

Requiring Racial Diversity on Juries

It is not surprising that the judge hearing Dzhokhar Tsarnaev's trial in Irish-laden Massachusetts is named George O'Toole. Yet, it should come as a shock to all Americans that the jury selected for the trial is entirely white. The jury pool for the District Court of Massachusetts is roughly 24% non-white. This raises serious questions about whether Tsarnaev will be sentenced by a jury of his peers. From a more practical perspective, the all-white jury also increases the likelihood that he will be sentenced to death. Promoting racial balance on juries is especially important for crimes like Tsarnaev's, where jurors are likely to view ethnicity/race as potential motivating factors.

The Sixth Amendment requires that juries reflect a cross-section of the community. However this only extends to the panels from which juries are later selected, not the juries themselves.¹ I believe that racial minorities should be represented on every jury conducting capital sentencing. I also think that minorities should be present on all juries within a limited deviation from their overall population numbers. Part of my proposed solution may be a reduction in the number of preemptive challenges that each side may use to eliminate unfavorable jurors for any reason. Several Jurisdictions, notably the Eastern District of Michigan, have taken less drastic approaches. They employ race-conscious measures to increase the numbers of minorities that are called for jury duty, with the hope that it will lead to more racially diverse juries.² A problem with this approach is that minorities may become overrepresented in certain cases and remain underrepresented in others. As a result, racial proportionality becomes worse overall.

Increasing the racial diversity of juries should result in less disparate sentences. Having a wide range of viewpoints within a single jury will lead them to meet somewhere in the middle of the ideological

¹ Albert Alschuler, *Racial Quotas and the Jury*, 44 *Duke Law Journal* 704 (1995), citing *Lockhart v. McCree*, 476 U.S. 162, 174 (1986).

² Alschuler, 712.

spectrum. Consequentially, this will lead to a reduction in death penalty. It is already at the most severe end of our sentencing scheme. I believe many Americans would accept this tradeoff, as a cost of producing a more just sentencing scheme.

What about expanding the use of racially diverse juries for sentencing outside of the death penalty? It will likely result in an increase for the most lenient sentences. Broad jury sentencing also conforms with Judge Marvin Frankel's argument that sentencing is punishment and not rehabilitation. However, it is at odds with his contention that we are a "government of laws, not of men." Sentencing guidelines are in place for juries, just as they are for judges. A major difference being that judges must explain their reasoning. Juries are freer to reflect personal values than the legal ideal. Racially diverse juries will help assure that a wide number of guidelines are receiving serious consideration, putting judge Frankel more at ease.

I don't see how my proposal harms the integrity of the sentencing process. Including more minorities will not inhibit the ability of juries to follow instructions and come to reasoned conclusions. It does no harm to the white jurors that are currently being disproportionately represented. Most importantly, my suggestions do not encourage selecting a jury that is opposed to the death penalty or necessarily favors lighter sentences. Minorities will assign more legitimacy to more racially diverse juries, perhaps ultimately reducing their crime rates.

Jury Groupthink

On February 19th, 2012 three expert skiers were killed in an avalanche after a group of 16 experienced skiers decided to leave the boundary gates of Stevens Pass Ski Area and head to Tunnel Creek. The Tunnel Creek ski path is notoriously dangerous and the conditions that day made it even more risky. So, why did this group of 16 experienced skiers decide to go to Tunnel Creek? The answer is a psychological phenomenon known as Groupthink. While each individual skier knew the conditions that day made Tunnel Creek a dangerous destination, together the group concluded it was safe.

Groupthink, a term coined by social psychologist, Irving Janis, occurs when “a group makes a faulty decision because group pressures lead to a deterioration of mental efficiency, reality testing, and moral judgment.”¹ Groupthink is occurring in jury deliberations. The defendants fate depends on the jury, and it is problematic that jurors, holding such an important role in the decision making process, may be subject to groupthink and conformity. Groupthink is likely playing an even larger role in the sentencing phase, especially if the jurors are given wide discretion.

In class on Wednesday, we participated in a mock sentencing deliberation for Rob Anon. Before class each individual class member prescribed a sentence they found adequate for the punishment of Rob Anon. The most lenient sentence from a class member was 3 years imprisonment, whereas the harshest sentence was 20 years. The class was then divided into groups of three to deliberate and make a decision for the group on what would be an appropriate sentence for Rob Anon. The groups reported similar sentences in the 8-10 year range. Therefore, no matter if the most lenient sentence was “right” or if the harshest sentence was “right,” when the groups come together and debate the sentence, groupthink occurs. Most groups reported a sentence of 8-10 years (the middle range of the minimum and maximum sentence for the crime). The results warrant

¹ Janis, I.L. (1972) *Victims of groupthink: A psychological study of foreign policy decisions and fiascoes*. Boston: Houghton Mifflin Company.

analysis. After listening to one member in my group who had strong opinions about mitigating the sentence, I was hesitant to voice opposition. I wanted to avoid conflict. This is extremely problematic. "Groupthink is a kind of thinking in which maintaining group agreement overrides a careful consideration of the fact in a realistic manner."² Nonconformity causes psychological pain, and thus some individuals will give into the group to avoid this psychological pain. I am one of those jurors.

The primary difference between the Avalanche example and a jury is that in the avalanche example groupthink is applied in a setting in which the individual members are making a decision for the group of which they are a part of, whereas in a jury setting, a group is deliberating and making a decision for someone not in the group. Therefore, a defendant is subject to the groupthink phenomenon of which they have no part.

Psychologists have studied ways in which a group can avoid succumbing to the groupthink phenomenon. Some psychologists suggest that every group should consist of a devil's advocate to help neutralize the conversation and the decision making process.³ Devil's advocates usually make suggestions against the opinion of majority undermining the authority held by the majority. Opposition creates a variance and leads to more individualistic thinking. While finding a devils advocate is not hard to find in law school, the jury is not made up of lawyers and law students. There is no assurance that a devils advocate is represented in every jury. Perhaps, a way to encourage individual choice and decisions making would be to encourage juries to consider conclusions individual before they meet as a group. Additionally, prosecutors and defense attorney should filter juries to ensure one individual acts as the devil's advocate. Obviously this topic deserves more exploration and analysis, but it is helpful for jury members to be aware of the groupthink.

² <https://psychlaw.wordpress.com/2010/07/14/the-tragedy-of-groupthink-in-juries/>

³ <https://psychlaw.wordpress.com/2010/07/14/the-tragedy-of-groupthink-in-juries/>