

BIASES IN PERCEPTION OF JUDGMENTS

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

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* The authors are grateful to participants in the 2012 Erasmus Mundus Law and Economics Conference in Ghent, Belgium, for valuable comments.

INTRODUCTION

Many studies have explored the effect of judges' characteristics, such as gender or ethnicity, on their own decisions and perceptions. For example, some studies focused on the relationship between judges' gender and their judgments on sexually based offenses.¹ None has studied whether such characteristics affect people's perceptions of the judgments. This question is important, *inter alia*, because the frequently heard argument that the judiciary must be "representative" or "reflective of society" is often linked to the assumption that representation increases public trust in the judiciary. Representation leads to trust only if members of a specific group have a greater trust in other members of the same group. Alas, empirical studies have not yet examined whether trust is actually dependent on judges' identities.

Two methodological comments must be made at this point. First, the value of representation in the judiciary does not hinge solely or necessarily on trust. For example, representation may generate a sense of dignity within the relevant groups in the society—a legitimate positive effect. However, our project aims to examine only the possible link between representation and trust, not other benefits of representation. Second, people may have a greater trust in judgments of members of their own group for three reasons. It is possible that members of different groups truly have different beliefs, values, and decision-making processes. In such a case people trust their own simply and justifiably because members of their own group hold, advocate, and promote the same views, whereas members of other groups do not. Alternatively, people may have a greater trust in judgments of others because they perceive a difference between their own group and other groups even when none exists. In the latter case, perceptions of judgments may vary regardless of real differences according to the evaluators' and evaluatees' affiliations. In other words, there is a cognitive bias, properly classified as a variant of the in-group-out-group bias. Group-based biases in the perception of judgments are the object of our project.

In this article, we wish to study whether men and women perceive judgments concerning gender-charged events differently, especially in view of the judge's gender. More accurately, we wish to examine whether men and women's identical judgments are perceived differently, indicating the existence of a possible bias. To do so, we employ an experimental research design. Our two independent variables are judges' gender (which is an active variable) and evaluators' gender (which is an assigned variable). The dependent variables are evaluators' perceptions with respect to different components of the judgments. Thus, this study examines whether people deem sentences imposed by female judges on sex offenders as more severe than identical sentences imposed by male judges. More importantly, this study examines whether men and women perceive identical sentences

¹ References

imposed on sex offenders as fairer when imposed by judges of their own gender.

I. THEORETICAL BACKGROUND

A. *General Biases in Judgment*

Personal characteristics of judges play a significant role in judicial decision-making. Rape, more than any other offense, provides us with unique judicial statements that help understand the impact of these characteristics and biases on judicial decisions. Thus, for example, interviews with judges in Philadelphia, in the United States, who faced rape cases, found that judicial attitudes toward rapists were less objective than expected and that judicial decisions were being influenced by the personal viewpoints of the judges.² Another study examining 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.³

In addition to judges' background, it is also generally accepted that legally irrelevant personal characteristics of both victims and defendants have an impact on case outcomes. Studies dealing with the daily practices followed by the judiciary when handling sexual offenses indicate that there is a considerable discrepancy between the oft-stated statement about importance of equality between the sexes and the actual situation in the courtrooms.⁴ These studies show that the law still reflects and reinforces conservative views, which limit the social roles of men and women to predefined and fixed areas of gender normalcy. The studies also show that the court perceives the relationships between the sexes, as these are viewed in cases of sexual offenses, in a manner which assigns different roles to men and women. The feminist movement has worked to reduce the emphasis on the sexuality of the offense of rape and highlight its character as primarily a crime of violence. In particular, reservations have been expressed at the use of the term "rape" which emphasizes the sexuality of the act and not the violence inherent in it, and which labels the victim.⁵

Research in this area has focused on identifying the characteristics of the victim or defendant that affect the attribution of causality to the act of rape. Jones and Aronson found that the rape victim's appearance (the extent to which she looks "respectable") has considerable influence on the degree of blame attributed to her.⁶ In addition, factors which are *prima*

² C. Bohmer, *Judicial Attitudes Toward Rape Victims*, *Judicature* 57 (February 1974)

³ Kulik, C. T., Perry, E. L., & Pepper, M. B, *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, *Law and Human Behavior* 27, 69-86 (2003).

⁴ Yofi Tirosh, 31 *Hebrew U.L.J.* 579, 580 (2001).

⁵ Reference

⁶ Jones & Aronson, *Penalties for Rape as a Function of Victim Provocativeness, Damage, and Resistance*, *Journal of Applied Social Psychology* 6(4), 360-368 (1976)

facie irrelevant to the offense in question, such as the social status, race, education, occupation and marital status⁷ of the victim and the defendant have an impact on the decisions of juries⁸ and even on professional judges.⁹ The argument voiced in the literature is that the legal system shows a greater tendency to legitimize the actions of the defendant if the complainant is not an “ideal” woman¹⁰, and a “flaw” may be seen in terms of her status or behavior.¹¹

In addition, it was found that the degree of blame attributed to the rape victim depends on her previous acquaintance with the rapist.¹² Susan Harris in her book offers the implicit distinction in the judicial process between “real rape” and “simple rape.” Real rape is characterized by the fact that it is committed in circumstances where the persons involved were not previously acquainted; it involves physical violence on the part of the rapist who forces himself on the woman as well as on the part of the victim who attempts to resist. In such cases the rapist possesses the characteristic of being foreign or “other” (in race, ethnicity, class, etc.) while the rape victim possesses “normative” traditional femininity (she is married, heterosexual, maintains a “decent” lifestyle). “Simple rape”, which is also known in the literature as “date rape,” is characterized by the fact that it takes place between acquaintances. In such cases, forcing the act is not always accompanied by the use of great physical force but may be accompanied by other means of pressure; opposition is not shown through physical violence; the rapist has the characteristics of a “normal” man while the rape victim does not necessarily possess the “normal” traits of femininity—she has a “sexual past” with a number of partners, is single, divorced or a single parent, etc.¹³ According to Harris, the legal system treats a real rapist seriously: conducts a comprehensive investigation, arrests suspects, convicts defendants and imposes severe penalties on them, generally

⁷ Deitz, S. R., & Byrnes, L. E., *Attribution of Responsibility for Sexual Assault: The Influence of Observer Empathy, Defendant Occupation, and Defendant Attractiveness*, Journal of Psychology 108, 17-29 (1981); Field, H. S., & Barnett, N. J., *Simulated Jury Trials : Students vs. Real People as Jurors*, Journal of Social Psychology, 104, 287-293 (1978).

