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"He Said, She Said": With a Twist

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“HE SAID, SHE SAID”: WITH A TWIST

*Ronen Perry, Oren Gazal-Ayal, and Chen Toubul**

TABLE OF CONTENTS

INTRODUCTION	4
I. THEORETICAL BACKGROUND	6
A. GENERAL JUDICIAL BIASES	6
1. <i>Characteristics of Judges</i>	6
2. <i>Characteristics of Other Parties</i>	8
B. GENDER DIFFERENCES IN PERCEPTIONS OF REALITY ..	9
C. GENDER DIFFERENCES IN JUDICIAL DECISIONS	11
D. GENDER BIASES IN PERCEPTION OF JUDGMENTS	12
E. HYPOTHESES	13
II. METHODOLOGY	17
A. PARTICIPANTS	17
B. MATERIALS	18
C. PROCEDURE	19
III. RESULTS	19
A. GENERAL	19
B. PERCEPTIONS OF SEVERITY	20
C. PERCEPTIONS OF FAIRNESS	22
D. PROPER PUNISHMENT	24
IV. DISCUSSION	25
A. SUMMARY AND INTERPRETATION	25
B. METHODOLOGICAL LIMITATIONS	28
CONCLUSION	30

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INTRODUCTION

MANY studies have explored the effect of judges' memberships in social categories, such as gender, ethnicity, religion, age, and political affiliation, on their decisions.¹ This body of research has focused primarily, but not exclusively, on areas in which a particular attribute is expected to have a significant effect on judges' perceptions of reality. For example, some studies examined the relationship between judges' gender and their decisions concerning sex-based offenses.² No study, as far as we know, has investigated whether membership in social categories affects public perceptions of judicial decisions, especially when such membership is suspected to affect one's perception of reality.³ Specifically, no one has examined whether the judge's or evaluator's gender might affect the perception of judicial decisions in sex-related cases. Simply put, does it matter if "he said" or "she said," and if "he heard" or "she heard"?

This question is important, *inter alia*, because the frequently heard argument that the judiciary must be representative or reflective of society⁴ may be partly linked to the assumption that representation enhances public trust in the judiciary.⁵ Such an assumption holds to the extent that lack of representation is perceived by members of a particular group as an exclusion of their unique viewpoint. This may happen because members of different groups (1) truly have different beliefs, values, interests, motivations, and emotional and cognitive processes, or (2) perceive a differ-

1. See *infra* Part I.A.

2. See *infra* notes 41–66 and accompanying text.

3. In fact, there has been very little empirical research on the public perception of judicial decisionmaking. One paper has studied the impact of case outcomes and reasoning on perceptions of judgments: Dan Simon & Nicholas Scurich, *Lay Judgments of Judicial Decision Making*, 8 J. EMPIRICAL LEGAL STUD. 709, 709 (2011). Another has studied the impact of judges' gender on perceptions of judges' characteristics and behaviors in court. Elizabeth A. Tomsich & Mary E. Guy, *Perceptions of Authority: How Gender Affects Citizen Ratings of Judges*, 46 ADMIN. & SOC'Y 471, 473 (2014). No study has tested the impact of judges' characteristics on public perception of judgments.

4. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 784 (1995) ("For the good democrat, it is important that members of the judiciary are representative of those over whom they exercise judicial power."); Nienke Grossman, *Sex Representation on the Bench and Legitimacy of International Criminal Courts*, 11 INT'L CRIM. L. REV. 643, 643 (2011) (discussing the Rome Statute, which emphasizes the need for "fair representation of female and male judges" on the International Criminal Court). *But see* David A.R. Williams, *The Judicial Appointment Process*, 2004 NEW ZEALAND L. REV. 39, 50 ("[T]here is no case for creating a judiciary that is 'representative' of the community—it is the antithesis of the judicial process that the Judge should 'represent' any particular sector or interest group.").

5. Trust in decisionmaking bodies is an integral component of their legitimacy. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 151 (2d ed. 2006). And legitimacy in turn inspires compliance with the law and cooperation with legal institutions. *Id.* at 4, 165–66 (explaining that legitimacy promotes compliance); TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW* 101–03 (2002); Jeffrey Fagan & Tom Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RES. 217, 218 (2005); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 517–18 (2003).

ence even where none exists. This article focuses on the latter, or, more accurately, on group-based biases in the perception of judgments.

Two caveats are due at this point. First, the value of representation in the judiciary does not hinge solely or necessarily on trust. Representation may also generate a sense of fairness (in the allocation of power), dignity, or empowerment within the relevant groups in society.⁶ However, our project was motivated by the possible link between representation and trust, irrespective of other benefits of representation. Second, as mentioned above, people may trust members of their own group more than members of other groups for two reasons. For one, members of different groups may truly have different perspectives.⁷ Carol Gilligan opined that males and females develop distinct worldviews and see themselves as differentially connected to society;⁸ Hanna Pitkin contended that women on the bench represent and protect the interests of their own class;⁹ and others have observed that different life experiences affect male and female judges' understandings of certain situations.¹⁰ If these observations are correct, people will trust other members of their own group simply and justifiably because they hold, advocate, and promote similar views, whereas members of other groups do not. Alternatively, people may have greater trust in judgments of members of their own group because they perceive a difference between this group and other groups even where none exists. In this latter case, perception of judgments may vary, regardless of any real differences between the judgments, according to the affiliations of the evaluators and the evaluated. Such group-based biases in the perception of judgments are the object of our project.

In this article we study primarily (1) whether male and female judges' decisions are perceived differently, and (2) whether men and women perceive judgments differently. Specifically, we wish to examine whether *identical* judgments concerning gender-charged events are perceived differently due to the judge's gender, the evaluator's gender, or a combination thereof, indicating the existence of cognitive biases. To do so, we employ an experimental research design. Our two independent variables are the judge's gender (an active variable) and the evaluator's gender (an attribute variable). The dependent variables are evaluators' perceptions with respect to different features of the judgments. This study examines, *inter alia*, whether people deem sentences imposed by female judges on

6. See, e.g., Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, 14 Soc. Sci. J. 77, 77 (1977) ("The reason most often cited [for representation] is simple fairness: the opportunities afforded women should equal the opportunities afforded men.").

7. See, e.g., Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 Am. J. Pol. Sci. 389, 390 (2010) (discussing the effects of sex on judging).

8. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT *passim* (1982).

9. HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION *passim* (1967); see also Boyd et al., *supra* note 7, at 391.

10. Gerard Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. Pol. 143, 145 (1986).

sex offenders more severe than identical sentences imposed by male judges, whether women and men perceive identical sentences differently regardless of the judge's gender, and whether men and women perceive identical sentences imposed on sex offenders as fairer when imposed by judges of their own gender.

Part I provides a systematic literature review and sets forth our five interrelated hypotheses. Part II explains the experimental methodology. Part III presents the results. Part IV summarizes and interprets the results, explains the methodological limitations, and suggests directions for future research.

I. THEORETICAL BACKGROUND

A. GENERAL JUDICIAL BIASES

1. *Characteristics of Judges*

In theory, judicial decisions should be independent of judges' identities. The judiciary emphasizes the neutrality and objectivity of judges, aiming to ensure public trust and legitimacy.¹¹ However, despite this facade of impartiality, legal realism assumes that judicial decisions are affected by judges' backgrounds and worldviews.¹² Empirical research has attempted to test this theoretical supposition, examining whether personal characteristics of judges, such as age, ethnicity, and political affiliation, play a role in judicial decisionmaking.¹³ Many have found differences between the decisions of judges having different personal attributes (age, gender, race, religion), social background (legal education, career as a prosecutor, a judge on another court, or an elected official), and ideology (as manifested in party affiliation and appointing president).¹⁴

Relevant studies usually focus on areas in which judges' characteristics are expected to make a difference. For example, appellate-level studies found that Democratic judges were more liberal than Republican judges, both in civil rights and liberties cases and in economic policy areas.¹⁵ Mat-

11. See, e.g., David C. Brody, *The Use of Judicial Performance Evaluation to Enhance Judicial Accountability, Judicial Independence, and Public Trust*, 86 DENV. U. L. REV. 115, 124 (2008) (“[C]onduct which reflects badly on the integrity and impartiality of the justice system is likely to decrease public trust in the judiciary. Explicit statements or acts of bias and partiality . . . are examples of actions for which a judge may be held accountable.”).

12. Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 257 (1995); see also JEROME FRANK, *LAW AND THE MODERN MIND* 111 (1930) (“The peculiar traits, disposition, biases[,] and habits of the particular judges will, then, often determine what he decides to be the law.”).

13. See Tracey George, *Court Fixing*, 43 ARIZ. L. REV. 9, 14–16 (2001) (discussing the importance of various individual factors on judicial behavior).

