. *Id.*

129. *Id.* at 41.

130. *Id.*; *see also* AHL, *supra* note 121, at 23 (noting courts' general unwillingness to challenge prosecutorial evidence).

131. Damien Krichewsky, *Political Responsiveness: The Identification and Processing of Problems in Modern Polities*, in DEMOCRATIC AND AUTHORITARIAN POLITICAL SYSTEMS IN 21ST CENTURY WORLD SOCIETY 121, 125 (Anna L. Ahlers et al., 2020).

132. *See* Runya Qiaoan & Jessica C. Teets, *Responsive Authoritarianism in China – A Review of Responsiveness in Xi and Hu Administrations*, 25 J. CHINESE POL. SCI. 139, 140–42 (2019) (defining responsive authoritarianism and identifying common characteristics such as establishing official channels for civilian feedback, tolerating some protesting, and controlled opening of media channels); *see also* Jidong Chen et al., *Sources of Authoritarian Responsiveness: A Field Experiment in China*, 60 AM. J. POL. SCI. 383, 383 (2016) (finding Chinese government responsive to online demands and threats of collective action).

133. Sarah Biddulph et al., *Criminal Justice Reform in the Xi Jinping Era*, 2 CHINA L. SOC'Y REV. 63, 65 (2017).

134. *See* Ira Belkin, *Justice in the PRC: How the Chinese Communist Party Has Struggled with Managing Public Opinion and the Administration of Criminal Justice in the Internet Age*, in JUSTICE: THE CHINA EXPERIENCE 195, 197 (describing practice of considering public approval in court decisions as judicial populism). *But see* Biddulph et al., *supra* note 133 (noting government

outrage—often online—has influenced death penalty cases, with courts going as far as to re-open cases and expedite executions.<sup>135</sup>

### 3. Japan

The Japanese criminal legal system is a “hybrid of the Continental European and Anglo-American legal systems.”<sup>136</sup> This has resulted in an adversarial system, like the United States, that requires judicial warrants for investigations and restricts the admissibility of certain evidence.<sup>137</sup> Unlike the United States—which uses all-citizen juries—Japan uses a *Saiban-in* system for serious criminal trials, with six laypeople and three judges to decide cases.<sup>138</sup>

Japan has a prison population of 46,000 as of 2021.<sup>139</sup> Of the four countries analyzed, it has the lowest per capita prison population, with 36 incarcerated persons per 100,000.<sup>140</sup> Japanese prosecutors have a conviction rate of over 99%.<sup>141</sup> However, the reasoning behind this high conviction rate is widely debated.<sup>142</sup> Prosecutors and judges often reference past cases to determine criminal sentences, but Japan does not have formal sentencing guidelines.<sup>143</sup> Japan’s criminal sentencing employs both retributive and utilitarian justice theories.<sup>144</sup> Officials use semi-informal procedures to customize the treatment of criminals in an effort to optimize opportunities for their reintegration into Japanese society.<sup>145</sup>

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agenda to limit judicial discretion under President Xi).

135. See Belkin, *supra* note 134, at 215–17 (describing case of Li Changkui, whose temporary reprieve was reversed after public outcry, resulting in his execution); see also *id.* at 212 (offering detailed accounts of public influence in Chinese criminal court decisions).

136. SUPREME COURT OF JAPAN, OUTLINE OF CRIMINAL JUSTICE IN JAPAN 4 (2023), [https://www.courts.go.jp/english/vc-files/courts-en/Material/Outline\\_of\\_Criminal\\_Justice\\_in\\_JAPAN\\_2023.pdf](https://www.courts.go.jp/english/vc-files/courts-en/Material/Outline_of_Criminal_Justice_in_JAPAN_2023.pdf).

137. *Id.*

138. *Id.* at 7.

139. *World Prison Brief Data: Japan*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/japan> (last visited Oct. 15, 2023).

140. *Id.*

141. See Murai Toshikuni & Muraoka Keiichi, *Order in the Court: Explaining Japan’s 99.9% Conviction Rate*, NIPPON.COM (Jan. 18, 2019), <https://www.nippon.com/en/japan-topics/c05401/order-in-the-court-explaining-japan%E2%80%99s-99-9-conviction-rate.html#:~:text=Nearly%20all%20criminal%20cases%20that,the%20issues%20facing%20Japanese%20prisons> (explaining conviction rate by prosecutors pursuing strong cases).

142. See Bruce Aronson, *Carlos Ghosn and Japan’s ‘99% Conviction Rate’*, THE DIPLOMAT (Mar. 31, 2020), <https://thediplomat.com/2020/03/carlos-ghosn-and-japans-99-conviction-rate/> (attributing conviction rate to inclusion of cases where defendant pleaded guilty); see also J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate so High?*, 30 J. LEGAL STUD. 53 (2001) (suggesting conviction rate is due to low prosecutorial budgets and understaffing that requires highly selective caseload); *Japan Crime: Why Do Innocent People Confess?*, BBC NEWS (Jan. 2, 2013), <https://www.bbc.com/news/magazine-20810572> (questioning integrity of Japanese criminal legal system’s reliance on closed-door confessions).

143. Erik D. Herber, *Japanese Sentencing Practices: Creating an Opportunity for “Formal” Paternalism*, 2 INT’L J. CRIMINOLOGY & SOCIO. THEORY 303, 304 (2009).

144. *Id.*

145. *Id.*

A “victims’ movement” started by the families of the injured parties led to the establishment of the National Association of Crime Victims and Surviving Families (NAVS), a highly influential nonprofit advocating for victims’ rights and the continuation of the death penalty.<sup>146</sup> The victims’ movement and public support led to new criminal offenses and stricter punishment for certain crimes.<sup>147</sup> Public demand for stricter punishment is targeted at the Japanese government by organizations like NAVS, rallying elected officials to expand the penal code and sentencing powers of the state.<sup>148</sup>

#### 4. Sweden

Sweden’s criminal courts fall somewhere between the inquisitorial and adversarial legal models.<sup>149</sup> They are adversarial in that there are state prosecutors who oversee criminal investigations, and the defendant is brought to trial.<sup>150</sup> Instead of a trial by jury, one judge with legal qualifications and three lay judges—political appointees—decide the case.<sup>151</sup> Prosecutors are highly selective in choosing cases they take to court, resulting in over 90% of cases concluding in convictions.<sup>152</sup> As of 2022, Sweden has the lowest prison population of the four countries analyzed with 8,000 incarcerated persons.<sup>153</sup> Its per capita prison population rate is 82 per 100,000 people.<sup>154</sup>

Sweden has historically focused on non-punitive and “knowledge-based” criminal policies.<sup>155</sup> To this end, the Swedish National Council for Crime Prevention was established in 1974 and to this day carries out applied research often commissioned by the government.<sup>156</sup> In Sweden—more than any other European country—crime is deemed the result of societal, environmental, or personal malfunction.<sup>157</sup> With this mindset, retribution becomes an inappropriate reaction to crime because it does not remedy the source of the malfunction—which should be

146. Kanako Takayama, *Reform of the Criminal Justice System in Japan*, 82 REVUE INTERNATIONALE DE DROIT PÉNAL 245, 248–49 (2011).

