

THE POWER OF THE JURY

Offering an alternative view of the jury process, this book argues that each stage transforms ordinary citizens, who are oftentimes reluctant to serve on juries, into responsible jurors. Jurors, Professor Marder argues, are not found, but rather they are made and shaped by the jury process. This book analyzes each stage of this process, from initial summons to post-verdict interview, and shows how these stages equip jurors with experiences and knowledge that allow them to perform their new role ably. It adopts a holistic approach to the subject of jury reform and suggests reforms that will aid the transformation of citizens into jurors. By studying the jury from the perspective of jurors, it gives readers a better understanding of what takes place during jury trials and allows them to see juries, jurors, and the jury process in a new light.

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THE POWER OF THE JURY

Transforming Citizens into Jurors

Nancy S. Marder

Chicago-Kent College of Law, Illinois Institute of Technology



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ACKNOWLEDGMENTS

I am extremely fortunate to have had one teacher and two judges who shaped my views of the jury in different ways. I was a student in Professor Owen Fiss's Procedure course at Yale Law School. I remember Professor Fiss made an eloquent defense of judges, and I came to share his view, especially after I had the opportunity to clerk for several judges and to observe firsthand the fine work they did. At the time, though, I wondered why Professor Fiss did not come to the defense of that other judicial decision-maker – the jury. I began to do research and writing on the jury, and Professor Fiss served as my supervisor. If I could persuade him that juries mattered then maybe I could persuade others as well. My interest in the jury began in that Procedure course in my first semester of law school and has continued ever since.

I had the opportunity to watch the jury in action when I clerked for Judge Leonard B. Sand, who was then a federal district court judge in the Southern District of New York. Judge Sand was a great believer in juries. When I clerked for Judge Sand, he had been on the bench for fifteen years. He told me that in those fifteen years, he had presided over many jury trials and he could count on one hand the number of times he had disagreed with a jury's verdict. He treated juries with great respect and took care to explain to jurors what was about to take place in the courtroom, what their role was, and what his role was. He remains my model of a trial judge and his relationship with the jury remains my ideal for the judge–jury relationship.

I also learned about the jury during two years as a law clerk to Justice John Paul Stevens at the US Supreme Court. I was fortunate to have the benefits of Justice Stevens's insights when I clerked for him and in the decades that followed. I had a front-row seat as the Court extended *Batson v. Kentucky* in an effort to eliminate discriminatory peremptory challenges. Initially, *Batson* applied just to prosecutors who were intent upon eliminating African-American prospective jurors when the defendant was also African American. However, during the two Terms that I was a law clerk, the Court expanded *Batson's* reach. In

a series of jury cases, the Court decided that *Batson* applied to defense attorneys as well as to lawyers in civil cases and that peremptory challenges could no longer be exercised on the basis of race, gender, or ethnicity. The logic of *Batson* seemed inexorable and held such promise. Justice Stevens, who had been a trial lawyer, had a great appreciation for juries. As a Seventh Circuit judge and then as a Justice, he wanted to make sure that as many citizens as possible could serve as jurors. I admired Justice Stevens and his views on juries, and I was optimistic about *Batson* and its progeny at the time.

These great mentors and these very different vantage points have informed my study of the jury. In my past writing as well as in this book, I seek to describe the experience of jurors in the courtroom, to think about the relationship between judges and jurors, and to make sure that jury service is available to as broad a swath of the population as possible, and that citizens are not excluded from serving as jurors because of discrimination. Each of my early teachers helped to shape my concerns, and their perspectives have guided my study of the jury, from how it works in practice to the challenges it still faces and the ways in which it needs to be reformed to meet an ever-changing society.

Although I have been writing about the jury since law school, and have had the chance to develop many of the ideas in this book in law review articles and book chapters, this book still required more time, feedback, and rewriting than any of my other projects. I could not have written this book without the support of my spouse, Jeremy David Eden. When I explained the idea of the book to him, he embraced it with alacrity. He read and critiqued numerous drafts and when my argument needed clarification, he helped me to sharpen it. He was willing to talk about the book whenever I encountered a problem or needed to test out a new idea. He took on this project with enthusiasm and gave generously of his time, insights, and ideas. He was a partner in this endeavor, as he is in the rest of my life.