14. See *id.*

15. See Jilda M. Aliotta, *Combining Judges' Attributes and Case Characteristics: An Alternative Approach to Explaining Supreme Court Decisionmaking*, 71 JUDICATURE 277, 280 (1988) (“[B]eing a Democrat is associated with casting votes in favor of equal protection claims.”); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 496, 505 (1975) [hereinafter *Voting Behavior of 1975*] (finding that Democrat judges tended to be more liberal than Republicans and that older judges tended to be more conservative than younger judges); Sheldon Goldman, *Voting*

thew Hall recently found that judges' partisanship has an effect on U.S. Courts of Appeals decisions in Takings Clause cases and criminal appeals cases.¹⁶ Similarly, some studies found correlation between appointing presidents and case outcomes.¹⁷ An interesting study on the impact of judges' personal characteristics on the outcomes of sexual harassment cases revealed that young judges and judges affiliated with the Democratic Party found in favor of the plaintiff at a higher rate than older judges and judges associated with the Republican Party, respectively.¹⁸

However, several studies found no clear correlation between political affiliation and judicial decisions.¹⁹ Moreover, other characteristics of judges—such as age, sex, religion, and experience in politics—have a weaker correlation with voting records in most types of cases.²⁰ Finally, in

Behavior on the United States Courts of Appeals, 1961-1964, 60 AM. POL. SCI. REV. 374, 380–82 (1966) [hereinafter *Voting Behavior of 1966*] (finding that party affiliation is associated with judges' voting behavior, especially when the issues involve economic liberalism); William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 55–56 (1991) (finding that judges appointed by Reagan are more conservative than those appointed by Carter in antitrust cases); Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1167 (1992) (finding correlation between political party and appointing president and outcomes of employment discrimination cases); Donald R. Songer, *The Policy Consequences of Senate Involvement in the Selection of Judges in the United States Courts of Appeals*, 35 W. POL. Q. 107, 109, 111 (1982) (finding that participation of home state senators of the president's party in the nomination of judges for the courts of appeals resulted in the selection of judges whose voting behavior supported policy positions similar to those of their home state senators); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978*, 75 AM. POL. SCI. REV. 355, 362 (1981) (finding that partisan affiliation, appointing president, and career experience have an impact on decisions in civil rights and liberties cases); see also Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551, 1554–62 (1966) (providing a comprehensive survey of the relevant literature in the mid-1960s).

16. Matthew Hall, *Randomness Reconsidered: Modeling Random Judicial Assignment in the U.S. Courts of Appeals*, 7 J. EMPIRICAL LEGAL STUD. 574, 585 (2010). But see Denise M. Keele et al., *An Analysis of Ideological Effects in Published Versus Unpublished Judicial Opinions*, 6 J. EMPIRICAL LEGAL STUD. 213, 231–32 (2009) (finding that the effects of ideological preferences are different in published and unpublished opinions of appellate judges: judges' decisions followed their ideological preferences in published opinions, but they did not in unpublished opinions).

17. Robert A. Carp et al., *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298, 299–300 (1993); ROBERT A. CARP & C. K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS 51–53 (1983); Jon Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48, 54 (1986); Tate, *supra* note 15, at 362.

18. See generally Carol T. Kulik et al., *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 LAW & HUM. BEHAV. 79 (2003).

19. See, e.g., David W. Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57, 59–60, 69, 72 (1969) (a study of the Wisconsin Supreme Court); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1193–94 (1991) (finding no significant relationship between a judge's party or appointing president and outcome of race-based equal protection cases).

20. Ashenfelter et al., *supra* note 12, at 262; see also *Voting Behavior of 1966*, *supra* note 15, at 382 (finding that religion, socioeconomic origins, education, and age were almost unrelated to judges' voting behavior).

studying federal district court decisions in civil rights and prisoner cases, Orley Ashenfelter and others found little evidence that the judge's political party, the party of the appointing president, age, experience, religion, and prior background as a judge, a prosecutor, or an elected official influenced the outcome.²¹

2. Characteristics of Other Parties

For the sake of completeness we note that researchers have also tested the possible impact of legally irrelevant characteristics of victims and defendants, in addition to those of judges, on case outcomes.²² For example, several studies have focused on identifying features that affect the attribution of responsibility in cases of rape.²³ James Scroggs found that the rape victim's appearance—the extent to which she looks “respectable”—has a considerable influence on the degree of blame attributed to her.²⁴ In addition, characteristics of the victim and the defendant that are prima facie irrelevant to the offense in question, such as social status, race, education, occupation, and marital status, have an impact on the decisions of juries²⁵ and even of professional judges.²⁶ The argument voiced in the literature is that the legal system shows a greater tendency to legitimize the defendant's actions if the complainant is not an “ideal” woman, and a “flaw” is found in her status or behavior.²⁷ Furthermore, it was found that in cases of acquaintance rape people attribute more responsibility to the victim and less responsibility to the rapist, express less empathy to the victim, and generally consider the rape less serious, as compared to stranger rape.²⁸

21. Ashenfelter et al., *supra* note 12, at 280–81.

22. *See id.*; *see also* discussion *supra* Part I.A.2.

23. *See id.*

24. James R. Scroggs, *Penalties for Rape as a Function of Victim Provocativeness, Damage, and Resistance*, 6 J. APPLIED SOC. PSYCHOL. 360–61 (1976).

25. *See, e.g.*, Sheila R. Deitz et al., *Attribution of Responsibility for Sexual Assault: The Influence of Observer Empathy and Defendant Occupation and Attractiveness*, 108 J. PSYCHOL. 17, 23–24 (1981); Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315, 1315 (1994).

26. *See, e.g.*, A. Leslie Sebba, *The Crime of Rape: Legal and Criminological Trends*, 3 PELILIM 47, 75 (1993) (finding a statistically significant relationship between the outcome of the case and defendant's age, complainant's personal status, defendant's personal status, defendant's prior record, previous acquaintance between the complainant and the defendant, location of the crime, identity of the location's owner, and delayed complaint).

27. ZSUZSANNA ADLER, *RAPE ON TRIAL* 1–3, 17–18 (1987) (explaining that legal institutions subjected rape victims to the argument that their behavior caused the crimes against them).

28. Lawrence G. Calhoun et al., *Social Perception of the Victim's Causal Role in Rape: An Exploratory Examination of Four Factors*, 29 HUM. REL. 518 (1976); Robert L. Quackenbush, *A Comparison of Androgynous, Masculine Sex-Typed and Undifferentiated Males on Dimensions of Attitudes Toward Rape*, 23 J. RES. PERSONALITY 318, 321, 331 (1989); Lynda A. Szymanski et al., *Gender Role and Attitudes Toward Rape in Male and Female College Students*, 29 SEX ROLES 37, 53 (1993). Estrich makes a corresponding distinction between “simple rape” and “aggravated rape.” SUSAN ESTRICH, *REAL RAPE* *passim* (1987). The latter is committed by a stranger and involves physical violence; the rapist is

Numerous studies have also examined whether the judiciary treats disadvantaged minorities differently, particularly in sentencing; many found that minorities do endure harsher sentences.²⁹ However, Gary Kleck analyzed U.S. research on racial bias in sentencing and found that the studies that appeared to find racial discrimination usually failed to adequately control for criminal record and other explanatory factors.³⁰ More recent studies have led some commentators to conclude that there is little evidence of overt racial bias in sentencing.³¹ This does not mean that racial discrimination has disappeared; rather, if it exists, it is more subtle and harder to observe. The methodological difficulty is that race and ethnicity are often correlated with other factors that have been found to significantly influence sentences, such as criminal record, pretrial detention, unemployment, court-appointed counseling, crime type, aggravating circumstances, and so forth.³² When these factors are controlled for, the independent effect of race loses all or most of its explanatory power in some of the studies.³³ Even when race and ethnicity have a direct effect on sentencing, it is still questionable whether discrimination should be attributed to the sentencing judges or to differential treatment by the police, prosecutors, probation officers, defense attorneys, and other participants.³⁴

B. GENDER DIFFERENCES IN PERCEPTIONS OF REALITY

A second body of research relevant to our study has found that men and women have different attitudes towards certain legally relevant events. A prominent example is the crime of rape. First, studies have found that men more than women believe rape myths, such as that wo-

typically different from the victim in ethnicity, class, etc., while the victim complies with normative femininity—she is married, heterosexual, maintains a “decent” lifestyle, etc. *Id.* “Simple rape” takes place between acquaintances; it is not accompanied by the use of great physical force, but by other means of pressure; the rapist is a “normal” man while the victim does not necessarily comply with normative femininity—she is single, divorced or a single parent, has a “sexual past,” etc. *Id.* According to Estrich, the legal system treats aggravated rape seriously: it believes victims, conducts comprehensive investigations, arrests suspects, convicts defendants, and imposes severe penalties on them. *Id.* In contrast, the system does not intensively react to simple rape. *Id.*

29. Oren Gazal-Ayal & Raanan Sulitzeanu-Kenan, *Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment*, 7 J. EMPIRICAL LEGAL STUD. 403, 405 (2010).

30. Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783, 798–99 (1981).

31. Darren E. Warner, *Race and Ethnic Bias in Sentencing Decisions: A Review and Critique of the Literature*, in *THE SYSTEM IN BLACK AND WHITE: EXPLORING THE CONNECTION BETWEEN RACE, CRIME AND JUSTICE* (Michael W. Markowitz & Delores D. Jones-Brown eds., 2000); Stephen A. Klein et al., *Race and Imprisonment Decisions in California*, 247 SCIENCE 812, 812 (1990); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 355–56 (1997).