147. *See id.* at 251 (including examples, such as creation of a gang rape and dangerous driving offenses, and increase in penalty for death caused by dangerous driving from fifteen to twenty years imprisonment).

148. Setsuo Miyazawa, *The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy*, 10 PUNISHMENT & SOC’Y 47, 72 (2008).

149. Felipe Estrada et al., *Crime and Criminology in Sweden*, 9 EUR. J. CRIMINOLOGY 668, 678 (2012).

150. *See id.* at 677–78.

151. *Id.* at 678.

152. *Id.*

153. *World Prison Brief Data: Sweden*, WORLD PRISON BRIEF, <https://www.prisonstudies.org/country/sweden> (last visited Oct. 16, 2023).

154. *Id.*

155. *See* Estrada et al., *supra* note 149, at 668 (observing distinctive criminology features of Scandinavian countries).

156. *See id.* at 670 (describing Swedish National Council for Crime Prevention’s role in researching crime policy in Sweden).

157. Niklas Juth & Frank Lorentzon, *The Concept of Free Will and Forensic Psychiatry*, 33 INT’L J.L. PSYCHIATRY 1, 3 (2010).

the purpose of the criminal legal system.<sup>158</sup>

Although still comparatively less punitive than other countries, the Swedish public has become increasingly so in recent years.<sup>159</sup> Surveys conducted in the 1990s and 2000s indicated that the general public disapproved of Swedish sentencing practices, finding them too lenient.<sup>160</sup> In the case of crimes of assault in Sweden, the public supports imprisonment over rehabilitation more so than judges and jurors.<sup>161</sup> This public sentiment continues to turn up in Swedish law as recently as 2022, when Sweden amended their sentencing guidelines to end certain leniencies for offenders aged eighteen to twenty.<sup>162</sup>

## **B. Treatment of Crimes**

This Section considers each country's use of the death penalty, and its levels of punishments for burglary, importing illegal drugs, and murder. Sweden, like most countries, has abolished the death penalty,<sup>163</sup> whereas the United States, China, and Japan still carry out state-sanctioned executions. All three countries have criminal legal systems with retributive qualities, with China issuing the harshest sentences.

### **1. United States**

Although each U.S. state and the federal government has its own sentencing scheme, there is a centralized United States Sentencing Commission (USSC) for federal crimes,<sup>164</sup> which publishes a manual with guidelines that judges can consult when sentencing federal offenders.<sup>165</sup> The USSC Guidelines Manual includes detailed instructions about how to calculate the offense severity and the offender's criminal history<sup>166</sup> along with a table to determine the intersection of those scores to

158. *Id.*

159. See Marie Demker et al., *Fear and Punishment in Sweden*, 10 PUNISHMENT & SOC'Y 319, 327–29 (2008) (suggesting that increasing punitiveness may be caused by individualization of victims and offenders).

160. *Id.* at 320.

161. *Id.* at 321.

162. See Elin Hofverberg, *Sweden: New Sentencing Rules Remove Exceptions for Young Offenders*, LIBR. CONG. (Jan. 10, 2022), <https://www.loc.gov/item/global-legal-monitor/2022-01-10/sweden-new-sentencing-rules-remove-exceptions-for-young-offenders/> (noting amendment as effort to reduce crimes committed by young people who are overrepresented as criminal offenders in Sweden).

163. See *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/international/abolitionist-and-retentionist-countries> (last visited Oct. 16, 2023) (listing 112 countries as having abolished the death penalty, with 23 additional countries that have abolished it in practice, and 9 others that have abolished it except for extraordinary circumstances or for military law crimes).

164. U.S. SENT'G GUIDELINES MANUAL ch. 1, pt. A, introductory cmt. (U.S. SENT'G COMM'N 2021) [hereinafter USSG]. See Sentencing Reform Act of 1984 Pub. L. No. 98-473 (1984); Federal Sentencing Act, 18 U.S.C. § 3553(a), for federal laws regarding sentencing frameworks.

165. USSG, *supra* note 164, Ch.5, introductory cmt. *But see id.* § 5K2.0 (allowing for departures from sentencing guidelines in aggravating or mitigating circumstances or circumstances not adequately taken into consideration).

166. See *id.* ch. 5, pt. A, application note (defining offense level and criminal history category for use in sentencing table).

find the appropriate sentencing range.<sup>167</sup> As mentioned before, each state has its own sentencing scheme, many of which include sentencing guidelines that consider the same types of factors as the USSC Guideline Manual.<sup>168</sup> Additionally, statutes at the federal and state levels include mandatory minimum sentences for certain crimes.<sup>169</sup> Sentencing offenders also largely depends on the crimes charged by the state or federal government.<sup>170</sup>

For burglary, defendants in New York with similar prior offenses can expect a sentence of five years, with a maximum sentence of seven years.<sup>171</sup> For some instances of importing illegal drugs,<sup>172</sup> federal United States law mandates a minimum sentence of ten years.<sup>173</sup> Depending on whether the suspect is charged under federal or state law, they can expect consequences ranging from immediate deportation to a ten-year prison sentence.<sup>174</sup> The maximum allowable sentence for drug importation in the United States is incarceration for life.<sup>175</sup> For murder, convicted persons under federal or New York law receive a mandatory fifteen-year sentence, with the potential for a mandatory life sentence without parole if certain “aggravating factors” are present.<sup>176</sup> With a plea deal, a convicted person can expect a sentence of fifteen to eighteen years.<sup>177</sup> Without a plea deal, the expected sentence is twenty-five years to life.<sup>178</sup> At the federal level and in some states, murder is punishable by the death penalty.<sup>179</sup> The United States still actively uses the death penalty, with eleven people executed in 2021.<sup>180</sup>

## 2. China

In China, imprisonment for theft can range from less than three years to life, depending on the amount of money stolen and whether there is “any other serious

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167. See *id.* ch. 5, pt. A.

168. See HEARD & JACOBSEN, *supra* note 101, at 8.

169. Brown, *supra* note 104, at 366; see also HEARD & JACOBSEN, *supra* note 101, at 8 (noting trend in mandatory minimum sentencing statutes for drug-related crimes and repeat offenders).

170. See Brown, *supra* note 104, at 370 (acknowledging that prosecutorial discretion in charging and applying state law plays defining role in sentencing outcomes, offering as example voluntary policy implemented by Florida prosecutors to limit sentencing enhancements permissible under Florida statutes for habitual offenders).

171. See HEARD & JACOBSEN, *supra* note 101, at 12 (acknowledging sentence may be as short as two years depending on prosecutor and/or plea deal).

172. See *id.* at 13 (describing illegal drugs’ quantity as 400 grams, or about one pound of heroin).

173. *Id.*

174. *Id.* Like burglary, sentences are dependent on deals offered by federal or state prosecutors. *Id.*

175. *Id.*

176. *Id.* at 14.