⁸ Mazzella, R., & Feingold, A., *The Effects of Physical Attractiveness, Race Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta Analysis*, Journal of Applied Social Psychology 24, 1315-1344 (1994).

⁹ Williams, J. J., *Predicting Decisions Rendered in Criminal Appeals*, Journal of Criminal Justice 19, 463- 469 (1991).

¹⁰ Z. Adler, *Rape on Trial*, London (1987)

¹¹ A statistically significant relationship was found between the outcome of the case (namely conviction or acquittal) and the following factors: (1) defendant’s age; (2) complainant’s personal status; (3) defendant’s personal status; (4) defendant’s prior record; (5) previous acquaintance between the complainant and the defendant; (6) location of the crime (a house, a car, a public space); (7) identity of the location’s owner; (8) delayed complain. A. Leslie Sebba, *The Crime of Rape: Legal and Criminological Trends*, 3 *Plilim* 47, 75 (1993).

¹² Calhoun, L. G., Selby, J. W., & Warring, L. J., *Social Perception of the Victim’s Causal Role In Rape: An Exploratory Examination of Four Factors* *Human Relations* 29, 517-526 (1976).

¹³ SUSAN ESTRICH, *REAL RAPE* (1987)

believes victims, and invests resources to prevent such crimes. In contrast, the legal system relates to the second type of rape as if it is not really serious, and therefore as an offense which does not justify intensive reaction, severe punishment or taking other measures aimed at prevention and deterrence.¹⁴

B. Gender Differences in Perceptions of Reality

Studies have found that in certain contexts, men and women differ in their attitudes towards certain events, including the crime of rape. Some studies have found that men more than women believe the rape myths, such as that women desire to be forced to have sex.¹⁵ These myths support the approach which limits the responsibility of the rapist and attributes more of the blame for the commission of the rape to the victim, thereby affecting the perception of the gravity of the act.

Other differences relate to the perception of the motivation for committing rape. Compared to men, women believe that the use of force more than sexuality motivates this crime.¹⁶ An experiment that examined the perception of the severity of the rape on the basis of motive found that men attributed greater responsibility than women to a victim of a sex-motivated rape compared to a victim of a violence-motivated rape.¹⁷ No differences were found between men and women regarding the perception of rape as anti-social behavior and the belief that the woman should resist the rape.¹⁸

¹⁴ Tirosh at 597.

¹⁵ 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, for example, whether white or black, 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"); Michelle L. Blumberg, David Lester, *High School and College Students Attitudes Toward Rape*, *ADOLESCENCE*, 26, 103 (1991); Barbara E. Johnson, Douglas L. Kuck, Patricia R. Schander, *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"); Lynda A. Szymansky, Ann Sloan Devlin, Goan C. Chrisler & Stuart A. Vyse, *Gender role and attitudes towards rape in male and female college students*, *SEX ROLES*, 29 (1993) ("In the present study, gender, not gender role, emerged as the significant indicator of attitudes toward rape")

¹⁶ Barnett N. G., Feild H. S., *Sex Differences in university students attitudes towards rape*, *JOURNAL OF COLLEGE STUDENT PERSONNEL*, 2, 93 (1977); Lynda A. Szymanski, Ann Sloan Devlin, Goan C. Chrisler & Stuart A. Vyse, *Gender role and attitudes towards rape in male and female college students*, *SEX ROLES*, 29 (1993) [fix the recurring citation].

¹⁷ Damon Mitchell, D. J. Angelone, Brittany Kohlberger, Richard Hirschman, *Effects of Offender Motivation, Victim Gender and Participant Gender on Perceptions of Rape Victims and Offenders*, 24 *JOURNAL OF INTERPERSONAL VIOLENCE*, 1564, 1574 (2009) (First, male participants exposed to the sex-motivated offender attributed more blame to the victim and less blame to the sex-motivated offender than did female participants).

¹⁸ Lynda A. Szymansky, Ann Sloan Devlin, Goan C. Chrisler & Stuart A. Vyse, *Gender role and attitudes towards rape in male and female college students*, *Sex Roles*, 29 (1993).

The differences between men and women are particularly striking in the case of rape by an acquaintance. Several studies show that when presented with a case of rape by an acquaintance, men attribute more responsibility to the victim than women.¹⁹ However, findings relating to women blaming the victim were inconclusive. Indeed, most of the studies found that women blame the victim less than men.²⁰ But there are studies showing that women blame the victim more than men.²¹ This is due to women being overly critical of other women, that is to say, evincing a greater sense of identification that allows them to see themselves in the victim's shoes and the concomitant belief that had they been in her place they would have been able to avoid the rape. Women believe that they can control the situation and avoid becoming the victim of rape. Therefore, women's identification with the victim is weaker with respect to simple rape compared to real rape. In contrast, men report a higher ability to identify with the assailant in situations of simple rape, as in their perception it would be more logical for such incidents to take place.²²

Another difference between men and women concerns the impact of rape on the victim. Women regard the ramifications of rape as more severe than men.²³

