

Chapter 1

Freedom in Our Hands

In a 2007 speech, Federal Judge William G. Young, recalled an encounter with a juror:

We are trying a short case, a three or four day case. We are on the second or third day. A juror is coming into Boston, her car breaks down on what we call the Southeast Expressway, a main artery clogged in the morning. Her fuel pump goes. She drifts off into the breakdown lane. She gets out of her car. This is Massachusetts. Nobody stops. Nobody helps her. Everyone just goes by. She's standing there in the rain. Eventually, our safety net kicks in. Here is a Massachusetts state trooper. He puts on the yellow flashing lights. He gets over into the breakdown lane, protective of her car. He is getting out of his cruiser, when she walks back to him and says, "I am a juror in federal court! Take me to the courthouse!" Mother of God! And you know what the trooper does? He puts her in the cruiser. He turns on the blue lights and he starts barreling up the Southeast Expressway. What's more, he has got a radio. He's patched through to us. We know the juror is coming in. I am ecstatic!...I am at the window, looking out into the rain. Then the cruiser comes up. It swoops in in front of the courthouse. She gets out. Very slow elevators in our courthouse.... Very slow she comes up. She gets out of the elevator on our floor and she starts running along the hallway.... She is out-of-breath and she says, "The trial...I tried." We've been down only about 17 minutes, you know. She's done it! And she says she wants to call AAA to get her car towed.... She calls. They won't tow her car. They are afraid of liability. I go crazy. "Give me that phone. Do you know who this is? You get someone out there to tow that lady's car!" You know, respectfully, that violates about four judicial canons, but it captures the idea. And I honor that juror, because she, at least, has the vision.¹

The “vision” Judge Young noted is the juror’s sense of civic duty. Few of those who have served on juries have stories of rescue from the breakdown lane, but most of those Americans who have served on juries share this feeling of responsibility. Their concern is not with punctuality but with their charge to see justice done. As one person wrote about serving on a jury in 2005, “We deliberated thoughtfully and spoke about many details” of the trial. “It is no easy task to take someone’s freedom into your own hands.”²

Roughly seventeen million Americans have served on juries during the past five years. Estimates are that a full third of U.S. citizens are likely to serve on a jury at some point in their lives.³ Yet there exists no Jury Veterans’ meeting hall where former jurors can celebrate, critique, and compare their experiences. Instead, their time as jurors tends to get sealed up inside them, as though they were still following the instruction they received from the judge not to discuss the case while the trial was underway. All too often, their brief careers as jurors are ignored or trivialized as anomalous moments in their lives.

Their personal stories are overshadowed by the sensational narratives that come from a handful of famous cases, such as O. J. Simpson’s trials. The mundane but memorable details of their visit to real court carry not a fraction of the candlepower of popular movies and books, such as *Twelve Angry Men* and *Runaway Jury*.⁴ Exceptional cases and fictional tales shed little light on the typical jury experience, which more commonly involves a two-day trial on such matters as petty theft, drunken driving, medical malpractice, or breach of contract. Moreover, the most widely circulated accounts focus on the content and outcome of the trials themselves, not on the experiences of those who sat in the jury box.⁵

This book tells the story of *jurors*. In fact, we will share the experiences of the thousands of jurors we have surveyed and studied over the course of a decade. These individual stories have intrinsic value, but we collected them and now relate them with a larger purpose in mind. Simply put, we aim to demonstrate that jury service is more than a noble civic duty. Participating in the jury process can be an invigorating experience for jurors that changes their understanding of themselves and their sense of political power and broader civic responsibilities. The typical service experience *matters* to former jurors. Whether they served ten days ago or ten years ago, many can recount their brief time at the courthouse in vivid detail and draw important lessons from jury service. More generally, we hope to show that it is the experience of deliberating with fellow citizens that gives the jury much of its power, and that underscores the importance of understanding, appreciating, and promoting meaningful public deliberation in modern democratic institutions.