177. *Id.*

178. *Id.*

179. See Amnesty Int’l, Death Sentences and Executions, ACT 50/5418/2022, at 19 (2021) (noting that death penalty is still legal in twenty-seven of fifty states and at the federal level).

180. *Id.* at 4–5.

circumstance.”<sup>181</sup> Burglary, where a person “intrud[es] into another person’s residence to rob,” is punishable by life imprisonment or death, but the average sentence is ten to twelve years.<sup>182</sup> For importing illegal drugs,<sup>183</sup> there is a mandatory sentence of at least seven years, with the potential for life imprisonment or death for smuggling large amounts of drugs, violently resisting inspection, or being involved in international drug trafficking.<sup>184</sup> For murder, the punishment is death, life imprisonment, or imprisonment for a minimum of ten years.<sup>185</sup>

As of 2020, forty-two crimes are punishable by death under Chinese law,<sup>186</sup> with methods of execution including lethal injection and firing squad.<sup>187</sup> Even though the number of crimes punishable by death was reduced in 2011 and 2015, this has not significantly affected the number of executions.<sup>188</sup> China refuses to release statistics about its use of the death penalty, asserting that it is a state secret.<sup>189</sup> However, as of 2021, Amnesty International suspects these numbers to be in the thousands annually, making China the highest state executioner worldwide.<sup>190</sup> This estimation places China far beyond the rest of the world—Iran ranks second-highest with at least 314 executions.<sup>191</sup>

In China, the death penalty is permitted only against those who commit “extremely serious crimes.”<sup>192</sup> “Extremely serious crimes” is not defined, resulting

181. Zhonghua renmin gongheguo xingfa (中华人民共和国刑法) [Criminal Law of the People’s Republic of China] (promulgated by the Nat’l People’s Congr., July 1, 1979, rev’d Mar. 14, 1997), art. 264, P.R.C. LAWS.

182. *Id.* art. 263; *see also* 2017 Guiding Opinion on Sentencing for Common Crimes, CHINA LAW TRANSLATE, <https://www.chinalawtranslate.com/en/2017-Guiding-Opinion-on-Sentencing-for-Common-Crimes/> (last visited Oct. 18, 2023) (listing sentencing guidance for common crimes).

183. Criminal Law of the People’s Republic of China (promulgated by the Nat’l People’s Congr., July 1, 1979, rev’d Mar. 14, 1997), art. 347(1), (5), P.R.C. LAWS.

184. *Id.* art. 347.

185. *Id.* art. 232. *See generally* Cary Bricker & Michael Vitiello, *Chinese Homicide Law, Irrationality, and Incremental Change*, 27 TEMP. INT’L & COMP. L. J. 43 (2013).

186. *How Many Crimes Are Punishable by Death in China?*, CHINA JUST. OBSERVER (Nov. 23, 2020), <https://www.chinajusticeobserver.com/a/how-many-crimes-are-punishable-by-death-in-china>.

187. *People’s Republic of China*, CORNELL L. SCH., <https://deathpenaltyworldwide.org/database/#/results/country?id=16#fn-42375086-e5bc-4c91-b7a0-f2116432e128> (Apr. 21, 2020).

188. *See* CHINA AGAINST DEATH PENALTY, *The Status Quo of China’s Death Penalty and the Civil Society Abolitionist Movement*, WORLD COAL. AGAINST DEATH PENALTY (Feb. 15, 2022), <https://worldcoalition.org/2022/02/15/china-death-penalty-2022/> (noting that thirteen crimes were removed from those punishable by death in 2011, with another nine offenses being removed in 2015).

189. Amnesty Int’l, *supra* note 179, at 28.

190. *Id.* at 4–5, 28. Amnesty International no longer publishes estimated figures on executions carried out by China due to China’s nondisclosure of death penalty statistics. *Id.* at 5.

191. *Id.* at 4–5.

192. Criminal Law of the People’s Republic of China (promulgated by the Nat’l People’s Congr., July 1, 1979, rev’d Mar. 14, 1997), art. 48, P.R.C. LAWS; *see also* CHEN, *supra* note 113, at 19–20 (noting that frequent use of vague terms without definition in Chinese law provides little guidance for sentencing).

in inconsistencies in application across Chinese provincial courts.<sup>193</sup> For example, a man who stole fourteen cattle and a man who murdered eleven women were both executed by the state.<sup>194</sup> This ambiguity in Chinese law allows for the death penalty to be sentenced for non-violent crimes—from stealing cattle to bribery or drug trafficking.<sup>195</sup> In 2007, the Supreme People’s Court of China took over the power to review death penalty cases, with the aim to “kill less and kill with caution.”<sup>196</sup> Prior to this, provincial courts had the power to review and carry out death sentences with minimal procedural safeguards.<sup>197</sup> The shift to centralized review of death penalty cases is believed to have reduced the abuses in death penalty cases at the local level to some extent.<sup>198</sup>

### 3. Japan

The Japanese Penal Code has a section for crimes of theft and robbery, without delineating burglary.<sup>199</sup> Theft is punishable by imprisonment of up to ten years, with a minimum of five years imprisonment for those who commit robbery through assault or intimidation.<sup>200</sup> For importing certain illegal drugs with the intent to profit, the punishment is life imprisonment.<sup>201</sup> The punishment for murder is no less than five years imprisonment and up to life imprisonment or the death penalty.<sup>202</sup> In 2021, Japan executed three men convicted of murder by hanging, with 117 others remaining on death row at the end of the year.<sup>203</sup> Two of the men executed had pending petitions for retrial.<sup>204</sup> Japan has faced criticism from international human rights organizations and legal backlash from inmates for providing notice for

193. Sartaz Billing, *China and The (Ab)Use Of The Death Penalty*, HUM. RTS. PULSE (May 24, 2021), <https://www.humanrightspulse.com/mastercontentblog/china-and-the-abuse-of-the-death-penalty>.

194. *Id.*; Amnesty Int’l, *People’s Republic of China: The Death Penalty in China: Breaking Records, Breaking Rules*, AI Index ASA 17/38/97, at 8 (Aug. 1997); see *China’s ‘Jack the Ripper’ Gao Chengyong Executed for Murders*, BBC NEWS (Jan. 3, 2019), <https://www.bbc.com/news/world-asia-china-46743882> (discussing in greater detail execution of Jack the Ripper following his conviction for murder of eleven women).

195. Billing, *supra* note 193; see also Criminal Law of the People’s Republic of China (promulgated by the Nat’l People’s Congr., July 1, 1979, rev’d Mar. 14, 1997), art. 347, 382–83, P.R.C. LAWS (defining crimes and punishments for drug trafficking and embezzlement).

196. CHINA AGAINST DEATH PENALTY, *supra* note 188.

197. *Id.*

198. *See id.* (stating this belief but acknowledging lack of data available to public on death penalty cases in China).

199. KEIHŌ [PEN. C.] 1904, art. 235–45 (Japan).

200. *Id.* art. 235–36.

