

Revisiting Suggested Jury Reforms

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It's a great honor to be with you at this event, especially one centered on the new book by my dear friend, one-time former student, and one-time coauthor, Renée Lettow Lerner. Thank you so much for inviting me. Renée and I wrote a couple of pieces back in 1995 about the Self-Incrimination Clause. That year, I also wrote a piece called *Reinventing Juries: Ten Suggested Reforms*. I'm not sure that I have any new ideas since, but I felt that I was right then, and I'm seeing now that some people are actually agreeing with the reforms proposed in the piece.

I'm going to share with you a few ideas from the piece. When I wrote *Reinventing Juries: Ten Suggested Reforms*, I didn't really think about a pathway forward on how to actually get these ideas implemented apart from the very naive thought that if I could convince the right five people, perhaps the Constitution could be interpreted or reinterpreted in a certain way. Today, I'm going to share with you a couple of possible pathways by which we might be able to move toward some of these reforms.

The piece begins with some overarching principles and analogies. First, jury service is like voting. If you vote, plus or minus, you should serve on a jury, and if you serve on a jury, you should vote. The plus or minus here exists because you can vote, for example, without speaking English. You can get your information in another language. It is harder, however, to serve on a jury if the trial is conducted entirely in English, your fellow jurors are speaking in English, and all the testimony is in English. There is no identity between voting and jury service, but there is a strong analogy that goes back to Tocqueville and the ancients.

Second, jurors are similar to legislators because they make policy interstitially. They are not just finding facts; they are rendering moral judgments on what is reasonable and unreasonable or who deserves punishment and who does not.

Finally, going way back to the Founding, we can think about the jury as the lower house of a bicameral judiciary. Just as we have the House and the Senate in the legislative branch, we have the jury and the judge in the court system. This is a useful analogy because, for example, if judges

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do not have to recuse themselves when they happen to read *The New York Times* or the *National Review*, why should we have different recusal standards and procedures for juries?

In considering the voting analogy, if we do not exclude people from voting because they have certain views on the world, why are we excluding people from jury service for having perspectives and opinions? When properly linked, these analogies actually have bite.

We can also think about the jury as an institution. Civil juries need not be unanimous, and grand juries need not be unanimous, so perhaps petit juries do not always have to be unanimous. Legislatures are not unanimous. Voters are not always unanimous. Even Supreme Court Justices are not always unanimous. These analogies provide larger context on the jury as an institution and a whole rather than the jury compartmentalized into grand juries, civil juries, and petit juries. The voting analogy, the legislative analogy, and the bicameral analogy inform big picture thoughts on how to think about the jury and how to perhaps reform it. Some reforms may require constitutional amendment, but some others may be accomplished by constitutional interpretation or reinterpretation, which I present today.

Returning to the legislative analogy, consider presidential impeachments. *Reinventing Juries: Ten Suggested Reforms* was written in 1995, or three presidential impeachments ago. What were the verdicts—defined as the speaking of the truth—of those impeachments? The verdicts in those three presidential impeachments were not “not guilty” because the impeachments actually resulted in acquittals, not verdicts. Regardless, none of the acquittals were unanimous. A two-thirds vote from the Senate suffices to convict in impeachments, but that is not unanimous either. Anything less than two-thirds counts as an acquittal, to which judgment attaches and there is no second impeachment. This is interesting because impeachments are quasi-criminal proceedings. We cap the punishment in certain ways, but impeachments handle morally fraught issues, such as treason, bribery, and other high crimes and misdemeanors. They do not have to technically be statutory crimes, but the jury in that context can convict without unanimity. This is how these big picture analogies to the legislative process, to voting, to a bicameral process inform jury reform.

The most critical idea here is that the jury is ultimately about republican self-government, democracy, and democratic republics. Tocqueville described jury service as a free public school where jurors learn how to be citizens and where jurors learn about their rights and responsibilities. Jury service is less about the parties and more about the jurors.

Jury service is also how you connect with other people, which we are not doing enough of today. We are a divided society that does not communicate anymore. People live in different neighborhoods, go to different schools, and worship in different places. And the paradigm of

interaction across all these divides is through a digital barrier. When I go through Wendy's, for example, I hear a voice through an intercom that says, "Will you have fries with that, sir?" This is the paradigmatic form of interaction, whereas in my romantic conception of a jury, people from different neighborhoods actually begin to talk to each other.