32. See *supra* notes 27–28 and accompanying text.

33. Gazal-Ayal & Sulitzeanu-Kenan, *supra* note 29, at 406.

34. *Id.*

men desire forced sex, or that women often falsely accuse men of rape, which may affect the willingness to believe allegations of rape and the perceived gravity of the offense.³⁵ Second, compared to men, women generally attribute less blame and responsibility to the victim and more to the rapist.³⁶ Third, women regard the ramifications of rape as more severe than men.³⁷

Two distinctions may be relevant at this point. The first is that the differences between the perceptions of men and women seem clearer in cases of acquaintance rape, as opposed to stranger rape. At least one study has found that women's tendency to blame rape victims less than men is greater in cases of acquaintance rape.³⁸ However, other studies have shown that women blame acquaintance rape victims more than men blame them,³⁹ perhaps because some women are overly critical of such victims, believing that had they been in the victim's place they would have been able to avoid the rape.⁴⁰ The second is that the differences between the perceptions of men and women seem clearer in the case of rape motivated by a desire for sex, as opposed to rape motivated by power—maintaining male physical superiority and social dominance through violence.⁴¹ One experiment found that in the case of a sex-motivated rape men attributed greater blame than women to the victim and less blame to the offender, whereas in the case of a power-motivated rape the differences were not statistically significant.⁴²

35. See David J. Giacopassi & R. Thomas Dull, *Gender and Racial Differences in the Acceptance of Rape Myths Within a College Population*, 15 *SEX ROLES* 63, 68 (1986) ("Females . . . were more likely than males to reject the beliefs that women often falsely accuse males of rape, that females have fantasy dreams about rape, and that the victims of rape are often a little to blame for the crime. They were also more likely than males to disagree with the statement that normal males do not commit rape."); Barbara E. Johnson et al., *Rape Myth Acceptance and Sociodemographic Characteristics: A Multidimensional Analysis*, 36 *SEX ROLES*, 693, 699 (1997) ("Sex differences in rape myth endorsement are evident for each of the rape myth dimensions."); Szymanski et al., *supra* note 28, at 51 ("Men . . . [have] stronger beliefs in rape myths.").

36. See Damon Mitchell et al., *Effects of Offender Motivation, Victim Gender and Participant Gender on Perceptions of Rape Victims and Offenders*, 24 *J. INTERPERSONAL VIOLENCE* 1564, 1570–71 (2009); see also *supra* note 35 and accompanying text.

37. Szymanski et al., *supra* note 28, at 53; see also Eugenia P. Gerdes et al., *Perceptions of Rape Victims and Assailants: Effects of Physical Attractiveness, Acquaintance, and Subject Gender*, 19 *SEX ROLES* 141, 149 (1988) ("Women saw the crime as more debilitating for the victim and warranting greater punishment."); Mitchell et al., *supra* note 36, at 1571 ("Female participants . . . believed the victim experienced more trauma than male participants.").

38. See generally Gerdes et al., *supra* note 37.

39. See, e.g., R. Lance Shotland & Lynne Goodstein, *Just Because She Doesn't Want to Doesn't Mean It's Rape: An Experimentally Based Causal Model of the Perception of Rape in a Dating Situation*, 46 *SOC. PSYCHOL. Q.* 220, 229 (1983) ("Women blame the victim more than do men. This finding suggests that a female's experience as sexual gate keeper may make her more critical of our victim's behavior because she may have felt, had she been Diane, that she could have successfully avoided victimization.").

40. Szymanski et al., *supra* note 28, at 40–41, 54.

41. Men are more inclined to believe that the motivation for rape is a desire for sex, whereas women more strongly believe that the motivation is power. *Id.* at 46, 52.

42. Mitchell et al., *supra* note 36, at 1571–72, 1574.

C. GENDER DIFFERENCES IN JUDICIAL DECISIONS

As explained above, although the judiciary makes an effort to create an image of impartiality, legal realism postulates that judgments are affected by the judge's background and worldview.⁴³ Because several studies have established that judicial decisions are affected by judges' views and identities,⁴⁴ and because men and women differ in their views and perceptions,⁴⁵ one might expect a gender bias in judicial decisionmaking. Researchers have examined whether the differences between the female and the male voice, emphasized by psychologists and sociologists,⁴⁶ are also expressed in judicial decisions. Put differently, are the differences in perception of reality reflected in judicial decisions? Studies that examined whether differences between the sexes affect judicial decisions provide no conclusive answer. In fact, many found no support for the supposition that a judge's gender has a significant impact on his or her decisions.⁴⁷ In a well-known study, Christina Boyd and others found that the presence of women in the federal appellate judiciary rarely has an appreciable empirical effect on judicial outcomes.⁴⁸

Even studies focusing specifically on gender-related decisions failed to yield conclusive results.⁴⁹ Some experimental studies found that women who were asked to assume the role of judges or jurors in rape cases were more likely than men to convict, and imposed harsher punishments on those convicted.⁵⁰ Particularly important in our context are studies that examined the severity of the punishment that men and women regard as appropriate in cases of rape.⁵¹ Lynda Szymanski and others presented a similar rape scenario to men and women, and found that women believed a harsher punishment should be imposed on the rapist than men (4.06 years in prison on average as against 3.77).⁵² Likewise, Eugenia Gerdes and others, who presented a different story of rape, found that men proposed imposing a custodial sentence of 14.78 years, while the average sentence proposed by women was 21.66 years.⁵³ However, other studies

43. *Supra* notes 11–12 and accompanying text.

44. *See* discussion *supra* Part I.A.1.

45. *See* discussion *supra* Part I.B.

46. GILLIGAN, *supra* note 8, at 24.

47. George, *supra* note 13, at 20 (observing that empirical studies have not found differences between male and female judges); John Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 AM. J. POL. SCI. 308, 317, 319–20 (1981) (finding that female judges were not more lenient than male judges in convicting and sentencing defendants); Elaine Martin, *Women on the Bench: A Different Voice?*, 77 JUDICATURE 126, 28 (1993) (observing that studies “offer little empirical support for the theory that women judges will speak in a unique feminine voice”); Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 898 (1995) (“[E]mpirical studies show only slight, if any, differences between the overall voting behavior of male and female judges along the dimension of gender.”).

48. Boyd et al., *supra* note 7, at 406.

49. *See supra* notes 43–47 and accompanying text.

50. *Id.*

51. *Id.*

52. Szymanski et al., *supra* note 28, at 46.

53. Gerdes et al., *supra* note 37, at 145.

found that women actually tend to show greater leniency to sex offenders.⁵⁴

Observational—non-experimental—studies of the actual behavior of male and female judges also failed to produce conclusive findings.⁵⁵ Some found that female judges adopt a harsher approach than male judges to men accused of sexual offenses against women.⁵⁶ Similarly, Christina Boyd and others observed statistically significant sex-based effects in sex discrimination cases: the probability of a judge deciding in favor of the party alleging discrimination decreased by ten percentage points when the judge was a male.⁵⁷ Moreover, the presence of a female on a panel actually caused male judges to vote in a way that they otherwise would not—in favor of plaintiffs.⁵⁸ However, other studies found that female judges were actually less likely to convict defendants of sex offenses and imposed lighter sentences than male judges.⁵⁹ A third set of studies found no significant differences between the decisions of male and female judges.⁶⁰

D. GENDER BIASES IN PERCEPTION OF JUDGMENTS

It follows from the above that while the two sexes differ in perspective, the scholarly basis is insufficiently strong for the assumption that the judgment patterns of male and female judges are systematically different—not even in gender-charged cases, such as sex offenses. It is possible that the substantive and procedural legal rules or the ethos of judicial objectivity override natural tendencies and produce uniformity.⁶¹ These

54. Bryna Bogoch, *Judging in a "Different Voice": Gender and the Sentencing of Violent Offences in Israel*, 27 INT'L J. SOC. L. 51, 55 (1999) (reviewing relevant literature).

55. See *supra* notes 46–47 and accompanying text.

56. See, e.g., James Stribopoulos & Moin A. Yahya, *Does a Judge's Party of Appointment or Gender Matter to Case Outcomes: An Empirical Study of the Court of Appeal for Ontario*, 45 OSOODE HALL L.J. 315, 351 (2007) (finding that in sexual assault cases in which the accused appealed the sentence, panels with female judges denied 78% of appeals, whereas purely male panels denied only 73% of appeals).

57. Boyd et al., *supra* note 7, at 390, 406; see also Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1786–87 (2005) (“[F]emale judges mattered to outcomes in Title VII sexual harassment and sex discrimination cases Panels with at least one female judge decided cases for the plaintiff more than twice as often as did all-male panels.”).

58. Boyd et al., *supra* note 7, at 406.

59. See, e.g., Gruhl et al., *supra* note 47, at 315 (finding that female judges convict sex offenders at a lower rate and impose lesser sanctions, with the exception of rape).

60. See, e.g., Kritzer & Uhlman, *supra* note 6, at 82 (finding no statistically significant difference between male and female judges' verdicts, jail sentences, and sentence severities in rape cases); Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 320 (2004) (finding no difference between the rulings of male and female federal judges in sexual harassment cases); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 607 (1985) (finding no difference between male and female judges in gender-colored issues).

61. Boyd et al., *supra* note 7, at 392 (“[M]ale and female judges undergo identical professional training, obtain their jobs through the same procedures, and confront similar constraints once on the bench.”).

sever the predicted link between real difference in perception and difference in judicial decisionmaking.

However, given the established difference between men's and women's perceptions of reality, gender probably plays a role in how judicial decisions are perceived, especially in gender-charged situations. There is reason to believe (1) that the public assumes male and female judges decide sex-related cases differently, and therefore perceives judgments differently based on the judge's gender, and (2) that men and women perceive judgments in these areas differently.

