



Moral Outrage Drives Biases Against Gay and Lesbian Individuals in Legal Judgments

by Sarah E. Malik, and Jessica Salerno, Ph.D.

Don't miss our consultant responses at the end of this article: Stanley L. Brodsky and Christopher A. Coffey; Alexis Forbes.

THE GROWING ACCEPTANCE of homosexuality in American society has been reflected in some areas of the legal domain, from the invalidation of sodomy laws (Lawrence v. Texas, 2003) to the growing legalization of gay marriage (e.g., Connolly v. Jeanes, 2014). Yet, bias against LGBT individuals persists in other areas of the legal domain. Although there have been some demonstrations of discrimination against gay individuals in legal settings (e.g., Quas, Bottoms, Haegerich, & Nysse-Carris, 2002; Stawiski, Dykema-Engblade, & Tindale, 2012; Wiley & Bottoms, 2009, 2013), we know little about sexual orientation discrimination in the legal system compared to the decades of research investigating racial discrimination in our legal system (e.g., Meissner & Brigham, 2001; Mitchell, Haw, Pfeifer, & Meissner, 2005; Sommers & Ellsworth, 2001; Sweeney & Haney, 1992). We will describe recent research that identifies two legal contexts in which LGBT individuals are discriminated against as both perpetrators and victims of crime:

support for juvenile sex offender registration and acceptance of the “gay panic” defense. Within each context, we will review a case study, our experimental findings, and legal implications.

Juvenile Sex Offender Registration

Case Study

Kaitlyn Hunt, a high school senior, was prosecuted for engaging in a sexual relationship with her 14-year-old girlfriend. Her girlfriend's parents reported their relationship as soon as Kaitlyn turned 18, making her a legal adult. Because her girlfriend was underage she was charged with lewd or lascivious battery (Harrison, 2013) and was sentenced to two years of house arrest followed by three years of probation (Corcoran & Lane, 2013). Kaitlyn's case gained international attention because people suspected her prosecution was a direct result of her sexual orientation. Kaitlyn's case is one of many that have resulted in concern that gay youth are being selectively prosecuted and punished for voluntary sexual activity among peers (Brydum, 2013; James, 2009; Sutherland, 2003).

Experimental Findings

We tested whether people are more supportive of sex offender registration for gay youth than for straight youth. Sex offender registries were created to protect society from dangerous sexual predators preying on children (Office of the Attorney General, 1999) and have recently been extended to include juvenile offenders (Adam Walsh Act, 2009). The appropriateness of sex offender registration for juvenile offenders becomes more ambiguous, however, when considering juvenile offenders who are prosecuted for voluntary sexual acts with their underage peers. The application of sex offender registration laws to these kinds of cases has been very controversial given the life-long hardship that comes with public sex offender registration (e.g., loss of personal relationships, harassment and shame, etc., Levenson, D'Amora, & Hern, 2007) and because juveniles are less likely to recidivate and are more amenable to treatment than adult sex offenders (Trivits & Repucci, 2002).

This ambiguity surrounding whether sex offender registration is an appropriate punishment for juvenile in these cases might also make discrimination against stigmatized groups, such as gay youth, more likely. Why? In contemporary society it is relatively less acceptable to express explicit prejudice against gay individuals than it once was. Although people still hold implicit (and often unconscious) biases against gay individuals, they are motivated to avoid looking prejudiced. As a result, people are more likely to discriminate against gay individuals in ambiguous situations because it is easier to justify that discrimination, making the prejudice less obvious (Crandall & Eschleman, 2003). The goal of the present research experimentally tests this question: Does the ambiguity surrounding juvenile sex offender registration put gay youth at a greater risk of being registered as a sex offender for consensual sexuality activity with their peers?

