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HEADLINE: Unlocking The Jury Box

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BODY:

The Founders of our nation understood that no idea was more central to our Bill of Rights -- indeed, to government of the people, by the people, and for the people -- than the citizen jury. It was cherished not only as a bulwark against tyranny but also as an essential means of educating Americans in the habits and duties of citizenship. By enacting the Fifth, Sixth, and Seventh Amendments to the Constitution, the Framers sought to install the right to trial by jury as a cornerstone of a free society.

Today that cornerstone is crumbling. In recent years, a parade of notorious criminal trials has called into question the value of citizen juries. The prosecutions of Oliver North, O.J. Simpson, William Kennedy Smith, the Menendez brothers, and the assailants of Rodney King and Reginald Denny have made armchair jurors of millions of Americans. Now the failings of the system seem obvious to anyone with a television.

* In search of "impartial" jurors, the selection process seems stacked against the educated, the perceptive, and the well informed in favor of those more easily manipulated by lawyers and judges. Attorneys exercising their rights to strike candidates from the pool cynically and slyly seek to exclude jurors on the basis of race, gender, and other supposed indicators of bias.

* Courts subject citizens to repeated summonses, intrusive personal questioning, and long and inefficient trials. Unsurprisingly, many citizens avoid jury duty.

* In court, jurors serve a passive role dictated by rules that presume jurors are incapable of impartial deliberation and that provide little help in understanding points of law or evaluating testimony.

* The public perceives that the scales of justice tip in favor of rich defendants with high-priced counsel.

More than a million Americans serve as jurors on state courts each year. Jury service offers these Americans an unequalled opportunity to participate democratically in the administration of justice. But

on its present course, this vital egalitarian institution may shrivel up, avoided by citizens, manipulated by lawyers and litigants, and ridiculed by the general public. To be sure, the system has inherent limitations; "correct" verdicts cannot be guaranteed. But given the jury's present form, society is bearing the costs of a jury system's vices without enjoying a jury system's virtues. Our task is to demonstrate why the citizen jury is worth defending, and to propose a number of specific reforms designed to restore the jury to its rightful status in a democracy under law.

A Cornerstone of Democracy

The Framers of the Constitution felt that juries -- because they were composed of ordinary citizens and because they owed no financial allegiance to the government -- were indispensable to thwarting the excesses of powerful and overzealous government officials. The jury trial was the only right explicitly included in each of the state constitutions penned between 1776 and 1789. And the criminal jury was one of the few rights explicitly mentioned in the original federal constitution proposed by the Philadelphia Convention. Anti-federalists complained that the proposed constitution did not go far enough in protecting juries, and federalists eventually responded by enacting three constitutional amendments guaranteeing grand, petit, and civil juries.

The need for juries was especially acute in criminal cases: A grand jury could block any prosecution it deemed unfounded or malicious, and a petit jury could likewise interpose itself on behalf of a defendant charged unfairly. The famous Zenger case in the 1730s dramatized the libertarian advantages of juries. When New York's royal government sought to stifle its newspaper critics through criminal prosecution, New York grand juries refused to indict, and a petit jury famously refused to convict.

But the Founders' vision of the jury went far beyond merely protecting defendants. The jury's democratic role was intertwined with other ideas enshrined in the Bill of Rights, including free speech and citizen militias. The jury was an essential democratic institution because it was a means by which citizens could engage in self-government. Nowhere else -- not even in the voting booth -- must Americans come together in person to deliberate over fundamental matters of justice. Jurors face a solemn obligation to overlook personal differences and prejudices to fairly administer the law and do justice.

As the great historian of anti-federalist thought, Herbert Storing, put it, "The question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the administration of government."

Perhaps most important was the jury's educational mission. Through the jury, citizens would learn self-government by doing it. In the words of Alexis de Tocqueville, "The jury is both the most effective way of establishing the people's rule and the most effective way of teaching them how to rule." This learning, of course, would carry over to other political activity. As Tocqueville explained:

"Juries, especially civil juries, instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of -- preparing people to be free They make all men feel that they have duties toward society and that they take a share in its government. By making men pay more attention to things other than their own affairs, they combat that individual selfishness which is like rust in society [The jury] should be regarded as a free school which is always open and in which each

juror learns his rights . . . and is given practical lessons in the law . . . I think that the main reason for the . . . political good sense of the Americans is their long experience with juries in civil cases."