Unfortunately, we have found no studies that addressed these conjectures directly. The only one that investigated the impact of judges' gender on public perceptions of the judiciary concerned differences in people's perceptions of male and female judges' characteristics, not their decisions.⁶² It found differences between how male and female judges are assessed when behaving in a stereotypically masculine—"tough"—or feminine—"nurturant"—manner.⁶³ Research has similarly shown that men and women in non-judicial positions are perceived differently irrespective of real difference. Studies that examined the evaluation of men and women in various leadership positions, in experiments confined to the manipulation of the leader's gender, found that women were valued less, particularly when performing functions normally carried out by men.⁶⁴ Undervaluation was more clearly, but not exclusively, evident when the evaluators were men.⁶⁵ Likewise, studies that examined the evaluation of job applicants found that male candidates were valued slightly higher than were female candidates with similar qualifications.⁶⁶ That men and women are perceived differently, and that men and women have different perceptions of professional behavior helps to substantiate our intuitions about gender-based biases in the perception of judgments.

E. HYPOTHESES

The purpose of this study is to examine how the punishment imposed for sexual offenses is perceived, depending on the gender of the judge and the evaluator, respectively. Previous studies have examined whether women truly have a different perspective, and whether the presence of a female judge on the bench affects case outcomes. The latter body of research yielded inconclusive findings.⁶⁷ Several studies found that female judges were more liberal in certain types of cases, especially those relat-

62. Tomsich & Guy, *supra* note 3, at 477–78 (explaining the independent and dependent variables and the main findings).

63. *Id.* at 488.

64. *See infra* notes 65–66 and accompanying text.

65. Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 *PSYCHOL. BULL.* 3 (1992).

66. Judy Olian et al., *The Impact of Applicant Gender Compared to Qualifications On Hiring Recommendations: A Meta-Analysis of Experimental Studies*, 41 *ORG. BEHAV. & HUM. DECISION PROCESSES* 180 (1988).

67. *See* discussion *supra* Part I.

ing to women, or that female judges tended to impose harsher punishments for crimes against women.⁶⁸ Other studies found no significant difference between male and female judges.⁶⁹ This article focuses on questions that have not been previously studied, particularly on the relation between the judge's and his or her evaluators' genders and how the judge's decision regarding a sexual offense is perceived.

Because the judicial decisionmaking process is in part driven by emotional forces, interpretation, and evaluation on the part of the judge, and because gender is known to affect these, the public may tend to perceive male and female judges' decisions differently. For instance, in the case of rape, one may hypothesize that a female judge's sentence will be deemed more severe than that of a male judge, even if there is no real difference between the two. One possible reason for this is that male and female judges belong to different social groups, hence to different identification groups.⁷⁰ Presumably, the public tends to think that a female judge in a rape case identifies more with the female victim whereas a male judge identifies more with the male aggressor, and that these respective tendencies lead to differences in punishment.

This hypothesis is inspired by the theory of in-group bias in social psychology, whereby people have a natural tendency to self-categorize, which generates classification into "us" and "them."⁷¹ Even under laboratory conditions, this division results in favoring in-group members and discriminating against out-group members.⁷² Henri Tajfel emphasized the emotional and moral significance of socialization alongside the concept of affiliation, and called this content "social identity."⁷³ The individual seeks to achieve positive social identity or positive differentiation.⁷⁴ This is achieved through favoritism toward the in-group and discrimination against the out-group.⁷⁵ The very fact of affiliation with a specific group is a source of hostility to other groups.⁷⁶ According to social identity theory,

68. *See id.*

69. *See id.*

70. HANS TOCH, *LEGAL AND CRIMINAL PSYCHOLOGY* 106, 136 (1966).

71. For an excellent literature review, see Miles Hewston et al., *Intergroup Bias*, 53 *ANN. REV. PSYCHOL.* 575, *passim* (2002).

72. MICHAEL A. HOGG & DOMINIC ABRAMS, *SOCIAL IDENTIFICATIONS: A SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS AND GROUP PROCESSES* 28-55 (1998); ELIOT R. SMITH & DIANE M. MACKIE, *SOCIAL PSYCHOLOGY* 203-46 (2d ed. 1999).

73. Henri Tajfel, *Social Psychology of Intergroup Relations*, 33 *ANN. REV. PSYCHOL.* 1, *passim* (1982).

74. *Id.*

75. *Id.*; Hewston et al., *supra* note 71, at 576 ("Intergroup bias refers generally to the systematic tendency to evaluate one's own membership group (the in-group) or its members more favorably than a non-membership group (the out-group) or its members. Bias can encompass behavior (discrimination), attitude (prejudice), and cognition (stereotyping).").

76. This was tested using the minimal group paradigm (MGP), namely a research design in which people are classified into groups based on arbitrary and meaningless distinctions, such as the color of their shirts; the groups do not compete for resources and are not in conflict. MGP shows that people systematically favor members of their own group and discriminate against members of other groups, demonstrating the importance of a sense of positive social identity.

the purpose of in-group bias is to raise a person's self-esteem, which consists of two factors: personal identity and group identity.⁷⁷ Just as an individual's self-esteem is affected by comparing him or her to others, it is affected by drawing comparisons between the group to which he or she belongs and other groups.⁷⁸

Empirical studies have lent some support to the in-group bias theory. Susan Welch and others found that black judges treated black defendants "more equally" than did white judges in the decision to incarcerate.⁷⁹ Brian Johnson found that minority judges were less likely to incarcerate black and Hispanic offenders, but found no difference in the length of sentences.⁸⁰ Still, the limited literature on the interaction between the judge's and the defendant's racial and ethnic backgrounds provides mixed evidence as to whether the harsher treatment of minorities in court results from a judge's in-group bias.⁸¹ Oren Gazal-Ayal and Raanan Sulitzeanu-Kenan found support for ethnic in-group bias in the likelihood of release from pretrial detention in Israel, but no support for such bias in the decision on the length of detention.⁸² While the defendant's and the victim's demographic characteristics should be irrelevant in the legal process, they might have an impact on the outcome due to an in-group bias.

In this study we intend to examine not only whether an in-group bias affects people's perception of judgments, but also whether the perceptions of judgments are affected by an unfounded belief that judges themselves exhibit in-group biases. We term the latter phenomenon "second-order in-group bias," because it involves a biased belief that an ordinary, first-order, in-group bias exists. The study focuses only on gender-based biases affecting the perception of a specific type of judgment: a criminal sentence in a gender-charged case—rape. In the following paragraphs we present and explain our hypotheses.

Hypothesis 1: A female judge's sentence in a rape case is deemed more severe than a male judge's identical sentence. Our first hypothesis is that the judge's gender has an effect on the perceived severity of the sentence he or she imposes on a sex offender. The theoretical explanation is a second-order in-group bias, that is, a false belief in the existence of an ordinary in-group bias, whereby a female judge identifies and sympathizes more with the rape victim, and a male judge identifies and sympathizes more with the aggressor.

Hypothesis 2: Men perceive any sentence imposed on a rapist as more severe than women do. Our second hypothesis is that the evaluator's gender has an effect on the perceived severity of sentences imposed on sex

77. See Tajfel, *supra* note 73.

78. Hewston et al., *supra* note 71, at 580.

79. Susan Welch et al., *Do Black Judges Make a Difference?*, 32 AM. J. POL. SCI. 126, 134 (1988).

80. Brian D. Johnson, *The Multilevel Context of Criminal Sentencing: Integrating Judge- and County-Level Influences*, 44 CRIMINOLOGY 259, 287 (2006).

81. Gazal-Ayal & Sulitzeanu-Kenan, *supra* note 29, at 407.

82. *Id.* at 420.

offenders. The theoretical explanation hinges on simple, first-order in-group bias. Presumably, female evaluators identify and sympathize more with the female victim, whereas male evaluators identify and sympathize more with the male aggressor, leading to different perceptions of the severity of the punishment.

Hypothesis 3: Women attribute greater weight to the judge's gender in rape cases. Our third hypothesis is that the judge's gender and the evaluator's gender exert a combined effect on the perceived severity of the sentence, at least in gender-charged cases. Put differently, the impact of the judge's gender will vary depending on the evaluator's gender. More specifically, Hypothesis 1 posits that female judges' sentences are deemed more severe because they are perceived as less identified with and sympathetic to the offender, and more identified with and sympathetic to the victim. However, if men and women assign different significance to the judge's gender, they will perceive differently the difference between female and male judges' decisions. Because the female voice was excluded and silenced for centuries, we suspected that women might assign greater weight to judges' genders, at least where gender-charged offenses are concerned. Thus, the perceived difference between female and male judges' decisions in rape cases may be greater in the eyes of women.

Hypothesis 4: Women believe female judges' decisions in rape cases are fairer, whereas men believe male judges' decisions are fairer. Our fourth hypothesis is that the judge's gender and the evaluator's gender have a combined effect on the perceived fairness of the punishment, at least in gender-charged cases. While we hypothesized that both women and men would deem a female judge's sentence in a rape case more severe than that of a male judge (Hypothesis 1), we expected women to consider a female judge's sentence fairer than a male judge's, and men to consider a male judge's sentence fairer. We assumed that in an experiment accounting for both the judge's and the evaluator's genders, these differences would cancel each other out in any comparison that disregards one of the two variables. In other words, no significant difference will be found between the perceived fairness of sentences imposed by male and female judges if the evaluators' genders are ignored, and no significant difference will be found between male and female evaluators if the judges' genders are ignored. Presumably, because the situation is gender-charged, male evaluators will identify more with male judges, whereas female evaluators will identify more with female judges (in-group bias). So men and women alike will feel that judges of their own gender impose sentences that better accord with their own values and beliefs.