The current research included two experimental studies (for full details about this research, see Salerno, Murphy & Bottoms, in press). The goal of the first study was to determine whether a gay offender would be treated differently than a heterosexual offender in an ambiguously serious (vs. less ambiguous) crime. A national sample of adults read a description of a crime. In the scenario, the male defendant videotaped himself receiving oral sex from a 14-year-old victim. Participants were randomly assigned to read about either a male or female 14-year-old victim, and about either a 16-year-old or 35-year-old defendant. In other words, they read about a straight-forward application of statutory rape laws (a 35-year-old who had sex with a 14-year-old minor) or a more ambiguous application of the law (a 16-year-old who had sex with a similarly aged 14-year-old peer). The study was aimed to test the hypothesis that the ambiguous situation would bring out participants' bias: We predicted that they would be more supportive of registering the gay juvenile as a sex offender than the heterosexual juvenile. Yet, in the more straight-forward scenario, we expected the participants to be equally harsh on the gay and straight adult defendants. The results of our study demonstrated that, indeed, participants

were significantly more supportive of sex offender registration for the gay juvenile compared to a straight juvenile, whereas they were equally punitive toward the adult defendants — regardless of their sexual orientation. Analyzing our data another way revealed the power of anti-gay bias. We found that people were much more supportive of registering a 35-year-old defendant who had sex with a minor than a 16-year-old defendant who had sex with a minor. This makes sense: the 35-year-old is the more prototypical offender for which the registry was created: an adult who preys on much younger minors, whereas the 16-year-old is a teenager engaged in sexual activity with a peer. Yet, this was only true in our study when the defendant was straight. When the defendant was gay, the research participants were just as harsh with the 16-year-old having sex with a peer as they were with a 35-year-old defendant. In other words, participants were willing to give the heterosexual juvenile a break, but did not afford the same leniency to the gay juvenile. Further, we determined that this bias toward gay youth was driven by retributive motives, rather than utilitarian motives — the latter being the stated purpose of the registry: to protect society from dangerous offenders. More specifically, reading about a gay (versus straight) juvenile made people more morally outraged, which in turn made them more supportive of registration. In other words, people believed the gay adolescent deserved punishment because they were morally outraged by his actions, not because they wanted to protect society.

We conducted the second study to test whether this anti-gay discrimination would extend to (a) another type of ambiguous situation (i.e., “sexting” or sending nude pictures of oneself between two juveniles) and to (b) lesbian defendants. Although gay males and lesbians both fall under the category of “homosexuals,” we hypothesized that our previous discrimination finding would not extend to lesbians because people do not feel as negatively toward lesbians as they do gay males (Herek, 2000) and because men who “act like women” are perceived more negatively than women who “act like men” (Vandello & Bosson, 2013). To test this hypothesis, we again presented participants with a crime scenario — this time describing an underage teenager sending a naked self photograph to another teenager. This time we compared participants' support for registering the juvenile when the sender was male versus female, and when the receiver was male versus female. This enabled us to compare participants' reactions senders who were straight girls, straight boys, lesbian girls, or gay boys.

As expected, when the perpetrator was male, participants were harsher on him when he sexted another male than when he sexted a female. Surprisingly, though, not only did this effect go away for females, but it actually reversed. When a female sexted another female, participants were marginally less punitive than when she sexted a male. In other words, participants were actually somewhat more lenient toward a lesbian offender than a straight female offender. Similar to our first study, the effects

of sender gender and sexual orientation on support for punishment was driven by retributive motives — but in this case, utilitarian motives also factored into the participants' punishment decision. More specifically, reading about the gender and sexual orientation of the sender of the sext determined how morally outraged they were (i.e., retributive motivation) and the extent to which they perceived the sender of the sext as a threat from which to protect society (i.e., utilitarian motivation), which both in turn predicted their support for sex offender registration.

