

The Eyes of the Beholders

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SCOTT SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (Palgrave Macmillan 2005).

Let's start with the bottom line: Professor Scott Sundby has published a fascinating account of jury deliberations in death penalty cases. *A Life and Death Decision: A Jury Weighs the Death Penalty*, which I will refer to as *Life and Death* hereafter, provides raw data about the intersection between juries and the death penalty, in the jurors' own words. It is also filled with interesting facts, useful information, and humor. It presents a morbid and, to some, forbidding topic—who wants to read about the death penalty on their day off?—with wit and elegance. And at only 187 text pages, it is easily readable over a weekend or on a longish plane flight. Finally, the book is quite accessible and not just, or even primarily, for lawyers. Yet it is also replete with information that is valuable and interesting to lawyers familiar with death penalty law. Professor Sundby never “dumbs down” the topic, but instead presents this complex legal area with a seamless, smooth style.

One of the nicest points is that *Life and Death* presents new information for the capital punishment debate, rather than rehashing the old—no mean achievement in the never-ending American controversy over capital punishment. Professor Sundby presents verbatim accounts from actual capital case jurors, discussing how they arrived at their decisions. There simply aren't any other contemporary books out there that present real capital jury deliberations in the jurors' own words.¹

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¹ Hearing about jury deliberations after the fact in the jurors' own words is as close to hearing the actual deliberations as American law and culture currently permits. Fifty years ago, in the most extensive empirical study of juries at the time, researchers in 1955 taped the live deliberations of five real criminal juries in Wichita, Kansas. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* xiv–xv (1971). The result was “public censure by the Attorney General of the United States, a special hearing before . . . the Senate Judiciary Committee, [and] the enactment of statutes in some thirty-odd jurisdictions prohibiting jury-tapping.” *Id.* at xv. Thus contemporaneously capturing American capital jury deliberations is not currently a viable option. See generally 18 U.S.C. § 1508 (2000) (prohibiting taping of jury deliberations); Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771 (2005) (arguing against jury secrecy); Abrahm Abramovsky & Jonathan I. Edelstein, *Cameras in the Jury Room: An Unnecessary and Dangerous Precedent*, 28 ARIZ. ST. L.J. 865 (1996) (arguing for jury secrecy).

I will confess something at the outset, something that many law professors, I suspect, guiltily understand: I don't really read a lot of law books or law review articles (or law book reviews) in my spare time. Life is full, teaching is fun but time-consuming if done well, and relaxation is often found in other genres or venues. So it is with the enthusiasm of the reluctant but well-satisfied legal reader that I recommend Scott Sundby's book. *Life and Death* is a good read for non-lawyers, and also for lawyers who want to read about the death penalty novelistically, rather than in dense legal jargon. For law professors, it seems a perfect companion book to assign in a capital punishment seminar, or any class that studies trial by jury (Criminal Procedure? Trial advocacy?). Indeed, I would recommend the book for undergraduate courses as well. Finally, the book is not limited to the death penalty context. It is more broadly a study of jury dynamics. Whether you seek to understand how juries think and act, or you want to influence them, or you just want a unique window into jury deliberations, *Life and Death* is an invaluable guide.

So my bottom line: Get this slim volume and read it quickly, all the way through. It will not only inform you, but will also entertain.

I. JURIES AND THE DEATH PENALTY: UNRESOLVED (UNRESOLVABLE?) RELATIONSHIPS

A. *Juries and Capital Punishment: Similar Conflicting Emotions*

Americans have long had a love-hate relationship with the death penalty. Critical of its harshness and unforgiving character, and recently distrustful of its accuracy,² a super-majority of Americans still supports its administration to "high-end" murderers whose guilt is unquestioned.³ While calls for moratoria on the death penalty currently abound,⁴ capital punishment has been part of the American justice system since the Framers enacted federal death penalties as part of the First Crime Bill in 1790.⁵ And but for a brief procedural hiatus in the 1970s,⁶ the death penalty has never been absent from the American legal landscape.

² See BARRY SCHECK ET AL., *ACTUAL INNOCENCE* (2000). I present *Actual Innocence* to my students as the most influential, in terms of actually changing legal institutions and fundamental perceptions, legal book of the Twentieth Century.

³ See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 *FORDHAM URB. L.J.* 347 (1999) [hereinafter Little, *History*] (collecting authorities growing out of Professor David Baldus's pathbreaking findings to this effect). Similarly, one of the many interesting facts that Professor Sundby provides even for death penalty scholars is that "most [capital] jurors stated that they still supported the death penalty after seeing the process at work." (Sundby, at 165.)

⁴ See Rory K. Little, *Why a Federal Death Penalty Moratorium?*, 33 *CONN. L. REV.* 791 (2001) [hereinafter Little, *Moratorium*].

⁵ Little, *History*, *supra* note 3, at 360-65.

Not dissimilarly, Americans have long had a love-hate relationship with the jury system. Critical of its uncertainty and inherently arbitrary character, and distrustful of its accuracy, Americans nevertheless venerate the concept of jury trials. Justice Scalia has metaphorically described the right to jury trial as “the spinal column of American democracy” because it is the only such right to appear in the body of the Constitution and also the Bill of Rights.⁷ While calls for “jury reform” are never absent, the criminal jury trial right was plainly fundamental to the Framers (many of whom had committed treason, one of the most serious crimes known to governments, and suffered British judge trials). Not only has the criminal jury trial right been recognized as “fundamental to the American system of justice” and thereby part of the due process that all states must provide,⁸ but it recently has been transformed through a bit of constitutional alchemy to apply not only to guilt or innocence, but also to important sentencing facts.⁹

Given these schizophrenic views, pulling in opposite directions on both topics, it is unsurprising that when the death penalty and jury trial concepts are combined, highly controversial views result. Some of our most raw and unresolved legal emotions are exposed when we study criminal juries that decide whether or not to impose a penalty of death.