Hypothesis 5: Women believe harsher punishments should be imposed on rapists compared to men. We note at the outset that this hypothesis is not directly linked to the general theme of this article as it does not focus on gender biases in perception of judgments, but instead on gender biases in judgment. We decided to test it nonetheless because we had an opportunity, within our experiment, to contribute to existing literature on gen-

der biases in judgment.⁸³ Our hypothesis has two related theoretical explanations. First, as explained in Part I.B, men and women have different attitudes towards real life situations, particularly rape. Men are more likely to believe rape myths, attribute less blame and responsibility to the aggressor and more to the victim, and regard the ramifications of rape as less severe.⁸⁴ Consequently, they are expected to recommend a more lenient punishment.⁸⁵ Second, one may expect an in-group bias. Arguably, men identify and sympathize with the male aggressor more than women, whereas women identify and sympathize with the female victim more than men, leading to different assessments of the proper punishment.

II. METHODOLOGY

We employed an experimental 2x2 factorial design. Our two independent variables were judges' genders (an active variable) and subjects' genders (an attribute variable). The dependent variables were perceptions of judgments, namely the judgments' perceived severity and perceived fairness.

A. PARTICIPANTS

Two hundred thirty (230) subjects participated in the experiment (96 men, 131 women, 3 unknown). Ages ranged from 18 to 66 ($M=24.38$, $SD=4.55$).⁸⁶ All subjects were law students⁸⁷ at the University of Haifa who volunteered to participate in the study after class. Specifically, we

83. See discussion *supra* Part I.C.

84. See *supra* note 36 and accompanying text.

85. See, e.g., Gerdes et al., *supra* note 37, at 145; Szymanski et al., *supra* note 28, at 46.

86. "M" represents the mean, while "SD" represents the standard deviation.

87. Using students as participants is very common in experimental research. In fact, most psychological studies are conducted using undergraduate psychology students as participants. Admittedly, this is not ideal because psychology students are not representative of the general population in terms of age, education, ethnic and socio-economic background, etc. But without student participants much of the psychological research could not have been carried out. See generally Alan E. Kazdin, *Overview of Research Design Issues in Clinical Psychology*, in HANDBOOK OF RESEARCH METHODS IN CLINICAL PSYCHOLOGY 3, 12, 19 (Philip C. Kendall et al. eds., 1999) (discussing the reliance on undergraduate students for psychological research and its problems); Lynne D. Roberts & Peter J. Allen, *Student Perspectives on the Value of Research Participation*, in 3 TEACHING PSYCHOLOGY AROUND THE WORLD 198, 198–99 (Sherri McCarthy et al. eds., 2012) (same); David O. Sears, *College Sophomores in the Laboratory: Influences of a Narrow Data Base on Social Psychology's View of Human Nature*, 51 J. PERSONALITY & SOC. PSYCHOL. 515, 515 (1986) (same). Although the body of experimental research generated by legal scholars is relatively modest compared to that generated by psychologists, legal researchers have also used students in their own departments, law schools, as experiment participants. See, e.g., Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, in BEHAVIORAL LAW AND ECONOMICS 120 (Cass R. Sunstein ed., 2000); Christoph Engel & Michael Kurschilgen, *Fairness Ex Ante and Ex Post: Experimentally Testing Ex Post Judicial Intervention into Blockbuster Deals*, 8 J. EMPIRICAL LEGAL STUD. 682, 689 (2011); Andrew M. Smith et al., *An Investigation of Top-Down Vs. Bottom-Up Processing in Post-Appellate Review of a Criminal Case*, 74 ALB. L. REV. 1365, 1370–71 (2011); Avishalom Tor et al., *Fairness and the Willingness to Accept Plea Bargain Offer*, 7 J. EMPIRICAL LEGAL STUD. 97, 101–03, 111 (2010). While using law students may also raise representativeness issues, it is somewhat better than using psychology students, whose familiarity with experi-

asked all students in three courses to participate in a survey on punishment in the criminal law system after class. These three courses—public law, tort law, and criminal procedure—are mandatory for first, second, and third year law students respectively, and are attended by roughly similar numbers of male and female students. The three groups did not and could not overlap. Participants in all three classes were randomly assigned to read one of two versions of a reasoned criminal sentence, followed by a questionnaire.

B. MATERIALS

We presented all participants with a decision based on an actual sentence imposed by the District Court of Tel Aviv on a defendant who had been convicted of aggravated rape⁸⁸ following a guilty plea.⁸⁹ The original decision described the facts of the case, the parties' arguments, and the punishment imposed on the offender—twelve years of imprisonment, and additional two years of a suspended sentence.⁹⁰ One hundred seventeen subjects received a version written by a male judge (experiment condition 1), and 113 subjects received a version written by a female judge (experiment condition 2). The two versions were identical, except for various words throughout the text indicating the judge's gender: the judge's name and numerous verbs and adjectives inflected for masculine or feminine gender.

After reading the decision, subjects had to answer a questionnaire,⁹¹ which was identical for the two experiment groups, apart from the use of gender-specific language with respect to the judges. It contained five items. Four closed questions were answered on a 1–5 scale: two dealt with the perception of the severity of the punishment, and two dealt with the perception of the fairness of the punishment. The last question was an open one in which each subject was required to select the proper duration of imprisonment within the legally prescribed zero to twenty-year range. In the data analysis, the items on the severity of the punishment were separated from those on the fairness of the punishment. The “perception of severity” was calculated as the average of subjects' answers to the questions on the severity of the punishment, and the “perception of fairness” was calculated as the average of subjects' answers to the questions on the fairness of the punishment.

Two comments are in order. First, the experimental manipulation used in this study is workable only in some jurisdictions, mostly those following the common law tradition where court judgments are delivered by specific judges in their own names. In many jurisdictions, judgments are

mental research methodology and design may interfere with the experimental manipulation. We discuss the possible effects of this methodological constraint in Part IV.B.

88. Penal Law, 5737-1977, §§ 345, 353, SH No. 864 p. 91 (Isr.).

89. CrimC (TA) 1128/06 State of Israel v. Michael Genser (Apr. 8, 2008) (Isr.).

90. *Id.*

91. *See* Appendix B.

delivered by the court as an institution on behalf of the people or the polity. For instance, German judgments are delivered by the court *Im Namen des Volkes* (in the name of the people), Austrian judgments *Im Namen der Republik* (in the name of the republic), and French judgments *Au nom du peuple français* (in the name of the French people). In these jurisdictions, revealing the judge's gender in the judgment might seem odd to the readers, and expose the manipulation.

Second, the manipulation in our study was particularly strong because the documents were written in Hebrew, a gender-specific language. In this language, as opposed to English, common nouns—such as “judge”—have masculine and feminine forms, and adjectives and verbs inflect for the two genders. As in English, third-person singular personal pronouns, used in the questionnaire, are also gender-specific. Thus, the judge's gender was evident from each and every sentence, and subjects could not fail to notice it.

A combination of these two methodological advantages is not common. On the one hand, judgments disclose judges' identities mostly in common law jurisdictions, so the experiment might be unfeasible in others. On the other hand, the language used in most common law jurisdictions, namely English, is not particularly gender-specific, so the experimental manipulation might be too weak. Israeli judgments not only disclose judges' identities, but are also written in a gender-specific language.

C. PROCEDURE

Students who agreed to participate were given one of the two versions of a decision relating to a defendant who had been convicted of aggravated rape on the basis of a guilty plea, along with a questionnaire drafted in a manner compatible with the sentencing decision. We allocated subjects to the experiment groups randomly in all three classes without explaining the purpose of the study or implying that two versions existed.

Participants were asked to read the decision quietly and thoroughly, and then to fill in the questionnaire. The two documents were stapled so participants could reread the decision while filling in the questionnaire. After ensuring that the subjects had answered the questionnaire, the experimenter collected the documents, thanked the subjects for participating, and asked them not to discuss the study, its methodology, and purposes with anyone.

III. RESULTS

A. GENERAL

The answers to the questionnaire are summarized in Table 1.

<i>Item</i>	<i>Question</i>	<i>Scale</i>	<i>M</i>	<i>SD</i>
1) Appropriateness of the punishment	Do you think that the sentence imposed on the defendant was just?	1=Not just at all 5=Very just	4.01	0.96
2) Severity of the punishment	How severe was the judge with the defendant?	1=Not severe at all 5=Very severe	2.30	1.29
3) Congruence between the punishment and the offense	Do you think that the sentence imposed on the defendant was congruent with the gravity of the crime?	1=Not congruent at all 5=Very congruent	3.83	1.05
4) Evaluation of severity	What is your general assessment of the sentence imposed on the defendant?	1=Overly lenient 5=Overly severe	3.17	0.90
5) Proper punishment	What in your view is the appropriate punishment for the crime?	0–20 years in prison	13.20	4.54

TABLE 1. RESPONSES TO QUESTIONNAIRE (N=230)

B. PERCEPTIONS OF SEVERITY

We calculated a “perception of severity” score as the average of subjects’ answers to questions two and four. To measure the correlation between the two items and to examine the internal consistency of the questionnaire—to ensure that the two questions indeed measured perceived severity—we calculated Cronbach’s Alpha; the internal consistency estimate of reliability was 0.702.⁹²

The first hypothesis related to the effect of the judge’s gender on subjects’ evaluations of the severity of the punishment. We hypothesized that subjects exposed to a decision of a female judge would evaluate it as more severe than subjects exposed to an identical decision written by a male judge. The raw data did not confirm, but were not inconsistent with, our hypothesis. Subjects’ assessments of the severity of the punishment imposed by a female judge ($M=2.76$, $SD=0.91$) was slightly higher than subjects’ assessments of the severity of the same punishment imposed by a male judge ($M=2.71$, $SD=1.05$). To examine the significance of the difference between the perceptions of the severity of the punishment imposed by male and female judges, we employed an independent samples t-test. The small difference was not statistically significant [$t(228)=-0.36$, n.s.].