201. See Goro Koto et al., *Drug Use, Regulations and Policy in Japan*, INT’L DRUG POL’Y CONSORTIUM 3 (2020) <https://idpc.net/publications/2020/04/drug-use-regulations-and-policy-in-japan> (citing Stimulants Control Act and Narcotics and Psychotropics Control Act as prescribing life imprisonment for production, importation or exportation of amphetamine-type stimulants and heroin with intent to profit).

202. KEIHŌ [PEN. C.] 1904, art. 199 (Japan).

203. Amnesty Int’l, *supra* note 179, at 27, 31.

204. *Id.* at 31.

execution only hours in advance.<sup>205</sup>

#### 4. Sweden

The punishment for burglary in Sweden is at least one year but no more than six years imprisonment.<sup>206</sup> For importing illegal drugs, the typical sentence is up to three years, but can be as long as ten years depending on the quantity transported and whether the act was in furtherance of large-scale drug trafficking.<sup>207</sup> Murder is generally punishable by ten to eighteen years of imprisonment, but life imprisonment is possible where the murder is premeditated, causes the victim extreme suffering, or is “otherwise particularly ruthless.”<sup>208</sup> Sweden completely abolished the death penalty in 1973.<sup>209</sup>

Legislation and court precedent, rather than sentencing councils or advisory boards, provide guidance and structure for sentencing in Sweden.<sup>210</sup> Legislative guidance includes both specific offense criteria and general principles to determine the appropriate type and length of punishment.<sup>211</sup> Swedish law views imprisonment as the last resort, only enforced where other options are not appropriate.<sup>212</sup> Alternatives to prison time include fines, probation, electronic monitoring, and contract treatment.<sup>213</sup> In determining whether imprisonment is appropriate, courts consider the severity of the offense and prior convictions.<sup>214</sup> When sentences do include prison time, most offenders are released on parole after two-thirds of their sentence.<sup>215</sup>

#### C. Free Will

Studies about belief in free will have focused on specific demographics, notably participants from Western, Educated, Industrialized, Rich, Democratic (WEIRD) countries.<sup>216</sup> The exclusion of non-WEIRD participants results in a “culture-

205. Elaine Lies, *Japan Death Row Inmates Sue over 'Inhumane' Same-Day Notification*, REUTERS (Nov. 4, 2021, 11:30 PM), <https://www.reuters.com/world/asia-pacific/japan-death-row-inmates-sue-over-inhumane-same-day-notification-media-2021-11-05/>.

206. BROTTSBALKEN [BRB] [Penal Code] 8:4a (Swed.).

207. 6 § Lagen om straff för smuggling [Act on Penalties for Smuggling] (Svensk författningssamling [SFS] 2000:1225) (Swed.).

208. BROTTSBALKEN [BRB] [Penal Code] 3:1 (Swed.).

209. H. Christian Thorup, *Sweden Abolishes Capital Punishment*, in HUMAN RIGHTS VIOLATIONS 68, 70–71 (Charles F. Bahmueller ed., 2003); see also REGERINGSFORMEN [RF] [CONSTITUTION] 2:4 (Swed.) (abolishing capital punishment on constitutional level via 1974 revision).

210. Ville Hinkkanen & Tapio Lappi-Seppälä, *Sentencing Theory, Policy, and Research in the Nordic Countries*, 40 CRIME & JUST. 349, 349 (2011).

211. *Id.* at 350.

212. *Id.* at 367; see also BROTTSBALKEN [BRB] [Penal Code] 30:4 (Swed.) (stating court's tendency to look for circumstances that favor lesser punishment).

213. Tapio Lappi-Seppälä, *Penal Policy in Scandinavia*, 36 CRIME & JUST. 217, 223–24 (2007).

214. Hinkkanen & Lappi-Seppälä, *supra* note 210, at 367.

215. Lappi-Seppälä, *supra* note 213, at 225.

216. See Renatas Berniūnas et al., *The Weirdness of Belief in Free Will*, CONSCIOUSNESS &

blindness” that ignores the possibility that concepts of agency, choice, and free will are not universal and may differ from the traditional Western views.<sup>217</sup> Even in an ethnically diverse country like the United States, a review of psychological studies found that more than three-quarters of samples were majority European Americans.<sup>218</sup> Although some studies have focused on free will beliefs from non-WEIRD countries,<sup>219</sup> available research often excludes details on participant race and ethnicity.<sup>220</sup>

One study analyzed the terms used by participants from four non-WEIRD countries when translating what they consider to be free will.<sup>221</sup> The result demonstrated no conceptual consensus on the term, leading researchers to believe that the Western definition of free will is not congruent cross-culturally.<sup>222</sup> Instead, they suggest that words like “choice” or “agency” may be more appropriate in future studies.<sup>223</sup> This finding juxtaposes with research by Hagop Sarkissian, which studied individual notions of free will across the United States, Hong Kong, India, and Colombia.<sup>224</sup> For all four country groups, the majority of participants indicated belief that the world is not deterministic—that people have free will.<sup>225</sup>

Although belief in free will is common globally, how this belief manifests in action varies from country-to-country.<sup>226</sup> Another study surveyed participants from twenty countries, including Japan, the United States, and China, to analyze layperson beliefs regarding free will and moral responsibility.<sup>227</sup> Participants were given two otherworldly scenarios.<sup>228</sup> In one, a perpetrator commits murder while living in a deterministic universe—that is, where all actions were caused by those before it.<sup>229</sup>

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COGNITION, Jan. 2021, at 1, 5 (finding up to 91% of participants in studies on free will beliefs were WEIRD); see also Esthelle Ewusi-Boisvert & Eric Racine, *A Critical Review of Methodologies and Results in Recent Research on Belief in Free Will*, 11 NEUROETHICS 97, 102, 104 (2018) (concluding that studies on free will beliefs primarily sample from women and undergraduate students, often without providing detail on subject’s background, race, or ethnicity).

217. See Berniūnas et al., *supra* note 216, at 4, 12 (concluding that concept of free-will is not physiological universal).

218. See Jeffrey J. Arnett, *The Neglected 95%: Why American Psychology Needs to Become Less American*, 63 AM. PSYCH. 602, 604, 606 (2008) (finding 77% of U.S. samples used in studies from six prominent Psychology journals contained majority European American subjects).

219. See generally Berniūnas et al., *supra* note 216.

220. Ewusi-Boisvert & Racine, *supra* note 216, at 102.

221. See Berniūnas et al., *supra* note 216, at 1 (considering participants from Lithuania, China, India, and Mongolia).

222. *Id.* at 12.

223. *Id.*

224. See Hagop Sarkissian et al., *Is Belief in Free Will a Cultural Universal?*, 25 MIND & LANGUAGE 346, 353 (2010) (finding that free will beliefs are prevalent across cultures).

225. *Id.* at 353. *But cf.* Ewusi-Boisvert & Racine, *supra* note 216, at 12 (critiquing sampling practices in studies about free will beliefs).

226. Ivar R. Hannikainen et al., *For Whom Does Determinism Undermine Moral Responsibility? Surveying the Conditions for Free Will Across Cultures*, 10 FRONTIERS PSYCH., 1, 1–11 (2019).

227. *Id.*

228. *Id.* at 3–4.