This book came to fruition only with the support of several academic communities. My colleagues at Chicago-Kent have been essential to this project. When I first described my book proposal to Christopher Schmidt, who was then Associate Dean for Faculty Development, he was enthusiastic and organized a workshop for it. His own manuscript conference served as a model for mine. He, along with Joan Steinman and Harold Krent, gave me the time to write this book by awarding me the inaugural Freehling Award. Thanks to the generosity of Paul and Sue Freehling, this award gave me a semester free from teaching so that I could focus full time on writing. Paul Freehling, who had been a trial

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lawyer, continues to have an abiding interest in the jury and I am grateful for our conversations on this subject over the years. My colleagues at Chicago-Kent have given their input at various stages of this project, including the book proposal, a workshop for the first two chapters, and several conference presentations at Chicago-Kent. Now under the leadership of Dean Anita Krug, Chicago-Kent has continued to support my scholarship and to provide summer funding that has allowed me to work on this book.

Another community that has been essential to my work on the jury in general, and to this book in particular, is the Collaborative Research Network (CRN) on Lay Participation that is part of the Law & Society Association. I have been a member of this CRN, organized by Valerie Hans, Sanja Kutnjak Ivković, and Mary Rose, for almost my entire academic career, and in that time I have never missed an annual meeting. These jury scholars, some from the United States and others from around the world, gather every year to share new developments, new methods, and new research on the jury. They have been a source of friendship, collaboration, and knowledge. I have used this group as a sounding board for this project, as well as for my other work on the jury. Indeed, I had the pleasure of collaborating with coeditors Sanja Kutnjak Ivković, Shari Seidman Diamond, and Valerie Hans to publish *Juries, Lay Judges, and Mixed Courts: A Global Perspective* (2021).

Colleagues from Chicago-Kent and the CRN on Lay Participation came together, even with short notice, for a manuscript conference for this book, funded by the Justice John Paul Stevens Jury Center at Chicago-Kent. These colleagues read an early draft of the manuscript and gave me written and oral comments. The participants included: Lori Andrews, Robert Burns, Sonali Chakravarti, Sungjoon Cho, Shari Seidman Diamond, David Erickson, Valerie Hans, Thaddeus Hoffmeister, Sanja Kutnjak Ivković, Richard Lempert, James Matsumoto (a former juror), Barbara O'Brien, Christopher Schmidt, and Carolyn Shapiro. I have also benefited from feedback when I presented chapters of the book at several conferences, including the roundtable organized by Anna Offit as part of the Civil Jury Project created by Stephen Susman at New York University Law School; the jury symposium at Louisiana State University organized by Raff Donelson and the *Louisiana Law Review*; the Midwest Law and Society Retreat; the Association for the Study of Law, Culture, and the Humanities; and the Practicing Law Institute. Carol Lee worked

mightily to keep me up to date about jury developments, especially during the pandemic, and I am grateful for her help and friendship.

Another academic community I want to thank is the community at the Baldy Center for Law and Social Policy at the University at Buffalo School of Law in Buffalo, New York. The Baldy Center, then under the directorship of Errol Meidinger, awarded me a Senior Fellowship that allowed me to spend a semester at the Center working on a draft of this book. This fellowship provided me with a community of scholars, as well as uninterrupted time in which to write. The Buffalo winter kept me indoors and free from all distractions.

Most recently, I have benefited from my return to Yale Law School, where I have been a Visiting Professor of Law. Yale, as always, is a vibrant and engaged community and it was a privilege to be a part of it. I benefited enormously from conversations with Judith Resnik, as I have throughout my academic career. I admire her expertise, energy, commitment, and passion. She has been an extraordinary friend and colleague and provided guidance for this project, as well as so many others. Over the decades, Judith and her spouse, Dennis Curtis, have given generously of their time to discuss a wide range of topics, and these conversations occurred even more frequently during my time at Yale. Other colleagues and friends at Yale, including Christopher and Janet Arterton, Owen Fiss, James Forman, and Anthony Kronman, have embraced the subject of this book and have spent time discussing it with me. Yale Law School, under the stewardship of Dean Heather Gerken, has been generous with its resources. I appreciate the tremendous assistance of Research Assistants Justin Cole and Lauren Lin and Faculty Assistant Marilyn Serna.

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