INTRODUCTION

Citizens summoned for jury duty usually enter the courtroom with a range of responses from trepidation to dread to even a little awe. These responses are understandable given the power of the jury to decide a party's fate. With such power, however, comes tremendous responsibility. To make matters even more challenging, the jurors will have to decide cases that can be complicated and they will have to reach a unanimous decision, at least in criminal cases in state and federal courts and in civil cases in federal courts.

The question that this book will address is what makes juries work? It does not seem possible that a group of twelve randomly chosen individuals who have no legal training, no expertise in the subject of the trial, no experience adjudicating legal claims, and no real guidance about how to work together as a group, can fairly and correctly decide the fate of the parties on matters about which the group knows little or nothing. It does not help that prospective jurors usually begin by resenting their summons and their jury service when they enter the courtroom, and they bring with them various biases and personality traits as well as a lack of training that make them seem, at first glance, wholly unsuited for the task.

The challenge that the American jury system faces is illustrated by the most famous American jury film, *12 Angry Men*.[1] How does a motley group of jurors, many of whom are unhappy about serving and eager to leave, become a jury that works successfully as a group to

[1] 12 Angry Men (Orion-Nova Films 1957).

reach a unanimous verdict based on the evidence that was presented to them during the trial? In spite of the challenge, the American jury system works reasonably well. What accounts for its success?

The answer lies in the jury process and the way in which it transforms citizens into jurors. The various stages of the jury process, including the summons, *voir dire* (questioning of prospective jurors), instructions, and deliberations, help citizens to step into their role as jurors. The final stage, the post-verdict interview with the judge, helps jurors to leave their role as jurors behind and to resume their lives as private citizens. Even if citizens do not want to be jurors initially or do not think they can perform this task well, the jury process transforms them from citizens who do not want to serve into jurors who perform their role responsibly. Although the jury process carries out this transformation of citizens into jurors reasonably well, there is still room for improvement. Each of the stages of the jury process can be improved upon by looking at the process as a whole rather than at each stage in isolation, and by ensuring that any reforms further the transformation of citizens into jurors.

The traditional view of jurors is that from a pool of citizens it is possible to find those who are jury-ready from the outset. In other words, they are unbiased, competent, and prepared to find the facts and apply the law as presented during the trial. This view assumes that prospective jurors have fixed qualities that can be recognized during *voir dire*. In some cases, prospective jurors are seen as so biased as to make them unable to render a fair verdict and the judge can remove them "for cause." In most cases, however, a juror's subtle biases are not revealed through *voir dire* questions. Lawyers strike a certain number of prospective jurors with peremptory challenges, but they typically know little about these prospective jurors' hidden biases. Once lawyers have exercised their peremptory challenges, they believe that they have removed the biased prospective jurors and that the jurors who remain are impartial and ready to serve. In other words, the traditional view is that jurors who have undergone *voir dire* questioning and survived peremptory challenges start out as ready-made jurors.

I argue that the reverse is true of our jury system: Jurors are made not found. Jurors do not, for the most part, have immutable qualities that lawyers and judges can discern during *voir dire* and that will make them impartial jurors throughout the trial. Rather, jurors are created by transforming citizens into jurors through every stage of the jury process. A dramatic illustration of this transformation is the change in attitude

that occurs from when citizens receive their summons to after they complete their jury service. They typically view their summons with irritation, displeasure, and the strong desire to be excused from jury service, whereas after they have served as jurors, they typically feel pride in having ably performed an important role for society. Polls and surveys of those who have served as jurors show that they believe they performed their task as jurors well and that they think more highly of the judiciary after they have served as jurors.[2] A less dramatic, but no less significant, moment that reveals the start of this transformation from citizens to jurors is when citizens, who have entered the courtroom trying to conjure up reasons why they cannot serve, start to experience a change of mind during *voir dire*. There is almost a palpable moment in the courtroom when prospective jurors begin to shift from wanting to be excused to wanting to serve.

