

Legal Transgressions: Anti-Transgender Bias in Mock Jurors

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ABSTRACT

LEGAL TRANSGRESSIONS: ANTI-TRANSGENDER BIAS IN MOCK JURORS

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Transgender individuals experience marginalization and rejection by society including unequal incarceration rates. As many as one in six transgender persons report spending time in jail during their lifetime. In order to understand why this may be this study examined how anti-transgender bias may affect *jury decision making* in the course of guilt determination and sentencing. A national sample of 404 adults was recruited and presented with one of three possible crime scenarios: petty theft, prostitution, and aggravated assault. The crime scenarios were paired with nearly-identical defendant profiles that only differed in gender identity of the defendant – one was cisgender and the other was *transgender*. The participants were provided with legal descriptions of each crime as well as sentencing guidelines and were then asked to rate the defendant guilty or not guilty on a scale from zero to one hundred and asked to recommend a sentence between 0 and 15 years. Following this the participants were presented three questionnaires, the Revised Causal Dimension Scale designed to measure attributions of actions, the Genderism and Transphobia scale designed to measure anti-transgender bias, and the Olatunji, Puncochar, & Cramer Disgust Scale designed to measure moral judgement against homosexual and heterosexual persons. The data was then analyzed with a series of moderated moderations and t-tests. Implications for *transphobia*, *attributions*, and *disgust* on *jury decision making* are discussed.

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PREVIEW

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PREVIEW

Legal Transgression: Anti-Transgender Bias in Mock Jurors

Individuals who come into contact with the legal system hope that their experience will be fair and equal. Unfortunately the legal system is not always fair and defendants may not receive equal treatment, in part because prejudices and biases can influence justice outcomes at every level of the judicial system (Bornstein & Greene, 2011; Kaplan & Miller 1978). For transgender individuals, who are often stigmatized and marginalized by society, this can mean a higher possibility of jail time than a cisgender person (Lombardi, Wilkins, Priesing, & Malouf, 2001; Nadal, Davidoff, & Fujii-Doe, 2014; Sausa, Keatley, & Operario, 2006; Stotzer, 2009).

The rejection of transgender individuals is seen in families (Koken, Bimbi, & Parson, 2009) and across society (Lombardi, et al., 2001; Stotzer, 2009). Rejection of transgender persons can lead to high poverty levels and instances of violence against transgender persons. Surveys have found 50-59% of transgender individuals report experiencing sexual violence, and transgender sex workers are particularly prone to experiencing physical violence (Stotzer, 2007; 2008; 2009).

A transgender person's initial point of contact with the justice system is typically with local city or county police officers. Evidence shows that the lesbian, gay, bisexual, and transgender community as a whole - and transgender persons in particular - have negative perceptions of police and therefore mistrust or avoid them more compared to heterosexual and cisgender persons (Serpe & Nadal, 2017). Due to the negative attitudes transgender persons have toward the police, transgender people may be less likely to call the police in the event of being the victims of crime (Dwyer, 2015; Nadal, et al., 2014; Lyons, et al. 2017; Serpe & Nadal, 2017; Stotzer, 2009.) Transgender individuals are more likely to be the victims of police violence than cisgender individuals (Lyons, et al., 2017; Stotzer, 2009). Transgender individuals may also be more likely to be treated as perpetrators of a crime, with

some police officers profiling transwomen, especially transwomen of color, as sex workers (Nadal, et al., 2014). A comprehensive report regarding transgender persons' interaction with the legal system found they are most often arrested on drug and sex work charges, and once arrested face discrimination by police officers (Center for American Progress & Movement Action Project, 2016).

Once in the courtroom a negative bias against transgender persons may also play a role. The same report from the Center for American Progress (2016) states that a majority of transgender women of color reported discriminatory comments made against them, including by attorneys and judges. These comments, including misgendering the defendant - which can reinforce stereotypes that transgender people are deceitful or criminal - may bias the jury (Center for American Progress & Movement Action Project, 2016; Lambda Legal, 2018).

Once incarcerated transgender persons may be housed in units with inmates whose gender identity does not match their own, which can create an environment where transgender persons may be harassed by other inmates and even guards (Center for American Progress & Movement Action Project, 2016; SRLP, 2007). The transgender population in America is overrepresented in jails and prisons, with as many as one in six transgender persons reporting being incarcerated for any length of time (Brown & McDuffie 2009; Lambda Legal, 2018). Given the chance for abuse, it is important to closely examine the factors, such as bias in the courtroom against transgender individuals, that contribute to their disproportional representation in jails and prisons.

Cultural LGBT Bias

Transgender people are the victims of discrimination and violent hate crimes (Stotzer, 2007, 2008, 2009). LGBT individuals reported more incidences of being victims of hate crimes per 100,000 people than African Americans and Muslims, but less than Jewish people (Stotzer, 2007). FBI statistics for 2017 reported that 132 individuals had experienced hate

crimes based on their transgender identity or gender non-conformity (Federal Bureau of Investigation [FBI], 2017). The existence of anti-transgender bias may make it difficult to populate a jury pool with persons who are free of such bias. Furthermore, information about anti-transgender bias within the justice system is important because the existing studies that examine homophobia as a biasing factor cannot be assumed to apply to transgender persons (Worthen, 2012).