C. Gender Differences in Judicial Decisions

The judicial system emphasizes the neutrality and objectivity of the trial, which is conducted independently of the identity of the judge. This objectivity is of great importance for establishing the legitimacy of the judges' decisions and for ensuring public trust in the legal system.²⁴ Even though the legal system makes an effort to create an image of remoteness and neutrality, legal realism assumes that judicial decisions are affected by the judge's worldview and identity.²⁵ Many empirical studies have examined these claims and a significant number have found differences between the decisions of judges belonging to different groups when dealing with similar cases.²⁶

¹⁹ Robert L. Quackenbush, *A Comparison of androgynous, masculine sex-typed and undifferentiated males on dimensions of attitudes toward rape*, JOURNAL OF RESEARCH IN PERSONALITY, 23 (1989); Lynda A. Szymansky, Ann Sloan Devlin, Goan C. Chrisler & Stuart A. Vyse, *Gender role and attitudes towards rape in male and female college students*, SEX ROLES, 29 (1993).

²⁰ Perceptions of Rape Victims and Assailants: Effects of Physical Attractiveness, Acquaintance, and Subject Gender (1988).

²¹ 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 (1983).

²² Lynda A. Szymansky, Ann Sloan Devlin, Goan C. Chrisler & Stuart A. Vyse, *Gender role and attitudes towards rape in male and female college students*, SEX ROLES, 29 (1993).

²³ Perceptions of Rape Victims and Assailants: Effects of Physical Attractiveness, Acquaintance, and Subject Gender (1988).

²⁴ Issachar Rosen Zvi, 8 L. & GOV'T 49 (2005)

²⁵ Reference

²⁶ Tracey George, Court Fixing, 43 Ariz. L. Rev. 9, 15 (2001).

One of the important characteristics focused on by researchers is judges' gender. One might expect that established differences in perspective, discussed above, would lead to differences in judgment. Researchers have sought to examine whether the differences between the female voice and the male voice emphasized by psychologists and sociologists,²⁷ are also expressed in judicial decisions. Put differently – is the difference in perception of reality reflected in judicial decisions? Surprisingly, most studies have found no basis for the conclusion that the judge's gender has a significant impact on his or her decisions.²⁸ In one study no differences were found between male judges and female judges regarding the rate of convictions, although differences were found in the severity of the punishments imposed on male defendants: female judges imposed more lenient sentences (than male judges), whereas benches of three judges, which included a female judge, imposed more severe punishments than a bench composed entirely of male judges.²⁹

Even more specific studies, attempting to identify differences between female judges and male judges concerning gender-related decisions, failed to yield conclusive results. Thus, some experimental studies found that women who are asked to act as judges or jury members in rape cases are more likely than men to convict where the evidence is weak, or to impose stricter punishments on those convicted, whereas other studies found that women actually tend to show greater leniency towards sex offenders.³⁰ Particularly important in our context are studies that examined the level of punishment that men and women respectively regard as appropriate for rape offenses. Szymanski et al. presented a similar rape scenario to men and women, and found that women believe that a harsher punishment should be imposed on the rapist than men (4.06 years in prison on average compared to 3.77).³¹ Likewise, Gerdes et al., who presented a different story of rape, found that the male subjects proposed imposing a custodial sentence of 14.78 years, while the average sentence proposed by women was 21.66 years.³²

²⁷ Carol Gilligan, *In a Different Voice: Psychological Theory and Womens Development* 24 (1982).

²⁸ Elaine Martin, women on the bench, a different voice? 77 *Judicature* 126, 128 (1993) (no evidence that female judges have a unique voice); Michael E. Solimine and Susan E. Wheatley, *Rethinking Feminist Judging*, 70 *IND. L.J.* 891, 898 (1995) (empirical studies show slight differences at most between male and female judges' decisions); John Gruhl, Cassia Spohn and Susan Welch, *Women as Policymakers: The Case of Trial Judges*, 25 *AM. J. POL. SC.* 308 (1981) (no gender differences, except that female judges impose more severe sanctions on female defendants found guilty); George, *supra*, at 20 (empirical studies have not found differences between male and female judges); Bryna Bogoch, *Judging in a Different Voice: Gender and the Sentencing of Violent in Israel*, 27, *INT'L J. SCIOLOGY OF L.* 51, 54 (1999).

²⁹ Ayelet Golan Tavori, *Price of Sex in Court*, 35 *NOGAH* 22 (1998).

³⁰ Bogoch, *supra*, at 55.

³¹ Refer to Gender role and attitudes towards rape in male and female college students

³² Refer to Perceptions of Rape Victims and Assailants: Effects of Physical Attractiveness, Acquaintance, and Subject Gender (1988).

Similarly, empirical (non-experimental) studies examining the actual behavior of male and female judges respectively also failed to produce conclusive findings. Some found that female judges adopt a harsher approach towards men accused of sexual offenses against women.³³ Given a rape scenario, women are more convinced of the guilt of the accused and impose harsher sentences than men.³⁴ In another study, which considered gender differences when rendering judgment and imposing a sentence in rape cases,³⁵ it was found that women felt greater empathy towards the victims and imposed harsher sentences on rapists, than men.³⁶ Other studies found that female judges are actually less likely to convict or will impose lighter sentences on such defendants compared to male judges,³⁷ while yet other studies found no significant differences between the decisions of male and female judges.³⁸

D. Gender Bias in Perception of Judgments

It follows from the above that while there is difference in perspective between the sexes, there is still an insufficiently strong scholarly basis for the assumption that the patterns of judgment of male and female judges are systematically different, not even in sexual offenses. It is possible that the substantive and procedural legal rules or the ethos of judicial objectivity override natural tendencies and produce uniformity. These cut the predicted link between real differences in perspective and difference in judicial decision-making. However, given the proven difference in perspective between the sexes it is very likely that gender does play a role in how

³³ 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 Osgoode Hall L.J. 315, 351 (2007) (panels with female judges denied 78% of appeals, whereas purely male panels denied only 73% of appeals).