229. *Id.*

In the other, a perpetrator decides to commit murder, but external forces would have prevented him from choosing any other option.<sup>230</sup> American, European, and Middle Eastern participants viewed the perpetrator in the second scenario, who was the source of action, as freer than the perpetrator in the first.<sup>231</sup> Likewise, they held the perpetrator in the second scenario as more morally responsible and deserving of harsher punishment.<sup>232</sup>

Unlike their American and European counterparts, South and East Asian participants<sup>233</sup> did not differentiate treatment between the two perpetrators.<sup>234</sup> This may suggest participants from these cultures are more likely to consider situational factors when assessing free will, control, and moral responsibility.<sup>235</sup> This interpretation is supported by prior experiments related to cultural differences in social attribution.<sup>236</sup> For example, Chinese participants in one study were more likely to attribute a medicine mix-up at a hospital to systemic and situational factors over the characteristics of the individual handling the medicine.<sup>237</sup> In another example, Chinese newspapers' coverage of murders highlighted more situational factors than American newspapers, which focused on personal characteristics.<sup>238</sup>

### 1. United States

Americans tend to consider others' actions, even in the face of situational constraints, as personal choices.<sup>239</sup> For example, one study found that middle-class Americans characterized Hurricane Katrina survivors who did not have the resources to leave as acting based on personal preferences.<sup>240</sup> In another study of Stanford University students, European Americans were more likely to consider human behavior (whether naturally arising or experimentally controlled) as

230. *Id.*

231. *Id.* at 10.

232. *Id.* at 7, 10.

233. *Id.* at 8 (noting participants from mainland China, Hong Kong, India, Indonesia, Japan, and South Korea).

234. *Id.* at 10.

235. *Id.* at 10. *But cf. id.* at 11 (noting that beyond situational attribution, other factors within cultural psychology such as collectivism may contribute).

236. *Id.* at 3, 8; see also Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY & SOC. PSYCH. 949, 957–67 (1994) (describing different studies conducted to test theory that dispositionalism in attribution for behavior reflects theory of social behavior more widespread in individualist than collectivist cultures).

237. See Chi-yue Chiu et al., *Motivated Cultural Cognition: The Impact of Implicit Cultural Theories on Dispositional Attribution Varies as a Function of Need for Closure*, 78 J. PERSONALITY & SOC. PSYCH. 247, 251 (2000) (noting that Chinese participants consistently made stronger group dispositional attributions across two different scenarios).

238. See Morris & Peng, *supra* note 236, at 958, 961–62, (describing how Chinese newspapers emphasize external pressures and relationships as causes for action).

239. See *infra* notes 240–241 and accompanying text for an overview of American views on personal choice.

240. See Nicole M. Stephens et al., *Why Did They "Choose" to Stay? Perspectives of Hurricane Katrina Observers and Survivors*, 20 PSYCH. SCI. 878, 878–82 (2009), (describing viewpoint that survivors that stayed were not acting logically).

individual choices than their Indian counterparts.<sup>241</sup> However, Indian students who had spent more than twenty months in the United States engaging in middle-class American contexts were more similar to their European American peers—they were more likely to view these instances of behavior as individual choices.<sup>242</sup> This suggests that long-term cultural exposure (in this case, exposure to middle-class Americans) can shift perceptions of choice, free will, and moral responsibility. In a study considering whether free will beliefs increase support for economic inequality, the World Value Survey<sup>243</sup> was used as a proxy for free will beliefs.<sup>244</sup> The study considered this WVS question:

Some people feel they have completely free choice and control over their lives, while other people feel that what they do has no real effect on what happens to them. Please use this scale where 1 means ‘no choice at all’ and 10 means ‘a great deal of choice’ to indicate how much freedom of choice and control you feel you have over the way your life turns out.<sup>245</sup>

Using “control perception” as a metric, the United States was determined to have the highest belief in free will, followed by Sweden, then China, then Japan.<sup>246</sup>

In one study of American college students, most participants described free will as the ability to make a decision or choice.<sup>247</sup> For community members outside the college, most participants defined free will as being free from both internal and external constraints.<sup>248</sup> This suggests that age plays a role in individual conceptions of free will. The study posits that because college students often do not have the external constraints of paying bills, holding jobs, and having children, fewer of them (only 29%) defined free will in this way.<sup>249</sup> Despite this difference, choice, desire, and freedom from constraints were frequently included in both groups’ responses. For the college students, 65% mentioned choice, 33% mentioned desire, and 29%

241. See Krishna Savani et al., *What Counts as a Choice? U.S. Americans Are More Likely than Indians to Construe Actions as Choices*, 21 PSYCH. SCI. 391, 396 (2010) (comparing American and Indian participants’ perceptions of choice in personal and interpersonal behaviors, including experimentally controlled and naturally occurring acts, ongoing behavior, behavior recalled from memory, and mundane or important acts).

242. *Id.* at 393.

243. See generally WORLD VALUE SURVEY, <https://www.worldvaluessurvey.org/WVSContents.jsp> (last visited Oct. 18, 2023) (“The World Values Survey (WVS) is an international research program devoted to scientific and academic study . . . of people in the world. The project’s goal is to assess . . . social, political and economic development of countries and societies”).

244. Nathan D. Martin et al., *Free Will Beliefs Predict Attitudes Toward Unethical Behavior and Criminal Punishment*, 114 PNAS 7325, 7325 (2017).

245. Boris Nikolaev & Daniel L. Bennett, *Give Me Liberty and Give Me Control: Economic Freedom, Control Perceptions and the Paradox of Choice*, 45 EUR. J. POL. ECON. 39, 42 (2016).

246. *Id.* at 45 fig.2.

247. See Andrew E. Monroe & Bertram F. Malle, *Free Will Without Metaphysics*, in SURROUNDING FREE WILL: PHILOSOPHY, PSYCHOLOGY, NEUROSCIENCE 25, 28 (Alfred R. Mele ed., 2014) (citing Monroe & Malle’s 2010 study coding folk definitions of free will, where 65% of participants described free will in this way).

248. See *id.* at 30 (finding 74% of participants, whose average age was 34, defined free will in this way).

249. *Id.* at 30.

mentioned freedom from constraints, whereas the community members included these terms 41%, 38%, and 74%, respectively.<sup>250</sup>

## 2. China

As previously mentioned, an inherent limitation to the discussion of free will in relation to criminal legal systems is that free will is largely a Western philosophical question.<sup>251</sup> In China, Confucian ethics touch on the importance of freedom, without fixating on the nature or origination of that freedom.<sup>252</sup> Buddhism holds that the world and the self are illusory, making the application of free will concepts difficult (if not impossible).<sup>253</sup> The Daoist text *Zhuangzi* emphasizes self-realization as a means to liberate oneself from fear and suffering but maintains that the goal is to follow nature's course by "respond[ing] spontaneously: naturally, immediately, without too much reflection, and without adding anything."<sup>254</sup> Some scholars argue that free will is present in the history of Chinese philosophy, but without the parlance that characterizes the concept in Western philosophy.<sup>255</sup> Others claim that mapping the concept of free will onto Chinese philosophy is improper<sup>256</sup> or, at the very least, has "serious limitations."<sup>257</sup>

Notwithstanding the debate over the relevance of free will to Chinese philosophy throughout history, present-day studies have considered the free will attitudes of Chinese individuals.<sup>258</sup> The Chinese version of the FAD-plus questionnaire is valid and relatively reliable.<sup>259</sup> Scientists collected FAD-plus data from 1,232 individuals and provided the questionnaire responses to the public for use in studies involving free will beliefs.<sup>260</sup>

Two studies of high school-age participants highlighted the positive association

250. *Id.* at 28, 30.

