

1986

# Images of the Woman Juror

Carol Weisbrod

*University of Connecticut School of Law*

Follow this and additional works at: [https://opencommons.uconn.edu/law\\_papers](https://opencommons.uconn.edu/law_papers)



Part of the [Law and Gender Commons](#), [Legal History Commons](#), and the [Litigation Commons](#)

---

## Recommended Citation

Weisbrod, Carol, "Images of the Woman Juror" (1986). *Faculty Articles and Papers*. 361.  
[https://opencommons.uconn.edu/law\\_papers/361](https://opencommons.uconn.edu/law_papers/361)

# HEINONLINE

Citation: 9 Harv. Women's L.J. 59 1986



Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Mon Aug 15 18:32:01 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0270-1456](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0270-1456)

# IMAGES OF THE WOMAN JUROR

CAROL WEISBROD\*

## INTRODUCTION

Although jury duty has long been viewed as an important aspect of citizenship,<sup>1</sup> for most of American history,<sup>2</sup> jury service

---

\* Professor of Law, University of Connecticut School of Law; J.D., Columbia University, 1961.

One version of this paper was given at the Law and Society Association meeting held in Denver in 1983, and a different version under the auspices of the Joint Committee for Socio-Legal Studies at the University of Exeter in November, 1983. I benefited from the discussions at both sessions.

I am indebted to Professor Saul Touster of Brandeis University for bringing to my attention the Susan Glaspell story, *A Jury of Her Peers*. I am also indebted to Richard S. Kay, Isabel Marcus, Martha Minow, Pamela Sheingorn, Aviam Soifer and Larry Yackle for their comments on drafts. Finally, I would like to thank the editors of the HARVARD WOMEN'S LAW JOURNAL for their editorial suggestions and for their careful work with sources.

A note on sources: It seems possible that almost any 19th or early- to mid-20th century American treatment of women's rights, whether legal, journalistic, or fictional, might have included at least a passing reference to the jury question. This Article is based on printed materials from a variety of sources. It draws on a discussion over roughly one hundred years, from the start of the women's movement to the time of *Ballard v. United States*, 329 U.S. 187 (1946). Although the discussions of the jury issue used here are often fragmentary—perhaps because they are fragmentary—they are suggestive and, I believe, representative. While the time frame is large, it appears to me that in important ways the debate was similar over many years. I have not classified materials as "legal" or "non-legal," or based on "actual" vs. "hypothetical" jury behavior. I have not used categories based on civil or criminal trials, nor have I systematically stressed arguable changes in emphasis in the historical discussion over time. I have attempted here only a preliminary treatment of what seemed to be the central and continuing issues.

Although the materials used are historical, the presentation is largely ahistoric, juxtaposing quotations from different times and places to demonstrate thematic connections. There is no attempt here to tell the story of the struggle for women's jury service in any particular place, or to trace the development of doctrine on the subject.

<sup>1</sup> Plato wrote of participation in trials that "all should have a share, for he who has no share in the administration of justice is apt to imagine that he has no share in the state at all." PLATO, *LAWS*, quoted in J. DAWSON, *A HISTORY OF LAY JUDGES* 10 (1960). DeTocqueville described the jury as a political institution as well as an educational one. A. DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 265-66 (New York, 1838). A recent commentator noted that "[j]ury service is the only remaining governmental function in which the citizen takes a *direct* part." Clark, *The American Jury: A Justification*, in *SELECTED READINGS THE JURY* 7 (G. Winters ed. 1971). See generally H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 3-11 (1966) (discussing the "remarkable political institution" of the Anglo-American jury, *id.* at 3).

Jury duty has been described as "one of the most basic demands voiced by women." E. FLEXNER, *CENTURY OF STRUGGLE* 164 (1975). In 1792, Theodor von Hippel suggested that the administration of justice would be "rendered more perfect" by the presence of women. T. VON HIPPEL, *ON IMPROVING THE STATUS OF WOMEN* 159 (Sellner trans. 1979) (1st ed. 1792).

<sup>2</sup> Women were also excluded from English juries, on the basis of the doctrine of *propter defectum sexus*, a "defect of sex." 3 W. BLACKSTONE, *COMMENTARIES* \*362. A "jury of

was restricted to men.<sup>3</sup> The Supreme Court indicated in 1879 that states could exclude women from juries,<sup>4</sup> and many continued to do so, even long after the adoption of the women's suffrage amendment.<sup>5</sup> At the time of the Second World War, twenty-one

---

matrons" was sometimes used in cases relating to possible pregnancy as affecting inheritance, *see id.* at \*367, or affecting punishment in the context of criminal law, *see* 4 W. BLACKSTONE, COMMENTARIES \*388. On the early use of the jury of matrons in England, *see* 16 THE LEGAL OBSERVER 306 (1838). *See also* Note, *A Jury of Matrons*, 48 AM. L. REV. 280, 281 (1914) (jury of matrons, impanelled to investigate defendant's alleged pregnancy, "not a very common spectacle in London"). An English statute of 1919 authorized a judge to appoint all male or all female juries when the case required it. The Sex Disqualification (Removal) Act, 1919, 9 & 10 Geo. 5, ch. 71, § 1(b). The legislative debate in the Commons revealed that one concern behind this act was that women, particularly young women, should not be exposed to the "disgusting evidence" typical of cases involving "unnatural offenses." 20 PARL. DEB. H.C. (1st ser.) 383 (Oct. 27, 1919). *See also* R. v. Sutton, 53 Crim. App. 128 (1968) (judge's appointment of all female jury for case involving manslaughter of a baby). The 1919 statute was amended so that single sex juries can no longer be appointed. The Courts Act, 1971 ch. 23, § 35. Until 1968, jury service in England remained a public duty which required holding property interests, excluding most women. *See* W. CORNISH, THE JURY 26-28 (1968).

