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Book Review: *The Power of the Jury: Transforming Citizens into Jurors* Cambridge University Press; New Edition (September 15, 2022)

BOOK REVIEW

PAULA HANNAFORD-AGOR

ABSTRACT

In her book *The Power of the Jury: Transforming Citizens into Jurors*, Professor Nancy Marder describes how the trial process, beginning with the jury summons and ending with a post-verdict meeting with the judge, transforms citizens into jurors and then back into more fully engaged citizens. In each chapter, Marder offers suggestions for making the process more effective so that jurors are better prepared to fulfill their role in the American justice system. In some instances, Marder's suggestions elevate the transformation from citizens to jurors over the actual task that jurors exist to perform—namely, to use their collective wisdom and community values to decide cases fairly and impartially. Overall, however, *The Power of the Jury* provides valuable insights into how citizens can be transformed into effective jurors and how this transformation can impact the legal system in the United States and society as a whole.

CORRESPONDING AUTHOR:

Paula Hannaford-Agor, JD

Directs the Center for Jury Studies at the National Center for State Courts, US

phannaford@ncsc.org

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A strong commitment to the institution of trial by jury as a method of adjudicating both criminal and civil cases is a defining feature of the common law system in the United States. Although many countries have jury trials, they are often restricted to cases involving serious criminal charges. Other countries involve laypersons in the adjudicative process through mixed tribunals of professional and lay judges. Some countries, especially those with civil law systems, have no lay participation whatsoever. In *The Power of the Jury: Transforming Citizens into Jurors* (Cambridge University Press, 2022), Professor Nancy Marder focuses on juries in the U.S. common law trial process.

Several years ago, I conducted a day-long workshop on the basic mechanics of jury system management for a state court task force charged with revising statutes, court rules, and business practices to ensure that the state's new jury automation software would not be hampered by obsolete legal requirements. At the end of the day, one task force member – a newly appointed magistrate judge – said to me "Wow! I had no idea that the process was so complicated. I always thought that the jury manager just 'waved her wand' and jurors magically appeared." Her comment was, of course, entirely in jest; she knew perfectly well that jurors do not "magically appear." But she, like most judges and lawyers in the United States, was unaware of the many intricacies of the process. Before the first prospective jurors start to walk up the courthouse steps on a Monday morning, the court must identify one or more sources of names of prospective jurors; combine them into a single master jury list; randomly select names from the list to receive a jury summons that instructs them to respond to questions about their qualifications for jury service; sift through their answers to identify individuals who are, in fact, qualified for service; and manage requests to be excused or deferred to a more convenient time. How well the court performs each of those steps affects the overall integrity of the jury system. Poorly executed operations are inefficient, costly, and can undermine the diversity of the jury pool. In extreme instances, they might prevent jurors from appearing at all.

In *The Power of the Jury: Transforming Citizens into Jurors* (Cambridge University Press, 2022), Professor Nancy Marder makes a similar point about the complexity of the process that changes ordinary citizens into jurors. According to Marder, the traditional view held by judges and lawyers in the United States is that jurors already live in our communities. Once summoned, they appear at the courthouse fully equipped to serve, at which point the judge and lawyers jointly participate in selecting the trial jurors through the winnowing process of *voir dire* that identifies the "jurors" from "not-jurors" – that is, those people who, for any of a variety of reasons, are deemed inappropriate or incapable of serving in this capacity. Marder argues instead that the citizens who are summoned for jury service are actually transformed – first into jurors, then into the collective jury – by the trial process itself. The book describes this transformative process, which begins with the jury summons and, ideally, ends with a post-verdict meeting of the judge and jurors that transforms them back into more fully engaged citizens. In each chapter, Marder offers suggestions for making the process more effective, so that jurors are better prepared to fulfill their role in the American justice system.

In the first chapter, Marder describes how the jury summons itself begins the transformation of citizens into jurors. For most people, receiving a jury summons in the mail is not an especially welcome event. Jury service is rarely convenient and, in some instances, can be quite burdensome. Often their understanding of what jury service entails is based on what they have learned from television or the movies or reports from jurors who have served in the past. Prospective jurors often have many questions

about how and why they were selected to receive a jury summons, how long they will have to serve, whether they will be compensated for their time or at least reimbursed for out-of-pocket expenses, and what types of cases they might hear. The arrival of the summons can provoke anxiety, irritation, or even fear. Marder argues that the jury summons is the court's first opportunity to set expectations for the people called to jury service. A well-designed jury summons, therefore, should inform jurors that they have been summoned to participate in something "out of the ordinary" that requires their full attention and prompt compliance with the instructions of the court.