251. See Kai Marchal & Christian Helmut Wenzel, *Chinese Perspectives on Free Will*, in THE ROUTLEDGE COMPANION TO FREE WILL 374, 374–75 (Kevin Tempe et al. eds., 2017) (noting similar questions about free will held by Western philosophers are seemingly absent from Chinese philosophic texts).

252. See Chenyang Li, *The Confucian Conception of Freedom*, 64 PHIL. E. & W. 902, 905 (2014) (explaining Confucians do not need or use concept of free will).

253. Marchal & Wenzel, *supra* note 251, at 379.

254. *Id.* at 382.

255. See Li, *supra* note 252, at 905 (explaining Confucianism developed concepts of human agency and freedom distinct from other Western philosophers).

256. See Chad Hansen, *Freedom and Moral Responsibility in Confucian Ethics*, 22 PHIL. E. & W. 169, 170 (1972) (noting lack of Confucian corollary to Western debate over freedom and moral responsibility); see also Marchal & Wenzel, *supra* note 251, at 375 (warning against shoehorning Chinese philosophy into Western frameworks).

257. See Li, *supra* note 252, at 902, 905 (asserting that free will as concept is unnecessary in Confucian ethics).

258. See Qing-Lan Liu et al., *Questionnaire Data from the Revision of a Chinese Version of Free Will and Determinism Plus Scale*, J. OPEN PSYCH. DATA, Jan. 6, 2020, at 1, 1 (testing Chinese version of a scale to measure belief in free will).

259. See Qing-Lan Liu et al., *The Reliability and Validity of Chinese Version of Free Will and Determinism Plus Scale*, PSYARXIV (May 7, 2019), at 25–26, psyarxiv.com/e53fk (noting three questions were omitted due to their potential for confusion when translated into Chinese).

260. Liu et al., *supra* note 258, at 1.

between Chinese adolescents' belief in free will and their perseverance for long-term goals and overall life satisfaction.<sup>261</sup> In both studies, FAD-plus criteria and self-reporting determined that the vast majority of students believe in free will.<sup>262</sup> This is consistent with other studies regarding common belief in free will,<sup>263</sup> although some scholars have cited methodological concerns regarding sampling.<sup>264</sup> Alternatively, this may be explained by the rise of individualism in Chinese society over the last forty years.<sup>265</sup>

### 3. Japan

In a Japanese study that considered whether free will beliefs impacted participants' sentencing decisions, promoting disbelief in free will resulted in lenient sentences when the offenders were strangers to the participants.<sup>266</sup> Interestingly, the study found that participants did not offer the same leniency when the offender was a friend.<sup>267</sup> A possible explanation is each of the participant's personal relationships with the offender motivates them to make their friend a "better person" through punishment.<sup>268</sup> In contrast, the lack of relationship with a stranger may cause the participant to rely exclusively on a detached consequentialist view of punishment.<sup>269</sup> In this way, punishing a third-party offender may offer an objectivity that dissolves when muddled by a personal relationship with the offender, resulting in an intuitive rather than reason-dominant punishment decision.<sup>270</sup> However, in the same study,

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261. See Chunkai Li et al., *The Freedom to Pursue Happiness: Belief in Free Will Predicts Life Satisfaction and Positive Affect Among Chinese Adolescents*, FRONTIERS PSYCH., Jan. 2017, at 1, 5 (finding free will beliefs were associated with higher life satisfaction and positive emotional disposition); see also Jingguang Li et al., *The Freedom to Persist: Belief in Free Will Predicts Perseverance for Long-Term Goals Among Chinese Adolescents*, 121 PERSONALITY & INDIVIDUAL DIFFERENCES 7, 9 (2018) (finding adolescents' self-reported free will beliefs were associated with stronger perseverance using Grit-S scale).

262. Chunkai Li et al., *supra* note 261, at 5 (finding that 85.4% of 639 tenth-graders believe in free will); Jingguang Li et al., *supra* note 261, at 9 (finding that 84% of 539 high school participants believe in free will).

263. Chunkai Li et al., *supra* note 261, at 5.

264. See *supra* notes 216–219 and accompanying text for a critique of sampling practices in studies about free will beliefs.

265. See Steele & Lynch, *supra* note 110, at 447–50 (finding individualistic values like income, status, and health have greater effect on subjective well-being scores in China from 1990 to 2007); see also Xi Zou & Huajian Cai, *Charting China's Rising Individualism in Names, Songs, and Attitudes*, HARV. BUS. REV. (Mar. 11, 2016), <https://hbr.org/2016/03/charting-chinas-rising-individualism-in-names-songs-and-attitudes> (providing examples of shift toward individualism in names, songs, and WVS responses).

266. See Takumi Watanabe et al., *Free Will Beliefs and Moral Responsibility: Disbelief in Free Will Leads to Less Responsibility for Third Person's Crime* in THE ASIAN CONFERENCE ON PSYCHOLOGY & THE BEHAVIORAL SCIENCES 2015 OSAKA, JAPAN: OFFICIAL CONFERENCE PROCEEDINGS 429, 433–435 (2015) (explaining why people assign harsher punishment to friends than strangers).

267. *Id.* at 434.

268. *Id.* at 435.

269. See *id.* (stating that punishment for strangers is because they deserve it for their conduct).

270. See *id.* (hypothesizing that conditions, such as personal relationship with criminal, may influence reasons for punishment).

encouraging belief in free will (in contrast to inducing disbelief in free will) did not cause participants to attribute greater moral blame to the offender.<sup>271</sup> A possible reason behind this finding is the general belief that people have free will, so further supporting this belief does not change participants' outlook on offender responsibility.<sup>272</sup>

How do Japanese laypersons define the idea of free will? Another study considered this question, determining that the idea was most frequently associated with agency, freedom from constraints, and ability to act otherwise.<sup>273</sup> Concepts including "sourcehood,"<sup>274</sup> moral responsibility, and self-control were mentioned less often, with no mention of metaphysical concepts, like indeterminism.<sup>275</sup> This study noted that its findings were consistent with previous studies by Monroe and Malle, concluding that laypersons' conceptions of free will were similar in Japan and the United States.<sup>276</sup> However, the Japanese study included a term not identified in the American studies—"sourcehood," or the idea that "the ultimate origin of an action is within the agent." Although not a major factor in the Japanese study (included by 10% of participants),<sup>277</sup> this demonstrates that certain elements of free will beliefs differ cross-culturally.