<sup>3</sup> In the United States, in the 17th and 18th centuries women "juries" or committees were used for physical examinations in witch trials. *See* RECORD OF GRACE SHERWOOD'S TRIAL FOR WITCHCRAFT (Virginia 1705), 74 (presented to the Virginia Historical and Philosophical Society, 1833) (on file at HARV. WOMEN'S L.J.). *See also* P. BOYER AND S. NISSENBAUM, SALEM POSSESSED: THE SOCIAL ORIGINS OF WITCHCRAFT 13 (1974) (committee of women used to look for witch marks). *See generally* J. DEMOS, ENTERTAINING SATAN: WITCHCRAFT AND THE CULTURE OF EARLY NEW ENGLAND 180 (1982) (committees of women in witchcraft trials).

The statutory history of women on the jury in the United States is conventionally dated from 1898 when Utah authorized the participation of women on juries. *See* Taylor v. Louisiana, 419 U.S. 522, 533 n.13 (1975). In fact, under Wyoming's 1869 Act to Grant to the Women of Wyoming Territory the Right of Suffrage, and to hold Office, women served on Wyoming juries in 1870. *See* Hebard, *The First Woman Jury*, 7 J. OF AM. HIST. 1293, 1302-03 (1913); 3 HISTORY OF WOMAN SUFFRAGE 1876-1885, at 731-38 (E.C. Stanton, S.B. Anthony & M.J. Gage eds. 1970) (unabr. repub. of 1886 Rochester ed.) [hereinafter cited as WOMAN SUFFRAGE 1876-1885]. Women served only infrequently on Wyoming juries, but their presence was sometimes praised by those who thought that women were harsh enforcers of criminal laws. *See id.* at 731; Train, *Twelve Good Women and True*, THE SATURDAY EVENING POST, Jan. 22, 1921, at 10. *See also* Hebard, *supra* at 1316 (describing woman juror who voted for first degree murder while knitting and saying: "Whoso sheddeth man's blood by man shall his blood be shed."). On the history of woman suffrage and women jurors in the Washington Territory, *see* S. MYRES, WESTERN WOMEN AND THE FRONTIER EXPERIENCE 1800-1915, at 225 (1982).

<sup>4</sup> *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1879) (14th amendment does not prohibit state from confining selection "to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications").

<sup>5</sup> The 19th amendment's grant of women's suffrage in 1920 did not result in automatic jury service for women, but many states were forced to consider the issue at that time because their jury venires were comprised of all registered voters. *See, e.g.,* Note, *Jurors—Effect of the 19th Amendment on Qualifications of Jurors*, 21 ILL. L. REV. 292 (1926) (discussing cases interpreting whether 19th amendment necessarily required women's jury service); *Tried and Approved—The Woman Juror*, 70 LITERARY DIGEST 46 (Sept. 17, 1921) (stating that women automatically became eligible for jury service in Ohio

states prohibited women jurors.<sup>6</sup> In 1962, three states still excluded women from juries.<sup>7</sup> It was not until 1975 that the Supreme Court held that a systematic exclusion of women from juries violated a defendant's sixth amendment rights.<sup>8</sup>

It is easy now to attribute this exclusion of women from juries to sexism or discrimination, but perhaps there is more that can be said. This Article examines images of the American woman juror in legal, literary, and journalistic discussions in the period before service of women on juries was a widely-accepted fact of public life. Investigation of the historical exclusion of women from juries reveals a complicated debate about the potential effects of gender difference on women's contributions to public life—a debate that current feminists have revived. This investigation finds that both the proponents and opponents of women's jury service shared assumptions not only about the existence of fundamental differences between women and men, but also about the nature of those differences. The two sides diverged, however, in the implications they drew from those shared assumptions. To attribute women's exclusion from juries solely to sexism is to miss the complexity of a debate in which opposing sides often held similar views about gender differences.

---

when they won the vote). See also Hildebrand, *A Historical Note on Jury Service for Women*, 40 THE HUMANIST 38 (July-Aug. 1980) (discussing *Taylor* and history of women's right to serve on juries).

In 1921, women's jury service in Oregon bore some resemblance to the expert jury of matrons. Under a state statute, "in all cases in which a minor under the age of eighteen is involved, either as defendant or as complaining witness, at least one half the jury shall be women." 1921 Or. Laws ch. 273, sec. 10 cited in *State v. Chase*, 106 Or. 263, 265, 211 Pac. 920, 922 (1923) (upholding limit of six men on jury in rape trial where complaining witness was nine year old child). The court stated that "when the quota of six men had been taken and accepted, the remaining men were disqualified . . . . It was not an exemption, but a disqualification, one such as neither the state nor the defendant could waive, because it existed in favor of the infant witness." *Id.* at 267. See also Miller, *The Woman Juror*, 2 OR. L. REV. 30 (1922) (discussing the Oregon law).

<sup>6</sup> See Note, *Courts—Women Jurors—Automatic Exemptions*, 36 TUL. L. REV. 858, 858 n.6 (1962). In 1946, the Supreme Court on statutory grounds held that the exclusion of women from jury panels could be highly prejudicial to defendants. *Ballard v. United States*, 329 U.S. 187 (1946). See *infra* text accompanying notes 75–80. Nonetheless, women still did not participate fully in jury service. In 1948, 15 states still denied women the right to serve on juries. See Anderson, *Jury Service for Women*, 11 GA. B.J. 196, 196 (1948). In 1961, the Court upheld a Florida statute which, although allowing women to volunteer, gave women an automatic exemption. *Hoyt v. Florida*, 368 U.S. 57 (1961).

<sup>7</sup> Note, *supra* note 6, at 858 (Alabama, Mississippi and South Carolina excluded women from juries at that time).

<sup>8</sup> *Taylor v. Louisiana*, 419 U.S. 22 (1975). See D. KIRP, M. YUDOF & M. FRANKS, GENDER JUSTICE 104 (1986) ("opinion in [*Taylor*] turns on the very gender differences whose relevance the Court has been at pains to deny in other contexts").