Upon arrival at the courthouse, these citizens-but-not-yet-jurors are further transformed by the jury selection process, during which the judge informs jurors about their role. This is not a purely educational process, however. During *voir dire*, the judge treats each prospective juror equally and courteously, thus demonstrating how they should treat each other. Likewise, judges speak to jurors as a group, previewing their eventual transformation from individual jurors into a unified jury. As prospective jurors answer questions from the judge and lawyers in open court, they come to understand the public role that they will play during the trial. During this *voir dire* process, these citizens, not the parties, are the exclusive focus of the trial proceedings. Their answers are recorded on the permanent record by the court reporter. Their answers inform the judge and lawyers about their suitability to serve as trial jurors, but also inform themselves about the life experiences and opinions of the individuals with whom the selected jurors will serve.

This transformative process continues throughout the rest of the trial and deliberations. For example, Marder explains that the jury instructions, which educate jurors about legal principles governing the case, serve to reinforce the group identity of the jury and (hopefully) make the law understandable to jurors. In other types of court hearings, knowledge of the law and its applicability to the legal issue to be decided is often presumed, but not explicitly stated on the record. Judges, for whom knowledge of the law is a given, often issue orders or enter judgments on contested matters with only the briefest reference to the law on which those decision are based—and sometimes without any reference whatsoever. In jury trials, however, the jury instructions do more than educate the jurors about the applicable law. They are also a formal part of the public record of the trial and serve as a public statement of the law.

To ensure that jurors can perform their role appropriately, Marder urges judges to employ a variety of techniques to increase juror comprehension of the evidence and law, including allowing jurors to take notes and to submit written questions to witnesses; instructing jurors on the black-letter law in addition to routine admonitions concerning their conduct during trial; and providing jurors with written copies of the instructions to consult during deliberations. For the past three decades, judges, lawyers, and researchers have tested these techniques and generally conclude that they are effective, non-prejudicial, and not disruptive to the trial process. Marder argues that these practices demonstrate judges' respect for the jurors and their role, and they help to foster a collaborative relationship in which the jurors feel obligated to perform as responsibly as possible.

Deliberations are the final phase of the transformation, which takes place largely through the formal legal structure of segregated jury discussions in the absence of judges, attorneys, and the public. By definition, deliberations require the active participation of all jurors, who ultimately must render a collective decision and announce it publicly in court. The size of the jury, the verdict decision rules, and the

isolation and secrecy of deliberations are part of the crucible of jury service. Twelve-person juries are more diverse than smaller juries in terms of both demographic characteristics and life experience. Larger juries tend to deliberate longer than juries comprised of fewer jurors, have better collective comprehension of the evidence and the law, and report greater confidence in the decision and satisfaction with jury service. Verdicts in criminal trials must be unanimous, requiring jurors to resolve disagreements over the correct interpretation of ambiguous or conflicting evidence through rational discussion. Non-unanimous verdicts are permitted in civil cases in 26 of the 50 states, but even these require a supermajority of jurors to agree on the verdict. Although the judge may not ethically interfere with the jury's deliberations, Marder argues that judges can continue to support jurors in their decision-making tasks by offering neutral guidance on effective deliberation techniques, answering jurors questions, especially about the jury instructions, and offering an opportunity for additional evidence or argument if jurors reach an impasse during deliberations.

Although a verdict signifies the end of the jurors' formal role in the justice system, Marder concludes with suggestions for how judges can support jurors as they resume their lives through post-trial meetings with jurors. While not a universal practice, many judges take time to meet with jurors to thank them for their service, to answer questions about the trial or the court system that could not be addressed earlier, and to solicit feedback from jurors about how to make jury service more pleasurable and meaningful for jurors. In high-profile cases or cases involving disturbing evidence, the judge can also offer guidance to jurors on addressing inquiries from friends, family and the media as well as techniques for managing post-trial anxiety or stress. Doing so, says Marder, completes the transformation cycle of citizens to jurors and back to citizens. As they leave the courthouse after jury service, they are better informed and more engaged citizens than when they first entered.

In most respects, I agree with Marder's view of the transformative experience of jury service. As someone who travels frequently on business, I am generally circumspect about what I do for a living because invariably I will hear stories from fellow travelers about their experience as a trial juror. It doesn't matter that the trial may have taken place decades ago. They report that they remember with perfect clarity what the trial was about, which witnesses were believable and which ones were not, what they discussed during deliberations, and how they ultimately decided the case. Many judges and lawyers have also told me about their surprise and delight at the diligence, care, and thoughtfulness with which jurors undertake their roles, sometimes in spite of the legal obstacles that the justice system puts in their way.

In part due to the pervasiveness of these experiences, Marder's description of the "traditional view" of jurors struck me as something of a strawman. It is not a view currently held by judges and lawyers in the United States and may not have been widely held even in the past. Judges and lawyers understand the importance of educating jurors not only about the law and facts at issue in the case, but also about their role. This is the point of routine oaths and admonitions. The use of this "traditional view" strawman as a rhetorical device sometimes leads to Marder to elevate the transformation from citizens to jurors over the actual task that jurors exist to perform—namely, to use their collective wisdom, powers of analysis, and community values to decide cases fairly and impartially.