The traditional view sees jurors primarily as ready-made problem-solvers. According to the traditional view, lawyers just need to find jurors who have no overt bias. Once these jurors have been found, then the trial will provide them with the facts, and the judge will provide them with the law, so that they can methodically solve the problem of reaching a verdict. According to the traditional view, jurors arrive at the courthouse knowing how to be jurors and the jury process does not have much to teach them.

In contrast, the transformation view accepts that citizens begin their jury service as individuals who might be unprepared for their role as jurors, but who will be transformed into jurors as they go through the stages of the jury process. This book analyzes these stages – from summons to post-verdict interviews – and shows how these stages provide citizens with experiences that change their behavior and their understanding of their role so that they will be transformed into responsible jurors. Everyone in the courtroom – from the jurors who are new to the experience to the judge, lawyers, and press who are all familiar with jury trials – might be unaware of the ways in which

[2] *See, e.g.*, Nancy S. Marder & Valerie P. Hans, *Introduction to Juries and Lay Participation: American Perspectives and Global Trends*, 90 CHI.-KENT L. REV. 789, 789 n.5 (2015) (citing polls and surveys). In addition to myriad recent surveys and polls, there is an extensive literature, going back decades, that shows that those who serve as jurors think highly of their jury experience, and that those who serve leave with positive views of the court system. *See, e.g.*, Brian L. Cutler & Donna M. Hughes, *Judging Jury Service: Results of the North Carolina Administrative Office of the Courts Juror Survey*, 19 BEHAV. SCI. & L. 305, 316, 319 (2001) (surveying 4,654 venirepersons in North Carolina and finding that they had a very positive view of the court system, which became even more positive after jury service).

every stage of the jury process gives jurors experiences that will enable them to assume their role. Prospective jurors enter the courtroom as individuals who are typically reluctant to be there and anxious to leave, but the jury process helps them to become jurors from whom certain behaviors are expected. They develop these behaviors with every stage of the jury process. By the time they reach deliberations, they conceive of themselves as jurors and understand the enormous responsibility that their role entails.

This book analyzes the stages of the jury process and shows how they help to transform ordinary citizens into responsible jurors. The stages that this book describes are the summons, *voir dire*, jury instructions, and jury deliberations. The stages are the same for criminal and civil jury trials. The final stage, the post-verdict interview with the judge, helps jurors leave their role as jurors after the trial and return to their lives as private citizens. It also helps jurors to serve as goodwill ambassadors for the jury system. The exercise of peremptory challenges, which allows lawyers to remove a certain number of prospective jurors from the jury, is another stage of the jury process, but one that I will argue does not help in the transformation of citizens into jurors. In fact, it undermines the process by limiting who can serve as jurors.

The stages of the jury process need to be viewed holistically rather than in isolation because that is how jurors experience them. The traditional view is to look at each stage in isolation, but this is a mistake. It leads to a myopic view of each stage of the jury process, and misses what jurors actually experience when they serve as jurors. I show how each stage of the jury process contributes to a critical, albeit unacknowledged, purpose, which is to transform citizens into jurors. The jury process needs to be viewed in its entirety because it is through this process that citizens who are initially reluctant to serve become jurors who behave responsibly and perform their role ably. It is the jury process, in its entirety, that enables citizens, who are for the most part untrained in the law, to assume their role as jurors.

The judge's interactions with the jury can aid in the process of helping jurors to assume their role. Judge and jury work together throughout the trial process, though they have different roles to perform. Throughout the trial, there is a back-and-forth between the judge and the jury. The jury learns about its role from this ongoing dialogue with the judge.