Comparative educational research from Japan and the United States provides context to Japanese perspectives of sourcehood.<sup>278</sup> Hidetada Shimizu argues that from infancy, Japanese children are taught to identify and accommodate others' needs, whereas American children are encouraged to identify and verbalize their own needs.<sup>279</sup> The Japanese emphasis on the "mutually influencing processes" between oneself and others rather than on one party being the origin or source of certain actions is referred to as "interactional relativism."<sup>280</sup> With interactional relativism, an agent's actions are not a result of external forces or internal desires,

271. *Id.*

272. *Id.*

273. See Takumi Watanabe et al., *How Do Japanese Conceptualize Free Will?: A Case Study of the Free Description Method*, 17 J. HUM. ENV'T STUD. 79, 81–82 (2019) (finding that 44%, 30%, and 21% of participants mentioned agency, freedom from constraints, and ability to do otherwise, respectively, in writing about free will).

274. See *id.* at 82 (defining sourcehood as the belief that an action originates internally from the agent).

275. See *id.* (finding 10%, 10%, and 3% of participants mentioned sourcehood, moral responsibility, and self-control, respectively, in writing about free will); see also Monroe & Malle, *supra* note 247, at 28–32 (concluding lay conceptions of free will are psychological rather than metaphysical, with only 1 of 180 participants offering a response consistent with metaphysical interpretation of free will).

276. Watanabe et al., *supra* note 273, at 82; see also Monroe & Malle, *supra* note 247, at 28–32 (noting lack of metaphysical factors in laypersons' concepts of free will).

277. Watanabe et al., *supra* note 273, at 82.

278. See *infra* notes 279–283 and accompanying text.

279. See Hidetada Shimizu, *Cognitive Anthropology and Education: Foundational Models of Self and Cultural Models of Teaching and Learning in Japan and the United States*, in A COMPANION TO COGNITIVE ANTHROPOLOGY 430, 436 (David B. Kronenfeld et al. eds., 2011) (distinguishing between American and Japanese mothers when it comes to developing children behaviors).

280. *Id.* at 433.

but instead are “a result of interaction and mutual influence between himself and his object.”<sup>281</sup> Studies on free will beliefs in East Asia provide evidence that belief in free will is common, though may be weaker than WEIRD individuals.<sup>282</sup> Despite the potential difference, there seems to be a similar effect in disbelief of free will on self-control for both WEIRD and Japanese participants.<sup>283</sup>

#### 4. Sweden

A study by Erik Johansson tested Björnsson and Persson’s Explanation Hypothesis regarding individual beliefs about moral responsibility.<sup>284</sup> Although not equivalent to free will beliefs, the concepts are related: personal beliefs about whether someone is morally responsible typically require a level of free will in the actor.<sup>285</sup> The Explanation Hypothesis suggests that people consider someone morally responsible for an action when they determine that some underlying motivation of that person is a “significant explanation [of] the outcome.”<sup>286</sup> Johansson confirmed the Explanation Hypothesis by finding people tend to attribute moral responsibility to actions that are readily explained by the actor’s motivations.<sup>287</sup> The Swedish participants attributed moral responsibility to the hypothetical actors even in situations where their actions would not have affected the outcome.<sup>288</sup> In light of this and due to the lack of studies, Sweden will be assumed to have personal free will beliefs similar to the other countries analyzed—that is, that people tend to believe that they have free will.

### IV. ANALYSIS

#### A. *Criminal Legal Systems and Responsiveness*

Countries with criminal legal systems that are responsive to public opinion on crime are more likely to align with cultural attitudes toward free will, resulting in punitive systems that attribute moral blameworthiness to crime. The criminal legal systems of the United States, Japan, and China are all relatively responsive to public opinion on crime and punishment.<sup>289</sup> For the United States, this responsiveness is a

281. *Id.* (quoting TAKIE SUGIYAMA LEBRA, JAPANESE PATTERNS OF BEHAVIOR 7–8 (1976)).

282. Takumi Watanabe et. al., *The Effects of Free Will Beliefs in Japan: Disbelief in Free Will Impairs Overriding Impulsive Decisions*, in UNITY, DIVERSITY AND CULTURE. PROCEEDINGS FROM THE 22ND CONGRESS OF THE INTERNATIONAL ASSOCIATION FOR CROSS-CULTURAL PSYCHOLOGY 405, 406 (C. Roland-Lévy et al. eds., 2016).

283. *Id.* at 407–08.

284. Erik Johansson, *Testing the Explanation Hypothesis Using Experimental Methods 4* (2010) (Cognitive Science Thesis, Linköping University) (available at <https://www.divaportal.org/smash/get/diva2:324835/FULLTEXT01.pdf>). I could not find any experimental study about person free will beliefs in Sweden as defined by the FAD-plus criteria.

285. *Id.* at 6.

286. *Id.* at 4–5.

287. *Id.* at 20.

288. *See id.* at 14–18 (finding that participants still found hypothetical actor morally responsible in scenario where actor ignored stranger’s cries for help while alone in woods even though actor would have been unable to rescue her).

289. *See supra* Section III.A for a discussion of country-specific criminal legal systems.

consequence of pressures from the public on elected officials.<sup>290</sup> China's responsiveness is a byproduct of the authoritarian prerogative to maintain social stability and control.<sup>291</sup> Japan falls between these two approaches, with a harsh response to crime prompted by bottom-up pressure from the electorate as well as top-down pressure from influential interest groups.<sup>292</sup> Despite their differences in government structure, all three countries have processes that incentivize them to be responsive to public requests for harsh punishment.<sup>293</sup> These processes enable the public's free will beliefs—and their corresponding predilection for retribution—to shine through to the penal codes of the United States, China, and Japan.

Sweden remains in contrast to these countries. The basis of their criminal legal system is on positivist criminology: it focuses on crime as the result of societal deficiencies rather than a morally abhorrent action that requires punishment for punishment's sake.<sup>294</sup> This foundation has resulted in a largely non-punitive criminal legal system, but this may be threatened depending on the influence of popular desire for harsher punishment on Swedish criminal codes.<sup>295</sup>

### ***B. Treatment of Crimes and Retribution***

China is the most heavily retributive of the countries analyzed in this Comment.<sup>296</sup> Amnesty International estimates that thousands of people are executed each year in China, putting their death penalty use far beyond any other country.<sup>297</sup> By comparison, the United States executed eleven people in 2021, Japan executed three people in the same year, and Sweden outlawed the death penalty centuries ago.<sup>298</sup> Although the death penalty can also be justified on deterrence grounds, its use for non-violent crimes suggests that deterrence is not the only justification.<sup>299</sup>

The severity of punishment in China is primarily a function of the authoritarian priority for social stability and control, rather than the public's free will beliefs.<sup>300</sup> However, in instances where judges' sentencing decisions consider the public's outcries and requests, judicial discretion is reduced to a conduit of the masses and

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290. See *supra* Section III.A.1 for a discussion of the United States' criminal legal system and its responsiveness to public opinion on crime and punishment.