To clarify and amplify jurors’ past experiences, we have taken three approaches in this book. We analyzed official county records of jury service

(and voting history) from over ten thousand empanelled jurors from eight counties across the United States. With funding from the National Science Foundation, we then surveyed thousands of people called for jury service in King County, Washington. They filled out questionnaires when they reported for service, after they left the courthouse, and in a follow-up survey many months later. Finally, we conducted in-depth interviews—face-to-face and by phone—with a smaller number of jurors. Assembling and analyzing these data has taken many years and thousands of hours of work by a large team of investigators and research assistants. In the end, the effort has proven worthwhile, as we now have a much clearer understanding of precisely how often, to what degree, and in what ways the jury experience can promote positive civic attitudes and more frequent public engagement.

Jury Service as Educational Opportunity

But if juries really have this power, might we expect that the framers of the American constitution would have recognized it and established jury service not only as a civic duty but as the right of every citizen? That the jury serves the juror, as a student of democracy, was widely understood at one time. In his 1835 monograph *Democracy in America*, French political observer Alexis de Tocqueville wrote, “I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation; and I look upon it as one of the most efficacious means for the education of the people which society can employ.”⁶

Though it took nearly two centuries for this view to take firm hold in American constitutional law, the U.S. Supreme Court now recognizes the right of qualified citizens to share in this powerful experience. In 1991, *Powers v. Ohio* completed a long line of cases stretching back to the post-Civil War Reconstruction era that established not simply the rights of defendants to stand before a jury drawn from the full community, but *also the rights of individuals to serve as jurors*. Before exploring our new data on the civic impact of jury service, it is important to review the legal story behind *Powers* to make clear where the modern jury stands—and what it stands for—in American democracy.

More than a century before *Powers*, the U.S. Supreme Court ruled in the 1880 case *Strauder v. West Virginia* that a state law excluding African Americans from juries violated the Fourteenth Amendment’s equal protection clause.⁷ Nonetheless, for a variety of reasons—not the least of them institutionalized racism—African Americans continued to be systematically excluded from American juries in many areas, not just the former Confederate states. The methods of this discrimination varied from the rules for summoning the jury pool to attorneys’ routine objections to seating individual African American jurors.⁸ (Similarly, institutionalized sexism prevented many women from serving on juries.⁹)

Over time, the court came to see that the exclusion of African Americans from jury *pools* was unconstitutional,¹⁰ but as recently as the mid-1980s, peremptory objections to *individual* African American jurors usually were upheld by the Supreme Court as constitutional.¹¹ (A peremptory challenge is a move during the jury selection process in which an attorney removes a potential juror, usually without having to give an explanation. It is a powerful tool, so courts limit the number of peremptories each side may make.¹²)

A peremptory challenge allows an attorney to strike a juror based on intuition or a hunch, even assumptions based on the juror's appearance that the lawyer may not wish to say out loud. As Chief Justice Warren Burger said in 1986:

The peremptory, made without giving any reason, avoids trafficking in the core of truth in most common stereotypes.... It is likely that certain classes of people statistically have predispositions that would make them inappropriate jurors for particular kinds of cases.... We have evolved in the peremptory challenge a system that allows the covert expression of what we dare not say, but know is true more often than not.¹³

The Chief Justice's quote reflected the belief, common among litigators until 1986, that peremptory challenges could be used to remove individual jurors based on their race.

For decades after *Strauder* struck down West Virginia's law against African Americans serving on juries, the U.S. Supreme Court let stand practices that effectively kept African Americans off juries.¹⁴ Finally, in 1940, the court ruled in a Texas case that a grand jury had to be drawn from a pool that represented a fair cross-section of the community—including African Americans.¹⁵ The case did not end racial bias in jury selection, but it pushed the locus of that discrimination from the formation of the jury pool to the selection of members for individual juries.