B. Professor Sundby's Snapshot

Professor Sundby's concise (187 text pages) and elegant volume provides a gripping, readable account of how the members of one capital jury arrived at their decision to impose death. In a captivating, almost novelistic narrative, the book primarily presents the jurors' own words and voices, recounting their views of the murder case they decided (*People v. Lane*—although all names have been changed for privacy reasons (Sundby, at xiv)), and how they arrived at a death verdict after four days of deliberation. Although the jury's verdict was ultimately unanimous, one chapter details the thoughts and deliberative process of a “holdout” juror, a young woman who refused to vote for death until the last day, and later said she regretted her vote.

Once the primary presentation of the *Lane* jury's deliberations is complete (Sundby, at 1–131), *Life and Death* then briefly compares *Lane* to another murder case (*People v. Brown*), where the offense facts were undoubtedly more egregious than *Lane*'s, yet the jury agreed on a life sentence. It is at this point that the book leaves pure description behind, and enters normatively (if subtly) into the death

⁶ From 1972 when *Furman* was decided, until 1976 when the *Gregg* opinions were issued, upholding state death penalty statutes enacted in response to *Furman*. See *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁷ *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting).

⁸ *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

⁹ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Blakely v. Washington*, 542 U.S. 296 (2004).

penalty debate. Although Professor Sundby “tried . . . to keep [his] personal views about capital punishment out of the telling of the jurors’ stories” (Sundby, at xiii) an obvious, if unspoken, point of the book is a claim that the two jury verdicts are inconsistent: death is given to the panic-shooting killer of a convenience store clerk (*Lane*), while life is given to the horrible torture-murderer of two young victims (*Brown*). The implicit conclusion seems clear, unspoken but not unapparent: we should eliminate the death penalty because it is unfairly arbitrary, as these two counterpoised verdicts plainly show.

C. An Outgrowth of the Capital Jury Project

The implicit conclusion I find in Professor Sundby’s book is unsurprising, when one considers that the book is one product of an immense empirical study known as the Capital Jury Project (CJP), whose anti-death penalty perspective is well-known. The goal of the CJP is to interview jurors who have served in capital cases and reached verdicts, gather lots of first-hand data about their deliberations, and then examine that data to see what it reveals about how capital juries reach their decisions and whether, and how, such juries follow the legal guides established by the United States Supreme Court for death cases.¹⁰ Headed by Professor William Bowers of Northeastern University, and funded in part by the National Science Foundation since 1991, the CJP has added immensely to our understanding of how jurors and juries make decisions, as well as to many important aspects of America’s capital punishment regime.¹¹ Almost 1,200 jurors who have actually served in capital cases have been interviewed in depth, from more than 353 capital trials in 14 states.¹²

But although the CJP website describes CJP’s mission as “*seek[ing]* to learn whether jurors’ exercise of capital sentencing discretion under modern capital statutes conforms to constitutional standards, [and] whether these statutes have remedied the arbitrariness ruled unconstitutional by the U.S. Supreme Court in *Furman v. Georgia*” (*emphasis added*),¹³ its answer has in fact been clear virtually from the project’s beginning: no. A 1995 article from Bowers initially reporting the CJP’s design and goals indicated (“preliminarily”) that its findings about the exercise of discretion by capital jurors “differ[s] from . . . Supreme Court precedent.”¹⁴ More recently, Professor Bowers explained the CJP findings more bluntly: “the capital punishment process is riddled with problems,” and

¹⁰ Capital Jury Project, at <http://www.cjp.neu.edu> (last visited June 4, 2006).

¹¹ Professor Sundby provides an Appendix listing 36 legal books or articles, including three of his own, that have originated through the CJP. (Sundby, at 213–15.)

¹² Capital Jury Project, *supra* note 10.

¹³ *Id.*

¹⁴ William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1101 (1995).

“constitutionally mandated requirements ... to eliminate arbitrary [capital] sentencing are not working.”¹⁵ “Surely,” Professor Bowers confidently writes, “this evidence of how capital jurors actually decide who must die will soon convince our lawmakers that America’s post-*Furman* experiment with capital punishment has failed.”¹⁶ Such progressive optimism echoes Justices Brennan’s and Marshall’s famous—but also famously wrong—assertions about contemporary values in *Furman*.¹⁷

D. *The Arbitrariness Critique: An Attractive Red-Herring*

Scott Sundby has long been one of the CJP’s capital juror interviewers, and his impressive scholarship in this area¹⁸ makes clear that he shares many of Bowers’ views. And surely, if the goal of consistent jury results were constitutionally mandated, the critique of capital punishment from seemingly “arbitrary,” or at least inconsistent, decisions would be irresistible.