A central assumption made by both sides in these debates was that woman's special sphere was the home. As a result, one key issue was the potential practical effects of a woman's jury service on her ability to fulfill her role in the home. Another important issue related to the impact of particular female traits: did possession of such attributes make women either unqualified or especially qualified to be jurors? Arguments on both sides of this issue were often based on the shared beliefs that women's perceptions of the world were different from men's, and that women had a different, sometimes higher, moral sense.

These historical discussions anticipated themes that have been resurrected in contemporary feminist discussions concerning sameness and difference and the public relevance of gender. The present feminist discussion centers on Carol Gilligan's argument that women and men perceive and evaluate moral issues differently.<sup>9</sup> Gilligan's *In a Different Voice* describes this gender difference in moral perceptions: men are associated with an ethic of rights, and women with an ethic of caring.<sup>10</sup> Gilligan's work suggests both that women are significantly different from men and that women's mode of analyzing moral issues in terms of interpersonal caring is as good as, if not better than, men's.<sup>11</sup>

Some feminists applaud this explicit discussion of women's unique and valuable traits.<sup>12</sup> "Difference feminism" is opposed,

---

<sup>9</sup> See C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 64-105 (1982). Gilligan states that "[a]t a time when efforts are being made to eradicate discrimination between the sexes in the search for social equality and justice, the differences between the sexes are being rediscovered in the social sciences." *Id.* at 6. She makes no "claims . . . about the origins of the differences described or their distribution in a wider population across cultures, or through time." *Id.* at 2.

<sup>10</sup> *Id.* at 165-66.

<sup>11</sup> *Id.* at 151-74.

<sup>12</sup> See, e.g., Comments by Carrie J. Menkel-Meadow, Mitchell Lecture Series, State University of New York at Buffalo School of Law (Nov. 20, 1984), reprinted in *The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFFALO L. REV. 11, 49-57, 54 (1985). Cf. Herrmann, *The Virile System*, in *NEW FRENCH FEMINISMS: AN ANTHOLOGY* 87-89 (E. Marks and I. de Courtivron eds. 1980) (if woman "adopts masculine values . . . like coldness and imperialism, she will succeed only by destroying herself . . . What she gains in the social arena she will lose on a personal level. It means nothing to allow women to participate in society if it robs them of everything that makes them different." *Id.* at 89); Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 175-76 n.2 (1982) ("[W]omen's life experiences still differ sufficiently from men's that a diverse group of women would bring a somewhat different set of perceptions and insights to certain issues than would a similarly diverse group of men. This observation

however, by a strong feminist tradition that urges gender-neutral approaches emphasizing individual, rather than group, characteristics.<sup>13</sup> This position treats women and men as individuals, and discourages acting on the basis of generalizations and stereotypes.

The choice between the two approaches raises a question for the future of men and women which Wendy Williams recently put this way: "Do we want equality of the sexes—or do we want justice for two kinds of human beings who are fundamentally different?"<sup>14</sup> In the nineteenth and early twentieth centuries, the question was whether women should participate in public life. Underlying both questions are issues of gender difference and its public significance. The debate over the service of women on juries provides important background to the current debate on difference feminism. The historical images of the woman juror offer an example of the elaboration of the nature and quality of women's "different voice."

## I. THE JURY DEBATE: IMPACT OF WOMEN'S JURY SERVICE ON THE HOME

The early debate over women's jury service was part of a more general discussion of women's participation in the public sphere which focused on the issue of women's suffrage. Suffragists and

---

about the importance of representation among decisionmakers is no less relevant to the judiciary or to juries than to legislatures.").

In addition, feminists who opposed the idea of a draft of women, the issue in *Rostker v. Goldberg*, 453 U.S. 57 (1981), contrasted "the female ethic of nurturance and life-giving with a male ethic of aggression and militarism and asserted that if we argued to the Court that single-sex registration is unconstitutional we would be betraying ourselves and supporting what we find least acceptable about the male world." Williams, *supra* at 189.

<sup>13</sup> This tradition, demonstrated in the Equal Rights Amendment debates, emphasizes characteristics and abilities of individuals rather than differentiation based on sex. See Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 874 (1971) (arguing for passage of the E.R.A. on ground that so "long as woman's place is defined as separate, a male-dominated society will define her place as inferior").

<sup>14</sup> Williams, *supra* note 12, at 200. Another feminist posed the question this way: "Do women, who rightfully claim the instruments of public power, have cultures, traditions, and inquiries which we should insist upon bringing to the public world?" Ruddick, *Maternal Thinking*, 6 FEMINIST STUD. 342, 345 (1980).

their opponents often assumed the existence of a natural,<sup>15</sup> fundamental difference between women and men; women were thought to embody personal, emotional, and nurturing values, while the male world was viewed as neutral, rational, logical, and objective. The suffrage controversy, as well as the jury debate, concerned, in part, whether specific qualities attributed to women—qualities that each side wanted to protect—would be harmed or eliminated if women as a group, and in large numbers, participated in the public arena.

Opponents of women's suffrage insisted that political responsibilities were an intrusion on home life that would injure the family.<sup>16</sup> The antisuffragists contended that it was only while women were centrally associated with the home that the special qualities of this separate sphere could exist.<sup>17</sup> The "antis" feared that to the extent that women moved from the home, they would become both estranged from the female values they needed to preserve the home and dominated by the male values of the world of politics, industry and the marketplace. Thus, the antisuffragists argued that women must be exempted from the burdens of the franchise in order to devote themselves to their proper vocations: rearing children, maintaining the home, and perhaps, doing unpaid work outside the home in service of charity or social re-

---

<sup>15</sup> Despite these assumptions about women's natural state, it was also argued that women's social conditioning made it pointless to speculate about what women might "naturally" be. See J.S. MILL, *THE SUBJECTION OF WOMEN* (S. Coit ed. 1909).