³⁴ Lynda A. Szymansky, Ann Sloan Devlin, Goan C. Chrisler & Stuart A. Vyse, *Gender role and attitudes towards rape in male and female college students*, SEX ROLES, 29 (1993); Perceptions of Rape Victims and Assailants: Effects of Physical Attractiveness, Acquaintance, and Subject Gender (1988) (while women imposed a sentence of 21.66 years in prison, men imposed a 14.78 years sentence).

³⁵ Avishay Antonovsky, *Psychology and the Legal System – Can the Two Walk Together?*, 5 Sha'arei Mishpat 11, 25 (2010).
<http://www.mishpat.ac.il/files/650/3168/3171/3172.pdf>

³⁶ *Id.*

³⁷ Spohn & Welch, *supra*...., at found that female judges convict sex offenders at a lightly lower rate, and impose lesser sanctions on sex offenders. Bogoch, *supra* at, found that in sex offenses, male judges imposed more severe punishments than female judges. In contrast, women in panels imposed harsher punishments.

³⁸ See, e.g., Cass R. Sunstein, David Schkade and Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301 (2004) (finding no difference between male and female federal judges); Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the courtroom: sex of judge and defendant in criminal case disposition*, The Social Science Journal, 14(2), 77, 82 (1977) (finding no difference between male and female judges in criminal matters, including sentencing in rape cases); Walker & 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).

judicial decisions are perceived,³⁹ especially with respect to gender-laden situations, such as sexual offenses. Because there is a difference of perspective there is reason to believe that the public in general will assume that male and female judges decide differently, and that there will be a difference between men and women's respective perceptions of legal decisions. In other words, the public may assess the severity and appropriateness of decisions relating to sexual offenses differently depending on the gender of the deciding judge; and it is possible that in addition to general differences in how the decisions of male judges compared to the decisions of female judges are perceived, there will also be differences between male evaluators and female evaluators regarding judges of each sex.

Unfortunately, no studies have addressed these conjectures directly. We intend to fill this gap. Studies that may lend some, though very limited, assistance are those showing that men and women in other positions are perceived differently. 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 are valued less, particularly when performing functions normally carried out by men. Undervaluation was particularly but not exclusively evident when the evaluators were men.⁴⁰ Likewise, studies which examined the evaluation of job applicants found that male candidates are valued slightly more than women candidates with similar qualifications.⁴¹ Similar differences may be reflected in the way men and women evaluate judicial decisions made by male and female judges respectively.

E. Purpose and Hypotheses

As implied above, the purpose of this study is to examine how the general public assesses the level of punishment imposed for sexual offenses depending on the respective genders of the *judge* and the *evaluator*. Previous studies have examined whether women truly have a different perspective, and whether the presence of a female judge on the bench affects the outcome of the process. The research findings are inconclusive. Some studies have found that female judges adopt the patriarchal position and the male perspective. Others have found that female judges are more liberal but that this liberality is confined to certain issues, such as those relating to women, or that the female judges tend to impose harsher punishments in respect of crimes against women. Yet other studies have found no difference between male and female judges. This study focuses on questions that have not been previously studied and centers in particular

³⁹ Antonovsky, *supra*, at 25.

⁴⁰ Alice Eagly, Mona Makhijani & Bruce Klonsky, *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOLOGICAL BULLETIN 3 (1992)

⁴¹ Judy Olian, Donald Schwab, Yitchak Haberfeld, *The impact of applicant gender compared to qualifications on hiring recommendations: A meta-analysis of experimental studies*, 41(2) ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES, 180 (1988)

on the relationship between the gender of the judge and his or her evaluators and the manner in which a judge’s decisions regarding rape offenses are perceived.

As the judicial process is driven, in part, by emotional forces, interpretation and evaluation on the part of the judge,⁴² and gender may affect these,⁴³ it may well be that the public will 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 lies in the fact that male and female judges belong to different social groups, hence to different identification groups.⁴⁴ The assumption is that the public will tend to think that a female judge would identify with the victim whereas a male judge would identify with the aggressor, and these respective tendencies will lead to differences in punishment. This hypothesis is consistent with the theory of intergroup bias in social psychology,⁴⁵ whereby people have a natural tendency to self-categorization, which generates classification into “us” and “them.” Even under laboratory conditions, this division results in bias towards in-group members and discrimination against out-group members.⁴⁶ Tajfel emphasized the emotional and moral significance of socialization alongside the concept of affiliation, and called this content “social identity.” He claimed that the individual wants and will always seek to achieve positive social identity. Positive social identity, or positive differentiation, is achieved through favoritism being shown to members of the in-group and discrimination being shown towards members of the out-group. This creates a comparison which emphasizes the group.⁴⁷ The very fact of affiliation to a specific group is a source of hostility towards other groups.⁴⁸ According to social identity theory, the purpose of in-group bias is to raise a person’s self-esteem. A person’s self-esteem consists of two factors: personal identity and group identity. In the same way as an individual’s self-esteem is affected by comparing him or her to others, so too is an individual’s self-esteem affected by drawing comparisons between the group to which he or she belongs and other groups. While the demographic

⁴² [Carmi 150]

⁴³ [Carmi 152]

⁴⁴ Toch H., *Legal and Criminal Psychology*, 106,136 (1966)

⁴⁵ Tajfel H., *Social Identity and Intergroup Relations*, *Am. Rev. Psychos* 33, 1-3 (1982)

⁴⁶ Hogg M. A., Abrams D., *Social Identifications: A social psychology of intergroup relations and Group Processes* (Routledge, London U.K, 1998); Smith E. R., Mackie D. M., *Social Psychology chapter 6: Social Identity?* (New York: Worth Publishers, 1995)

⁴⁷ 3 RUTH BEYTH-MAROM, *PERSONALITY: THEORY AND RESEARCH* __ (1992)

⁴⁸ 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 distinction (such as the color of their shirts); the groups do not compete for resources and are not in conflict. MPG 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. MAROM, *supra* note __, at __. [add references by W]

characteristics of the defendant and the victim are—or at least should be—irrelevant in the legal process, we explained that they might. Here we wish to examine whether the public does in fact have a different perception of court decisions concerning the punishment of a defendant accused of rape depending on the judge's gender. In other words, we expect the public to perceive judgments under the assumption that an intergroup bias exists.