However, Bowers and the CJP go far too far when they claim that the Supreme Court ruled in *Furman* that “the arbitrariness of capital sentencing rendered all existing capital statutes unconstitutional.”¹⁹ In fact, *Furman* declared only (only!) that the unguided *processes* for jury deliberations in capital cases at the time were unconstitutional, not the arbitrariness of their results.²⁰ To be sure, the arbitrariness of results was disturbing, as Justice Stewart so succinctly captured in his as arbitrary as “being struck by lightning” critique.²¹ But as even Bowers notes, we have known empirically for at least half a century that jury trial results can be inconsistent. Kalven & Ziesel’s famous 1966 study of *The American Jury*

¹⁵ William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 49 CRIM. L. BULL. 51, 84 (2003).

¹⁶ *Id.* at 86.

¹⁷ See *Furman*, 408 U.S. at 299–300, 305 (Brennan, J., concurring) (“rejection [of the death penalty] by contemporary society is virtually total”); *accord id.* at 360, 369 (Marshall, J., concurring) (“the death penalty is amorally unacceptable to the people of the United States at this time in their history” and “the average citizen would, in my opinion, find it shocking to his conscience and sense of justice”). Of course, within four years of *Furman*, thirty-six jurisdictions had legislated new death penalty statutes. See *Gregg*, 428 U.S. at 179–80 (opinion of Stewart, Powell, & Stevens, JJ.).

¹⁸ Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003) [hereinafter Sundby, *The Capital Jury and Empathy*]; Scott E. Sundby, *The Interaction of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1997); Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997).

¹⁹ Bowers & Foglia, *supra* note 15, at 51.

²⁰ See *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (“*Furman*’s basic requirement [was] . . . to guide, regularize, and make rationally reviewable the *process* for imposing a sentence of death”) (emphasis supplied).

²¹ *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

explained this clearly.²² Indeed, it has always been so: “[a]t least since the Revolution, American jurors have, with some regularity, disregarded their oaths and refused to convict defendants where a death sentence was the automatic consequence of a guilty verdict.”²³ In sum, inconsistent criminal jury results have long been recognized and have never presented a constitutional objection.²⁴

Moreover, it would seem impossible for it to be any other way. Jurors are human beings, and human beings are notoriously inconsistent and unpredictable. As Professor Sundby notes, apparently without concern, “individual jurors can react differently to the very same evidence” and, consequently, “the very nature of any one jury’s deliberations will be unique.” (Sundby, at 133, 134.) Thus it cannot be a surprise that juries may differ in results. To put it bluntly, therefore, America’s constitutional enshrinement of the criminal jury trial is a constitutional *acceptance* of “arbitrary” (if arbitrary means seemingly inconsistent) jury verdict results. This is true throughout the American justice system: civil, criminal, felony or misdemeanor. Capital jury verdicts are no exception. Indeed, what would be surprising is if it were otherwise.

In fact, it is the opportunity for arbitrariness—that is, treating similar cases differently—that constitutionally *supports* the requirement that juries *must* have discretion to choose life in all capital cases.²⁵ After *Furman*, one State reaction was to eliminate juror discretion entirely, and return to the common-law fashion of imposing death mandatorially upon conviction of a capital offense.²⁶ In *Woodson*

²² E.g., KALVEN & ZEISEL, *supra* note 1, at 8, 496 (“only a very uneven and unequal administration of justice can result from reliance on the jury;” “no two juries are alike”). Bowers notes that Kalven and Zeisel “found substantial evidence of arbitrariness in the sentencing of capital juries” in the very first sentence of his article. Bowers & Foglia, *supra* note 15, at 51.

²³ *Woodson*, 428 U.S. at 293.

²⁴ See *United States v. Powell*, 469 U.S. 57 (1984) (so holding).

²⁵ The opportunity for arbitrariness is also, by the way, what allows most lawyers to make a living. It is, in fact, an opportunity for which most private attorneys secretly hunger (but would never admit to the public). That is, lawyers who want leniency, in any forum, for their client, want an opportunity for arbitrariness, if what that means is non-uniform results. Lawyers seeking lenience always want to argue that their particular case is “different” from all others, and occasionally persuade a judge—or jury—that this is so, even when objective observers would uniformly disagree. That is, lawyers want an opportunity for arbitrariness—so long as their case is on their preferred (i.e., the “right”) side of the malleable dividing line.

Criminal defense lawyers in particular want an opportunity to influence the results of *their* cases in ways that are non-uniform, or in other words, “arbitrary.” For example, this has long been the defense critique of the federal sentencing guidelines: by attempting to regularize the results in all “like” cases and thereby eliminate “unwarranted disparity,” the Guidelines have (goes the critique) reduced judges to inhumane number-crunching computers and sentencings to emotionless, unindividualized (in)justice events. They have eliminated the opportunity for “creative” defense advocacy—meaning, the opportunity to persuade the judge to impose an inconsistently lenient result. In short, what criminal defense lawyers *want* is the opportunity to create non-uniform, “arbitrary,” results. This descriptive account seems not to be a criticism in the general sentencing context. How interesting that it is, however, when capital sentencing is discussed.

²⁶ Little, *History*, *supra* note 3, at 375.

v. North Carolina (one of the companion cases to the *Gregg* trio that sustained the constitutionality of “guided” juror discretion capital statutes), the Court ruled that “evolving standards of decency” under the Eighth Amendment required that mandatory death penalties be disallowed. Capital jurors must have “the possibility of compassionate or mitigating factors stemming from the diverse frailties of mankind.”²⁷ The “uniquely individual” characteristics of every capital defendant, his²⁸ “character and propensities,”²⁹ must be given to the jury *so that* they might decide to impose life rather than death. Thus the potential for jury results that might be viewed, by outside trial observers or summarizing generalizers, as “inconsistent,” is actually *constitutionally required* in the capital context. While we might wish for perfect consistency (and yet we would also have to acknowledge the impossibility of its achievement), there is simply no requirement, constitutional or otherwise, for consistent capital verdicts. Moreover, unless we want to risk the “level up” remedy that seems likely,³⁰ we ought not even desire it.