In 1965, the Supreme Court addressed the continued perception that African American defendants were harmed by having to appear before all-white juries, but it was a hollow victory for equality. In *Swain v. Alabama*,¹⁶ the court ruled that a defendant could only demonstrate abuse of the peremptory challenge if it was found that the prosecutor systematically used those challenges to strike *all* African American jurors over a number of cases.¹⁷ In practice, such a standard was almost impossible to meet.

All-white juries continued in many courts, deeply insulting many African Americans who were summoned but never empanelled on a jury. In 1984, an anonymous letter-writer who described himself as a "common laborer" complained to District Attorney Elizabeth Holtzman about his experience in the King's County, New York, court:

There were a least sixty or seventy people sent to room 574 to pick a jury of twelve plus two alternates. The majority of the groups sent were Blacks.... After telling us what the law expected of us as possible

jurors, which, as the judge stated, was common sense and a promise from each of us to be fair and impartial, then the selection began; it made no difference to the judge, the district attorney or the defendant's lawyer that the majority of the prospective jurors were Black. They managed to pick thirteen whites and one black *second* alternate, making sure of an all-white jury. . . . And so I ask you Mrs. Holtzman, if we Blacks don't have common sense and don't know how to be fair and impartial, why send these summonses to us? Why are we subject to fines of \$250.00 if we don't appear and told it's our civic duty if we ask to be excused? Why bother to call us down to these courts and then overlook us like a bunch of naïve or better yet ignorant children? We could be on our jobs or in schools trying to help ourselves instead of in court house halls being made fools of.¹⁸

The Supreme Court finally changed its stance on peremptory challenges in 1986. In *Batson v. Kentucky*, the Justices ruled that an African American defendant's Fourteenth Amendment right to equal protection was violated when the prosecutor used peremptory strikes to remove all prospective jurors of his race. Thus, peremptory challenges based solely on race became illegal.¹⁹

In 1990, Daniel Holland, a white criminal defendant, claimed a violation of his Sixth Amendment right to be tried by a representative cross-section of the community when a Cook County, Illinois prosecutor used peremptory challenges to remove African Americans from his jury. The court ruled he had the legal right to object to their exclusion, but he would have to demonstrate his own membership in the same racial group that the prosecutor had systematically excluded. In an auspicious concurrence, however, Justice Anthony Kennedy wrote:

Exclusion of a juror on the basis of race, whether or not by use of a peremptory challenge, is a violation of the juror's constitutional rights. To bar the claim whenever the defendant's race is not the same as the juror's would be to concede that racial exclusion of citizens from the duty, and honor, of jury service will be tolerated, or even condoned. We cannot permit even the inference that this principle will be accepted, for it is inconsistent with the equal participation in civic life that the Fourteenth Amendment guarantees.²⁰

Kennedy wrote that as far back as the *Carter v. Jury Commission of Greene County* decision in 1970, the court had recognized that jurors removed by a race-based peremptory challenge have the right to sue for that violation, but that as a practical matter they are extremely unlikely to do so. A "juror dismissed because of his race," Kennedy wrote, "will leave the courtroom with a lasting sense of exclusion from the experience of jury participation, but possessing little incentive or resources to . . . vindicate his own rights."²¹

And yet, to speak on behalf of these silent, aggrieved jurors, stood Larry Powers. Not every person whose name is associated with establishing a civil right is as likeable as Clarence Gideon, who penciled a letter to the U.S.