In several places in the book, I found myself disagreeing strenuously with Marder's suggestions for strengthening this transformation because they would ultimately

undermine jurors' impartiality as well as public confidence in the fairness and integrity of jury trials. In the chapter on jury selection, for example, Marder describes the impact of the judge asking each juror individually "can you serve impartially?" Marder explains that the repetition of this question with each successive juror emphasizes the importance of impartiality to the jurors sitting in the courtroom and prompts jurors to imagine themselves as impartial jurors. Yet this suggestion overlooks a large body of empirical research on the social dynamics at play during jury selection. The judge's role in this stage of the trial is to ensure that only individuals who can set aside preexisting opinions and decide the case solely on the law and the evidence are impaneled as trial jurors. Most judges take this task very seriously, but they must also balance the inquiry into prospective jurors' lives and attitudes against the expediency of completing *voir dire* and progressing to the evidentiary stage of the trial. Unless they disclose an obvious bias during jury selection, prospective jurors who say they can be impartial are generally given the benefit of doubt with the understanding that lawyers can use peremptory challenges to remove jurors whose impartiality they may question.

In the next chapter, however, Marder proposes eliminating peremptory challenges, citing extensive literature on their discriminatory use by lawyers resulting in less-diverse juries. She argues that lawyers are not particularly adept at recognizing biases in prospective jurors, so peremptory challenges are an imperfect tool for removing individuals they suspect of bias. She also claims that peremptory challenges interfere with the transformation of citizens into jurors by removing a source of diverse perspectives that would otherwise contribute effectively to the transformative experience of jury deliberations. Marder acknowledges that some individuals may be unwilling or unable to undergo the transformation from citizen to juror; such individuals should be removed for cause by the trial judge.

Although Marder remains confident that those who survive a challenge for cause will ultimately be transformed into effective jurors, she overlooks how the social dynamics of *voir dire* also affect prospective jurors' candor during jury selection. Jurors generally view the judge as an authority figure and are more likely to answer the judge's questions with socially desirable responses, especially if more candid answers might disappoint or anger the judge. However wanting to be impartial and believing that one can be impartial does not necessarily make it so. A juror who confidently says "yes, I can be impartial" can often persuade a judge to deny a challenge for cause that otherwise should have been granted. Peremptory challenges provide an important escape mechanism for lawyers to remove jurors whom a credulous judge has left on the panel.

Marder offers another suggestion in the chapter on *voir dire* that struck me as both wildly impractical and inconsistent with the role that the jury is supposed to play: that jurors be given robes, similar to judicial robes, to wear. Although most courts in the United States provide badges to differentiate jurors from other trial participants and members of the public congregating in the courthouse, no courts currently provide jurors with robes. Marder explains that donning robes will further the process of transforming citizens into jurors by literally cloaking them with the dignity and authority of their very weighty responsibilities as jurors. This idea confuses form with function. A fundamental purpose of the jury trial is to inject community values into the adjudicative process. Jurors are drawn from the community and a jury verdict is the community's statement of a just outcome for a particular case. To do so, it is critical that jurors be seen by the public, and see themselves, as members of the

community. This is harder, if not impossible, to do if the transformation of citizens into jurors conflates into a transformation of citizens into judge-lookalikes.

Apart from the philosophical objection of putting jurors in judicial robes, the logistics of acquiring and maintaining an adequate supply of robes is staggering. Jury trials involve 6 to 12 jurors, plus alternates, who come in all shapes and sizes. Achieving the objective of enhancing their dignity would require robes that fit and are of reasonable quality. And even well-fitting robes are not always comfortable, especially in courtrooms with erratic heating and air conditioning. Courts can better demonstrate respect for jurors in more meaningful ways by using their time effectively, using techniques to improve juror comprehension and performance, increasing juror compensation, and investing in comfortable seating, adequate space, better coffee, and light snacks. Providing judicial robes is simultaneously a costly and a superficial gimmick that would ultimately undermine the public legitimacy of jury trials and jury verdicts.

Throughout her book, Marder conveys an unshakable confidence in citizens' ability to set aside personal preoccupations and serve as competent and fair jurors. She is not wrong in this regard, but she does present an overly idealized image of jurors, which ultimately does them a disservice. To paraphrase Winston Churchill's observation about democracy, jury trials are the worst system of adjudication—except for all other systems that have been tried from time to time. The real miracle of jury trials is not the transformation of (imperfect) citizens into (flawless) jurors. Instead, it is the messiness of imperfect citizens who appear for jury service, sometimes begrudgingly, and do the best that they can with incomplete evidence and often impenetrable legalese to render verdicts that their communities accept as legitimate precisely because they were decided by fellow citizens serving as temporary jurors, not judges.

COMPETING INTERESTS

The author has no competing interests to declare.

AUTHOR AFFILIATIONS

Paula Hannaford-Agor, JD orcid.org/0000-0001-6342-0262
Directs the Center for Jury Studies at the National Center for State Courts, US

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