291. See *supra* Section III.A.2 for a discussion of China's criminal legal system and its responsiveness to public opinion on crime and punishment.

292. See *supra* Section III.A.3 for a discussion of Japan's criminal legal system and its responsiveness to public opinion on crime and punishment.

293. See *supra* Section III.A for a discussion of country-specific criminal legal systems.

294. See *supra* Section III.A.4 for a discussion of Sweden's criminal legal system.

295. See *supra* Section III.A.4 for a discussion of Swedish public sentiment finding sentencing practices too lenient.

296. See *supra* Section III.B for a discussion of the treatment of crimes in country-specific criminal legal systems.

297. See *supra* Section III.B.2 for a discussion of China's use of the death penalty.

298. See *supra* Section III.B for a discussion of the use of the death penalty in China, the United States, and Sweden.

299. See *supra* Section II.D for a discussion of theories to justify punishment.

300. See *supra* Section III.A.2 for a discussion of China's legal system.

their desire for retribution.<sup>301</sup>

### *C. Free Will*

Belief in free will is generally accepted worldwide.<sup>302</sup> People subjectively feel as though they have control over their actions and believe that others do too.<sup>303</sup> Although belief in free will is common globally, how this belief manifests in action varies from country-to-country. Chinese and Japanese participants were more likely to consider situational factors when assessing moral responsibility, whereas the American and European participants were more focused on the specifics of the individual actor.<sup>304</sup>

Globally, belief in free will predicts greater support for harsh punishment for criminal behavior but is decoupled from attitudes toward unethical behavior.<sup>305</sup> Although correlated with free will beliefs, intolerance for unethical behavior was more closely linked to the institutional integrity of a given country.<sup>306</sup> Interestingly, institutional integrity does not influence citizens' desire for retributive punishment.<sup>307</sup> This suggests that although greater government corruption may increase one's tolerance for unethical behavior, free will beliefs dominate when considering criminal behavior—regardless of sociopolitical factors.<sup>308</sup> Perhaps even more interesting is that citizens in countries with low levels of institutional integrity are more tolerant of unethical behaviors but show greater support for retributive punishment for criminal behavior.<sup>309</sup> By the same token, high levels of institutional integrity were associated with intolerance for unethical behavior, but show lowered support for harsher punishments.<sup>310</sup>

## V. LIMITATIONS AND LOOKING FORWARD

The arguments here require additional support with further research on free will beliefs and their interactions with criminal legal systems. Studies on free will beliefs have historically analyzed WEIRD participants consisting of mostly university-educated American women, often failing to identify the participants' race and ethnicity.<sup>311</sup> Although the FAD-plus questionnaire has been adapted and validated

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301. See *supra* Section III.A.2 for a discussion of China's policy in considering public opinion in deciding criminal cases and sentencing options to preserve social stability.

302. See *supra* Section III.C and accompanying text for a discussion of global viewpoints on free will.

303. See *supra* Section III.C for a discussion of personal free will beliefs around the world.

304. See *supra* Section III.C for a discussion of factors several countries found relevant in assessing free will and moral responsibility.

305. See Martin et al., *supra* note 30, at 7326 (explaining that free will beliefs have little effect on attitude toward unethical behavior).

306. See *id.* at 7328 (considering subjects' tolerance for tax fraud, government benefits fraud, avoiding transit fares, and accepting bribes).

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. See *supra* notes 216–20 and accompanying text for limitations in free will studies.

in several languages, many countries have yet to adopt the method.<sup>312</sup> Perhaps due to the vagueness of the subject, free will belief methodologies continue to emerge and evolve. An inherent downside to this progression is the lack of data uniformity, which constrains the ability to meaningfully compare findings across countries.

There is an opportunity to analyze and interpret criminal legal systems and personal free will beliefs as they relate to the rise of populism,<sup>313</sup> specifically penal populism.<sup>314</sup> Even with mounting scientific research, there is not—and likely will never be—a definitive answer to the question of free will. Due to the nature of the esoteric beast, free will beliefs are difficult to divorce from their philosophical context, let alone debate politically. This concept-gap constrains the impact of free will studies on criminal law and policy, despite the documented influence that these beliefs have on personal attitudes regarding punishment. A potential solution is to nest findings about free will beliefs and punishment into relevant political concepts. Neuroscientist and experimental psychologist, Molly Crockett, opined that populism “taps into the human desire for punishment,”<sup>315</sup> echoing the conclusions of studies discussed in this Comment. Considering that populism promotes the “will of the people,”<sup>316</sup> this comes as no surprise. Studies on free will beliefs can readily supplement understanding of the rise of populism and its effects on criminal law and policy.

## VI. CONCLUSION

Countries with criminal legal systems that are responsive to public opinion are more likely to reflect the free will beliefs of their general population. When this is the case, a country’s criminal law and procedure will prioritize punitive justice and retribution—regardless of regional differences in free will beliefs. Criminal legal systems that are responsive to public opinion are more likely to be hard on crime and prioritize retribution because most individuals favor retributive justice when confronted with serious crime. Serious crimes like murder, rape, or robbery inflate individuals’ attribution of moral blameworthiness, resulting in a preference for retributive justice. This is the case even where individuals explicitly profess a preference for non-retributive justice.

People can reason that they live in a deterministic universe without free will, but their subjective experience of personal choice runs counter to determinism—it

312. See *supra* Section III.C for alternatives to FAD-plus free will belief studies.

313. “[W]e define populism as a thin-centered ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, ‘the pure people’ versus ‘the corrupt elite,’ and which argues that politics should be an expression of the *volonté générale* (general will) of the people.” CAS MUDDE & CRISTÓBAL ROVIRA KALTWASSER, *POPULISM: A VERY SHORT INTRODUCTION* 5–6 (2017) (emphasis omitted).

314. See *generally* JOHN PRATT, *PENAL POPULISM* 12–14 (Tim Newburn ed., 2007) (exploring concept of penal populism and its impact on contemporary penal policy).

315. Sophie Hardach, *How Populism Taps into the Human Desire for Punishment - A Psychologist Explains*, *WORLD ECON. F.* (Jan. 5, 2017), <https://www.weforum.org/agenda/2017/01/how-populism-taps-into-the-human-desire-for-punishment/>.

316. MUDDE & KALTWASSER, *supra* note 313, at 16–18.

“feels” like they have free will, and that their choices and actions stem from their own volition. This belief may be reinforced when individuals see other people committing crimes that (1) are counter to how they believe they would act and (2) present a danger to society. Put another way, people can objectively reason that criminal sentences should only be as long as is necessary to benefit society (for deterrence and public safety reasons), but when faced with real-life instances of serious crime, they are more likely to vouch for harsher sentences from a retributive standpoint due to their personal free will beliefs.

Countries that do not have criminal legal systems that are responsive to public opinion on crime employ theories of punishment independent of individual free will beliefs. Whether or not these countries are hard on crime and retributive is a top-down determination, rather than the result of the will of the people. Countries like this, with criminal legal systems that choose to prioritize rehabilitation and non-punitive action, can exist despite individualistic desires for harsh punishment.