

Victim Profiling and Judicial Ethics

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Caveat

- A judge is not a referee
- There are victims of crimes who do not see a trial
- There are victims of crimes who participate in trials resulting in acquittals
- There are persons accused of wrongdoing who do not go to court
- There are defendants who are guilty, but acquitted
- There are defendants who are found guilty, but are not (innocent)
- There are defendants who are guilty, and are

Opening Thoughts

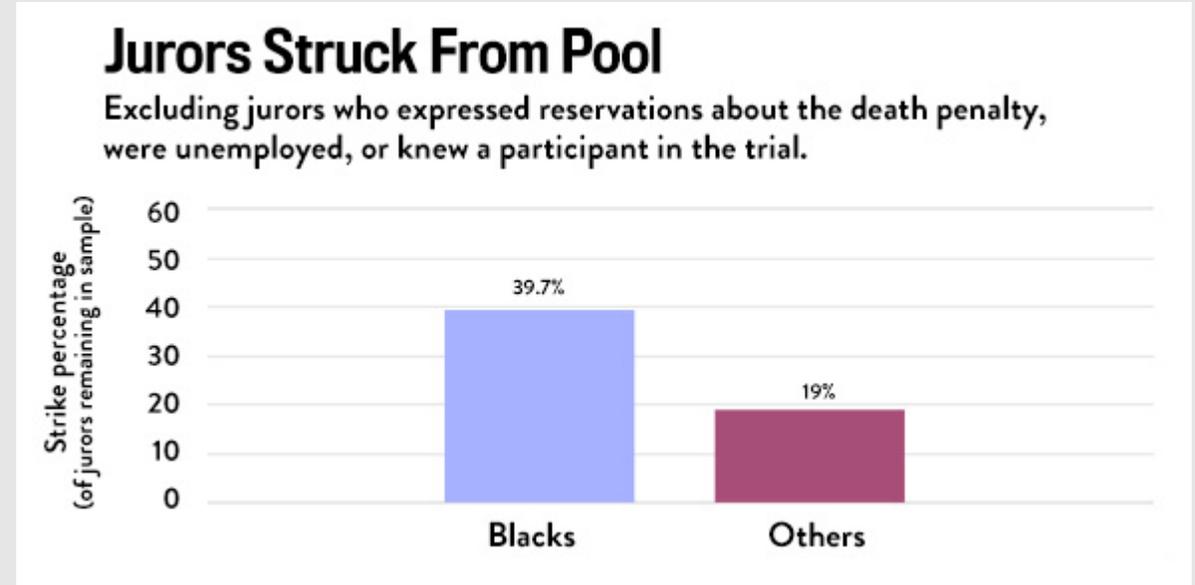
- Profiling persons on the basis of police conduct partly occurs as a result of the observations of witnesses / persons deemed as victims under the law
- Police profiling of victims and of suspected persons impacts the fairness of criminal trials
- The means to assure a fair trial that comports with due process for a defendant, and the means to assure that statutory rights of victims are preserved are a duty of trial judges (who may or may not need to be reminded of this duty)
- A judge must be as neutral as humanly possible to ensure this occurs

Statistics.... There is no problem if one is willfully blind to facts

- US Department of Justice, Criminal Victimization Report for 2016
 - 5,749,330 total for Violent Crime (VC)
 - 4,925,200 for assault (both aggravated and simple – 3/1 simple ratio)
 - 323,450 for sexual assault
 - 15,917,340 for Property Crime (PC)
 - 3,291,490 for burglary
 - 585,500 for motor vehicle theft
 - 12,040,440 for theft/larceny

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- Victim Demographic: rate of total violence per 1,000 persons age 12 or older
 - 20.5 Caucasian
 - 24.1 African American
 - 20.2 Hispanic
 - 23.0 Other



<https://www.bjs.gov/content/pub/pdf/cv16.pdf>

Statistics.... There is no problem is one is willfully blind to facts

- According to a U.C. Irvine study
- 59% of sexual assault exonerees are African-American men
 - Assaults on Caucasian women by African-American men are a small minority of all sexual assaults in the US, but these constitute half of the eyewitness misidentifications which result in exoneration