Our primary hypothesis is that the judge's gender has an effect on the perceived severity of the sentence imposed by the judge on sex offenders. Subjects who are exposed to sentences imposed by a female judge would evaluate it as more severe compared to subjects who are exposed to sentences imposed by a male judge. The reason is the perceived identification between the judge and the victim.

Our second hypothesis is that the subject's gender has an effect on the perceived severity of sentences imposed on defendants accused of committing a sex offense, so that male subjects will evaluate the sentence as more severe compared to women. In other words, male subjects would rank the sentence higher on a scale of 1-5 than would women in answer to questions about the degree of severity of the sentence.

Our third hypothesis, which is more accurately a question, is that the gender of the judge and the gender of the subject will have a combined effect on the perceived severity of sentences imposed on defendants accused of committing sexual offenses. The impact of the judge's gender will vary depending on the subject's gender. Regardless of the judge's gender, male subjects will evaluate the sentence as being more severe than female subjects. However, if men and women assign different significance to the judge's gender, the difference between men and women in their assessment of a female judge's decision may not be equal to the difference between men and women in their assessment of a male judge's decision. We had a weak intuition about this question. We suspected that women would assign a greater importance to the judge's gender, because of the historical exclusion and silencing of women. Again, we hypothesized that female judges' sentences would be deemed more severe because they are perceived as less sympathetic to the offender, and more identified with the victim. So we expect a difference between the evaluations of male and female judges' sentences. We thought that the size of this difference might depend on the level of identification between the evaluator and the judge. Presumably, male subjects would identify with male judges, who are seemingly more sympathetic to offenders, whereas female subjects would identify with female judges, who are seemingly more sympathetic to victims. So men and women alike would feel judges of their own gender impose sentences that better fit their own perception of severity. If the difference between male and female judges gets a different value for male and female subjects, it may result from a different level of identification between evaluators and judges of their own gender. If women more strongly believe that the judge's gender makes a difference, they will perceive a greater difference between judges of different genders. We speculate that that they do. Because women were excluded and silenced for

centuries, they may attribute a greater importance to the fact that a rape case—an extreme example of gender-oriented offense—is decided by a female judge. Men, on the other hand, might attribute more importance to the “objective” elements of the case, and less importance to the judge’s gender.

II. METHODOLOGY

We employed an experimental research design. Our two independent variables are judges’ gender (which is an active variable) and evaluators’ gender (which is an assigned variable). The dependent variables are perceptions of judgments. The two perceptions measured were

A. Participants

Ninety subjects participated in the experiment (42 men, 48 women). Ages ranged from 20 to 29 ($M=25.4$, $SD=2.12$). All subjects were students at the University of Haifa – School of Law, who volunteered to participate in the study after class. Participants were assigned to read one of two versions of a reasoned criminal sentencing decision, followed by a questionnaire.

B. Materials

The decision presented to the participants was based on a sentence imposed by the District Court of Tel Aviv⁴⁹ on a defendant who had been convicted of rape with aggravating circumstances (Section 347(B)(3) of the Penal Law) following a guilty plea.⁵⁰ The original decision, attached as Appendix A, described the facts of the case, the parties’ arguments, and the punishment imposed on the offender. 39 subjects received the decision in a version written by a judge identified as a man (experiment condition 1), and 51 subjects received the same decision in a version written by a judge identified as a female (experiment condition 2). The two versions were nearly identical, different from each other solely on the basis of the judge’s gender.

After reading the decision, the subjects were asked to answer a questionnaire, attached as Appendix B. The experiment questionnaire, which was constructed for the purpose of the study, was identical for the two experiment groups, apart from the use of gender-specific language with respect to the judges. In Hebrew—pronouns, general nouns, adjectives and verbs take different forms for male and female, so it is likely that subjects noticed the judge’s gender. The questionnaire contained five items: four closed questions the answer to which was a number on a scale of 1-5, and one open question the answer to which was a number to be selected by the subject.

⁴⁹ Criminal Case (Tel Aviv) 1128/06 State of Israel v. Michael Genser.

⁵⁰ Penal Law, 1977.

Some of the questions dealt with an evaluation of the severity of the punishment imposed on the convicted offender and some dealt with an evaluation of the congruence between the offense and the punishment imposed. During the analysis of the data, the items dealing with the severity of the punishment were separated from those dealing with the congruence between the punishment and the offense. Thus, the perception of the severity of the punishment was calculated as an average of subjects' evaluations in relation to the two items dealing with the severity of the punishment. The value of this perception accordingly ranged between 1 (not severe at all) and 5 (very severe).

C. Procedure

The subjects, students at the University of Haifa – School of Law, enrolled in two courses, were asked to participate in an experiment on punishment within the criminal legal system after class. Both courses—tort law, and legal ethics—are mandatory for law students in advanced years of study, and attended by similar numbers of male students and female students.

