

WHY JURY DUTY ***MATTERS***

A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION

ANDREW GUTHRIE FERGUSON

WITH A FOREWORD BY CHARLES J. OGLETREE JR.



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FOREWORD

The American Jury System: Democracy at Work

A jury verdict changed my life. It was 1972. I was in college at Stanford University and the trial was about a half hour away in San Jose. I was a part of a large group of African American students at Stanford University who had been organizing against the criminal prosecution of Angela Davis. Davis—a political prisoner, black activist, and alleged criminal—had been charged with aiding the kidnapping and murder of a judge during the attempted escape of several prisoners from a criminal courtroom. The Angela Davis trial, mixing murder with racial politics, was one of the most controversial legal spectacles of the early 1970s. Our task was not simple. Ronald Reagan was the Governor of California and Richard Nixon was the President. Our solution would not be a political one, but rather putting faith in the twelve people who would decide Angela Davis's guilt or innocence. Personally convinced of her innocence,

I and other students had organized to protest what we saw as another unfair target of the criminal justice system, and what we assumed would be a politically motivated conviction.¹ How could the face of black radical politics get a fair trial before an all-white jury?

On the day of the verdict, we pensively awaited the jury's decision. In a California courtroom, seven men and five women defied a history of racial injustice and our expectations. The "not guilty" verdict provided a full and surprising vindication. It was a public trial. It was an impartial jury. Davis had the benefit of competent and committed defense lawyers. They were, in my view, the original "Dream Team," led by four progressives: Howard Moore, Leo Branton, Doris Walker, and a close childhood friend of Professor Davis, Margaret Burnham. Yet it was still a revelation that the system of justice worked. Through the Angela Davis trial, I became aware of the critical role that lawyers, judges, and juries can and should play in securing justice. From that moment on, I knew I wanted to pursue a career in the law. It was the first murder trial I ever witnessed, but it would not be the last.

In 1978 I entered the legal profession as a public defender. In short order, I regularly appeared before criminal juries in the District of Columbia Superior Court. Standing before twelve citizens and standing up for one accused defendant were among the most humbling and formative experiences of my professional life. As a trial lawyer, each client, each case, and each jury was different. I learned that jurors have a wide range of life experiences that help provide them with the insight to fairly assess the particular facts of each case. I represented the young and old, men and women, black, brown, and white, and so many others. I represented

those presumed guilty, the truly innocent, and, again, everyone in between. And it all happened in front of a jury.

During those early years, I saw juries struggle with the power being entrusted to them day after day. Just as you develop a compelling narrative in a closing argument, you develop a relationship with a jury. In murder cases or other serious criminal cases, the emotional bond between lawyer and jury becomes palpable. I envisioned my advocacy reaching across the wooden railing of the jury box and into the thoughts, and then the deliberations, of the jurors. I do not know if it worked, but I do know that the juries worked hard at their jobs. In the trenches of criminal court, it is hard not to be impressed with the jury.

Yet I was not unmindful of my role as a Harvard-educated lawyer, arguing before predominantly African American juries, for almost exclusively African American clients. My success for my clients was not typical of the history of racially segregated and racially biased juries in the United States. Unlike many jurisdictions, the District of Columbia had racially balanced jury panels and, in my view, the best public defender agency in the country. Hard work, intelligence, and more hard work could get positive results. However, as a busy trial lawyer I did not have the luxury to ponder the historical or systemic inequities of the jury system. All one could do is hope that the twelve citizens before me would do the right thing, listen to my argument, and take seriously the life and liberty of my client.