E. *The Critique of Arbitrariness can Disappear upon Closer Examination*

When viewed in the light of allowing jury discretion in order to permit leniency, even the specific results in the *Lane* and *Brown* cases detailed in *Life and Death* can readily be seen as far less “arbitrary” than the book suggests. Lane shot a store clerk in cold blood, and the security videotape of the killing showed no particular emotion or other explanatory evidence. Lane showed no remorse at trial, and Lane’s background showed no particular reason to feel sympathy sufficient to overcome the jury’s revulsion at his senseless murder of an innocent father of two toddlers. (Sundby, at 1.) Brown presented a very different, and far more sympathetic, picture to his jury. Unsurprisingly, the *Brown* jurors all reported complete loathing for his horrific crime, and an initial inclination to sentence him to death. But in the course of his sentencing hearing, Brown demonstrated to the jury that he also had suffered an equally horrific childhood. He also presented convincing testimony that he would pose no danger if imprisoned for life. (Sundby, at 142–47.)

Thus the *Brown* and *Lane* cases were not, in fact, the same. While Brown’s *crime* was worse, his *character* was not.³¹ Undoubtedly, however, capital

²⁷ *Woodson*, 428 U.S. at 304.

²⁸ The pronoun “his” is used here because almost everyone on death row in the United States is male. See U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STANDARDS, CAPITAL PUNISHMENT STATISTICS, available at <http://www.ojp.usdoj.gov/bjs/cp.htm> (last visited June 5, 2006) (of 3,314 persons on U.S. death rows in 2004, only 52 were women, and of 60 executions, one was of a woman). Shall we ask whether this reflects gender bias, and if so, do we wish to see it remedied?

²⁹ *Woodson*, 428 U.S. at 304.

³⁰ See RANDALL KENNEDY, RACE, CRIME AND THE LAW 334, 341–45, 385–86 (1997).

³¹ Moreover, although Professor Sundby is notably silent about this, see *infra* at pp. 248–249, Lane’s lawyers did an obviously much worse job on the capital aspects of the case than did Brown’s.

sentencing requires evaluation on *both* these axes. So the differing results are not “arbitrary,” but rather explicable based on salient differences (in law school parlance, the two cases were “distinguishable”). When one charitably reviews the details of the two cases, the arbitrariness critique seems far weaker than the book implicitly claims.

II. TALE OF TWO JURIES (A SUMMARY OF THE BOOK)

A more detailed summary of *Life and Death* is, I think, useful at this point. *Life and Death* primarily presents the “inside story” of one jury’s deliberations in a death penalty case, and details how the jury finally arrived at a unanimous decision for death. It then briefly compares the *Lane* case to another (*People v. Brown*), in which the offense facts were seemingly more egregious yet the jury eventually voted for life. The book then concludes with a number of intelligent suggestions for changes in the capital jury process, and some thoughtful consideration of “the policy questions . . . raised by the jurors’ stories.” (Sundby, at 186.)

It is in this last chapter that, I think, Professor Sundby’s committed opposition to the death penalty unavoidably seeps in, and it is only here, in his repeated (if implicit) calls for “consistency” in death penalty jury verdicts, that I would suggest a mild criticism. Professor Sundby writes that he “tried to keep [his] personal views about capital punishment out of the telling of the jurors’ stories” (Sundby, at 1), and he does a remarkably fair job of this. Yet it seems fairly obvious by the book’s end that this is an anti-death penalty book. The same jury stories told by a capital punishment defender would likely have a different “spin” at some points. This is merely a descriptive point for my review, however, surely not enough to form a strong criticism. Sundby’s efforts to stay “neutral” are probably as effective as can possibly be achieved in this highly charged area.

A. *People v. Lane*

Stephen Lane committed a “generic” (Sundby, at 5) convenience store robbery-murder. He was dumb enough to do it while a security camera captured his acts on tape, thus leaving “not a shred of doubt about [his] guilt” for the killing. (Sundby, at 8.) Despite this undisputable evidence, though, Lane presented a defense of mistaken identity at the guilt-innocence stage. This surely must have insulted the jury. And as Professor Sundby explains, such guilt-innocence impressions inevitably infect later penalty-stage deliberations.

Moreover, despite the fact that the videotape showed an inexplicably fast shooting (“Lane . . . uttered ‘Open the till’ and then pulled the trigger, shooting the clerk at point-blank range,” (Sundby, at 7–8)), the defense apparently never even suggested an accidental, or at least unpremeditated—and thereby non-death-eligible—killing. Surely a competent lawyer would have at least suggested that Lane’s adrenaline-pumped trigger finger slipped.

Then, in the sentencing stage, Lane exhibited no remorse for his cold-blooded killing. Indeed, a lead juror described Lane as a “mean-looking guy, a scowler.” (Sundby, at 8.) Where was Lane’s million-dollar—or even buck ninety-five—jury consultant? More relevantly, perhaps, where was Lane’s constitutionally effective lawyer?