92. Spearman’s rank correlation coefficient was 0.55 ($p<0.0001$).

<i>Judge's Gender</i>	<i>Perception of the Severity of the Punishment</i>	
	<i>M</i>	<i>SD</i>
Male (n=117)	2.71	1.05
Female (n=113)	2.76	0.91

TABLE 2. PERCEPTION OF SEVERITY BY JUDGE'S GENDER
(N=230)

The second hypothesis in the study related to the effect of the subject's gender on his or her perception of the severity of the punishment. We hypothesized that male subjects would evaluate the sentence as more severe than female subjects, irrespective of the judge's gender. Once again, we used an independent samples t-test to examine the difference between male and female evaluators in assessing the severity of the punishment. The data confirmed the hypothesis. Men generally deemed the punishment more severe ($M=2.88$, $SD=1.04$) than did women ($M=2.62$, $SD=0.91$). This finding was statistically significant [$t(225)=2.05$; $p=0.041$].

<i>Subject's Gender</i>	<i>Perception of the Severity of the Punishment</i>	
	<i>M</i>	<i>SD</i>
Male (n=96)	2.88	1.04
Female (n=131)	2.62	0.91

TABLE 3. PERCEPTION OF SEVERITY BY
SUBJECT'S GENDER (N=227)

Lastly, we hypothesized that the judge's gender and the subject's gender exert a combined effect on the perceived severity of the punishment. We believed women would attribute greater weight to the judge's gender in rape cases. The data do not seem consistent with our hypothesis: the difference between male and female judges was not much greater in the eyes of women.⁹³ Male subjects perceived the severity of the punishment imposed by a male judge ($M=2.93$, $SD=1.24$) as slightly higher than the severity of the punishment imposed by a female judge ($M=2.85$, $SD=0.85$). Female subjects perceived the severity of the punishment imposed by a male judge ($M=2.56$, $SD=0.86$) as slightly lower than that imposed by a female judge ($M=2.68$, $SD=0.96$). We used ANOVA to examine the possibility of a combined effect of the judge's gender and the subject's gender on the perceived severity of the punishment. No statistically significant difference was found [$F(3, 223)=1.62$, n.s.].

93. See *infra* Table 4.

<i>Judge's Gender</i>	<i>Subject's Gender</i>	
	Male (n=96)	Female (n=131)
Male (n=114)	n=44	n=70
<i>M</i>	2.93	2.56
<i>SD</i>	1.24	0.86
Female (n=113)	n=52	n=61
<i>M</i>	2.85	2.68
<i>SD</i>	0.85	0.96

TABLE 4. PERCEPTION OF SEVERITY BY JUDGE'S AND SUBJECT'S GENDER (N=227)

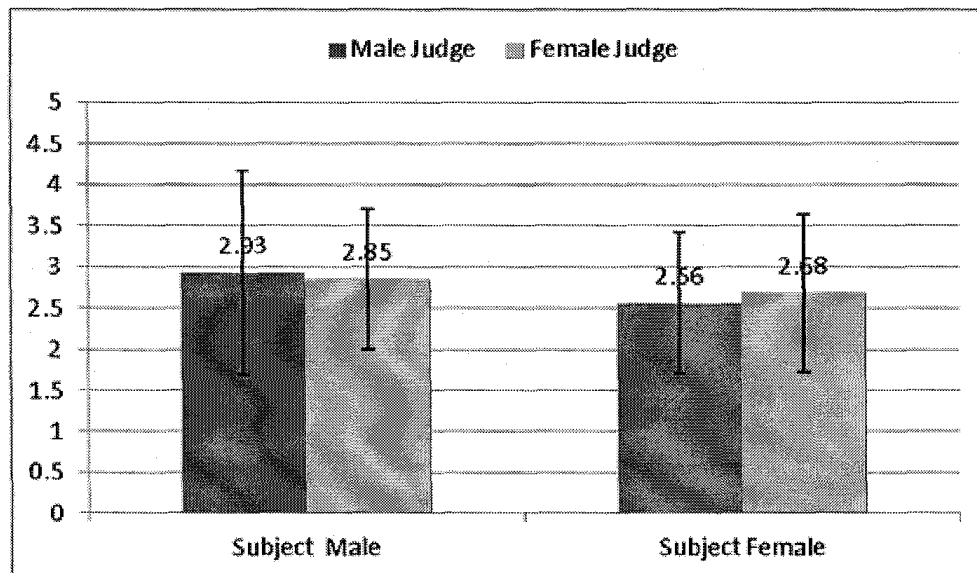


FIGURE 1. PERCEPTION OF SEVERITY BY JUDGE'S AND SUBJECT'S GENDERS

C. PERCEPTIONS OF FAIRNESS

Next, we examined subjects' perceptions of the fairness of the punishment. The "perception of fairness" score was calculated as the average of subjects' answers to questions one and three, measuring the appropriateness of the punishment and its congruence with the gravity of the crime, respectively. To measure the correlation between the two items and to examine the internal consistency of the questionnaire (i.e., to ensure that the two questions indeed measured perceived fairness), we calculated Cronbach's Alpha. The internal consistency estimate of reliability was 0.744.⁹⁴

94. Spearman's rank correlation coefficient was 0.61 ($p < 0.0001$).

We found that subjects perceived the sentence imposed by a female judge ($M=3.99$, $SD=0.86$) as slightly fairer than an identical sentence imposed by a male judge ($M=3.85$, $SD=0.93$). To examine the significance of the difference between the perceptions of fairness of sentences imposed by male and female judges, we employed an independent samples t-test. The difference was not statistically significant [$t(228)=-1.27$, n.s.].⁹⁵ This result seems consistent with the underlying explanation of our fourth hypothesis.

<i>Judge's Gender</i>	<i>Perception of the Fairness of the Punishment</i>	
	<i>M</i>	<i>SD</i>
Male (n=117)	3.85	0.93
Female (n=113)	3.99	0.86

TABLE 5. PERCEPTION OF FAIRNESS BY JUDGE'S GENDER
(N=230)

To examine the difference between male and female subjects in assessing the fairness of the punishment, we also employed an independent samples t-test. We found no statistically significant difference between the perceptions of fairness of men and women [$t(225)=-0.86$, n.s.]. This result also seems consistent with the underlying explanation of the fourth hypothesis.

<i>Subject's Gender</i>	<i>Perception of the Fairness of the Punishment</i>	
	<i>M</i>	<i>SD</i>
Male (n=96)	3.87	0.95
Female (n=131)	3.97	0.85

TABLE 6. PERCEPTION OF FAIRNESS BY SUBJECT'S GENDER
(N=227)

Surprisingly, the lack of significant difference between the perceptions of male and female subjects persisted when we distinguished between male and female judges. With regard to male judges, male subjects' perceptions of fairness ($M=3.78$, $SD=0.98$) were slightly lower than female subjects' perceptions ($M=3.91$, $SD=0.89$). With regard to female judges, male subjects' perceptions of fairness ($M=3.94$, $SD=0.93$) were once again slightly lower than female subjects' perceptions ($M=4.04$, $SD=0.80$). We used ANOVA to examine the possibility of a combined effect of the judge's gender and the subject's gender on the perceived fairness of the

95. *But see infra* note 97.

punishment. No statistically significant difference was found [$F(3, 223)=0.72$, n.s.]. The results are inconsistent with our fourth hypothesis.

<i>Judge's Gender</i>	<i>Subject's Gender</i>	
	<i>Male (n=96)</i>	<i>Female (n=131)</i>
<i>Male (n=114)</i>	<i>n=44</i>	<i>n=70</i>
<i>M</i>	3.78	3.91
<i>SD</i>	0.98	0.89
<i>Female (n=113)</i>	<i>n=52</i>	<i>n=61</i>
<i>M</i>	3.94	4.04
<i>SD</i>	0.93	0.80

TABLE 7. PERCEPTION OF FAIRNESS BY JUDGE'S AND SUBJECT'S GENDERS (N=227)

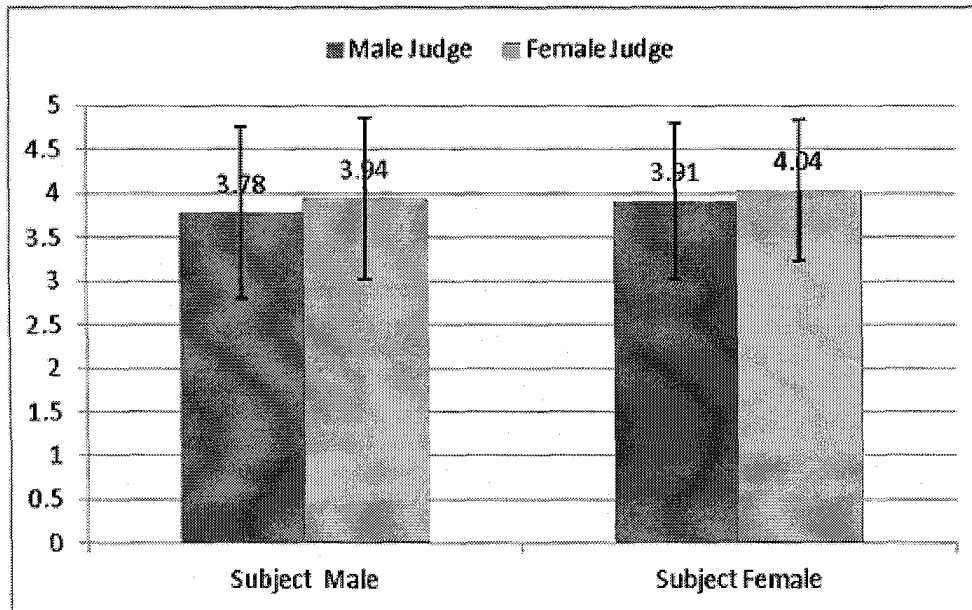


FIGURE 2. PERCEPTION OF FAIRNESS BY JUDGE'S AND SUBJECT'S GENDERS

D. PROPER PUNISHMENT

Lastly, we examined the possible difference between male and female subjects in assessing the appropriate punishment under the circumstances. The findings seem consistent with our fifth hypothesis: the punishment selected by female subjects ($M=13.44$, $SD=4.33$) was generally harsher than that selected by male subjects ($M=12.86$, $SD=4.76$). However, an independent samples t-test showed that this difference was not statistically significant [$t(218)=-0.96$, n.s.].