As a law professor at Harvard, I have spent a career training a generation of legal advocates in criminal law and procedure and its historical context. The history of racial inequality in juries is not only depressing, but

also often deadly. Innocent men and women, many of color, have been convicted unjustly by all-white juries. Equally troubling, history reminds us in cases like that of the individuals prosecuted for the murder of Emmett Till in 1955, factually guilty white men and women have been acquitted by similarly constituted juries because racial discrimination, not law, controlled the outcome. The line between due process and lynch mob was not always so clear.² Further, the United States has seen formal and informal barriers to racially inclusive jury selection processes. Legal, social, and bureaucratic roadblocks to diversity have been erected and dismantled, and then erected again. The evolution has been forward moving, but it is never complete. Even in this new century, charges of racial discrimination in jury selection and jury venires are being litigated. Large segments of communities—mostly those of color—continue to be excluded. We have made great progress, but there is much progress to be made.

This book identifies how you, as a juror, can continue that progress. Central to every trial—be it on behalf of a powerless prisoner or a powerful politician—is the jury. Like American democracy itself, the jury represents the best ideals of this country. Both democratic citizenship and jury service require participation, deliberation, a respect for equality, fairness, dissent, and most importantly, a fundamental faith in individual liberty. To witness jury service at its best is to see the United States at its best. It must be inclusive, open, and representative of the diversity of the country.

The constitutional values discussed in this book—equality, liberty, participation, fairness, dissent, accountability, the common good—were values that motivated me to become a lawyer. They sustain my teaching. They are the values of the civil rights

movement because they are the values of the United States. Charles Hamilton Houston, perhaps America's greatest civil rights genius of all time, was a DC native, graduate of Harvard Law School, and teacher at Howard Law School, who won his first Supreme Court victory for the NAACP by appealing a criminal conviction from a segregated, unequal jury.³ As a Supreme Court Justice, Thurgood Marshall wrote about the harm of excluding segments of society. In *Peters v. Kiff*, he stated, "Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well."⁴ To preserve the legitimacy of the legal system, all citizens had to participate. Having persons of color on the jury provided a measure of accountability for crimes against minorities, just as much as it ensured a sense of fairness for the defendant or integrity to the system of justice. Participation in jury service for all people was, thus, a central victory in the battle for civil rights. In a criminal case marking the beginning of the Supreme Court's refusal to tolerate discrimination against minority jurors, Thurgood Marshall supported the Supreme Court's decision to end the racial use of peremptory challenges against jurors. In many senses prescient, Justice Marshall advocated to end the use of peremptory challenges altogether.⁵

Today, perhaps as a measure of our progress, all races and all citizens groan equally loudly when the jury summons arrives in the mail. Today, the right to participate occasionally becomes overshadowed with the obligations and inconvenience attendant to the summons. Yet the reason why participation in jury service matters has not changed over the years. The constitutional strength of this country begins with its citizens.

A jury gives ordinary people extraordinary power. It is a constitutional power. And sadly, it is not always a recognized and appreciated power.

This book begins where I began as a lawyer, in the hallways of the Superior Court of the District of Columbia. Written by a public defender, now law professor, it reflects on the constitutional values that define our national identity and our legal system. It asks that as citizens we take our obligation as jurors seriously. It asks that we see the potential of the jury system and our responsibility to make the system work.

It was a similar hope that led me to follow the trial of Angela Davis in that California courtroom decades ago and to become a defense lawyer. We attended the trial with the hope that justice could be done by thoughtful, engaged citizens summoned to participate in our constitutional system. That day, like every day in courtrooms all across the United States, the jury system worked.

At the end of the Angela Davis trial, the presiding judge, Richard E. Arnason, excused the jury with the following words.⁶ Quoting from G. K. Chesterton's observation of the jury process almost a century ago, Judge Arnason read:

Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. It wishes for light upon that awful matter, it asks men who know no more law than I know, but who can feel the things I felt in the jury box. When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary

men standing round. The same thing was done, if I remember right, by the founder of Christianity.⁷

It is true today, as it was then. The jury's strength—legal, constitutional, moral—rests with ordinary Americans like you. It is the very essence of our democracy.

CHARLES J. OGLETREE JR., HARVARD UNIVERSITY

The Constitution is all that gives us a national character.