Finally, little mitigating personal evidence was presented for Lane, while the government presented Lane’s numerous prior robbery convictions and evidence of a post-offense prison escape plan of Lane’s. These facts had not been known to Lane’s jury before, and had a “pyrotechnic effect” on their deliberations. (Sundby, at 17.) The initial vote in the jury room was 9–3 for death, and after four days of deliberation, the death verdict became unanimous.

B. Lane: *Unspoken, but Clearly Ineffective, Counsel*

Frankly, to me, even Professor Sundby’s sympathetic description of Lane’s case simply screams out “ineffective assistance.” Contesting identity despite the videotape, no challenge to intent-to-kill, a lack of remorse, “mean-looking” appearance and expressions, and little personal mitigation evidence? Come on! The book does not reveal whether Lane has a habeas pending, and one wonders whether the death verdict will stick. (Although as Professor Sundby points out, the habeas and ineffective assistance standards are quite ungenerous to defendants, and often a lawyer will be adjudged “effective” when s/he really did only “just enough to get his client executed.” (Sundby, at 137)).

Professor Sundby only tangentially adverts to the ineffectiveness critique in *Lane* (mainly by showing how the fine job done by the lawyers in the *Brown* case (Sundby, at 136–48) led to an improbable and, Sundby clearly suggests, “inconsistent” (Sundby, at 79–185) life verdict). This seems intentional: he cannot too harshly ascribe the *Lane* death verdict to ineffective assistance, or the “inconsistency” he wishes to present with the later-described *Brown* LWOP (life without parole) verdict will not seem as stark. One can argue that the soft-pedaling of the ineffective assistance issues in *Lane* might be a case of putting one’s point (capital juries are disturbingly inconsistent) before one’s fair judgment (Lane got death due to ineffective assistance, not juror irrationality). Or perhaps Professor Sundby wants to preserve Lane’s habeas options and so avoids this issue. Or perhaps, a more fair (smile) reviewer might suggest, Professor Sundby may have so proceeded out of a commendable desire not to distract the reader while presenting an unbiased view of the *juror’s* stories. No matter: this is a small objection and not likely apparent or important to many readers. The book continues to fascinate once this point is passed.

C. *The Lane Jury Deliberations*

After describing the *Lane* case, the bulk of the book provides a novelistic account of how the jury reached its verdict, and overcame its initial divisions, over the next four days. (Sundby, 1–132.) This aspect of the book is, quite simply, fascinating—in part because most lawyers with interest in the criminal law will never serve on a jury, let alone a capital jury, and in part because the writing is so good and the human story is told so captivately. One imagines that Sundby’s best-selling novel will soon follow. Scott Turow, watch out.

Most dramatically, these chapters describe the emotional, wrenching two days of deliberation that saw a lone female “holdout” juror ultimately vote for death—only to later express remorse about her decision, too late to change the verdict. Remember, these accounts are provided through the jurors’ own words, gathered in remarkable in-depth interviews. This is wonderful first-hand source material, not usually found in appellate decisions that are the standard fare in law school classes. Professor Sundby does a masterful job in weaving the jurors’ words together with his own observations. He also interweaves a deceptively “oh by the way” presentation of the intricacies of capital punishment law. I really cannot make the point strongly enough: stop reading this review, and go read the book.

Chapter one presents the *Lane* case and deliberations through the eyes of Ken, “the Idealist” juror, who had little difficulty reaching a death verdict and played a central role in developing “norms” that the *Lane* jury used to try to keep their discussions calm and equal. (Sundby, at 13.)

Chapter two presents the story from “the Chorus,” a group of five jurors whose accounts were “remarkably similar,” perhaps because they were all white women with grown children. (Sundby, at 29.) (Tangentially, the *Lane* jury appears to have been comprised of white jurors only. As Professor Sundby later notes, this turns out to be an unexpectedly influential factor: a “groundbreaking study” finds that “the seating of at least one male black juror [is] the key in precipitating [a 35%] drop in the rate of death sentences.” (Sundby, at 151, 203 n.11.³²) Data showing undeniable effects of race on the capital punishment system is consistent, persistent, and disturbing.³³ Commendably, because the goal is to present a short, readable book about capital juries, Professor Sundby does not overburden his book with these studies. Yet he also does not ignore or undersell the racial undertones that cast a shadow in virtually all capital cases.)

“The Chorus” is used to present many practical, as well as legal, concerns that arise in capital cases:

³² *Id.* at 151, 203 (citing William J. Bowers et al., *Death Sentencing in Black and White*, 3 U. PA. J. CONST. L. 171 (2001)).

³³ See Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 55 DEPAUL L. REV. 1591, 1591–96 (2004) [hereinafter Little, *What Federal Prosecutors Really Think*]; see also Little, *History*, *supra* note 3, at 476–90; Little, *Moratorium*, *supra* note 4, at 807–10.

- The unspoken messages that jurors can receive through the defendant's appearance and non-verbal actions (for example, Lane changing his appearance from arrest photos to the trial table, taken as an effort to "deceive;" and a demeanor that seemed to show unrepentance).
- The backfiring danger of contesting guilt, only to later admit it at the sentencing stage and ask for mercy.
- The silent fear of jurors that life in prison actually means release someday. And the confidence of many jurors that a death penalty will, realistically, never be carried out—in California, where the *Lane* case was prosecuted, a confidence born of the reality that from 1977 through 2004, "only 10 of the 717 defendants sentenced to death . . . have been executed." (Sundby, at 38.)
- The fact, revealed only through the Capital Jury Interviewing Project, that when victims are randomly selected, jurors tend to view their killers as "particularly menacing" and, surprisingly to some, often choose death in such cases despite an absence of terribly gross killings. (Sundby, at 41.³⁴)
- The fact that capital jurors (indeed, all jurors? all people?) are "suspicious of mental health experts" and can view paid psychologists as "hired guns" and "professional witnesses" in a pejorative sense. (Sundby, at 44–45.)
- The confusing nature of jury instructions, in important cases where all might agree that the instructions to jurors ought be absolutely as clear and jargon-free as possible.