<i>Subject's Gender</i>	<i>Assessment of the Proper Punishment</i>	
	<i>M</i>	<i>SD</i>
Male (n=94)	12.86	4.76
Female (n=126)	13.44	4.33

TABLE 8. PROPER PUNISHMENT BY SUBJECT'S GENDER
(N=220)

Because of the noticeable difference between male and female subjects' assessments, we decided to perform another test. We used a chi-square test to determine whether the proportions of subjects selecting punishments below, equal to, and above the actual sentence differ between male and female subjects.⁹⁶ The data are presented in Table 9. While the proportion of subjects selecting a harsher punishment than that imposed by the court was similar for men and women, women were more likely to adhere to the actual sentence, whereas men were more likely to select a more lenient punishment. The difference in distribution was statistically significant ($\chi^2_{(2)}=7.53$, $p=0.023$).

<i>Subject's Gender</i>	<i>Proper punishment (years in prison)</i>					
	Less than 12		12		More than 12	
	N	%	N	%	N	%
Male (n=94)	40	42.55	1	1.06	53	56.38
Female (n=126)	43	34.13	12	9.52	71	56.35

TABLE 9. PROPER PUNISHMENT BY SUBJECT'S GENDER
(N=220)

IV. DISCUSSION

A. SUMMARY AND INTERPRETATION

The purpose of this study was to examine whether gender biases affect perceptions of judgments, with an emphasis on gender-charged settings. The first hypothesis was that subjects would perceive a sentence imposed by a female judge as more severe than an identical sentence imposed by a male judge. The difference between the perceived severity of sentences imposed by male and female judges was not statistically significant.⁹⁷ Likewise, we hypothesized that men would perceive the sentence as more severe than women would, irrespective of the judge's gender. Our finding

96. We assume that given subjects' lack of experience in sentencing, anchoring contributed to their decision. Recall that the actual sentence was 12 years of imprisonment; the average sentence selected by subjects was 13.2 years of imprisonment.

97. In a pilot study reported at the 2012 Conference on Empirical Legal Studies (hereinafter "the pilot study") the difference was marginally significant, but due to methodological problems we do not report its results here.

to this effect was statistically significant. An additional hypothesis was that the judge's gender and the subject's gender would have a combined effect on the perception of severity. No such interrelation was found.

The study also examined the subjects' perceptions of the fairness of the punishment as a function of the judge's gender and the subject's gender. The subject's gender had no statistically significant effect on the perceived fairness of the sanction. Interestingly, subjects perceived a sentence imposed by a female judge as slightly more fair than an identical sentence imposed by a male judge, and such difference was found among male and female subjects alike. However, these differences were not statistically significant.⁹⁸ At any rate, our hypothesis that women believe female judges' decisions in rape cases are fairer, whereas men believe male judges' decisions are fairer, was not confirmed.

The first hypothesis intended to validate, in limited circumstances, the existence of a second-order in-group bias, that is, the belief that an in-group bias exists even where it does not. Given the established and known difference in perspective between men and women⁹⁹ and the understanding that a natural tendency to favor members of the in-group and discriminate against members of the out-group exists,¹⁰⁰ it would not be surprising if the public perceived a sentencing decision of a male rape defendant by a female judge as somewhat more severe than an identical decision of a male judge. Possibly, the public would assume that a female judge is more sympathetic to the female victim and that a male judge is somewhat more sympathetic to the male offender, even where this is not the case. Surprisingly, the difference between perceptions of severity for male and female judges was not statistically significant. The most straightforward explanation is that the presumed second-order in-group bias does not truly exist, at least in the examined context. In other words, people do not perceive a gender-based judicial bias where none exists. Alternative explanations are related to methodological constraints, and explained in Part IV.B below. If the problem was methodological, replication with the proper modifications should yield the expected results.

We admit that even if our findings were statistically significant, our understanding of the underlying mechanism would be fairly speculative and incomplete. First, we cannot be certain that we have characterized the bias accurately. It may well be that female judges are perceived as more sympathetic to victims generally, not only to female victims, and that male judges are perceived as less sympathetic to victims generally. To test this alternative theory, a similar experiment may be conducted using gender-neutral offenses. These can be cases of same-sex rape, or even a non-sexual offense, such as a murder or economic crime. To validate our own

98. In the pilot study the difference between the perceptions of fairness of sentences imposed by male and female judges was statistically significant, but this was not the case when distinguishing perceptions of male and female subjects.

99. See *supra* notes 7–10 and accompanying text.

100. See *supra* notes 72–73 and accompanying text.

theory, one may conduct similar experiments in other gender-charged settings, such as divorce cases.

Second, assuming we have accurately characterized the bias, we do not know its source with certainty. The idea of in-group favoritism may be so entrenched in people's minds that they assume its existence even without empirical support—what we called a second-order in-group bias. Alternatively, to the extent that the bias exists, it may be based on relevant real-life experience. If people are exposed to data suggesting that female judges are “harsher,” this prior knowledge may affect their evaluations. However, this seems unlikely given the inconclusiveness of relevant and publicized research on actual differences in judgments between male and female judges. Lastly, evaluations of the severity of punishments may be politically driven. That is, people may consciously or subconsciously wish to portray female judges as being tougher on sex offenders, perhaps in order to advocate greater representation of female judges on the bench.¹⁰¹

Third, a gap between the public perception of male and female judges may emanate from a belief that male judges are biased, a belief that female judges are biased, or both. Without a gender-neutral reference point, we cannot determine which of the three alternatives is true. Although we have no real reason to believe that the public attributes a bias only to judges of one gender, this matter can be tested in future research by adding a third experiment group whose members receive a gender-neutral version of the documents. While a decision authored by “the court” rather than a specific judge might seem odd to participants with Anglo-American legal training, adding a third group might be useful if we expand the experiment to non-lawyers.

The statistically significant finding that men perceived the sentence as more severe than did women may be explained by traditional in-group bias theory. Men belong to the aggressor's gender group, so their identification with and sympathy for the aggressor may be greater than those of women. Women belong to the victim's gender group, so their identification with and sympathy for the victim may be greater than those of men. Consequently, men's perceptions of the severity of the punishment are closer to that of the offender, whereas women's perceptions are closer to that of the victim. Alternatively, our finding may be attributed to the fact that women identify and sympathize more with victims generally, irrespective of gender, to the fact that men identify and sympathize more with aggressors, or to both. As explained above, one can test this alternative explanation by using gender-neutral offenses in a similarly structured experiment. Additionally, our questionnaire did not examine participants' levels of identification with and sympathy for the victim and the aggressor, and this should be done in future research.

101. The federal judiciary is only 20% female, and the state court judiciary is about 27% female. Tomsich & Guy, *supra* note 3, at 3.

We were somewhat puzzled that both men and women perceived a female judge's decision in a rape case as somewhat more fair than an identical decision of a male judge. Although the differences were not statistically significant, they were of sufficient magnitude to warrant discussion. The whole project hinges on the assumption that women identify and sympathize more with women, and men identify and sympathize more with men. Thus, while women were expected to consider female judges fairer, men were expected to have a different perception. We can provide only two, admittedly weak, explanations for the surprising data. First, a social analysis of the crime of rape shows that it possesses a powerful emotional dimension and is perceived as one of the most heinous crimes in Western society.¹⁰² If the sentence imposed by a female judge is perceived as somewhat more severe, it might be deemed more compatible with the perceived gravity of the offense. Second, it is conceivable that independently of the severity of the punishment, there may be a perception that female judges, who are of the same gender as the victim, can better grasp, deal with, and impose punishment in such a case, making their decisions more appropriate.¹⁰³

Although there is no convincing reason to suspect that something in the Israeli culture is fundamentally different from that of other Western countries, making our findings country-specific, repeating the experiment in other countries may help strengthen or corroborate the findings. As explained above, this might not be easy. In many jurisdictions, judgments do not disclose judges' identities. In many more, the local language poses an obstacle by not being sufficiently gender-specific to support the experimental manipulation. However, if one conducts the experiment in legal systems using more gender-specific languages, where the second problem is not present, the first problem can also be alleviated by selecting only non-lawyer participants or by using "translated" Anglo-American decisions that disclose judges' genders.