—Daniel Webster



City Hall (n.d., ca. 1916) Completed in 1849 (third phase)

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The Circuit Court of the District of Columbia met here from 1823 until that court was abolished in 1863; the Supreme Court of the District of Columbia met here from 1863 until 1936; the District Court of the United States for the District of Columbia met here from 1936 until 1948; the United States District Court for the District of Columbia met here from 1948 until 1952; the Court of Appeals for the District of Columbia met here from 1893 until 1910. Now in use by local government.

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INTRODUCTION

In a poorly lit hallway, on an uncomfortable bench, a young man sits wringing his hands. Around him hums the bustle of an urban courthouse. Uniformed police officers, slick-suited lawyers, and casually dressed witnesses go in and out of the courtroom doors. Were he paying close attention, the young man could witness the anguished aftermath of a murder sentencing or a messy divorce down the hall.

But at that moment, the man is concentrating on himself. Or perhaps, more specifically, the man is concentrating on twelve jurors behind a closed door—twelve jurors deliberating his fate. The man has just witnessed a trial—his own. He has seen due process of law firsthand. He faces accountability and the stark choice of incarceration or liberty. A choice that now belongs to the jurors in his case.

Inside that jury room, twelve citizens sit around a wooden table. They share little in common save for the

jury badges affixed to their chests. Despite different backgrounds, they face one another as equals, each person given no more power than anyone else. No matter their position in society, in that jury room they have but one vote. And vote they must. They have been asked to participate in a fundamentally American process—the deliberation of guilt or innocence in a criminal trial. They have just experienced a legal process that they hope was fair and just. Today is their day of decision.

As a public defender practicing in an urban courthouse, I have sat on that uncomfortable bench with my clients many times. And occasionally, during those nervous waits, I turn to the document that brought me there—the United States Constitution. In the copy I carry, the print is small and the words old-fashioned. Yet that single document influences everything that is happening in the courthouse. I watch as constitutional ideals such as civic participation, deliberation, fairness, equality, liberty, accountability, freedom of conscience, and the common good come alive through the practice of ordinary citizens. I witness jurors applying constitutional principles to reach a fair verdict. I wonder if they know their closeness to the Constitution.

* * *

This book began on that courthouse bench, observing constitutional values in action. It was written with the realization that most of us—my client, the litigants, the witnesses, and most especially the jurors—do not see the constitutional principles all around us. These good citizens are playing a role at the heart of our constitutional structure without realizing their connection to the larger principles of our nation.

This is not to say that citizens do not value the Constitution. To the contrary, the United States Constitution

remains our most sacred national document. Most citizens would lay down their lives to preserve it. Yet, despite an abstract faith in the Constitution, we remain disconnected from its practice. Most decent and well-meaning citizens haven't read the text of the Constitution since high school (if then). Many otherwise conscientious Americans remain constitutionally uninformed, knowing more about current television contests than current legal decisions.¹ And while we might read about the latest hot-button issue ending up before the Supreme Court, only a handful of us ever have a direct connection with a legal issue, much less a constitutional court case.

Yet the truth is that we are all constitutional actors. As a citizen—regardless of whether you want to accept it—you have been entrusted to act within the constitutional system.

This book seeks to reconnect you to those constitutional principles through one of the last unifying acts of citizenship—jury duty. Yes, jury duty—our recurring civic obligation to head down to the courthouse and participate in resolving a criminal or civil case involving members of the community. It is an important but usually much dreaded task. It presents a necessary but inconvenient moment of civic responsibility. A sad reality, really, as jury trials were notably at the forefront of our established constitutional rights.

The premise of this book is simple: imagine that instead of considering jury duty an inconvenience, you considered it a day of reflection—a day to reevaluate your role as a constitutional actor. After all, a jury summons provides a government-provided free pass from your normal family and work responsibilities. It is literally the law of the land that you cannot complete your everyday routine. Jury duty thus provides an opportunity (with plenty of waiting time) to reflect on our constitutional values. In addition, you have the chance to practice the