Imagine I am a suburbanite and as a juror, I say to my fellow jurors, "The cops said this, so obviously that was true." Another juror may start laughing and say, "What are you talking about? Cops always lie." I might respond with, "Oh really? In my experience, they are very upright people." The other juror may then respond and say, "What world are you living in? In my neighborhood . . ." Now we are beginning to talk. Whether this is an unreasonable search and seizure *Bivens* suit or a criminal case in which the question presented is whether the cop is "testifying" or not, this is what the jury should be about.

Here are some reforms that may lead to my vision of the jury system. First, we should not remove people from juries. I, like many law school professors, always get removed because I know lawyers. Judges know lawyers too, but they do not recuse themselves. We should not remove people for these types of qualifications because, ultimately, they are only one of twelve individuals, whereas the judge sits alone.

Second, we should pay jurors like we pay legislators and judges. If we do not pay jurors, only the idle rich will be able to serve and everyone else will try to avoid service. This is where the analogies are relevant. One of the most radical features of the United States Constitution is that we pay our lawmakers, which England did not do until 1911. Likewise, we should pay jurors for their service and everyone should serve. The court can request scheduling and logistical information from the jury panel in advance.

Third, we have to rethink impartiality. None of us are impartial. We are all partial. We have a sex, a gender, an age, a political leaning, and an identity. We are not impartial jurors because we are not impartial people. I aim for an impartial *jury*, not impartial jurors, which results from the representativeness in letting everyone serve. We should aim for a statistical sense of impartiality, like how pollsters aim for an impartial sample of likely voters. If you are a family member of one of the litigants, you can sit in the next trial. We should rarely have peremptories and almost no challenges for cause, because we would pay people and make it easy for people to serve.

Fourth, we should respect jurors' ability to build knowledge around the case. We should let jurors ask questions and take notes. The jury system infantilizes jurors by prohibiting notetaking and by withholding information at the outset on what the trial is about. Only at the end do we tell jurors what they were supposed to be paying attention to. These reforms, however, will put a lot of pressure on unanimity, which leads to the fifth point.

Fifth, the breakdown for convicts should be ten to two, perhaps nine to three, and anything less than that should count as an acquittal. Then we would not have to put the defendant through the ringer again for the sake of unanimity. Majority rule reminds us that unanimity is not in the nature of the universe. Today, if the jury hangs eleven to one in the defendant's favor, the court can retry the defendant. If the jury comes back with all twelve the second time, the court will declare unanimity, but it is unanimous only because the court did not count the first eleven votes, which would actually make it thirteen to eleven. This is not how we do presidential impeachments. One-third plus one counts as an acquittal. We have asymmetric rules.

Now, how do we actually distribute and implement these approaches? I was imagining that the Supreme Court Justices would read *Reinventing Juries: Ten Suggested Reforms* and publish it in the *U.S. Reports*. Well, that did not happen. I also imagined that we might change the rules of peremptory challenges, but that did not quite happen either. Arizona is moving in this direction, but if we get rid of peremptories, there will be pressure on unanimity, which may discourage reform. I would prefer bringing everyone to the table. Let's talk to each other for a few days in conference format. On the first day, we would discuss unanimity and eventually discuss the ten-to-two proposal.

To actually implement the proposed reforms, we need laboratory states like Arizona to devise a package of reform. We need states because the case-or-controversy requirement makes it difficult for Justices to implement the entire package of reform. The package would include fewer peremptories, fewer challenges for cause, and more people around the room. The package would eliminate the unanimity requirement and instead require ten to two for convicts; anything less, such as nine to three or eight to four, would result in an acquittal. We could start with misdemeanor cases and present defense with the choice to opt into this system in a state like Arizona to provide proof of concept. The Supreme Court would then have to revisit *Ramos v. Louisiana*, which requires a unanimous jury verdict. We may bring the defense bar into the conversation as well. I am unsure what defense-oriented individuals may think about this package of reform, but they may view the package favorably because, recently, sympathetic jurors are being removed by prosecutors, and ten to two or eleven to one in the defendant's favor is only a hung jury by which a defendant may be retried. This kind of selective implementation system would also provide data on how many defendants opt into the system.

Twenty years after writing *Reinventing Juries: Ten Suggested Reforms*, this is my vision on how we might implement the proposed reforms. Thank you.