<sup>16</sup> One historian states that "[c]lose to the heart of all antisuffragist orators, particularly congressmen, was a sentimental vision of Home and Mother, equal in sanctity to God and the Constitution." A. KRADITOR, *THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT 1890-1920*, at 15 (2d ed. 1981). This sentimental vision was tied to a view of society which rested on marriage and family. The argument based on the home was not merely a matter of the home as a refuge for the wage earner, or a source of his domestic comfort. The link between women, marriage, and the home were basic to an idea of marriage as the foundation of the social order. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

Despite the focus on marriage and the home, not all women were wives, of course. English law drew a distinction between married and unmarried women. The unmarried woman had "a legal capacity *a little less* than that of a male (she was excluded from public functions) but in the exercise of private rights she was almost completely competent." W. WADLINGTON, *CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* 195 (1984) (Successor ed. to 3d ed. 1978) (emphasis added).

Furthermore, the antisuffrage movement was not solely devoted to keeping women isolated in their homes: some who opposed suffrage supported many forms of non-domestic activity. For a detailed treatment, see L. BROCKETT, *WOMAN: HER RIGHTS, WRONGS, PRIVILEGES, AND RESPONSIBILITIES* (2d ed. 1970) (1st ed. 1869).

<sup>17</sup> See A. KRADITOR, *supra* note 16, at 96-122.



form.<sup>18</sup> Although some suffragists, such as Elizabeth Cady Stanton, thought in terms of suffrage "revolutionizing" the home,<sup>19</sup> more typically, proponents of women's suffrage maintained that women could assume these new responsibilities without abandoning their traditional role in the home.<sup>20</sup>

As in the controversy over suffrage, both proponents and opponents of women's jury service assumed women's nature was fundamentally different from men's,<sup>21</sup> and that women's special sphere of influence was the home.<sup>22</sup> The antisuffragists' concern that women's political participation would harm the home was even more applicable to the jury debate, because jury service could require women to be away from home for long periods of

<sup>18</sup> See *id.* at 27.

<sup>19</sup> Elizabeth Cady Stanton, Address at the Decade Meeting on Marriage and Divorce (Oct. 20, 1870), reprinted in P. DAVIS, A HISTORY OF THE NATIONAL WOMAN'S RIGHTS MOVEMENT 61 (2d ed. 1971). See also Weisbrod & Sheingorn, Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women, 10 CONN. L. REV. 828, 830 (1978) (discussing suffrage movement as threat to women's traditional domestic role).

See also M. WALZER, SPHERES OF JUSTICE 241 (1983). Walzer notes that the antisuffragists' concern that large-scale political participation by women would introduce new forms of conflict into kinship groups and suggests that the antis' argument "may yet prove nearer to the truth." *Id.* at 244. Cf. F. TOENNIES, ON SOCIOLOGY: PURE, APPLIED, AND EMPIRICAL (1971) (linking women to Gemeinschaft and stating that the "emergence of women as individuals surely is a giant final step in the disintegration of age-old communal ties").

<sup>20</sup> Caroline Dall argued that in addition to public roles, women should continue in their traditional role as guardian of the well-laid table: "There is no excuse for neglecting any home duty for the most desirable foreign pursuit." C. DALL, THE COLLEGE, THE MARKET, AND THE COURT; OR, WOMAN'S RELATION TO EDUCATION, LABOR, AND LAW 128-29 (Boston 1867).

<sup>21</sup> See, e.g., J. HICKS, WOMEN JURORS 15 (March 1928). This pamphlet, prepared for the National League of Women Voters, argued that "upon many matters of fact the points of view of men and of women may be different." *Id.* at 15. See also M. RYAN, CRADLE OF THE MIDDLE CLASS 190 (1981) ("Women's power, so the theory went, never assumed a public and official dimension but worked through intimate social relations and spoke in the meekest tones."). See generally A. KRADITOR, *supra* note 16, at 96-122 (discussing the suffragists' and antis' shared assumptions about women's moral superiority and role in the home); Bromley, *Ladies of the Jury*, 50 LADIES HOME J., Feb. 1933, at 108 (it is "now generally conceded that women have certain qualities which men lack, just as men have certain qualities which women lack").

<sup>22</sup> See D. LIPSON, FREEMASONRY IN FEDERALIST CONNECTICUT 330-31 (1977). See also RYAN, *supra* note 21, at 190 (discussing women's influence in the private sphere). On women's nature and the separate sphere, see Welter, *Anti-Intellectualism and the American Woman: 1800-1860*, 48 MID-AMERICA 258 (Oct. 1966). See also Llewellyn, *Behind the Law of Divorce: I*, 32 COL. L. REV. 1281, 1293 n.30 (1932) (suggesting that the home provides justice tempered with mercy). The "separate spheres" arguments against jury service did not quickly disappear. See *Ladies of the Jury*, 2 POLAMERICAN L.J. 21 (1939).

time. An 1870 rhyme implied that sitting on juries might force women to abandon their children:

Baby, baby, don't get in a fury;  
Your mamma's gone to sit on the jury.<sup>23</sup>

Opponents of women jurors also seemed to fear that the delicacies of jury service would interfere with women's ability to maintain the purity required by their role in the home.<sup>24</sup> They expressed concern about exposing women to indelicate language: "Criminal court trials often involve testimony of the foulest kind," a court noted in 1949, "and they sometimes require consideration of indecent conduct, the use of filthy and loathsome words, references to intimate sex relationships and other elements that would prove humiliating, embarrassing and degrading to a lady."<sup>25</sup>

---

<sup>23</sup> Hebard, *supra* note 3, at 1313. The argument concerning the amount of time involved in political responsibilities was made by antisuffragists as well. A commentator in 1914 criticized antisuffragists "who insist that if a woman exercises the right of suffrage she must neglect her duties in the home"; the antis, he claimed, illogically overlooked the fact that "the voter does not vote all the time." S. CROTHERS, MEDITATIONS ON VOTES FOR WOMEN TOGETHER WITH ANIMADVERSIONS ON THE CLOSELY RELATED SUBJECT OF VOTES FOR MEN 52 (1914).