Once we see how juries serve as major avenues for popular education and political participation, the connections early American observers drew between jury service and other means of political participation -- especially voting -- make more sense. Tocqueville keenly understood these linkages: "The jury system as understood in America seems to me to be as direct and extreme a consequence of the . . . sovereignty of the people as universal suffrage. They are both equally powerful means of making the majority prevail . . . The jinx, is above all a political institution [and] should be made to harmonize with the other laws establishing tile sovereignty . . . For society to be governed in a settled and uniform manner, it is essential that the jury lists should expand or shrink with the lists of voters . . .

"[In general] in America all citizens who are electors have the right to be jurors."

We have come to think of voting as the quintessential act of democratic participation. Historically, the role of the people in serving on juries was often likened to the role of voters selecting legislative bodies, and even to the role of legislators themselves. Indeed, the jury's place in the judicial framework was closely related to the idea of bicameralism: Just as the legislature comprised two equal branches, an upper and a lower, juries and judges constituted the lower and upper branches, respectively, of the judicial department.

The Supreme Court has reinforced the linkage of jury service and voting as part of a "package" of political rights. For example, in a 1991 case challenging race-based exclusions in jury selection, Justice Anthony Kennedy observed in his majority opinion that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process . . . Whether jury service may be deemed a right, a privilege or a duty, the State may no more extend it to some of its citizens and deny it to others on racial grounds than it may invidiously discriminate in the offering and withholding of the elective franchise."

Later in the same term, Justice Kennedy again invoked the similarity between jury service and voting, observing that just as government cannot escape from constitutional constraints by farming out the tasks of administering elections and registering voters, neither can it evade constitutional norms by giving private parties the power to pick jurors.

The link between jury service and other rights of political participation such as voting was also recognized and embraced by the drafters of the Reconstruction amendments and implementing legislation, and still later by authors of various 20th-century voting amendments. For example, the framers of the Fifteenth Amendment, which prohibited race-based discrimination in voting, understood well that the voting they were protecting included voting on juries. That amendment, drafted and ratified in the 1860s, proved to be a template for later amendments protecting women, the poor, and the young from voting discrimination.

Justice's Weak Link?

The weaknesses of jury trials are sometimes ascribed to the mediocre capacity of ordinary citizens to adjudicate matters of law and fact in an increasingly complex society. It is true that jurors will not always decide "correctly," any more than voters will always choose the most qualified candidates for public office. But the real problem is not that we rely too much on men and women of ordinary

intelligence and common sense to decide questions of fact and value in the courtroom. The problem is that we rely too little. The jury is crippled by constraints imposed by the court professionals.

In the era of the Founders, the jury was no more egalitarian than was suffrage, limited by race and sex and by tests of personal traits thought necessary for judging cases. Over two centuries, even as the right of jury service was gradually extended to all citizens of voting age, the freedom of jurors to participate in the finding of fact in the courtroom was constricted. Contrary to the spirit in which the jury trial was woven into our constitutional fabric, judges and lawyers have aggrandized their own roles in litigation at the expense of the jury.

The deepest constitutional function of the jury, is to serve not the parties but the people -- by involving them in the administration of justice and the grand project of democratic self-government. Alas, over the years, the search for adversarial advantage by attorneys won out over the values of public education and participation.

Judges, charged with protecting these enduring constitutional values, have at times done just the opposite in order to maintain their control over trials. The jury was to check the judge -- much as the legislature was to check the executive, the House of Representatives to check the Senate, and the states to check the national government.

It is not surprising that we -- as jurors, as citizens -- have not fought off these creeping assaults. The benefits of jury service are widely dispersed -- they rebound to fellow citizens as well as the individual jurors. But the individual juror bears all of the cost -- the hassle, the inconvenience, the foregone wages -- of jurors, service.

If the jury system is to remain a central institution of democracy and citizenship, it must be refined. Jury trials must attract engaged and thoughtful citizens; the rules of the courts must treat jurors as sovereign, self-governing citizens rather than as children. To this end, we suggest a number of reforms. In many instances, these changes would require no new laws, but merely a willingness on the part of the courts to unleash the common sense of the ordinary citizen.

I. Respect jurors

First, we must try to design the system to welcome jurors. All too often they are mistreated by the trial process, forced to wait in cramped and uncomfortable quarters while the judge and lawyers question jury candidates, who are often dismissed from selection without explanation. We should use juries to reconnect citizens with each other and with their government. After serving on a jury, a citizen should, in general, feel better -- less cynical, more public-regarding -- about our system.