Finally, this chapter presents the "personal turmoil and exchanges frayed with tension and anger" that ultimately led to a unanimous death verdict. The Chorus jurors described the holdout juror as "mentally unbalanced" (Sundby, at 54) and described all the non-legal tactics that they employed (including consciously misinterpreting some of the instructions and suggesting that the holdout might lose her job if deliberations continued longer) to convince the holdout to change her vote. (Sundby, at 54.) Yet in the end, "they felt that justice had been achieved." (Sundby, at 57.) Ultimately, the Chorus chapter presents a fascinating psychological portrait of capital deliberations that is instructive to any lawyer who prepares jury cases of any kind.

D. *An Aside: Do Subtle Descriptions Betray Perspective?*

As an aside, I think a few points in this chapter belie Professor Sundby's professed allegiance to neutrality. By describing a "*perception* of Lane as a

³⁴ Citing Sundby, *The Capital Jury and Empathy*, *supra* note 18, at 343.

remorseless manipulator” that was “rapidly hardening,” Professor Sundby subtly suggests that this perception was perhaps inaccurate. (Sundby, at 42.) But my reading is that it seems like a perfectly responsible perception for the jurors to have developed, based on the totality of what they saw and heard. Similarly, the jurors’ idea that Lane would probably never be put to death, but that placing him on death row would subject him to the worst possible prison conditions, seems neither irrational nor criticizable, as I think Professor Sundby subtly suggests. (Sundby, at 39.)

Similarly, Professor Sundby notes that the Chorus jurors viewed the Holdout juror as “irrational,” but he describes it as “what they saw as” irrational. (Sundby, at 53.) This is a small and subtle, but I think revealing, phrase. The idea that a holdout juror in a capital case might actually *be* irrational or unbalanced, seems not to be capable of objective identification in an anti-death penalty worldview. If you are against capital punishment, holding out for life simply cannot be irrational.

Finally, Sundby explains that Lane’s lawyers “had to create a case for life” by “present[ing]” a “story” that would show that “the tragedy that ensued was but the final act of a series of life events that had hurtled [Lane] into a downward spiral beyond his control.” (Sundby, at 43.) Now that is a well-written screenplay, and no doubt Lane would have done better with Sundby as the director. But perhaps such a “story” was unavailable because it was factually not true. Even more wonderingly, perhaps it would not be appropriate for honest lawyers to offer it, if not true, in a *justice* system. That is, perhaps only an absolutist opponent of capital punishment can believe that such a mitigating “story” is available in every capital case. Or in other words, perhaps some killers—perhaps even Lane—actually *deserve* to die for their crimes. (Timothy McVeigh is undoubtedly a “poster child” for this view.³⁵) Perhaps there simply *is* no mitigating “story” that should defuse the capital case for some killers. While Professor Sundby aspires mightily to present an evenhanded capital punishment account, a subconscious disbelief that such a world-view can reasonably exist—that is, that there can be a reasonable, morally acceptable pro-death penalty view—subtly infuses even this admirable attempt.

E. *The Holdout Juror*

But back to our story. Chapter three presents the story of “The Holdout” juror, Peggy. I do not think it is a coincidence that this is the longest chapter, by some 50%, in the book. *The Holdout*³⁶ is presented not as an irrational,

³⁵ See Little, *What Federal Prosecutors Really Think*, *supra* note 33, at 1604.

³⁶ Professor Sundby begins this chapter by describing a 1959 Norman Rockwell magazine cover entitled *The Holdout*, which depicted a lone female juror coolly refusing to give in to the other, all-male jurors. In addition to my other praises for his work, the breadth and depth of Professor Sundby’s research is evident and impressive. Yet this also subtly romanticizes the anti-death penalty view. To my knowledge, Rockwell never suggested that his “holdout” was a capital juror.

emotionally unbalanced person, but as an heroic Jimmy Stewart-ish figure who tried epically to withstand the force of the somehow unthinking or overbearing pro-death jurors. (At one point, Sundby conversely describes the pro-death jurors, pejoratively if unconsciously, as acting like “devoutly religious individuals proselytizing.” (Sundby, at 52.) But no facts about the pro-death jurors’ actual religious beliefs are in fact offered. It is unspoken, and unfortunate, that the “intelligentsia” that oppose capital punishment also often hold the religiously devout in quiet contempt). Peggy is not actually unbalanced, but rather exhibits a “strength of conviction” that “one could not help but admire.” (Sundby, at 106.) But respectfully, this seems true only if “one” is staunchly against the death penalty. The depiction of the Holdout juror, and of Lane, is quite sympathetic. Death penalty lawyers would do well to examine it closely, in the effort to persuade (or prevent) a juror to (1) hold out, and (2) stay true and not switch her vote. Moreover, if Lane’s actual lawyers could have created more generally the impression about Lane that the holdout developed, and which Professor Sundby so articulately describes, then a different verdict might have resulted (again this raises the undiscussed ineffective assistance claim).