The subjects who agreed to participate in the experiment were given a decision relating to a defendant who had been convicted of rape with aggravating circumstances on the basis of a guilty plea, and were asked to read it closely. We allocated subjects to the experiment groups randomly, without their knowledge, based on the course in which they were participating, and without any explanation being given to them regarding the purpose and hypotheses of the experiment.⁵¹

After reading the decision, participants were asked to fill in a questionnaire drafted in a manner compatible with the sentencing decision and containing four statements relating to the decision. Participants were asked to rank the extent to which they identified with each of these statements on a scale of 1-5. They were given the opportunity to reread the decision while filling in the questionnaire. After ensuring that the subjects had answered the questionnaire, the experimenter collected the decisions and questionnaires, thanked the subjects for participating in the experiment and asked them not to discuss the study, its methodology and purposes with anyone.

III. RESULTS

A. General

As noted, for the purpose of examining the perception of the severity of the sentence, the subjects filled in a questionnaire which had been adapted to the study, in which their personal attitude to the decision was ranked on a numerical scale of 1 to 5 (see Table 1).

⁵¹ The subjects in the first experiment group, students attending the tort law class, were given a decision written by a male judge. The subjects in the second experiment group, students attending the legal ethics class, were given a decision written by a female judge.

<i>Item</i>	<i>Question</i>	<i>Scale</i>	<i>M</i>	<i>SD</i>
1. Appropriateness of the punishment	In your assessment, was the custodial sentence imposed on the defendant justified?	1= Not justified at all 5= Very justified	3.80	1.08
2. Congruence between the punishment and the offense	In your assessment, was the custodial sentence imposed on the defendant congruent with the gravity of the crime?	1= Not congruent at all 5= Very congruent	3.66	1.13
3. Severity of the punishment	In your assessment, how severe was the judge with the defendant?	1= Not severe at all 5= Very severe	2.55	1.14
4. General evaluation of the punishment	What is your general assessment of the sentence imposed on the defendant?	1= Overly lenient 5= Overly severe	3.12	0.94
5. Appropriate punishment	What in view is the appropriate punishment for the crime?	0–25 years in prison	13.85	5.84

Table 1: Responses to Questionnaire (N=90)

B. The Severity of the Punishment

The “severity of the punishment” score was calculated as an average of subjects’ answers to questions 3 and 4. To measure the degree of correlation between the two items and to examine the internal consistency of the questionnaire (in other words, to ensure that the two questions indeed related to the severity of punishment variable), we used Cronbach’s Alpha. The internal consistency estimate of reliability is sufficiently high (0.71).

The first hypothesis related to the effect of the gender of the judge on the subjects’ evaluation 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. To examine 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 finding is consistent with our hypothesis: the subjects’ assessment of the severity of the punishment imposed by a female judge ($M=2.98$, $SD=0.91$) was higher than the subjects’ assessment of the severity of the punishment imposed by a male judge ($M=2.65$, $SD=0.93$); however, this finding was only marginally significant [$t(88)=-1.68$, $p=0.097$].

<i>Judge’s Gender</i>	<i>Perception of the Severity of the</i>
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	<i>Punishment</i>	
	<i>M</i>	<i>SD</i>
Male (n=39)	2.65	0.93
Female (n=51)	2.98	0.91

Table 2: Perception of the Severity of the Punishment as a Function of the Judge’s Gender (N=90)

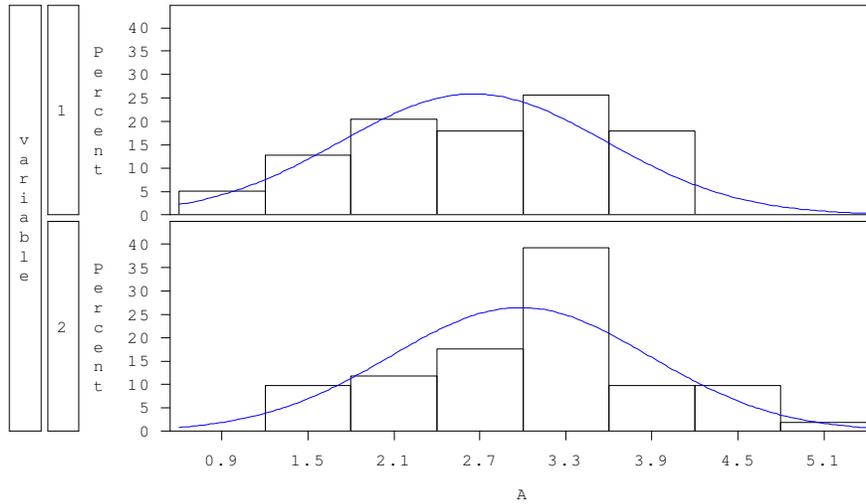


Figure 1: Comparison of Average Assessments of the Severity of the Punishment as a Function of the Judge’s Gender (1=male; 2=female)

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, independently of the gender of the judge writing the decision. Once again, we used independent samples t-test to examine the difference between male and female evaluators in assessing of the severity of the punishment. The findings confirm the hypothesis that the gender of the subject affects the evaluation of the severity of the punishment. Men generally deemed the punishment more severe ($M=3.13$, $SD=0.90$) than women ($M=2.58$, $SD=0.88$). This finding is statistically significant [$t(88)=2.92$; $p<0.01$].

<i>Subjects’ Gender</i>	<i>Perception the Severity of the Punishment</i>	
	<i>M</i>	<i>SD</i>
Male (n=42)	3.13	0.90
Female (n=48)	2.58	0.88

Table 3: Ranking of the Severity of the Punishment as a Function of the Gender of the Subject (N=90)

In addition, we hypothesized that the judge's gender and the subject's gender would have a combined effect on the perceived severity of the punishment: under the condition where the sentence is imposed by a female judge, male subjects would evaluate it as more severe than female subjects. Where the condition is that the sentence is imposed by a male judge, male subjects would evaluate it as being more severe than female subjects, but the difference would probably be smaller than in the first case.