Because jurors want to do the right thing – they want to perform their role as well as possible – they look to the judge for guidance. In

Democracy in America, first published in 1835, the French writer Alexis de Tocqueville recognized the judge–jury relationship as a source of learning when he described the jury as a "free school."[3] Tocqueville suggested that in civil trials jurors would look to the judge for guidance. They would do this more so than in criminal cases, which he thought dealt with easily understandable issues and where the judge was regarded more as an arm of the state. Tocqueville surmised that jurors would learn how to act judiciously and to apply these lessons to their business affairs once they resumed their lives as private citizens. He also described the jury as "above all a political institution" because in a democracy the jury trained citizens to engage in self-governance.[4] Although Tocqueville emphasized that jury service helps jurors to become better citizens, my aim is to show how the jury process helps ordinary citizens to become better jurors.

This holistic view of the jury process also has implications for jury reforms. Rather than assessing a proposed reform in isolation, as the traditional view does, reform needs to be considered in light of how it fits into the entire jury process and whether it aids the transformation of citizens into jurors. Thus, the transformation view is a lens through which any jury reform should be assessed. This understanding of the jury process as transforming citizens into jurors also opens the door for more citizens to serve as jurors because it is the jury process that will help them to become responsible jurors, not an overly simplistic view that they are either unbiased or biased jurors when they walk through the courtroom door.

The power of the transformation view is that it reveals reforms that the traditional view obscures. Accordingly, each chapter in this book explores the reforms suggested by the traditional view and then those revealed by the transformation view.

The book is organized in six chapters that take the reader through every stage of the jury process, as the juror experiences it. Chapter 1 sets the stage for the challenge that the American jury system faces. Citizens receive a jury summons requiring them to appear in court. They are often dismayed when they receive their summons. They might know little or nothing about the jury system. The information they have is probably gleaned from newspaper accounts of jury trials or

[3] Alexis de Tocqueville, Democracy in America 275 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).
[4] *Id.* at 272 (describing the jury as "above all a political institution" and explaining that "it is from that point of view that [the American jury] must always be judged").

movies or television episodes involving a jury, and many of these portrayals are negative.[5] To make matters worse, jury duty inevitably interrupts work and personal lives, so it is not surprising that many citizens view their summons with annoyance if not anxiety.

Those who heed their summons often do so reluctantly. When they enter the courthouse, they are not always treated well. Often they are made to wait and given little explanation as to what will happen next. Those who progress from the Jury Assembly Room to a courtroom usually enter with trepidation. They enter thinking of reasons why they cannot serve.

The traditional view of the summons is that it is just an isolated step designed to bring a sufficient number of prospective jurors to the courthouse to ensure that there will be enough jurors for the scheduled trials. From this point of view, this step is successful as long as enough prospective jurors show up, and it does not matter much how they feel about the experience at this point.

The transformation view is that the experience of receiving a summons and going to the courthouse is an unusual event that begins to transform the outlook and behavior of those who are ultimately selected as jurors. However, from this perspective the summons and introduction to the courthouse can and should be reformed to reinforce the desire of citizens to assume the role of jurors. Even at this early stage of the jury process, there are steps that courts can take to assist in the transformation of citizens into jurors. Courts can design summonses that are written clearly, provide answers to frequently asked questions, and reassure citizens that they do not need any special knowledge to serve as jurors. When citizens heed their summons and go to the courthouse, court staff should answer their questions, and when they enter the courtroom, judges should put them at ease. The summons, which courts view mainly as a vehicle to bring citizens to the courthouse, should instead be viewed as a form of outreach that begins the transformation of citizens into responsible jurors.

Chapter 2 focuses on *voir dire*, which is the questioning of prospective jurors. The traditional view is that this stage is supposed to enable judges and lawyers to determine which prospective jurors are biased and need to be removed and which are unbiased and so can serve on the

[5] For an example of a novel, see JOHN GRISHAM , THE RUNAWAY JURY (1996); for examples of movies, see THE JUROR (Columbia Pictures 1996) and TRIAL BY JURY (Morgan Creek Productions 1994); and for an example of a television episode, see *All in the Family: Edith Has Jury Duty* (CBS television broadcast Mar. 9, 1971).

jury. However, jury scholars, social scientists, and psychologists have conducted numerous empirical studies showing that *voir dire* is not well designed to elicit information about who is biased and who is not.