Professor Sundby also attributes to the jury a misunderstanding of the jury instructions, an erroneous belief that if the jury rendered a “hung” verdict, then Lane would automatically receive a life sentence. I think he is wrong in this. While it seems true from Sundby’s account that the other jurors described it this way to the Holdout, it seems inaccurate to say that “no one realized” that this was erroneous. (Sundby, at 56, 90.) A hung verdict meant simply that a new sentencing hearing would be held (i.e., that a death verdict would not be precluded by a hung jury). My reading of the deliberations is that the pro-death jurors fully understood this. It seems that they intentionally misdescribed an “automatic life sentence” view to the holdout juror as a *tactic* to get her to vote for death. As Professor Sundby quotes one of the Chorus, “We made an *interpretation* on this because we were dealing with Peggy . . . and we were trying to *force* the issue.” (Sundby, at 55–56, *emphasis added*.) Now, the difference here could be important only to a habeas court attempting to decide if the jury was operating under a material confusion. My reading is that they were not (except possibly for the Holdout); Professor Sundby seems here to be trying to preserve Lane’s habeas options.

In any case, the last eight pages of the Holdout chapter are devoted to describing Peggy’s change of heart about her vote, and her efforts to deal with that psychologically as well as legally. We are left with lingering, or even stronger, doubts about the fairness, as well as the legal validity, of Lane’s death sentence.

The final chapter describing the *Lane* case is “The Twelfth Juror,” a brief depiction of a “rough” juror with “brief . . . predictable” answers to explain why he had firmly voted for death, and who was “blunt and challenging” in attempting to persuade the Holdout to his position. Now, these descriptors may be accurate. But their pejorative cast might also suggest a somewhat unbalanced view of the pro

and anti-death jurors in the *Lane* case. Holdout jurors are thoughtful and courageous, while firmly pro-death jurors are blunt, rough, and unsophisticated. Sundby even describes the latter “type” of juror as a “fundamentalist” for believing “that certain types of murder morally require a sentence of death.” (Sundby, at 125.) While this does not appear to be a conscious attempt to invoke prejudices that exist against religious “fundamentalists,” the implication is, it seems to me, unavoidable.

The “fundamentalist” label seems unnecessarily, although again perhaps not consciously, pejorative and revealing of an anti-death penalty perspective. I will unempirically submit that, in fact, many Americans share a moral view that “you’re responsible for your actions” and have a “fundamental” belief in taking personal responsibility for one’s choices. (Sundby, at 114.) Rather than describe such views in a belittling manner, as though no sophisticated member of the intelligentsia could possibly hold such a view, American opponents of capital punishment would do better, I think, to accept that intelligent, caring people can hold such views, and even show respect for them. In a society which consistently shows roughly two-thirds or more support for capital punishment, caricaturing the views of the majority as simply blunt and unsophisticated will do nothing but drive the camps further apart. Sundby closes this part of his book describing Peggy as needing to “explain” that Lane’s case “had gone terribly awry,” as though its awryness were a fact. (Sundby, at 131.) It is a small, semantic matter, but another view might be that while Peggy might need to try to “convince” others that the case had gone awry, it actually had not.

F. *The Brown Case*

Professor Sundby then briefly, in one chapter, presents a capital case to contrast to *Lane*. The *Brown* case presented horrific killings, preceded by torture and rape, of two young male victims, described by one juror as “the most horrible, gruesome things you can ever imagine one human being doing to another.” (Sundby, at 138.) And yet the jury returned an LWOP, no-death, verdict. The unasked question fairly burns while hanging in the air: how can this be? How can this be *fair*?

G. *The Last Three Chapters*

The last three chapters of Professor Sundby’s wonderful, if not entirely neutral, book are chock-full of perceptive thoughts and analysis, as well as smart and practical suggestions for improving the capital system. I will not belabor this review with more detail. But again: any capital lawyer, judge, or legislator should read this book. It is realistic and it is cutting-edge, in terms of what individual defense lawyers, as well as systemic policy-makers, can do.

III. CONSISTENCY AND JUSTICE: NOT THE SAME, NOT EVEN NECESSARILY COMPLIMENTARY

In his final chapter, Professor Sundby repeatedly presents the idea that capital cases verdicts should be “consistent” in order to be fair: “A series of randomly chosen juries should consistently reach the same factual conclusion when looking at the same evidence, just as randomly chosen math students should always agree that four times four equals sixteen.” (Sundby, at 183.) Putting aside my jealousy that Sundby’s children are plainly better at math than mine—as well as Justice Holmes’ concern for legal hobgoblins—I will accept this assertion for the moment.³⁷ If consistency is the goal, or the standard by which the desirability of capital punishment should be judged, then how can the Lane death sentence possibly survive next to Brown’s life sentence?

In fact, I think this is Professor Sundby’s overarching point: a system that produces life for Brown and yet death for Lane is unjust, and should be abandoned. And the point is all the more powerful for being unstated: the book never directly proclaims such a blunt view. Rather, the intelligent reader necessarily must come to it simply by the unvarnished force of neutral description.

However, as described above, I think Professor Sundby’s account actually provides a variety of reasons to respect the jurors’ decision in both of these cases, and to understand the difference in results, even if one does not agree with them. The *Brown* and *Lane* cases are in fact quite different, significantly so, and provide no fair ground for an inconsistency argument.