Duties of a Judge in Criminal Cases

- Impartiality and Independence
- Safeguarding Due Process Rights of Accused Persons
- Enabling the authority of the prosecution (sovereign)
- Ensuring the rights of other potential litigants (e.g. public right to an open trial)
- Maintaining the efficiency and decorum of the court proceedings

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- CVRA and its state analogs
 - Washington State
 - New Mexico
- Maintaining the efficiency and decorum of the court proceedings

Examples of Profiling and the Rules of Judicial Ethics



State v. Saintcalle, 309 P. 3d 326 (WA 2013)

- This decision arises from the prosecution's peremptory challenge against a competent African-American juror

Washington State Crime Rates - 2016

- 5,251 Reports of Adult Crime (forcible sex crimes)
- 1,218 Reports of Kidnapping
- 790 Adult Arrests (forcible sex crimes)
- 2,320 Superior Court filings (all sex crimes)
- 601 Adults convicted and imprisoned (forcible sex crimes)
- Average jail sentence (six months – but some of these convictions were for matters other than forcible sex crimes)

Thoughts on Judicial Ethics

- In a civilized society, members of the judiciary are significant public figures whose authority necessarily reaches all points within their respective jurisdiction, if not beyond.
- In re Disciplinary Hearing against Turco, 137 Wn.2d 227 (WA 1999)
 - Judge's insensitivity to victims of domestic violence grounds for temporary removal from bench
 - "[Y]ou didn't need to bite her. Maybe you needed to boot her in the rear end . . ." In another matter he told the defendant, "[F]ifty years ago I suppose they would have given you an award"

Washington State Example: Const. art. 1, § 35 (amend. 84),

- 1989 (unanimous in legislature... vote by 78 % in referendum)
- Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights.

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Limitations on Victims' Rights in Washington

- Victims' rights, though embedded in the state constitution, do not limit the due process right of defendants
 - Judges have a duty to “harmonize” the rights of victims with the due process rights of persons accused of crimes
 - “To the extent that these rights are irreconcilable, federal due process rights supersede rights arising under Washington's statutes or constitution”
 - *State v. McDonald*, 346 P.3d 748 (WA 2015)
- One concern regarding sentencing in Washington is “the race of the defendant.”
 - *State v. Benn*, 845 P.2d 289 (WA 1993)

Massachusetts: Profiling of Suspects

Commonwealth v. Warren, 475 Mass 530 (MA Sup Jud Ct 2016)

- Because of a long history of racial profiling by the Boston Police Force, courts should be reticent to accord too much weight to a minority member who flees from the police



Massachusetts – Victims Rights

- Massachusetts – Victims Rights Bill of 1983
 - Victim advocates are considered part of the prosecution team
 - Disclosure of exculpatory evidence is through the discovery process
 - However, the work product privilege extends to the victim advocate
- *Commonwealth v. Bing Sial Liang*, 434 Mass. 131 (MA Sup Jud Ct 2001)
- *Hagen v. Commonwealth*, 437 Mass. 374 (MA Sup Jud Ct 2006)

Alaska

**Cooper v. District Court, 133 P.3d 692
(AK 2006)**

- Victim of a crime lacks standing to challenge a sentence



Arizona



- Victim' Bill of Rights (Const. Art II. sec. 2.1)
 - 1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process
 - 5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
- An accused persons due process rights must be given precedence over a victim's state constitutional rights, *State ex rel Romley v. Superior Court*, 172 Ariz 232 (AZ 1992)
- And, the right of cross-examination (confrontation) cannot be curtailed to shield a victim from hiding biases or potentially embarrassing facts, *State v. Blackmon*, 184 Ariz 196 (AZ Ct app 1995)

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 - 5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.
 - 10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.
- *State v. Towery*, 204 Ariz 386 (AZ 2003)
 - Court observes that multiple appeals defeat the intent of para 10
 - But what does this do to an investigation?

Final Thoughts

- Profiling persons on the basis of police conduct partly occurs as a result of the observations of witnesses / persons deemed as victims under the law
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