Legal Implications

Although the Supreme Court has recognized that adolescents should be spared from serious punishments because they are less culpable due to their lack of maturity (Steinberg, Cauffman, Wooland, Graham, & Banich, 2009), life-long and public stigmatization as a sex offender has been extended to juvenile offenders. Sex offender registration can lead to lifelong negative outcomes (Levenson et al., 2007). Yet, sex offender registration is mandatory in 26 states (Salerno, Stevenson, et al., 2010) — even for teenagers engaged in arguably normative sexual activity. This is particularly dangerous because many teenagers do not consider the legal consequences of their actions (Strassberg et al., 2013), and are unaware they could get into legal trouble for engaging in consensual sexual activities with a peer (Stevenson, Najdowski, & Wiley, 2013). The ambiguity surrounding the appropriateness of these laws for juvenile cases of non-coerced sexual activity may inadvertently allow for discrimination against offenders who have acted in a way that leads people to feel morally outraged, such as gay youth. To the extent that judges and attorneys hold similar biases, gay youth might be particularly vulnerable to public stigmatization on sex offender registries, thereby potentially contributing to institutionalized prejudice against gay youth.

The “Gay Panic” Defense

Case Study

The previous example demonstrated bias against gay defendants. Yet, biases against LGBT individuals also extend to victims of crime. We demonstrated such bias in the context of the gay panic murder defense. The gay panic defense is a form of a provocation defense, in which murder defendants may use a provocation defense to claim that they committed the act because they were under extreme mental or emotional disturbance and thus could not control their actions (Dubber, 2002). Specifically, the gay-panic provocation defense is used to claim that the victim had made an uncomfortable sexual advance on the perpetrator, leading to the defendant's loss of control (Chen, 2000). A recent example involved Vincent McGee, who beat and stabbed Richard Barrett and subsequently set his house on fire because Barrett allegedly made a sexual advance toward McGee that he was not comfortable with. In his “gay-panic” defense (Chen, 2000), McGee claimed that, though he did commit the crime, he was less culpable because he was overtaken by his emotions in the heat of the moment.

Most courts still allow the gay panic defense (Lee, 2008), with only a few courts having ruled that the gay-panic defense cannot be used (see Davis v. State, 2005; Janofsky, 1999). In fact, gay-panic defenses have been utilized in at least 45 trials since 2002 (Nichols, 2013; e.g., Van Hook v. Bobby, 2011). Recently, the American Bar Association (2013) has encouraged state legislatures to ban the gay-panic defense because of its inherent bias against gay victims. Since then, California became the first and only state to ban the gay panic defense (Kutner, 2014).

Experimental Findings

Although concern that this defense might bias jurors against gay victims has been voiced, there was no experimental evidence that it would, indeed, make jurors more lenient. Given, however, that jurors must make a very subjective decision in these cases regarding whether they believe the defendant's actions were reasonable, we hypothesized that this subjectivity could give rise to antigay discrimination by individuals who react negatively to homosexuality, such as political conservatives. Thus, the goal of this research was to test the hypothesis that conservative (but not liberal) jurors would be more lenient (i.e., downgrade a murder defendant's charge to manslaughter) when a perpetrator's provocation defense was a gay-panic defense rather than a nongay-panic defense (for full details about this research, see Salerno, Najdowski, et al., in press).

Participants were asked to read a description of a murder case that included a provocation defense. The defense argued that the victim provoked the defendant into a fight by insulting his wife and yelling, which resulted in the defendant beating the victim to death. Participants were randomly assigned to read a scenario that either did or did not also include the victim making a gay advance toward the defendant (i.e., a gay-panic provocation defense). After reading jury instructions, the participants completed several relevant measures, including their verdict choice (either murder or manslaughter), how confident they were in their verdict, feelings of moral outrage toward the defendant and victim, and their political orientation. Our results demonstrated that political conservatives were, in fact, significantly more likely to downgrade the charge from murder to manslaughter when the perpetrator used a gay-panic defense compared to when they used a similar provocation defense that did not include a gay advance. The gay panic defense did not, however, make liberal jurors more lenient. Similar to the juvenile sex offender studies, this bias against gay victims was again driven by retributive motives: specifically, moral outrage among political conservatives. Conservative jurors felt less moral outrage toward the murder defendant when he offered a gay-panic defense, which in turn made them more likely to downgrade the charge from murder to manslaughter.