Moreover, it would seem quite reasonable to argue that if any jury got it “wrong,” it was the *Brown* jury, and that in fact both Brown and Lane could reasonably be said to deserve death penalties. In stating this idea, I come to what I thought was a most revealing paragraph at the end of the book. Professor Sundby presents three possibilities (Sundby, at 179–80): perhaps “some might believe” that Lane ought not receive death, if Brown gets life. Or perhaps some would accept the two differing verdicts as reasonable based on the significant differences in the defendants’ mitigation cases. Or (finally), perhaps “some” would argue that neither Lane nor Brown should receive death.

Do you see the possibility that is missing? The fourth alternative view that, seemingly, has not found its way to consciousness in this ultimately anti-death penalty book? Of course it is the view, which some “fundamentalists” might hold, that both Lane and Brown should have received death penalties. It is something like the “level up” reality that Professor Randy Kennedy confronts in his masterful book *Race, Crime and the Law*.³⁸ It is not only symmetrically, but also viscerally, obvious in light of the facts of Brown’s offense. And yet this fourth view does not receive mention, let alone serious attention, in the closing pages of *Life and Death*.

³⁷ *But see supra* text accompanying notes 19–30.

³⁸ KENNEDY, *supra* note 30.

I think the failure to perceive it as a realistic view is symptomatic of the anti-death penalty camp. Until the fourth view is acknowledged and understood, foes of capital punishment still have a long American distance to travel.

IV. CONCLUSION

In the end, one's view of capital juries is—and is this too obvious a point?—unavoidably colored by one's views about capital punishment. Thus it is no criticism to suggest that Professor Sundby does not remain dispassionately neutral; such dispassion is neither possible, nor perhaps even to be desired, on one of the largest moral questions in American law. The story of juries that appear to reach “inconsistent” verdicts is not a new one, nor is it limited to the death penalty context. Moreover, a dramatic presentation that different juries can reach markedly different verdicts—life versus death—in cases that are presented as meriting the opposite results, is not really an argument against the death penalty. It is, instead, an argument against using juries. Yet Professor Sundby argues convincingly, I think, that requiring juries of 12 for death penalty decisions is normatively better than using solo judges. (Sundby, at 177–78.) I agree with him in this, even if the Constitution did not mandate it (as I think it does).

Life and Death is about the death penalty as seen through the “eyes of its beholders:” twelve average non-lawyer jurors, exposed to the stark issues of capital punishment in the crucible of specific facts. But it is clear that the beauty of the jury itself is also, as it were, in the eyes of its beholders: lawyers who oppose, or support, the death penalty see the flexibility, or inherent arbitrariness, of the jury system as a value or an ill.

In the end, the subjectivity of the capital punishment debate is simply a reflection of the penalty itself. Strive as we may, “the community's moral sense of . . . just punishment” will never be consistent. (Sundby, at 177–78.) But it may be “just”—at least in individual cases.³⁹ Here, I think, Professor Sundby's critique unconsciously fails. He describes a concept of “moral accuracy” as requiring “consisten[cy] and fair[ness].” (Sundby, at 179, *emphasis added*.) But the two concepts are hardly the same, and need not necessarily be co-joined. Thus, I think, one is hard put to describe the verdict in either *Brown* or *Lane* as “unjust”—one can merely claim they are somehow “unequal.” But on such moral questions, the carpenter's measure fails. Just (or “fair”) results may not always seem “consistent,” when the level of abstraction is raised even one notch. In fact, abstraction is sometimes the enemy of justice, at least in the eyes of non-lawyers. Many non-lawyers do not seek consistency across categories, so much as justice in individual cases. They do not see the two concepts as one, and are not offended by “inconsistency” of just results. People, like law professors, can always distinguish

³⁹ That jury results may be inconsistent and yet also just is hardly a new idea. See, e.g., Alexander M. Bickel, Comment, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649, 653 n.22 (1950).

similar cases; but injustice is not so easily dismissed. Thus, I think Justice Holmes was (as usual) correct, if too aphoristic, about consistency being a hobgoblin for lawyers. It often is not, for the average American.

“Average” non-lawyer Americans, however, are the “beholders” that count, as jurors determining death penalties and as voters determining America’s societal policies. Our judicial system is not about to take capital legislation off the table by constitutional fiat—even *Furman’s* mild experiment in that direction failed, dramatically so in terms of speed and numbers. Thus the need to describe death penalty results as unjust, as well as unequal, is a powerful if subjective point, one that the capital punishment debate must acknowledge or it will never capture the *heart* of the average non-lawyer citizen who, in our democracy, controls the relevant legal processes. Professor Sundby’s admirable volume takes us closer to “lay” understanding here. While it does not close the gap—and the gap may not be closeable, for those of us forever warped by three years of law school—it takes us further, with less deadening detail and more entertainment,⁴⁰ than any similar volume in the field. Critique is easy, writing is hard. Scott Sundby has done admirable heavy lifting here.

⁴⁰ An entire section of this review probably should be devoted to the quick and subtle humor that also pops up throughout this wonderful book. It cannot be easy to write with humor about capital punishment. Few could pull it off without offending. But Professor Sundby does so with grace, so that his treatment of serious issues is furthered by softening them, if you will, with genuine smiles. Thus: “The phrase ‘death eligible’ sounds as if the defendant has won something (‘*Mr. Lane, you are now death eligible. . .*’).” (Sundby, at 9.) Or, “[i]n a case that will give heart to English teachers everywhere, a juror who taught high school English played a key role throughout the deliberations in clarifying definitions of words like ‘heinous.’” (Sundby, at 119.)

