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Reviewed by Diana Gordon

A Life and Death Decision: A Jury Weighs the Death Penalty

By Scott E. Sundby, Palgrave Macmillan, New York, N.Y. 220 pages, \$26.95

Frank felt the defendant had no one to blame but himself for a life trajectory that led him to an apparently senseless convenience store murder. Juror X thought she couldn't have voted for death if the defendant had cried or otherwise shown remorse at the trial. But Peggy found the defendant's childhood trauma of a brother's death, for which he was partially but unwittingly responsible, to be a mitigating factor in his criminal career and a reason for the jury to impose a life sentence instead of capital punishment.

These jurors (not their real names) are part of the cast of characters in Scott Sundby's balanced, informative and eminently readable account of sentencing in a capital trial. They struggle with questions of social responsibility, free will and its limits, and the psychological impact of past events. They do their best to make a decision on which a life depends and which expresses one of society's most profound moral judgments. They make enormous sacrifices of time and energy to deliver this judgment, even as many of them worry that they ought not to "play God" and that the legal system, in the words of the late U.S. Supreme Court Justice Harry Blackmun, "fails to deliver the fair, consistent and reliable sentences of death required by the Constitution."

The capital jurors' struggle makes for a compelling read. But Sundby goes beyond the drama of the particular case that resulted in a death sentence (and a contrasting case that imposed a life sentence for seemingly far more heinous crimes) to develop important themes that illustrate the dilemmas that so frustrated Justice Blackmun. He draws from hundreds of hours of interviews conducted with capital jurors (divided approximately evenly between those who voted for death and life) as part of the Capital Jury Project, a continuing national study begun in 1991 and directed by Northeastern University Professor William J. Bowers. That research examines how capital jurors exercise discretion in their decision-making and assesses the effectiveness of contemporary death penalty statutes in removing the arbitrariness found in the 1972 Supreme Court case *Furman v. Georgia*.

Sundby honors the urgings of generations of creative writing teachers who tell students to show the reader what they are getting at, rather than simply stating it; letting the jurors speak for themselves is what makes the book so lively. The larger points he wishes to make about the process emerge as the reader works through the individual experiences of the jurors in his two prototypical cases. For one thing, it becomes apparent that efforts undertaken in the last 30 years to eliminate unfairness in capital decision-making have bred new problems. Separating the guilt adjudication phase and the sentencing phase of a capital trial and allowing extenuating circumstances to be considered by the sentencing jury, for instance, has produced the diabolical result that an unsuccessful plea of innocence in the earlier phase hurts the defendant later, when he or she must acknowledge guilt to present mitigating circumstances. The due process protection of requiring that a defendant's attorneys be present whenever a jury asks to review evidence may seem intimidating to jurors and deter them from full consideration of relevant questions. An increasingly rule-bound machinery constrains its operatives: jury instructions are so elaborate as to confound even well-educated jurors; and judges may be so worried about being seen to interfere with juries' deliberations that they refuse to answer questions and thereby increase the likelihood that the instructions will be applied erroneously.

Contrasting the primary case with another also serves Sundby's purpose of showing the importance

to jury deliberations of competent defense counsel. In the latter case the defendant was convicted of killing two young people, torturing and decapitating one of them. After the first killing the defendant and his accomplices went to a movie. Although the defendant appeared remorseless his lawyers managed to present a compelling picture of a ghastly childhood filled with indescribable brutality against both the child and the pets who were his only refuge. The jury was receptive to well-made arguments that emphasized influences from the defendant's past as mitigation of his present crimes, and a life sentence was the result.

Sundby is able to use the contrast between the two juries' decisions to make other important points. He notes that in the case where the jury opted for death a substantial majority was inclined in that direction to begin with and that no such majority strength existed in the jury that decided on life, reflecting patterns observed in other cases studied by the Capital Jury Project. There were two African-American males on the jury that voted for life, and their ability to provide context for the white jurors looking at the black defendant's background weighed heavily—again a trend observed in a recent study, which found that

where a black defendant had killed a white victim, the chances of a death sentence were reduced when the jury included even a single black male.

It is this focus on the dynamics of what goes on in the jury room that, for this reader, casts the greatest doubt on whether sentencing decisions in capital cases can ever be consistent in ways that honor constitutional principles. A guarantee of skillful representation for capital defendants could be achieved with the political will to do so. Jury instructions could be written that would be understood by jurors of average intelligence and education, and judges could be trained to be more responsive to jurors' questions without intruding on their decisions.

But every group of human beings is different from every other, and in an area where discretion is wide and the choice is more moral and personal than legal those differences constitute inconsistency by definition.

Sundby is stumped by this problem, too. He can envision policy solutions to some of the flaws in the current system of capital sentencing, but he cannot escape the evidence that one or two jurors who are adamantly punitive or softhearted or religious or angry can pull the group in one direction or another in ways that cannot be anticipated or guided by the law. One juror may bully another into submission; justice may or may not be seasoned by mercy. The author concludes that "the debate as to whether a system can ever be devised that enables juries to impose the death penalty in a consistent manner will continue for as long as we have capital punishment." He never takes a position for or against it, but his findings strongly support Justice Blackmun's conclusion more than a decade ago that the "machinery of death" can't be repaired.

As I read "A Life and Death Decision" I kept wishing that I were still teaching crime policy to undergraduates. Discussions of the death penalty generally begin with a heated debate about whether it should exist. While this book will resonate with criminal justice professionals and academics, it also provides a fine introduction to thinking seriously about the death penalty from inside out—that is, examining the practice first as a way into more informed discussion of the policy.

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