Supreme Court declaring that poor criminal defendants should be provided with attorneys. Before becoming the name behind *Powers v. Ohio*, Larry Powers was a Vietnam veteran and former carpenter, unable to work because of a back injury. The Hamilton County, Ohio prosecutor alleged that Powers might have been a hit man, hired to kill a man reputed to have had affairs with married women. Powers never denied killing Gary Golden and Thomas Kicas in the Columbus home of Golden's ex-wife in 1985. Powers said he shot Golden in self-defense, then killed Kicas to eliminate him as a witness. Powers was convicted of two counts of aggravated murder, plus attempted aggravated murder for shooting at Charlotte Golden as she fled her home.²²

Powers was sentenced to life in prison for the crimes. But, perhaps because of Gideon before him, Powers got very good attorneys for his appeal. Robert Lane of the Ohio Public Defender Commission saw that the prosecutor had used seven of ten peremptory challenges to remove African Americans from Powers' jury. Although Powers' trial attorney had objected to the strikes, the judge had allowed them. Saying the *Batson* precedent did not apply because Powers was white and the removed jurors were African American, the judge did not require the prosecutor to provide a nonracial reason for the exclusions, despite a request from Powers' trial attorney that he do so.²³

In looking for grounds on which to appeal, Lane saw that Powers' case was just what Justice Kennedy had asked for in his *Holland* concurrence. If Powers could win an appeal using the equal protection clause of the Fourteenth Amendment, he might get a new trial. "We needed to argue that Mr. Powers was denied a fair trial," Lane said in a 2009 interview. "The argument that we posited was that to have a fair jury, you need to have *all* those perspectives."²⁴

The brief Lane wrote with Greg Ayers, the Chief Counsel of the legal division at the Ohio Public Defender Commission, argued that Powers had the legal right to assert the rights of the excluded African American jurors, that a defendant, "regardless of his race, has a personal interest in having his case tried before a jury that has been selected in a racially nondiscriminatory manner." Exclusions of African Americans from Powers' jury, they argued, violated the Fourteenth Amendment's equal protection clause and eroded public confidence in the fairness of the justice system.²⁵

When the case was argued at the U.S. Supreme Court, the Justices asked Lane again and again how Powers had been harmed by the exclusion of African Americans. Lane turned the focus back on the excluded jurors, who had an equal protection right *not* to be pushed off the jury because of their race. He added that Powers himself was harmed because the racially biased jury selection process robbed his trial's verdict of the legitimacy a properly convened jury would confer.²⁶

Seven Justices agreed that citizens have what Lane called "the juror's right to sit." Writing for the majority this time, Justice Kennedy identified jury service as a significant right of citizenship akin to voting²⁷ and described the important benefits jurors receive from performing this duty. The jury,

he wrote, “postulates a conscious duty of participation in the machinery of justice.”²⁸ Kennedy quoted Alexis de Tocqueville:

The institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society. . . . The jury . . . invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society; and the part which they take in the Government.²⁹

In that moment, Justice Kennedy explicitly affirmed not only the individual’s right to serve on a jury but also the belief that jury service is an effective means of educating citizens. Justice Kennedy’s majority opinion³⁰ asserted that the opportunity for jury service must be available to all citizens so that they might better understand and connect with the many other institutions of American democracy.³¹

An Overview of Our Argument

Though the Supreme Court claimed that the institution of the jury yields civic benefits, was it correct to do so? Is the jury system a quiet engine of democratic public engagement? Does it really influence—let alone *transform*—those who participate as jurors?

We begin to answer these questions by explaining in chapter 2 how the jury fits into a theoretical conception of democracy. We argue that members of a democratic society need to connect not just with each other but also with the state in ways that are inspiring, empowering, educational, and habit forming. This is what we call *political society*—a public sphere that stands apart from both the state (public officials and agencies) and civil society (primarily the private, individual, and community sphere). This perspective provides a new appreciation of the unique position of the jury, through which a state institution brings private citizens together to deliberate on a public problem. When viewed in this way, it is clear why we propose that the jury can help private citizens make new and lasting connections between their private lives, their communal associations, their public selves, and the state.