The transformation view is that *voir dire* has little value as a means of finding jurors who are impartial, but it has a lot of value in helping to transform citizens into impartial jurors. Other than in extreme cases of bias, which can be identified and weeded out for cause, there is little evidence that the kind of biases that everyone has can or should be identified during *voir dire*. The chapter describes the experience of going through *voir dire*, which really begins the process of helping prospective jurors to put aside their private concerns, to understand the crucial need to manage their own biases, and to see themselves as part of a group endeavor. There is a moment during *voir dire* when prospective jurors stop formulating their excuses and start thinking about serving. At that moment, a transformation begins in earnest. It is almost a palpable moment in the courtroom. Citizens who were reluctant to serve now want to be selected for jury service.

Although this stage of the jury process is the beginning of the transformation, the chapter describes how *voir dire* can be reformed to bring about the transformation of citizens into jurors even more effectively than the current practice. For example, the judge–jury relationship can aid in this transformation. *Voir dire* needs to be reformed so that the judge asks different questions of prospective jurors. The judge should devote more of *voir dire* to describing the trial process and the roles of the judge and the jury, rather than trying to uncover hidden biases. If *voir dire* is a crucial stage in helping citizens to step into their role as jurors, as I argue it is, this needs to be made explicit.

Chapter 3 considers peremptory challenges and how they impede the transformation of citizens into jurors. The traditional view of peremptory challenges is that they help to seat an impartial jury. Peremptory challenges permit lawyers to remove a certain number of prospective jurors from the jury without having to give a reason. In this way, lawyers can remove some prospective jurors about whom they have misgivings. Once these prospective jurors have been removed, the parties can have confidence that the jurors seated on the jury will be impartial.

There are several problems with the exercise of peremptory challenges, which the traditional view depends on to reassure the parties that the selected jurors are impartial. One problem is that lawyers are ill-equipped to uncover subtle juror bias during *voir dire*, even though they claim to be able to do so. Another problem is that some lawyers

continue to exercise peremptory challenges in a discriminatory manner, particularly in capital cases when the defendant and the prospective juror are African American. This leaves many, particularly African Americans, doubting the impartiality of the jury. The Supreme Court has tried hard to strike a balance so that peremptory challenges could continue, but discriminatory peremptory challenges would end. However, that balance has been difficult to achieve, and peremptory challenges based on race, ethnicity, and gender persist.

According to the transformation view, the jury needs to consist of a diverse group of jurors. They might have some biases, as all people do, but as a group they will be able to learn from each other and challenge each other's biases. As a diverse group, they will have access to a wide range of experiences and perspectives. The transformation view rejects the goal of trying to weed out subtle biases that cannot really be known in favor of the goal of increasing jury diversity.

If a diverse jury is important,[6] as I argue it is, then peremptory challenges, which continue to be exercised in a discriminatory manner, stand in the way of such diversity. Eliminating peremptory challenges is the most effective way of stopping discriminatory peremptory challenges, particularly because other methods have fallen short. Eliminating peremptory challenges would, for example, stop the practice of lawyers who exercise peremptory challenges against African-American prospective jurors in capital cases when the defendant is African American. There are other ways to minimize the harms of peremptory challenges, such as minimizing the number of peremptory challenges allotted to each side or expanding the test of a discriminatory peremptory challenge to include implicit bias and not just discriminatory intent; but, short of eliminating peremptory challenges altogether, these methods are likely to permit lawyers to continue to exclude broad swaths of the population from serving as jurors.

Even with the elimination of peremptory challenges, for cause challenges should remain. For cause challenges, which are decided by the judge and for which a reason must be given in open court, should remain because they allow the judge, *sua sponte* or at the behest of the lawyer, to remove extreme cases of biased jurors, such as those who

[6] Although I see a diverse jury as very important, I recognize that the U.S. Supreme Court has only said that parties have a right to a jury venire, or panel, that is drawn from a fair cross section of the community and not a petit jury that is drawn from a fair cross section of the community. *See* Taylor v. Louisiana, 419 U.S. 522, 537–38 (1975).

admit that they are biased, who have a familial connection to one of the trial participants, or who have a financial stake in the outcome of the trial.