<sup>24</sup> Concern was expressed about what the women might learn:

Juries deal with all manner of crimes, from innocuous offences to the vilest and most revolting aberrations of the human beast. Their educations, their habits of mind, their points of view have not prepared women to deal with such cases. A few advanced women, a few sisters of the intelligentsia, are abreast of the last word in criminal depravities, but the great majority of women hardly know that such things exist.

*Asking for Trouble*, 114 THE INDEPENDENT 368 (Apr. 4, 1925). See also R. SUTLIFFE, IMPRESSIONS OF AN AVERAGE JURYMEN 81 (1922) (describing women as "too fine" for jury work except in women's cases with all women juries). Cf. *In re Motion to admit Miss Lavinia Goodell to the Bar of this Court*, 39 Wisc. 232 (1875). Stating that nature had tempered woman "little for the judicial conflicts of the court room," the Wisconsin Supreme Court refused Goodell's application to practice law. *Id.* at 245. In the course of the opinion denying bar admission to women, the court revealingly commented not only on women, but also the nature of the legal profession, which it said, "has essentially and habitually to do with all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene, in human life." *Id.*

<sup>25</sup> *Bailey v. Arkansas*, 215 Ark. 53, 61, 219 S.W.2d 424, 428 (Ark. 1949) (upholding discretionary exclusion of women from rape trial jury). See also Sheridan, *Women and Jury Service*, 11 A.B.A. J. 792, 794 (Dec. 1925) (statement of Harold B. Beitler, Philadelphia Bar Association secretary and trial lawyer, that he had never challenged a potential juror "because she was a woman, except in cases where the facts to be proven were the kind that women ought not to be called upon to discuss in the jury room").

In England and the United States, the indecency problem was sometimes raised in the context of divorce cases. See *Should Women Serve as Jurors in Divorce Cases?*, 70

Opponents also feared that a woman's purity might be compromised by having to stay overnight with male jurors during long trials.<sup>26</sup> They argued that overnight arrangements in a hotel with male jurors would assault a woman's sensibilities, and thus perhaps indirectly damage those for whom she cared.

Proponents of jury service responded that when these long cases occurred, the solution was separate quarters in a hotel where the jurors would stay "in care of sheriffs of their own sex."<sup>27</sup> Moreover, the fear that jury service would force women to abandon their families was unfounded: "Many cases do not last longer than the average bridge party or church festival."<sup>28</sup> Hence, like the majority of suffragists, proponents of women's jury service responded to their opponents' arguments without challenging the fundamental assumption that women's sphere of influence was the home. In fact, some proponents argued that women were needed on juries in order to protect and support their domain of the home. One late nineteenth century judge argued that while men represented the worlds of work and the battlefield, women were "peculiarly alert" to vices that "assail the home" and thus, only women could competently represent the home and family.<sup>29</sup> In 1943, this theme of women jurors protecting the home appeared in the statement that "[m]ost women see that by jury duty and the proper enforcement of law they protect their children as much as [by] watching over them in the home."<sup>30</sup>

---

CURRENT OPINION 511 (Apr. 1921). George Bernard Shaw objected to the assumption underlying the English discussion, that his male "sensibilities in this matter [were] less delicate than those of women . . . ." *Id.* at 512.

<sup>26</sup> See, e.g., WOMAN SUFFRAGE 1876-1885, *supra* note 3, at 736-37 (1870 letter from Wyoming Judge J.H. Howe to the Chicago Legal News discussing overnight accommodations for a mixed jury).

<sup>27</sup> LEGISLATIVE LEAFLET ISSUED BY THE LEGISLATIVE COUNCIL: BILL MAKING WOMEN LIABLE FOR JURY SERVICE, reprinted in *The Proposal to Make Women Liable for Jury Service*, 8 MASS. L.Q. 36, 40 (Feb. 1923) [hereinafter cited as BILL MAKING WOMEN LIABLE]. The accommodations issues were still referred to in 1943, although one woman noted that "the sentimental oratory wasted" on this issue was "ludicrous." Lutz, *Uncle Sam Needs Women Jurors*, Christian Science Monitor, June 12, 1943 (Magazine), at 6, 13.

<sup>28</sup> BILL MAKING WOMEN LIABLE, *supra* note 27, at 40.

<sup>29</sup> Judge Greene and Women Jurors, Chi. Legal News, Oct. 4, 1884, at 30, col. 4.

<sup>30</sup> Lutz, *supra* note 27, at 13.

## II. WOMEN ON THE JURY: WOMEN'S PERCEPTIONS AND ABILITY TO RENDER JUST VERDICTS

In addition to arguments about the potential effects of women's jury service on the home, there was also debate over what effects women's different nature would have on their service as jurors. Women's role in the home potentially affected their ability to do justice in two ways. First, what was perceived as their narrow experience in the confines of the home raised questions of whether women were sufficiently familiar with the public world to be qualified for jury service. Second, the fundamental differences between women and men that were assumed to make the home women's appropriate sphere could affect both their perceptions about the world and the moral standards they used to evaluate what they saw.

### A. *Qualifications*

Women's domestic role left them vulnerable to attack on the ground that their inexperience in business and the ways of the world made them unqualified to serve on juries. Since many civil cases involved commercial issues, women's limited knowledge of the public world could be seen as a distinct disadvantage.<sup>31</sup> Thus, it was said that their role in the home left most women "as ignorant of the conditions and influences that surround the life of a man as a wooden Indian."<sup>32</sup>

Supporters of women's jury service often responded with arguments based on the same assumptions as those used by their

---

<sup>31</sup> Nonetheless, H.H. Sawyer suggested that women, having "fewer business and political prejudices than men," were "less prejudiced against large corporations, such as insurance companies, [and] railroads . . ." Sawyer, *Women as Jurors*, 15 AM. MERCURY 139, 142 (Oct. 1928). Despite those perceived differences, Sawyer believed that there was "no essential difference between the sexes as to their merits as jurors." *Id.* at 144. See also A. TRAIN, FROM THE DISTRICT ATTORNEY'S OFFICE 348-49 (1939) ("It is too late to question the qualifications of women to serve as jurors" because "[s]he is justly fearful of injustice, discrimination, and brute force; and suspicious that her ignorance of business will be taken advantage of. For these reasons where she individually is concerned she is apt to see red and let the law go hang. But when she is called upon to administer and enforce the law for others her very suspicions will lead her to apply it literally and stringently.").