We used two independent samples t-tests to examine the difference between male and female subjects in the perception of the severity of the punishment, one in relation to a male judge and the second in relation to a female judge. With regard to a decision of a female judge, the ranking of the severity of the punishment was as expected higher among male subjects ($M=3.23$, $SD=0.93$) than among women subjects ($M=2.76$, $SD=0.83$). However, this finding was only marginally significant [$t(49)=1.90$, $p<0.07$]. With regard to the sentence imposed by the male judge, we found that the assessment of the severity of the punishment was again higher among male subjects ($M=3$, $SD=0.84$) than among female subjects ($M=2.32$, $SD=0.89$), and this difference was found statistically significant [$t(37)=2.42$, $p<0.05$]. The fact that the difference between the evaluations of male and female subjects was significant in the case of a male judge, and only marginally significant in the case of a female judge, does not in itself prove that women attribute greater significance to judges' gender, but it is consistent with such a hypothesis.

THE FINDINGS ARE CONSISTENT WITH OUR HYPOTHESIS: THERE SEEMS TO BE A GREATER DIFFERENCE BETWEEN THE ASSESSMENTS OF MALE AND FEMALE JUDGES' DECISIONS AMONG WOMEN THAN AMONG MEN. BUT WE NEED TO PERFORM SOME MORE STATISTICAL TESTS TO DETERMINE THE SIGNIFICANCE.

MUST CHANGE T-TESTS TO EXAMINE ATTRIBUTION TO JUDGES GENDER PLUS STATISTIC FOR THE SIGNIFICANCE OF THE DIFFERENCE IN DIFFERENCES

<i>Judge's Gender</i>	<i>Subject's Gender</i>	
	<i>Male</i> (<i>n=42</i>)	<i>Female</i> (<i>n=48</i>)
Male (<i>n=39</i>)		
<i>M</i>	3.00	2.32
<i>SD</i>	0.84	0.89
Female (<i>n=51</i>)		
<i>M</i>	3.23	2.76
<i>SD</i>	0.93	0.83

Table 4: Assessment of the Severity of the Punishment as a Function of the Judge's Gender and the Subject's Gender (N=90)

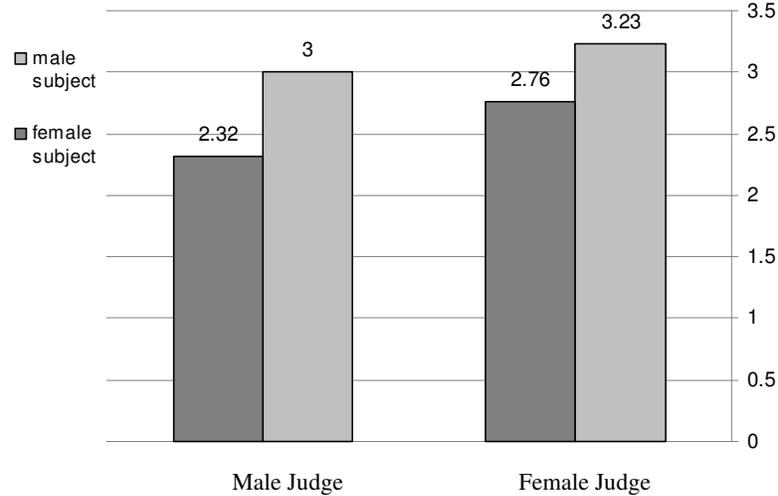


Figure 2: Assessment of the Severity of the Punishment as a Function of Judge's Gender and the Subject's Gender

C. Fairness of the Punishment

In addition, we examined subjects' perception of the fairness of the punishment. The "fairness of the punishment" score was calculated as an average of subjects' answers to questions 1 and 2, measuring the appropriateness of the punishment and its congruence with the gravity of the crime, respectively. In order to measure the degree of correlation between the two items and to examine the internal consistency of the questionnaire (in other words, to ensure that the two questions indeed related to the fairness of the punishment), we used Cronbach's Alpha. A high correlation was found between the items (0.81).

To examine the difference between the perceptions of fairness of sentences imposed by male and female judges we employed an independent samples t-test. We found that subjects perceived the sentence imposed by a female judge as fairer ($M=3.93$, $SD=0.939$) than an identical sentence imposed by a male judge ($M=3.47$, $SD=1.06$), and this finding was statistically significant [$t(88)=-2.16$, $p<0.05$].

<i>Judge's Gender</i>	<i>Perception of the Fairness of the Punishment</i>	
	<i>M</i>	<i>SD</i>
Male (n=39)	3.47	1.06
Female (n=51)	3.93	0.94

Table 5: Perception of the Fairness of the Punishment as a Function of the Gender of the Judge (N=90)

To examine the difference between male and female evaluators in assessing the fairness of the punishment, we employed an independent

samples t-test. We found no statistically significant difference between the perceptions of fairness of men and women [$t(88)=-0.79, n.s.$].

<i>Subject's Gender</i>	<i>Perception of the Severity of the Punishment</i>	
	<i>M</i>	<i>SD</i>
Male (n=42)	3.64	0.98
Female (n=48)	3.81	1.04

Table 6: Perception of the Fairness of the Punishment as a Function of the Subject's Gender (N=90)

The lack of significant difference between male and female evaluators persisted when we distinguished between male and female judges. With regard to male judges, male evaluators' perception of fairness ($M=3.26, SD=0.99$) was slightly lower than female evaluators' perception ($M=3.68, SD=1.12$); but an independent samples t-test confirmed the difference was insignificant [$t(37)=-1.22, p=0.23$]. With regard to female judges, there was no discernible difference between male evaluators ($M=3.96, SD=0.88$), and female evaluators ($M=3.91, SD=1.00$) [$t(49)=0.17, p=0.86$].