Chapter 3 presents our most simple and compelling finding—that deliberating on a jury causes previously infrequent voters to become more likely to vote in future elections. By merging voting and jury service records, we were able to see how jury service influenced the likelihood that a person would vote in later years. Like many other details about one’s life, a person’s voting history exists in the public domain and can be merged with other data using name-matching software. Our analysis of public records shows that the effect of jury service on voting applies only to criminal, not civil, trials and that it occurs for any jury that deliberates, including those that end

as hung juries. The effect is amplified in those cases with multiple charges, where jurors have a more complex deliberative task.

How could just two or three days at the courthouse change a person's inclination to vote years into the future? To answer this, chapter 4 takes a careful look at the jury experience, exploring court records and surveys of jurors in Seattle, Washington, and the county that surrounds it. Our study draws out the *subjective* experience of deliberating with fellow jurors. Open-ended survey questions, complemented by transcripts from longer interviews, describe what it feels like to be a juror in the language of jurors themselves. Readers will find many surprises—such as the eagerness many prospective jurors have to be seated on a jury and the genuine admiration many jurors develop for judges and attorneys.

Chapter 5 focuses more narrowly on the experience of deliberating. We analyze spontaneous quotes from jurors to learn what deliberation *means* for jurors. We find that most citizens carry with them a shared understanding of this cultural practice, even if they have never previously set foot in a courtroom. One of the unique features of our data is that the King County judges permitted us to ask questions about the deliberation itself, something that only a handful of courts have ever allowed. This lets us describe which jurors draw on their personal experiences, how gender and ethnicity shape deliberation, how jurors judge their own performance, and what leads them to more—or sometimes less—satisfying verdicts. The evidence is encouraging, but this chapter also highlights the challenges that jurors face as strangers who must deliberate together on a complex case.

Having reached a better understanding of the jury service experience, we then return to the impact of that experience in chapter 6. We demonstrate that beyond the voting effects shown in chapter 3, serving on a jury can change many aspects of an individual's political and community life. We present narrative examples of people being changed by their jury experience with quantitative findings from a longitudinal survey that continued to track jurors several months after they completed their work at the courthouse. This investigation reveals general patterns, such as increased attention to news media and more frequent participation in conversations with neighbors about community issues. We also find more diffuse impacts, such as the tendency of jurors who reach guilty verdicts in criminal trials to become more active in charitable group activities after leaving the courtroom.

Chapter 7 shows how jury service changes not only behavior but also how people see the world. Using the same longitudinal survey data, we show that jury service often makes citizens more supportive of not only the jury system, but also of local judges and even the Supreme Court. Jurors can develop stronger faith in government and their fellow citizens, and they come to see themselves as more politically capable and virtuous. We also explore the complex relationships between civic attitudes and behaviors in this chapter, showing that the two have a mutually-reinforcing, reciprocal causal relationship.

Chapters 8 and 9, the last two chapters of the book, draw out the implications of our research for democratic theory and the practice of law. Over the past several decades, legislatures have whittled down the American jury system in the interest of expediency. Our research shows that those efficiencies have unintended consequences for our larger democratic society. Low voter turnout, political indifference, and a decline in civic involvement are all symptoms of a malaise for which reinvigorated citizenship is a good cure. Securing the jury as a special experience in citizen deliberation is essential. Though reforming the American jury system is appropriate and necessary over time, such changes must not harm its core features and functions, including its benefit to civic life.

Returning to the larger theoretical questions that frame our research, the final chapter considers how the civic impact of the jury experience can influence our thinking about deliberation and democracy. Our approach moves beyond an unrefined civil society and concern with free markets to an emphasis on engaging citizens and maintaining institutions capable of nurturing them. We show how this approach makes sense in efforts to introduce juries in countries as varied as Japan and Kazakhstan. We show how democracies could flourish by developing more deliberative institutions, such as Brazil's Participatory Budgeting process and Citizens' Assemblies in Canada. When structured appropriately, such bodies can provide even more powerful deliberative experiences that give citizens confidence in themselves and their state institutions, as well as the skills necessary to participate effectively as free citizens in a democratic society.