<sup>32</sup> R. SUTLIFFE, *supra* note 24, at 81.

opponents. The proponents argued that because of their inexperience, female jurors would listen more carefully and objectively than would male jurors.<sup>33</sup> As for the lack of commercial experience, the supporters argued that a woman's individual inexperience was often not as relevant as her vicarious experience. The women jurors would, in general, be well-educated and enlightened women who were the "wives, daughters and sisters of prominent business and professional men whose own service on juries it is practically impossible to procure."<sup>34</sup> Supporters also used the predominant image of women as leading a life of domesticity and leisure to argue that a woman's time was not worth as much as a man's, and women "who have no especial occupation . . . could easily find leisure to respond to a summons . . . ." <sup>35</sup> As

---

<sup>33</sup> "Then, too, women are more careful and conscientious in their new-found duties than men, and are particularly anxious to learn and make good in their new field. Because of their inexperience they pay closer attention to the lawyers, the witnesses, and the instructions of the court." Sawyer, *supra* note 31, at 142.

A contrary argument accused women of an inability to listen:

We go to the court house for stern, unyielding justice. Will women help our courts to better administer justice? They will not. Nobody is qualified to decide any case until they have heard all the testimony on both sides but the average woman would make up her mind before the plaintiff had concluded his testimony.

*Hearing on the Federal Suffrage Amendment Before the House Comm. on Woman Suffrage*, 65th Cong. (Jan. 3-7, 1918) (statement of former U.S. Senator Joseph W. Bailey) quoted in 5 HISTORY OF WOMAN SUFFRAGE 1900-1920, at 587 (I.H. Harper ed. 1970) (unabr. repub. of 1922 New York ed.).

To counteract the argument that women were too inexperienced to serve as jurors, some advocates of women's jury service supported the creation of schools to aid women in this role. Dorothy Dunbar Bromley suggested that "an intelligent woman who has had some training in sifting facts could walk into court without ever having gone to a jury school and competently try a case as one of twelve jurors. Still," she thought that, "jury schools [were] a good idea" since they would "teach women the fine points of jury service . . . ." *Form Schools for Women Jurors in New York*, 16 INDEPENDENT WOMAN 276, 294 (1937).

<sup>34</sup> Sheridan, *supra* note 25, at 794 (quoting Pennsylvania U.S. District Court Clerk George Brodbeck). Others argued that women's willingness and availability weighed against their fitness for jury service: "Perhaps it is true that women are more willing to serve on juries than men, but if anything, this means that they are less qualified for the duty." Darrow, *Women and Justice: Are Women Fit to Judge Guilt?*, MCCALL'S 15, 65 (June 1928). Professor R. Justin Miller of the University of Oregon suggested that

[i]t is only too possible that after the novelty of the thing is over, and the subject is no longer fresh and interesting for club-meeting discussions, the better type of women will lose interest just as many of the better type of men have done, and the ones who accept service will be the scandal-loving, professional juror type.

Miller, *The Woman Juror*, 2 OR. L. REV. 30, 45 (1922/1923).

<sup>35</sup> Harper, *Women in the Jury-Box*, 20 NAT'L MAG. 40, 44 (1904).

more women began to work in an increasing variety of occupations and professions,<sup>36</sup> proponents changed tactics; instead of arguing that inexperience was a virtue, they came to simply deny the inexperience argument on the facts.<sup>37</sup>

### *B. Perceptions and Morality*

The issues raised by gender differences in perception and morality were more complex than those concerning qualifications. The assumption that differences between women and men were so great as to require separate spheres of influence led to a further assumption that women would contribute something unique to the jury box. The paramount question concerned the value of this contribution: "Will the presence of women on juries lead to juster verdicts?"<sup>38</sup>

Proponents of women's suffrage and jury service argued that giving political responsibility to women would allow them to contribute to the public world the special beneficial influence they wielded in the home. Believing that the benefits women gave to

---

<sup>36</sup> At the start of the 20th century, women were represented in "virtually all" professions and in the "great majority" of occupations. C. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 376 (1980).

<sup>37</sup>

In ancient times when women were called upon to sit on juries in specific cases, the purpose was to refer to women those questions which the courts believed were peculiarly within the knowledge or experience of women. The same principle applied today would compel the presence of women in the jury box in all cases.

Barron, *Ladies and Gentlemen of the Jury*, quoted in 5 *THE WOMEN VOTER'S BULL.* 1 (March 13, 1925). See also Sawyer, *supra* note 31, at 142 (1928 observation that "[w]omen are becoming as familiar with the practical affairs of life as men").

Women's contributions during World War II further supported arguments that women had sufficient experience to serve on juries: "'Are we going to tell our women who have been serving as nurses on Bataan and Corregidor, who have been ferrying planes for the Army, who have been taking men's places in war industries, that they are incapable of being jurors?'" Lutz, *supra* note 27, at 6 (quoting Mrs. Leslie B. Cutler, member of the Massachusetts legislature). Heroism in time of war has also been associated with the French decision to grant women the franchise in 1944. See *NEW FRENCH FEMINISMS* 28 (E. Marks & I. de Courtivron eds. 1981).

<sup>38</sup> Jacobs, *Women Jurors*, 7 *AUST. L.J.* 262 (1933).