IV. DISCUSSION

The purpose of this study was to examine the manner in which the public evaluates decisions in rape cases, with an emphasis on potential gender biases. The principal hypothesis was that the subjects would perceive a sentence imposed by a female judge as being more severe than an identical sentence imposed by a male judge. Our finding is consistent with this hypothesis, although the difference was only marginally significant. Likewise, we hypothesized that men would evaluate the sentence as being more severe than women. Our finding to this effect was statistically significant. We found that men perceive the punishment as more severe than women in a significant manner, irrespective of the judge's gender. An additional hypothesis was that the judge's gender and the subject's gender would have a combined effect on the perception of severity. In the case of a sentence imposed by a female judge, men considered it more severe than women, but the difference was only marginally significant. On the other hand, in the case of a sentence imposed by a male judge, men considered it more severe than women, and this difference was statistically significant.

In addition, the study examined the subjects' sense of the fairness of the punishment as a function of the judge's gender and the subject's gender. An examination of the effect of the subject's gender on the perception of the fairness of the sentence generated no statistically significant finding. Surprisingly, an examination of the impact of the judge's gender on the subjects' perception of fairness showed that subjects perceived a sentence imposed by a female judge as being fairer than a

sentence imposed by a male judge. This finding was statistically significant.

These findings may be explained in part by the theory of in-group bias⁵² and the theory of social identity which were discussed in Part I,⁵³ and in part by public endorsement of such theories, at least intuitively. In view of the impact of gender on the judicial process considered earlier,⁵⁴ and the understanding that a natural tendency to favor members of the in-group and discriminate against the out-group exists,⁵⁵ it is not surprising that the public perceives a decision of a female judge, who is associated with the group of women to which the victim of the crime also belongs, as being more severe than a decision of a male judge, who is associated with the group of men to which the offender belongs. This was so although the sentences were identical.

In-group bias theory may also explain the fact that male subjects tended to perceive the sentence as being more severe than did female subjects. Men belong to the same gender group as the aggressor, so there may be a stronger, even if unconscious, tendency to identify with the aggressor among men than among women. Alternatively, women may have identified with the victim more than men, consequently perceiving the sentence as less severe than men.

An additional finding was that people perceive the decision as being fairer when given by a female judge (compared to a male judge). There are two interrelated explanations for this somewhat surprising finding. First, a social analysis of the crime of rape shows that it possesses a powerful emotional dimension and perceived as one of the most serious crimes in Western society.⁵⁶ If the sentence imposed by a female judge is perceived as more severe, it might be deemed more compatible with the 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.⁵⁷

This study is subject to a number of methodological constraints which may explain the lack of significant findings in relation to some of our hypotheses. First, it is possible that there was a problem with the efficacy of the manipulation. In other words, participants may have not paid sufficient attention to the judge's gender. It is possible to detect such a deficiency by performing a manipulation check after the subjects fill out the questionnaires. Obtaining a statistically significant result might indicate that the subjects indeed paid attention to the judge's gender during the

⁵² Tajfel.

⁵³ Hogg.

⁵⁴ Antonovsky, at 25.

⁵⁵ Hogg.

⁵⁶ Genser case: "rape is one of the harshest crimes in the criminal code"; Criminal Appeal 4173/97 Abu Mahreb Farkhan v. State of Israel: "the offender injures the body, soul, dignity, and freedom of the victim."

⁵⁷ [Shitrit 133]

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 either with the materials or the procedure, or with the participants. Possibly, materials to which the subjects were exposed, or the way in which the questionnaire was transmitted, did not sufficiently highlight the experimental manipulation. A possible solution would be to strengthen the manipulation. For example, the experimenter can emphasize the judge's gender before circulating the materials by mentioning the judge's personal name and referring to his or her background and actions using the relevant pronouns, adjectives, and verbs.⁵⁸ This might help draw the subjects' attention to the judge's gender. However, if not done cautiously it might also expose the manipulation.

Alternatively, the problem may lie with the nature of the participants. Law students may be accustomed to functional reading of multiple judgments, focusing on legally relevant information, and playing down all other details like the judge's gender. The solution in such a case would be to conduct the experiment with a different set of participants who would not have a tendency to focus only on the legally relevant components of the judgments.

Second, it is possible that there was a problem with the sample. For starters, it may have been too small. Arguably, had we conducted the experiment on a larger sample we would have obtained statistically significant results. In addition, a question with respect to representativeness of the sample may arise. This question is related to another, already discussed above: One must consider whether the results, based on a sample consisting solely of law students, may be attributed to the public at large (a question of external validity). These problems increase mainly the probability for type I errors.

Third, one may consider running the same experiment on a date rape scenario where the differences in perceptions between men and women are apparently more obvious.⁵⁹ Possibly, the findings in such a case would be more clear-cut.

In conclusion, it is important to carefully consider the public tendency to assume the existence of differences between male and female judges in terms of the severity and fairness of punishment, where none truly exist. Perceived differences in punishment could harm the court system and undermine the goals of punishment.⁶⁰ First, the perception that the judge's gender affects the severity of the punishment may undermine public trust in the objectivity and neutrality of the judiciary. Second, the perception that such differences exist might complicate the legal process by leading

⁵⁸ Recall that in Hebrew grammatical gender also occurs in adjectives and verbs.

⁵⁹ Cross ref.

⁶⁰ [Shitrit 137]

lawyers to use procedural ploys in order to ensure that the case is heard by a forum which is as sympathetic as possible to their client.⁶¹

<http://www1.psych.purdue.edu/~willia55/392F/HewstoneRubinWillis.pdf>

⁶¹ [Shitrit 138]