II. Make juries more representative

Earlier in the nation's history, juries were impaneled under the elitist principle that only the propertied or the highly educated possessed the habits of citizenship needed to serve well. Now that we know better, it is perverse that professional and literate citizens often are exempted or struck from the jury pool. When juries produce stupid verdicts, it is often because we let interested parties pick stupid jurors in stupid ways. It is a scandal that only those who had never heard of Oliver North were permitted to judge him. Now that we have ceded so much control over trials to the court regulars, this shouldn't come as a surprise -- it is akin to letting lobbyists hand-pick candidates for office.

A juror should have an open mind but not an empty mind. We must empower juries in ways that make them more representative and less vulnerable to encroachments of the judicial professionals, without turning them into professionals themselves.

Limit peremptory challenges. By and large, the first 12 persons picked by lotter, should form the jury. The jury -- and not just the jury pool summoned for each case -- should be as representative of the entire community as possible. Peremptory challenges (a device that allows lawyers to remove a specified number of jurors from the panel without having to show "cause") should be eliminated; they allow prosecutors and defense attorneys to manipulate demographics and chisel an unrepresentative panel out of a representative pool. Juries should represent the people, not the parties.

Consider the analogies outlined earlier. Our society does not let an individual defendant hand-pick the legislature to fashion the norms governing his conduct; or the prosecutor who pursues him; for the grand jury that indicts him; or the judge who tries him; or the appellate court that reviews his case. We do not set out -- and we'll resist the temptation to wisecrack -- to pick the most stupid people imaginable to populate our legislatures or our judiciary. And we are especially uneasy about depriving citizens of the right to vote on the basis of discretionary criteria that may mask racial or sexual stereotyping.

Some major arguments have been advanced to support peremptories. First is the idea of legitimacy: The parties will respect a decision reached by a body they helped to select. But what about the legitimacy of verdicts for the rest of society -- We, the people, whom the jury system is supposed to serve? After all, the parties regard the trial judge, the appellate court, the legislature, and the grand jury as legitimate, even though the defendant didn't personally select any of them or exercise any peremptory challenges. In the name of principle, the court professionals are merely disguising a power grab at the expense of the jury.

Second, some argue that peremptories allow counsel to probe jurors with incisive questions during the selection process to unearth "cause" to remove particular jurors. Lawyers need peremptories to vigorously exercise this right, the argument goes, lest they offend a juror for whom no provable grounds exist for a "for cause" dismissal. Our response to this is that "for cause" dismissals should be limited; jurors should not have to recuse themselves by different criteria than do judges. If "for cause" challenges are restricted, the prophylactic argument for peremptories collapses.

The Supreme Court has made clear that no constitutional right to peremptories exists: They are a relic of an imperfectly democratic past. At the Founding, we suspect, peremptories were exercised mainly as a polite way of dismissing folks with personal knowledge of the parties. In a homogeneous jury pool, peremptory challenges would rarely skew the demographics of the eventual jury. But to vindicate the Fifteenth and Nineteenth Amendments, we must close off attempts by lawyers to exploit race and gender in jury selection in a way that deprives some citizens of their right to participate as democratic equals.

Jury pay. We should pay jurors for their time. Payment at a fair, fiat rate will permit a broad cross section of society to serve. Our analogy to a bicameral legislature suggests that payment is appropriate, for judges and legislators are paid for their time. To decline to compensate citizens for their sacrifice -- or to pay them a token \$ 5 per day as is done in many California courts -- is in effect to impose a functionally regressive poll tax that penalizes the working poor who want to serve on juries, but who cannot afford the loss of a week's pay. Payment should come from the government, not private

employers. All jurors are equal as jurors, and should be paid equally: One person, one vote, one paycheck.

III. Restore the notion of duty

Jury service is not only a right, but also a duty. Few of us have militantly insisted that we perform this obligation, just as few of us insisted in the last 30 years that we pay our fair share of the intergenerational tax burden. *The Economist* reports that half of all Californians called for jury duty in the state's criminal courts ignore the summons. Citizens should not escape so easily.

Few exemptions. Exemptions from service should be extremely limited: If you are the brother-in-law of the plaintiff, you may be excused; but you may not be excused merely because you happen to read the newspaper or work in a profession. The idea of the jury is rooted in equality; just as all defendants are treated equally before the law, all jurors have equal claims as well as obligations to play a part in the administration of justice. This measure would expand the size of the jury pool, enforce the universality of required service, and raise the average education level of juries.