B. METHODOLOGICAL LIMITATIONS

This study is subject to several methodological constraints that may explain the lack of significant findings for some of our hypotheses, particularly the first, but also the third and the fourth. First, there may have been a problem with the efficacy of the manipulation. In other words, participants may have not paid sufficient attention to the judge's gender despite our efforts. It is possible to detect such a deficiency by performing a ma-

102. *Coker v. Georgia*, 433 U.S. 584, 607-08 (1977) (Burger, C.J., dissenting) ("[R]ape is inherently one of the most egregiously brutal acts one human being can inflict upon another."); *CrimA 4173/97 Abu Mahreb Farkhan v. State of Israel* (1998) (Isr.) ("Rape is one of the most heinous crimes in the criminal code. The offender critically injures the victim's body, soul, dignity, and freedom.").

103. *Cf. Peresie*, *supra* note 57, at 1783 (explaining that, in federal appellate panels deciding sexual harassment and sex discrimination cases, "male judges defer to female judges because male judges view them as more credible and persuasive in gender-coded cases, based on their viewpoints, past experiences, or gender alone").

nipulation check after the subjects have filled out the questionnaires. Obtaining a statistically significant result might indicate that the subjects indeed paid attention to the judge's gender in the course of the experiment. A non-significant or marginally significant result would show that there was a problem with the strength of the manipulation, which prevented the desired effect from being obtained.

A problem with the efficacy of the manipulation may lie with the participants, the materials, or the procedure. With regard to the participants, law students may be accustomed to functional reading of judicial decisions, focusing on legally relevant information, and playing down "irrelevant" details like the judge's gender. The solution may be a replication of the experiment with a different set of participants, non-lawyers, who do not have a tendency to focus only on the legally relevant components of the judgments. Note, however, that law school training might also have the opposite effect if there is sufficient emphasis on legal realism and critical legal studies in the curriculum. Alternatively, materials to which the subjects were exposed, or the way in which the questionnaire was transmitted, may have not sufficiently highlighted the experimental manipulation. In that case, the manipulation should be strengthened. For example, the judge's gender can be emphasized by including a short bio in the questionnaire, mentioning the judge's personal name and referring to his or her background and actions using the relevant pronouns, nouns, adjectives, and verbs.¹⁰⁴ This might help draw the subjects' attention to the judge's gender. However, if not done cautiously, it might also expose the manipulation.

Second, the sample might be problematic. It may have been too small, and arguably, had we conducted the experiment on a larger sample we would have obtained better results. Larger sample sizes for each of the four evaluator-judge combinations would either provide corrective interpretations or enhance the confidence with which we have stated the results. In addition, a question about the representativeness of the sample may arise. This question is related to another, already discussed above: could our results, based on a sample consisting solely of law students, be attributed to the public at large?¹⁰⁵ Law students may not be representative of the general population in terms of age, education, ethnic and socio-economic background, etc. More importantly, they are trained to read judgments in an objective, professional manner, underplaying legally irrelevant details. If we had significant findings, participants' functional reading skills would not be an impediment. If those trained to ignore legally irrelevant details in reading a judicial decision perceive a difference between male and female judges then, a fortiori, those not trained to ig-

104. Recall that in Hebrew, common nouns, adjectives, verbs, and third-person pronouns, take different forms for male and female. Yaakov Levi, *Gender and Number in Hebrew*, UNIV. OF MINN. TWIN-CITIES, <http://www.tc.umn.edu/~levix004/Students/Gender%20and%20Number%20in%20Hebrew.pdf> [<https://perma.cc/DT6Q-F6JV>].

105. This is a question of external validity. For a general discussion of the common reliance on student-participants in experimental research, see *supra* note 87.

nore such details will perceive a difference. But the lack of significant findings in relation to some of the hypotheses may be attributed, at least in part, to the nature of the sample.

Third, we used a scenario of aggravated rape by a stranger. Given the gravity and special circumstances of the offense, the differences between men and women's perceptions of the situation could be too small to observe. One may consider running the same experiment on a date rape scenario where, according to at least some studies, the differences in perceptions between men and women are more obvious.¹⁰⁶ If men attribute more responsibility to the victim in such cases, the initial difference between male and female perspectives would be greater, and the findings would be more obvious. This suggestion should be taken with caution, though, because other studies have shown that women tend to attribute more blame to date rape victims than do men.¹⁰⁷ If this is correct, male and female perspectives of the sentence might be more aligned.

CONCLUSION

This is the first study to investigate whether personal characteristics, such as gender, affect people's perceptions of judgments. In particular, we examined (1) whether male and female judges' decisions are perceived differently, and (2) whether men and women perceive judgments differently. We employed an experimental research design to determine if *identical* judgments in a rape case are perceived differently due to the judge's gender, the evaluator's gender, or a combination thereof, indicating the existence of cognitive biases.

Our first hypothesis was that subjects would perceive a sentence imposed by a female judge as more severe than an identical sentence imposed by a male judge. The data did not confirm our hypothesis, although they were not inconsistent with it. Additionally, we hypothesized that men would perceive the sentence as more severe than would women, irrespective of the judge's gender, and found a statistically significant difference. Finally, we hypothesized that the judge's gender and the subject's gender would have a combined effect on the perception of severity. We believed women would attribute greater weight to the judge's gender in rape cases. The data did not confirm this hypothesis.

The article also examined the subjects' perceptions of the fairness of the punishment as a function of the judge's and the subject's genders. An examination of the effect of the subject's gender on the perceived fairness yielded no statistically significant finding. Surprisingly, an examination of the impact of the judge's gender on subjects' perceptions of fairness showed that subjects perceived a sentence imposed by a female judge as more fair than an identical sentence imposed by a male judge. This difference was found among male and female subjects alike, although it was

106. Gerdes et al., *supra* note 37, at 149–50.

107. Shotland & Goodstein, *supra* note 39, at 229.

not statistically significant. Our hypothesis that women believe female judges' decisions in rape cases are fairer, whereas men believe male judges' decisions are fairer, was not confirmed.

Lastly, we found a difference between male and female subjects in assessing the appropriate punishment for aggravated rape by a stranger. Although this finding is not directly linked to the general theme of this article, it is a valuable contribution to existing literature on gender biases in judgment.

To conclude, the article puts forward new and provocative hypotheses, provides a systematic analysis of their theoretical underpinnings, develops an experimental research design for testing them, implements it, and discusses necessary and possible improvements. Still, it is a preliminary study. Additional research is necessary to obtain conclusive results, to properly interpret them, to uncover the underlying mechanisms, and to explore the policy implications.

APPENDIX A: THE SENTENCE (ENGLISH TRANSLATION)

* Nouns and verbs inflected for gender in the original Hebrew versions are underlined. Mentions of the judge's name, which was different in each version, appear in brackets and are also underlined (because the name indicates the judge's gender).

Good morning. A sentence imposed by Judge [version 1: Shaul Shohat; version 2: Dalia Ganot] of the Tel Aviv District Court is enclosed. Please read the text carefully and complete the following questionnaire.

Serious Crimes Case (Tel Aviv-Jaffa) 1128/06

Before Judge [version 1: Shaul Shohat; version 2: Dalia Ganot]

State of Israel

v.

Michael Genser

Sentence

Judge [version 1: Shaul Shohat; version 2: Dalia Ganot]:

1. On January 14, 2008 the defendant was convicted, based on his own confession, of aggravated rape in accordance with section 347(b)(3) of the Criminal Code of 1977 (hereinafter the Code), and of witness tampering in accordance with section 245(b) of the Code.
2. According to the facts of the indictment, which the defendant admitted, the complainant's neighbor organized a party at their condominium's backyard, and invited the complainant, the defendant, and other friends. During the party the defendant consumed alcohol. When the complainant decided to return to her apartment, she realized that her keys were missing. The defendant helped her get into her apartment through the window, after displacing the window bars. She got in and went to sleep, but a while later noticed that the defendant stood by her bed. He started to aggressively hit her face, and when she resisted he tore her shirt, told her he wanted have sex with her, and continued hitting her head until she lost her consciousness. He then took the rest of her clothes off and had sex with her. The complainant sustained injuries around her eyes, in her upper lip, and in her left arm.
3. The prosecutor emphasized the brutality of the rape, and referred to the defendant's presentence investigation report, whereby he did not take any responsibility for the crimes and demonstrated uncontrollable aggressiveness. The prosecutor also mentioned the complainant's serious condition, and requested a significant custodial sentence.
4. The defendant's attorney did not contest the gravity of her client's deeds. However, she emphasized he was otherwise a law-abiding person with only one prior conviction (of a non-sex-related offense),

who served in the army and was still active as a reservist, and lived an ordinary life. Moreover, the defendant had a daughter who was born during his arrest, and was removed from home due to her mother's drinking problem. The defendant has not met his daughter, and long incarceration might prevent him from exercising fatherhood. Furthermore, the birth of his daughter has dramatically changed his character. Finally, his confession implies taking responsibility. It has saved the complainant, who sustained mental distress, the need to give testimony and re-experience the rape, and has also saved judicial resources.

5. In conclusion, I sentence the defendant to 14 years in prison, of which 12 years are to be served and two years are suspended on condition that he does not commit a felony within three years of his release.
6. Additionally, I sentence the defendant to 12 months of suspended sentence on condition that he does not commit witness tampering or an assault within two years of his release.
7. Finally, I order that the defendant pay the complainant compensation in the amount of NIS 50,000, to be deposited with the court within 60 days.

[version 1: Shaul Shohat; version 2: Dalia Ganot], *Judge*

Articles

