

# Foreword

## Shining Light on the Black Box

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Nothing about the criminal justice system is more mysterious than the workings of the jury. In virtually every other formal legal setting for the resolution of important disputes, we demand an accounting—a written decision, a statement of reasons. Indeed, to a very real extent, the provision of reasons is necessary to law—it is what makes precedent, *stare decisis*, and the rule of law even possible. Yet the system we have constructed to decide the most important question the legal system ever confronts—whether the state should take a fellow human being’s life—relies centrally on a decision for which no reasons must be given.

Furthermore, we have fashioned rules to block inquiry into the jury’s decision-making process. The process itself takes place entirely in secret. The jury need only announce a verdict and need not give any explanation of why it reached that verdict. Prosecutors’ discretionary decisions also generally need not be explained in court, but as an administrative matter they will often be reflected in the notes taken by the prosecutor. Jurors are rarely if ever even allowed to take notes. And only on extraordinary occasions does the law allow evidence of what went on inside a jury room to be introduced in court; the general rule is that a jury’s verdict cannot be impugned by subsequent testimony from the jurors who participated.

What is most extraordinary about Ben Fleury-Steiner’s book, then, is that it seeks to shed light on the “black box” of capital jury deliberations. Based on a remarkable social science survey of persons who served on capital juries, this volume illuminates the

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workings of the most closely guarded secret in the criminal justice system. What he reveals is comforting at one level but deeply troubling at another; in the end, his findings provide further evidence in support of the abolition of the death penalty.

On the positive side, the study illustrates that capital jurors take their jobs very seriously. Whatever else is evident from the many accounts Fleury-Steiner offers, one cannot help but be impressed by the gravity with which all those interviewed appear to have taken their responsibilities. Jurors differed in the extent to which they were pro-prosecution or pro-death penalty and in a host of other presuppositions that they brought to the task, but all these men and women appear to have taken the job extremely seriously. The drama and tension reflected in many of Fleury-Steiner's accounts of confrontations between jury majorities and "hold-outs" or "resisters" is precisely a result of the shared understanding of the gravity of the decision they are being asked to make.

But in the end, this positive lesson provides little comfort because Fleury-Steiner's study also demonstrates that no matter how seriously jurors take their job, it cannot possibly be done fairly. Jurors are left to make life-or-death judgments based on partial understandings of the facts and necessarily subjective assessments of personality and life opportunities. And as Fleury-Steiner demonstrates, these assessments cannot help but be colored by jurors' attitudes—conscious or unconscious—about race and class. The fundamental promise and predicate of our justice system is that it is blind to both class and color. The reality, as Fleury-Steiner shows, is that although the black box blinds us to the consideration of race and class, it in no way precludes such considerations. Indeed, because the decisions may be made without stated justifications, biases are all the more likely to play a significant role.

The strength of this book lies in its focus on narrative evidence. Most social science studies of race and the death penalty have been far more quantitative—examining results and seeking through statistics and regression analyses to determine the extent to which racial bias affects outcomes. Fleury-Steiner adds multiple layers of depth and complexity to those studies, virtually all of which have

found that race matters. This study seeks to show *how* race matters.

In some instances, the results are predictable. An especially horrific murder by starvation committed by a black defendant leads to the death penalty, but a black female juror and a white male juror arrive at that result along starkly different paths. She is empathetic and understanding and sees the defendant as an individual, albeit one who, in the end, deserves to die for his crime. He, by contrast, dehumanizes the defendant, describing him in racially charged terms as “just like a gorilla. Like Rodney King.”

But in other instances, the results are quite surprising. Affinities between the juror and the defendant in race or class terms may make the juror less sympathetic to the defendant. Those who consider themselves closer to the defendant may be less inclined to “excuse” the horrific acts committed by social circumstance because these jurors or people they know may have suffered many of the same circumstances without them leading to murder. Because these jurors feel that they have walked in the defendants’ shoes, they feel entitled to judge him for his actions and to dismiss mitigating factors.

At the end of the day, the accounts in this book illustrate that no one can walk in the defendant’s shoes. And, therefore, the decision to take or spare a life is inevitably a flawed one, driven by the dynamics of the jury room, personal experiences that are supposed to have no role in the process but cannot be factored out, and skewed rationalizations (for example, the woman who voted to execute a man because she thought that result would be less painful over the long term for the man’s mother than having her son alive but in prison for decades, or the person who voted for death while telling herself that “I wasn’t the one that was putting the guy to death. The state was.”).

We are the state, and we cannot avoid responsibility by pointing to abstractions. This book makes that lesson crystal clear by revealing the intensely human drama involved in declaring who among us will be allowed to remain among the living and who will have his life taken away. Fleury-Steiner’s study confirms that jurors assigned this task try very hard and care deeply about what they

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are doing; at the same time, this book confirms that the task is simply not one that human beings, with all our faults and biases and subjective (mis)understandings, should take on. The job of rendering the judgment to take another person's life ultimately ought never be entrusted to humans.