Legal Implications

Similar to the ambiguous context of applying sex offender registration to juveniles, the gay-panic defense might provide

a vehicle for jurors to express their anti-gay bias. Our results confirm the **American Bar Association's** concern that this defense will lead to same-sex behavior justifying murder (Nichols, 2013) — at least among political conservatives. California passed a law in 2006 requiring jury instructions to tell jurors not to use sexual orientation as a basis for decision-making in a provocation defense (Egelko, 2013) and very recently has banned the gay-panic defense. On the other hand, some have argued that it is important to allow the gay-panic defense in court because being able to talk about the issue out in the open may make it easier to reduce its effects. This would allow the opportunity to (a) eliminate jurors with antigay biases during voir dire, (b) make antigay bias salient, and © allow the opportunity to present evidence that gay panic does not necessarily cause violent behavior (Lee, 2008; Perkiss, 2013). This study also has implications for juror selection. Because political conservatives were more likely to have their moral values violated by a gay advance, it might be beneficial for prosecutors to keep conservatives off the jury when a gay-panic defense is offered. Finally, these results raise questions regarding whether provocation defenses are essentially inviting jurors to rely on their biases. When jurors are asked to determine whether a certain provocation might cause a reasonable person to lose control and commit a crime, they will likely turn inward and think about how they personally would have reacted. This introspective process might invite reliance on jurors' personal biases, such as anti-gay sentiment.

Conclusion

Blatant and explicit discrimination against gay individuals in the legal system is becoming less socially acceptable. It is important to understand, however, that discrimination against gay individuals in the legal system has not disappeared, but changed into a more subtle form. Anti-gay bias might still drive discrimination against gay defendants and victims in ambiguous punishment situations. We identified two very different legal contexts in which we demonstrated discrimination against gay defendants and victims. We also identified the psychological motivation behind anti-gay bias in legal judgments. Although the stated purpose of these laws are often utilitarian, such as protecting society from dangerous offenders, people's biases against gay individuals are motivated by more emotional, retributive goals to punish the offender, rather than by utilitarian goals to protect society. In the case of both the gay panic defense and juvenile sex offender registration, people experienced more moral outrage toward gay (versus) straight defendants and victims, which in turn determined their level of punitiveness. Because more contemporary, subtle bias is more difficult to detect than more traditional, blatant bias of the past, it is important to continue to identify ambiguous punishment contexts that breed discrimination against gay individuals in the legal system. 19

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Stanley L. Brodsky and Christopher A. Coffey respond:

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Anti-Gay Bias in the Courtroom

To begin with, Malik and Salerno have done nice job of pulling out the essential findings from the longer article by Salerno, Mary Murphy and Bette Bottoms in *Psychology, Public Policy, and Law*. Their studies are methodologically sound and yield findings that are likely generalizable to the greater public. Nevertheless, readers who would like to know, for example, how many people they studied and who these people were, are advised to go right to the source.

These are compelling findings. The anti-gay bias is cogent in both the Juvenile Sex Offender Registration study and the Gay Panic Defense study. Consider the image of Lady Justice wearing a blindfold; it goes back at least 500 years, with the blindfold representing a commitment to objectivity. Justice is supposed to be administered by the triers of law and triers of fact blinded to power, appearance, social status, and identity. Lady Justice surely has not been blindfolded when it comes to gay defendants in criminal trials.

Issues related to homosexuality in the legal system provide fertile ground for discussion and research, particularly as these issues continue to elicit media attention. Identifying and understanding these biases will help ensure that individuals receive fair treatment in the criminal justice system, regardless of sexual orientation. The authors' discussion of Kaitlyn Hunt's case provides a useful illustration of the anti-gay bias they discovered through their studies. Kaitlyn's parents issued several public statements advocating for equal treatment and avoidance of registration as a sex offender. With her parents' help and the support of her attorney, Kaitlyn eventually was not re-

quired to register as a sex offender. However, not all gay youth are fortunate enough to have the support Kaitlyn had. Many gay youth are rejected by their families when they come out. As a result, a few turn to criminal activity, including drug trafficking and sex work, to support themselves, increasing the likelihood that they will become involved with the criminal justice system. Malik and Salerno's findings are especially concerning for these LGBTQ individuals who are forced to face the biases of the legal system. Identifying and illuminating these biases are important steps.