Yearly service. The Swiss defend their country with a citizen militia that regularly requires a citizen to serve a periodic stint of active service. Similarly, we should ask each citizen to devote, say, one week a year to jury service, depending on the needs of his or her jurisdiction. Each citizen could register in advance for the week that is most convenient, and except for genuine emergencies, citizens should then be obliged to serve when their turn comes. Courts should be willing to provide professional day care or day-care vouchers to enable homemakers to take their turns in this project in collective self-governance.

Enforcing the duty. And how should this obligation be enforced? Progressive fines are probably the best option. If you miss your week, you should pay two weeks' salary. (Flat fines, by contrast, would be functionally regressive and create incentives for highly paid citizens to dodge service.) If for some reason fines didn't work, perhaps we could consider a more radical recoupling of jury service with voting: If you want to opt out of the responsibilities of collective self-government, fine -- but you may not then exercise any of its rights. You may choose to be a citizen, with democratic rights and duties, or a subject, ruled by others. On this view, you are not entitled to vote outside juries if you are unwilling to serve and vote inside juries. If you are not willing to engage in regular focused deliberation with a random cross section of fellow voters, you should not be governing the polity, just as you may not vote in the Iowa presidential caucuses unless you attend and hear the arguments of your peers.

Serial jurors. Each jury, once constituted, should be able to try several cases in a row. If you can hear four quick cases in your week a year, so much the better. The grand jury reviews more than one indictment, the judge sits on more than one case, and the legislature may decide more than one issue in a session. The quality of deliberations is likely to improve with practice. The burden of jury service will be more evenly distributed -- one week for everyone -- and more trials can take place if we get rid of all the wasteful preliminaries like elaborate jury questioning and peremptories. Indeed, perhaps a jury should hear both civil and criminal cases in its week. One week a year will not turn citizens into government bureaucrats, though it will give them regular practice in the art of deliberation and self-government.

IV. Free jurors to do their jobs

Juries today are often criticized for reaching foolish decisions. But it's not all their fault. Nothing is more important to fulfilling the democratic aims of jury service -- including just outcomes -- than active participation by the jurors. Over the years, the court professionals have conspired to strip jurors of their ability to evaluate the facts. Running the courtroom to maximize their own convenience, they have often slighted the jury's legitimate needs to understand its role, the law, and the facts. The bicameral analogy is instructive: Would we expect the House of Representatives to perform its duties competently if its access to information and ideas were entirely determined by the Senate?

Taking notes. Many judges do not allow jurors to take notes. This is idiocy. Judges take notes, grand jurors take notes, legislators take notes -- what's going on here? This prohibition is based on the misguided beliefs that note-taking distracts jurors from the testimony and that deliberation would be unfairly dominated by jurors with extensive records. Neither fear outweighs the benefit of giving jurors the means to highlight key evidence and keep track of their impressions, particularly in long trials.

Plain-English instructions. Judges should give the panel, at the *outset* of a case, the basic elements of the charged offenses -- in English, not legalese -- so jurors can consider them and check them off in their notebooks as the trial unfolds.

Questioning of witnesses. Jurors should be allowed to question witnesses by passing queries to the judge. This allows jurors to pierce the selective presentation of facts offered by counsel, and it also keeps jurors more attentive to proceedings. Best of all, it would expose any lingering confusion about testimony in the minds of the jurors, giving prosecutors and defense counsel the chance to address these concerns. Consider, for example, the possibility that each of the jurors in the O. J. Simpson trial had a different pet theory of police conspiracy. If each juror could submit questions, prosecutors would have had an opportunity to understand, address, and debunk many of these mutually inconsistent and factually insupportable theories.

Discussion among jurors prior to deliberation. A ban on such discussion assumes that jurors are superhumanly capable of suspending all judgment for days or weeks and that conversation can only contaminate their faculties. Common sense suggests that it is human nature to form provisional judgments; at least by discussing a case prior to deliberation, jurors can test each other's impressions of the evidence and begin to hone their understandings of key points before these points are lost in the rush of the proceedings. Such a reform must, of course, be accompanied by reminders from the judge that jurors may not reach final conclusions about guilt or innocence until they have heard all the evidence.

Support staff. We should allow juries to hire support staff when it is necessary. In a world of increasing complexity and specialization of labor, few can do an important job well without such help. If legislators and judges can have staffs, why not grand juries? We trivialize jurors when we insist that they alone remain trapped in the 18th-century world of generalists. Perhaps every court should hire a permanent staff with undivided loyalty to the jury itself, and subject to "term limits" to prevent the staff from entrenching itself and using the jury to advance its own agenda.