Chapter 4 examines jury instructions, which are given by the judge to provide guidance to the jurors, including an understanding of the relevant law. The traditional view of jury instructions is that jurors are rational problem-solvers who just need to be told the law they must apply. Once they are informed, they will apply the law to the facts as they find them and eventually be able to reach a unanimous verdict. The facts are provided by the parties during the trial and the law is provided by the judge in the jury instructions. The instructions are usually a lengthy monologue that the judge delivers orally at the end of the trial before the jury goes into the jury room to deliberate. The judge assumes that the jurors will understand the instructions and retain everything he or she has told them. According to the traditional view, the carefully written instructions and their oral delivery to the jury are simply a vehicle for making sure that all of the jurors know the law they must apply. The underlying assumption is that they will understand the instructions and use them as the basis for their deliberations.

According to the transformation view, however, the reading of the instructions provides an experience for the jurors that is far more than simply the conveyance of information about the law. As the instructions are read, the jurors have an experience unlike any they would have had in their lives outside of a courtroom, and certainly a different experience than if they had just been handed the instructions to read on their own. The judge's reading of the instructions as the jurors sit together in the jury box ensures that all of the jurors hear the instructions from start to finish, as a group, and that everyone in the courtroom, including the jurors, senses the important role that the instructions play. The jury is being given a very specific task in front of the parties; they are being told to put aside their biases and personal views and to reach a verdict based only on the evidence presented in the courtroom. The reading aloud of the instructions in open court before the jurors, the parties, and the public highlights the importance of the jurors' task, their need to be fair, and the role they are about to play as equals in a group effort to achieve a unanimous verdict.

If jury instructions are understood as part of the jury process of helping jurors to assume their role as jurors, then the oral reading by the judge needs to be supplemented by certain aids so that jurors

understand the substance of the instructions. The instructions need to be delivered in a preliminary form at the start of the trial, on a need-to-know basis as the trial proceeds, and in a summary form at the end of the trial. Jurors also need to be given an individual written copy of the instructions, complete with subject headings, so they can follow the instructions as the judge reads them aloud. They should also be permitted to take notes on their written copy of the instructions so that they can highlight words or concepts they want to clarify with their fellow jurors during deliberations. To make jury instructions more of a dialogue than a monologue, jurors should be permitted to submit written questions to the judge after he or she has read them aloud and the judge should answer those questions, to the extent he or she is permitted to do so.

Even when jurors understand the instructions, they might resist following them, as some do with the instruction to refrain from discussing the trial or doing research about it online. However, it is the judge–jury relationship, begun during *voir dire* and developed throughout the trial, as well as their relationship with their fellow jurors and their commitment to the group endeavor, that will ultimately persuade jurors to adhere to the instructions.

Chapter 5 looks at deliberations. The traditional view of jury deliberations is that jurors are capable, from the moment they are selected, to deliberate in a way that yields a fair and just verdict. Moreover, the traditional view is that the jury is an independent body that should be left to its own devices as much as possible. According to this view, it is up to jurors to structure their deliberations as they see fit, and the judge must not intrude in any way. Although jurors are free to structure their deliberations on their own, deliberations should be seen as part of the process of helping jurors to realize fully their role as jurors.

According to the transformation view, jurors are made, not found. The citizens who receive a summons are seemingly quite unprepared for the daunting task ahead of them. They must perform a role for which they have not volunteered; they must be aware of their personal biases and try hard not to be swayed by them; they must deliberate to try to reach a unanimous verdict with a group of strangers; and they must decide the facts and apply the law even though both are new to them and might be quite complicated. However, the experiences they go through from the moment they receive their summons to the moment they are about to enter the jury room help to prepare them to deliberate. In addition, the setting and structure of the deliberations help them to