The two Malik & Salerno studies yield results in which a gay identity was found to have special relevance for the simulated decision-makers. We would like to raise the issue of whether there is a wider reach of homophobia in our justice system. At the very least four questions call for investigations and meaningful data.

1. Is there a systemic discrimination against gay defendants in garden-variety criminal cases, in which there is no sexual identity issue explicitly raised?
2. In civil cases in which there is a gay plaintiff or defendant, do jurors devalue the arguments or probative value of a case because of LGBTQ bias?
3. Are fact witnesses who are strongly or marginally identifiable as LGBTQ believed less than comparable straight witnesses?
4. Are there forms of bias against attorneys who are visibly or ambiguously identifiable as LGBTQ?

Although anti-gay bias continues in the court system, there are reasons to be hopeful. Malik and Salerno's findings nicely illuminate unfair treatment toward LGBTQ defendants and victims. Along with the uncovering of discrimination against this population, laboratory findings from recent years suggest that progress is being made for LGBTQ individuals in other cases of overt and egregious discrimination. For example, research using actual jurors by Cramer and colleagues, published in *Psychology, Public Policy, and Law* in 2013, reported that mock jurors favored imposing harsher punishments for offenders in cases in a hate crime perpetrated against a gay individual,

compared to African American and transsexual victims. Other research provides reasons for LGBTQ professionals practicing within the legal system to be optimistic. In research completed but not yet published in our Witness Research Lab, we studied the effects of CV items indicating gay or lesbian sexual orientations in expert witness credibility. This was a modest manipulation. We found no effects, adverse or otherwise. A growing body of empirical evidence suggests a decrease in overt discrimination against LGBTQ individuals. Subtle forms of discrimination are being identified and brought to light.

Not only are promising findings being observed in laboratory settings, real world changes are being made that will likely continue the trend of improving conditions for LGBTQ individuals who become involved in the legal system. Recently, the 9th U.S. Circuit Court of Appeals held that men and women could not be struck from a jury pool on the basis of sexual orientation, extending the Supreme Court's ruling in *Batson v. Kentucky* (1986) that barred juror strikes on the basis of race. This decision had a dissenting minority, but nevertheless appears to yield an important impetus to offer equal protection on the basis of sexual orientation. This ruling could have legal implications in a number of cases, including cases in which the "gay-panic" defense described by Salerno and Malik is employed. Nevertheless, we still don't know how much one's sexual orientation can impede objective decision-making in real gay panic cases, or other related cases. Meaningful empirical and case study data are necessary to evaluate this question.

Let us applaud this thoughtful beginning by Malik and Salerno. It serves us all well when the covert and unacceptable in the justice system make their way to being viewed in the bright light of scholarly findings. And let us hope that subsequent research builds on this solid foundation. ©

Alexis Forbes responds:

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Victimizing and Criminalizing Sexual Minority Youth

Malik and Salerno smartly used uncomplicated mock juror research methods to investigate discrimination against sexual minority youth and adults. Lesbian, gay, and bisexual teens are vulnerable to victimization and maltreatment because of their sexual orientation (Almeida, Johnson, Corliss, Molnar, & Azrael, 2009). Often, the discrimination and abuse that they endure in their school-aged years translates into negative financial and mental health outcomes in adulthood (Almeida et al., 2009; Birkett, Espelage, & Koenig, 2009). The type of bias that Malik and Salerno observe in their first study, is a great test