Existing experimental studies on transphobia demonstrated that a fear of invalidity, that is - a general fear of making wrong decisions, were positively correlated with transphobia in both genders, but more prevalent in men (Garelick, Filip-Crawford, Varley, Nagoshi, Nagoshi, & Evans, 2017). Garelick and colleagues speculated that the correlation was due to insecurity in masculine identity which results in a larger reaction to gender non-conformity. The fear and insecurity experienced by cisgender men may contribute to the “trans panic defense” used by cisgender men accused of murdering transgender women (Lee & Kwan 2014). In cases like these the defense team may say that transgender victims were deceitful by hiding their biological sex and thus violating gender norms. A survey of 274 participants analyzed how often participants endorsed cultural stereotypes about transgender men and women. The respondents did not express stereotypes related to masculinity, meaning they did not perceive transwomen as masculine, but two other negative stereotypes were found. Descriptive statistics showed that fifty-eight per cent of the sample stereotyped transwomen as violent and abusive, and fifty-four per cent stereotyped transwomen as criminal (Gazzola & Morrison, 2014). Although not all transgender people may be subjected to a jury trial, any evidence of bias against transgender individuals accused of a crime may shed light on a contributing factor to the disproportionate incarceration rate.

Jury Bias and Decision Making

While the role of juries in criminal trials is well-known by the general public, the impact of individual juror's bias or prejudice is often overlooked by many except those in the legal field. The process of *voir dire* allows attorneys on the defense and the prosecution teams to select and veto jurors based on qualities that the attorneys believe may influence the final verdict in a direction they find favorable (Legal Law Institute, 2018). Rules and federal legal rulings have been established to attempt to reduce bias in juries, however bias may persist because, from selection to deliberation, factors outside of the evidence and testimony presented in a trial may influence the final verdict. Attorneys are skilled at identifying potential jurors who they believe will be biased for or against the defendant (Morrison, Devaul-Fetters, & Gawronski, 2016), and because of this the jury selection process can shape the final verdict, as much as the actual trial (Anwar, Bayer, & Hjalmarsson, 2012; Maddera, 2016; Rose & Diamond, 2008).

Federal rulings, for example *Batson v. Kentucky*, were implemented in the hopes of limiting attorneys' ability to bias proceedings by eliminating jurors based on traits such as race, ethnicity, and gender (Maddera, 2016; Revesz, 2016; Sommers & Norton 2006). Peremptory challenges - removing a person from the jury pool without explanation - based on race, gender, or other factors were made nominally illegal by *Batson*. In reality, the ruling has proven hard to enforce (Maddera, 2016). An attorney only needs to justify their challenge in neutral terms that avoid the appearance of race, gender, or ethnicity bias in order to have the challenge pass inspection (Revesz, 2016; Sommers & Norton, 2016). The ineffective enforcement of this ruling leaves certain defendant populations vulnerable because they have a reduced chance of a representational jury (Maddera, 2016).

One of the questions members of a jury pool are asked before they are assigned to a trial jury is if they believe they hold any biases that would affect their deliberation and final

verdict on the trial (Rose & Diamond, 2008). Even when jurors answer negatively to this question their response may not accurately represent their beliefs. Jury pool members may not be aware of their own biases, and judges may be convinced by a biased possible-juror based on the confidence they project when they say they will be unbiased (Reynolds, 2013; Rose & Diamond, 2008). Jurors will then bring their biases into the deliberations at the conclusion of the evidentiary portion of the trial.

Social Influence on Jury Decision Making

Once attorneys from both sides have presented the facts of a trial the role of social influence may begin to affect jurors. At the conclusion of closing statements, when juries have been sent to deliberate, individual biases may influence the resulting verdict. Jurors may not understand the type of information - provided during the trial, or based on personal judgments - they should use to make their decision (Reynolds, 2013), and may over-rely on their own biases and experiences rather than the evidence presented in the trial (Bornstein & Greene, 2011; Kaplan & Miller 1978). When emotions or biases influence information processed during the trial it may influence a juror's vote before formal jury deliberation has begun (Feigenson, 2010). When a majority opinion arises during jury deliberation that faction may influence the remaining jurors to their side, and jurors may make their final vote to conform to the group rather than trial information (Kaplan 1984; Kerr, Niedermeier, & Kaplan, 1999).

Group and individual characteristics of the jury may lead jurors who were initially in the minority to change their views and agree with the majority verdict group (Baddeley & Parkinson, 2012). In these situations, individuals are likely to use persuasive information, presented by the majority, to inform their decision to leave the minority and vote with the majority (Bornstein & Greene, 2011). Conformity has also been found to be a factor in influencing individual juror decisions; when placed in a group of strangers mock jurors were

more likely to reach a decision that was influenced by social approval (Baddeley & Parkinson, 2012.)

Minority influence. Conversely, the minority may also be able to influence majority decisions (Moscovici, 1980). Research has shown that minority opinion holders who are consistent in their beliefs are sometimes able to convert majority opinion holders to the minority side. Once this conversion has happened more conversions are likely (Clark, 1999; Moscovici, 1980). If the minority opinion holders in the jury are able to convert at least one person to their side then the probability that the minority opinion will become the majority increases.

When the verdict vote happens and in what order votes are made might also affect the outcome. Because of an effect called the leniency bias - the desire to avoid punishing a not-guilty person being more important than the risk of a guilty person getting away - juries may be influenced when not-guilty opinion holders vote first (Davis, Kameda, Parks, Stasson, & Zimmerman, 1989). If the minority opinion holders in the jury are in favor of a not-guilty verdict and vote first in a unified block during the verdict vote then majority opinion holders may feel pressured to vote with them even if that is not the verdict they had supported during discussions.

Moscovici (1980) and Wolf (1985) emphasize the importance of consistency by the minority opinion holders in order to be effective. In the case of trials that involve a racial component, and possibly trials involving an LGBT defendant, the makeup of the jury may dictate how strongly consistency is maintained by the minority opinion holders. Consistency, in this case, means holding to the minority opinion without the appearance that the opinion can be changed by the majority. One study that examined religious similarity between mock jurors and defendants found that jurors were more lenient on defendants they were similar to. The same principle may lead LGBT jurors who feel they are similar to the