V. Avoid hung juries

When hung juries occur, mistrials waste the time and resources of all concerned. They even harm defendant in cases where the jury was leaning toward acquittal, because a mistrial allows a vindictive prosecutor a second bite at the apple. All this brings us to another controversial -- and we admit

extremely tentative -- suggestion. Perhaps, just perhaps, we should move, even in criminal cases, away from unanimity toward majority or supermajority rule on juries. Founding history is relatively clear -- a criminal jury had to be unanimous. But this clear understanding was not explicitly inscribed into the Constitution, and the modern Supreme Court has upheld state rules permitting convictions on 10-2 votes. (England today also permits 10-2 verdicts in criminal cases.)

Three arguments support our suggestion that nonunanimous verdicts should be upheld. First, at the Founding unanimity may have drawn its strength from certain metaphysical and religious ideas about Truth that are no longer plausible: to wit, that all real truths would command universal assent. Second, most of our analogies tug toward majority rule -- used by legislatures, appellate benches, voters, and grand juries -- or supermajority rule: In impeachment proceedings, for example, a two-thirds vote in the Senate is required for conviction.

Last, and most important, all our other suggestions lead the modern American jury, system away from its historical reliance on unanimity. At the founding of our nation, unanimity *within* a jury was nestled in a cluster of other rules that now must fall. In early days, blacks, women, the poor, and the young were excluded from voting and jury service. Peremptory challenges probably made juries even more homogenous. But now that all adult citizens may serve on juries, and we have eliminated all the old undemocratic barriers, preserving unanimity might also be undemocratic, for it would create an extreme minority veto unknown to the Founders.

Even at the Founding, unanimous jury verdicts may have existed in the shadow of a custom of majority or supermajority rule. Jurors would discuss the case and vote on guilt; and even if the minority were unconvinced about the verdict, they would in the end vote with the majority' after they had been persuaded that the majority had listened to their arguments in good faith. This custom bears some resemblance to legislative "unanimous consent" rules. A single lawmaker may often slow down proceedings -- force her colleagues to deliberate more carefully on something that matters to her -- but in the end she may not prevent the majority from implementing its judgment. Perhaps the same should hold true for juries.

In allowing juries to depart from unanimity, we must try to preserve the ideal of jury deliberation and self-education. Jurors should communicate with each other seriously and with respect. Fans of unanimity argue that it promotes serious deliberation -- everyone's vote is necessary, so everyone is seriously listened to. But unanimity cannot guarantee *mutual* tolerance: What about an eccentric holdout who refuses to listen to, or even try to persuade, others?

Nonunanimous schemes can be devised to promote serious discussion. Jurors should be told that their job is to communicate with others who have different ideas, views, and backgrounds. Judges could also advise jurors that their early deliberations should focus on the evidence and not jurors' tentative leanings or votes, and that they should take no straw polls until each juror has had a chance to talk about the evidence on both sides.

We suggest a scheme in which a jury must be unanimous to convict on the first day of deliberations, but on day two, 11-1 would suffice; on day three, 10-2; and so on, until we hit our bedrock limit of, say, two-thirds (for conviction) or simple majority (for acquittal).

VI. Educate the People

Once we start thinking about the jury from the perspective of democracy rather than adjudication from the viewpoint of the citizenry rather than the litigants -- other possibilities open up. Recall Tocqueville's description of the jury as a "free school . . . always open" to educate the people in citizenship. If this is the big idea, why not take advantage of new video technology to advance it? Think of how C-SPAN broadcasts of legislative debates and hearings have contributed to the education of the public. The courts could likewise tape jury deliberations for use as high-school teaching materials about democracy in action (perhaps delaying the release of sensitive cases). Of course, we would have to ensure that these records would not be used to impeach jury verdicts.

Let the Changes Begin

The vision we have sketched is a demanding one. Yet many states are already taking up the challenge, enacting reforms by statute or by court policy. The court system of New York state is mulling over reforms to make the experience of serving more efficient and convenient for citizens, and many states already have a one-day, one-trial policy. New Jersey and New York last year joined the 25 or so states that eliminate exemptions based on profession. Arizona is the leader in endorsing proposals, such as note-taking and questioning witnesses, to increase jurors' participation in the process. Oregon and Louisiana allow nonunanimous verdicts in some cases, and Arizona allows a jury to ask the lawyers to explain evidence again if it has reached an impasse in deliberations.

But much more needs to be done. Until America's state and federal judicial systems live up to the ideals embedded in their founding documents and learn to trust the capacity of ordinary citizens to dispense justice, a cornerstone of democracy will continue to crumble.

GRAPHIC: Illustration, no caption, by Phil Foster

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