of how jurors might apply the "Romeo and Juliet" provision in some states' statutory rape laws. The "Romeo and Juliet" provision prevents mandatory sex offender registration for some defendants who are guilty of statutory rape (Higdon, 2008). The exception was intended to allow teens over the age of 14 to avoid the lifelong stigma of being labeled a sex offender. The provision generally states that if both participants in the sexual behavior are 14-years-old or older, have no more than a three-year age difference between them, and the sexual behavior is consensual, the eldest teen in the relationship does not have to register as a sex offender. However, in some parts of the country, the Romeo and Juliet provision does not apply if the teens are engaging in same-sex sexual behavior. For instance, California has a Romeo and Juliet provision in its statutory rape laws but that provision does not apply if the teens have engaged in sodomy. Currently, there are also same-sex exceptions to the Romeo and Juliet provision in Texas and Alabama. Legal provisions that disparately criminalize same-sex sexual behavior by teens is just one way that certain institutions, like the educational and criminal justice systems, discriminate against gay and lesbian teens (Higdon, 2008).

In the most recent biennial report from the Gay, Lesbian, and Straight Education Network, entitled *National School Climate Survey (NSCS)* (Kosciw, Greytak, Palmer, & Bosen, 2014), teens who identified as lesbian, gay, or bisexual reported that they were harassed, assaulted, or discriminated against in school because of their sexual orientation. Hostile learning environments negatively affect students' achievement and mental health. For example, in a sample of 7,898 students between the ages of 13 and 21, nearly three-quarters of the LGBT-identified (Lesbian, Gay, Bisexual, and Transgender) respondents reported being verbally harassed in school. Some of the LGBT teens (16.5%) were physically assaulted because of their sexual orientation. Over half (56.7%) of the LGBT students who had been assaulted or harassed had not reported these incidents to school administrators because they believed that reporting would have produced null results or it would have worsened their situation (Kosciw et al., 2013).

Research on lesbians and gays people frequently demonstrates connections between being mistreated in school and poor mental health outcomes (Albelda, Badgett, Schneebaum, & Gates, 2009; Almeida et al., 2009; Birkett et al., 2009). Additionally, these negative physical and mental health effects of in-school discrimination occur in childhood through adulthood. For instance, gay men and lesbian adults who were harassed or assaulted in school because of their sexual orientation, were more likely to attempt suicide in their lifetime than gays and lesbians who had not experienced sexual orientation discrimination in school (Albelda et al., 2009; Almeida et al., 2009; Birkett et al., 2009).

Given these poor trajectories associated with anti-gay discrimination, school systems have attempted to incorporate remedies that improve outcomes for lesbian and gay children. Some school systems provide a simple framework for LGBT acceptance and support that may improve social and interpersonal outcomes for students. Kosciw and colleagues (2014) report that institutional-level adjustments, such as LGBT-inclusive educational curriculums, are associated with positive peer relations among LGBT and non-LGBT teens. For example, ap-

proximately 75% of the LGBT teens who attended schools that use LGBT-inclusive curriculum said that they felt accepted by their peers. In contrast, only 39.6% of the LGBT teens that attended schools that did not use an LGBT-inclusive curriculum felt that the other students were accepting of LGBT-identified people (Kosciw et al., 2014).

Discouraging bias by incorporating the diverse perspectives of lesbians and gay men may help to reduce the institutionalized discrimination that many sexual minority teens face. As the targets of institutionalized discrimination, lesbian- or gay-identified children may not understand the extent to which their behaviors are perceived as morally wrong, compared to the same behaviors by their heterosexual counterparts. It would be interesting to know if, after being reminded of the conse-

quences of a sex offense conviction (registering as a sex offender and being stigmatized as a predator), jurors would still recommend such stigmatizing sentences for children and teens engaging in same-sex sexual behaviors.

Malik and Salerno examined how jurors can apply and enforce systemic and institutionalized sexual orientation discrimination in a mock juror paradigm. It serves as a great bridge between the typical juror decision-making research and current issues in LGBT studies. The simplicity of the research provides a very clear basis for extended voir dire or a supplemental juror questionnaire. It suggests that there are implicit biases that individuals may or may not be aware of that impact their legal judgments for, or against, sexual minorities. ©

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