It should be noted that one might discover different moral standards in particular groups (churches, corporations, fraternities) which might be higher or lower than the "public" standard. Questions similar to those raised here might then be considered. For example, should Catholics serve as jurors in divorce cases? See Ringrose, *The Apparent Conflict Between Church and the Divorce Court*, 21 *CASE AND COMMENT* 14, 16 (1914).

the home could readily be transferred to the public world, their goal was, as Frances Willard put it in 1888, "to make the whole world homelike."<sup>39</sup> As stated by a judge in 1884, just as women make the home a special place where goodness reigns, their involvement in the public sphere would raise the moral level of society: "[I]n political as well as household affairs, 'it is not good that man should be alone.' Vices that one sex will tolerate, both sexes, if together, will abominate and punish."<sup>40</sup> A suffragist at the turn of the century perhaps best summarized the point by saying that "the feminine heart, the maternal influence, are needed in the court-room as well as in the home."<sup>41</sup>

The perceptive capacities of women were sometimes seen as superior to men's in a way particularly relevant to jury service.<sup>42</sup> Supporters of women's jury service thought domestic virtue gave women a heightened ability to sense the truth. A state official in 1884 offered the following in favor of women jurors: "They do not reason like men upon the evidence, but, being possessed of a higher quality of intellectuality, i.e., keen perceptions, they see the truth of the thing at a glance."<sup>43</sup> Proponents also argued that,

---

<sup>39</sup> J. LEMONS, *THE WOMAN CITIZEN* 85 (1975) (quoting Frances Willard of the Women's Christian Temperance Union (W.C.T.U.)). On the W.C.T.U. and social reform, see B. EPSTEIN, *THE POLITICS OF DOMESTICITY: WOMEN, EVANGELISM AND TEMPERANCE IN NINETEENTH CENTURY AMERICA* 117-46 (1981); A. KRADITOR, *supra* note 16, at 110-22.

<sup>40</sup> *Judge Greene and Women Jurors*, *supra* note 29, at 29, col. 4. See J. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN* 235-52 (1981).

Elizabeth Cady Stanton, espousing female moral superiority, stated that women were needed to "exalt purity, virtue, morality, true religion, to lift man up into the higher realms of thought and action" and away from "loving war, violence, conquest." Elshtain, *Moral Woman and Immoral Man: A Consideration of the Public-Private Split and Its Political Ramifications*, 4 *POL. & Soc'y* 453, 463 (1974) (quoting Elizabeth Cady Stanton). The idea was to judge public behavior by the rigorous standards of the private sphere. Cf. S. OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 163 (1979) (discussing Rousseau on male and female morality).

<sup>41</sup> Address by Lillie Devereux Blake on The Right of a Citizen to a Trial by a Jury of His Peers, given to the National Council of Women (Feb. 23, 1891), *quoted in* 4 *HISTORY OF WOMAN SUFFRAGE 1883-1900*, at 182 (S.B. Anthony & J.H. Harper eds. 1970) (unabr. repub. of 1902 Rochester ed.) [hereinafter cited as *WOMAN SUFFRAGE 1883-1900*]. Blake also invoked the idea that "in many criminal cases, such as seduction and infanticide, women could better understand the temptations than could men." *Id.*

<sup>42</sup> See C. DALL, *supra* note 25, at 330 (arguing that intuitive sense and ability to judge details made women specially qualified to test evidence as jurors).

<sup>43</sup> Statement of Wyoming Attorney-General M.C. Brown, *quoted in* 4 *HISTORY OF WOMAN SUFFRAGE 1883-1900*, *supra* note 41, at 1091 app. Ohio Supreme Court Judge Florence Allen noted the success of women jurors in Ohio who, according to at least one "distinguished Ohio lawyer," were "more intelligent and more conscientious than the men jurors whom we had before." Allen, *Forward, Jury Women*, *WOMAN CITIZEN*, Apr. 18, 1925, at 15.

once having determined the truth, women would hold fast to their positions, ensuring a just verdict.<sup>44</sup>

Supporters of women's jury service also argued that women's heightened perceptions included the ability to understand other women, whether as witnesses<sup>45</sup> or defendants,<sup>46</sup> better than men

---

<sup>44</sup> See Statement of Wyoming Attorney-General M.C. Brown, *supra* note 43, at 1091 app. ("once settled, neither sophistry, logic, rhetoric, pleading nor tears will move [women's minds] from their purpose"). It was argued that women had been found who "take control of the juries where they are mixed with men" and, therefore, the practical effect of allowing women to sit on juries was to make them "more than equal to men in the jury room." O'Connor, *Ladies of the Jury*, COLLIER'S, Dec. 26, 1925, at 23. The women "do it by insisting on their opinion until the men give way, as often happens at home, and the verdict of the women members becomes the unanimous verdict of the mixed jury." *Id.* In one trial, a liquor case, the jury foreman asked the one woman juror how strongly she felt about the case. "'So strongly' came the reply 'that I am willing to sit here for three weeks if necessary.'" Slade, *Women as Jurors*, WOMAN CITIZEN, Sept. 20, 1924, at 19. The conviction "was brought in without further delay." *Id.*

Others argued against this position. One writer remarked that, "[w]omen by nature seem to be less stubborn than men; they have learned to make concessions to reach agreements." Sawyer, *supra* note 31, at 142. Similarly, Bromley suggested that women jurors' "strong respect for authority" sometimes will result in following the views of a prosecuting attorney "too slavishly." Bromley, *supra* note 21, at 21.

For a short story dealing with women as members of a mixed jury, see Banning, *Women Come to Judgment*, 149 HARPER'S MAG. 562 (Oct. 1924).

<sup>45</sup> See Lutz, *The Case for Women Jurors*, 15 INDEPENDENT WOMAN 19, 31 (Jan. 1936) (quoting Judge Florence Allen) ("The presence of women jurors . . . has stopped the sneering of the unfeeling and the kindly motherly sympathy of women in the jury box has drawn from witnesses the necessary details of testimony which made conviction possible.").

For discussions of women as witnesses, see A. TRAIN, *supra* note 31, at 330-33 (women, despite certain limitations, "make the most remarkable witnesses to be found in the courts"). See also Note, *Women in the Witness Box*, 5 ALB. L.J. 71, 72 (1872) (suggesting that a woman makes a good witness in part because "she is likely to be left by counsel, from feelings of politeness, free to tell her story after her own fashion").

<sup>46</sup> See, e.g., Address by Elizabeth Cady Stanton to the Legislature of the State of New York (Feb. 14, 1854), reprinted in 1 HISTORY OF WOMAN SUFFRAGE 1848-1861, at 595-98 (E.C. Stanton, S.B. Anthony & M.J. Gage eds. 2d ed. 1970) [hereinafter cited as WOMAN SUFFRAGE 1848-1861]. Elizabeth Cady Stanton's 1854 address to the New York State Legislature demanded in criminal cases,

that most sacred of all rights, trial by a jury of our own peers . . . [S]hall an erring woman be dragged before a bar of grim-visaged judges, lawyers, and jurors, there to be grossly questioned in public on subjects which women scarce breathe in secret to one another? Shall the most sacred relations of life be called up and rudely scanned by men who, by their own admission, are so coarse that women could not meet them even at the polls without contamination? [And] yet shall she find there no woman's face or voice to pity and defend? Shall the frenzied mother, who to save herself and child from exposure and disgrace, ended the life that had but just begun, be dragged before such a tribunal to answer for her crime? How can man enter into the feelings of that mother?

*Id.* at 597-98. See also Address by Rev. Antoinette L. Brown to the Syracuse National Woman's Rights Convention (Sept. 1852), cited in WOMAN SUFFRAGE 1848-1861, *supra*



could. Thus, one author claimed that in most criminal cases where women are involved, women could "be of immense service in clearing up evidence, and showing to the male jurors on the panel the absurdity or impossibility of some of the statements."<sup>47</sup>

Women's supposed greater understanding of other women led some supporters to argue not only that women were more able than men to do justice in cases involving women, but also that the sexes were so different that men could not fairly judge women at all. They claimed that men lacked knowledge of a woman's "peculiar physical and mental organization which is requisite to the judgment of motives and temptations. They cannot comprehend the variable moods and emotions, nor the power of her impulses. It is monstrous injustice to judge women by the same rules as men."<sup>48</sup> Advocates of jury service for women thought the unfairness was greatest in cases with a female criminal defendant, such as when Susan B. Anthony was tried before an all-male jury for attempting to vote when it was still illegal for women to do so.<sup>49</sup>

Supporters assumed that the differences between the sexes were so great that the peers of women could only be other women.<sup>50</sup> As one author argued in 1867: "Women are very much

---

at 524-25 (observation that justice demands that women be lawmakers and executors when the defendant is a woman). A resolution read at an 1854 women's convention in Albany, New York, demanded that the legislature make women "eligible to the jury-box, whenever one of their own sex is arraigned at the bar." WOMAN SUFFRAGE 1848-1861, *supra* at 594.

<sup>47</sup> C. DALL, *supra* note 20, at 330.

This difference in perceptual capacity supported arguments for women to be attorneys as well as jurors. See Pettus, *The Legal Education of Women*, 61 ALB. L.J. 325, 328 (1900) ("Women see quicker the confusion which is misleading the client and the utter ignorance of law which a man cannot even imagine.").

<sup>48</sup> WOMAN SUFFRAGE 1876-1885, *supra* note 3, at 737-38 (citing article appearing in the April 14, 1870 Cincinnati Gazette).

<sup>49</sup> *United States v. Anthony*, 24 F. Cas. 829 (C.C.N.D.N.Y. 1873) (No. 14,459). Circuit Justice Hunt directed a verdict of guilty and denied a request that the jury be polled. *Id.* at 832. The National Woman Suffrage Association passed a resolution condemning this "infamous decision" in 1889. See WOMAN SUFFRAGE 1883-1900, *supra* note 41, at 154-56.

<sup>50</sup> This idea was not without qualification. As one observer noted,

[i]t does not by any means follow that if women were in the jury box the women on trial would be judged by their "peers," but they would have the comfort of knowing that those who were to decide their fate had personal knowledge of the feelings, the temptations, the disposition and the limitations of a woman.

Harper, *supra* note 35, at 43.

The issue of peers, here based on gender, might be raised in other contexts. See Note, *The Case for Black Juries*, 79 YALE L.J. 531 (1970).

needed on juries. Otherwise women will never be tried by their peers."<sup>51</sup> Similarly, a nineteenth century suffragist believed that the law was "created and executed by man" and was "wholly masculine."<sup>52</sup> Men could not represent women or give "impartial justice," she argued, stating that "we can be represented only by our peers."<sup>53</sup>

As a result, a jury of matrons in "women's cases"<sup>54</sup> was one of the objectives of those arguing for including some women, if not solely women, on such juries.<sup>55</sup> Occasionally, individual judges called juries of women to serve in sensitive cases.<sup>56</sup> H.H. Sawyer noted this point in 1928, arguing that there are certain trials—for crimes when women or girls are the victims or the accused—where the presence of women, especially "sympathetic motherly women, is of inestimable value in the administration of justice."<sup>57</sup>

<sup>51</sup> C. DALL, *supra* note 20, at 330.

The modern American constitutional emphasis is on a "fair cross-section" of the community rather than "peers." See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975). In 1925, Jennie Loitman Barron had argued that "a jury should represent a cross-section of the community" and that "no cross-section of the community is complete without women." Barron, *supra* note 37, at 1. Nearly 25 years later, Mathilda Fenberg referred to the "foundation of the principle of jury service"—a "cross-section of your peers." Fenberg, *Jury Service for Women*, 33 WOMEN LAW. J. 45, 47 (1947).

<sup>52</sup> Address by Rev. Antoinette L. Brown, *supra* note 46, at 524.

<sup>53</sup> *Id.* The argument that the sexes were so different that men could not judge women left women vulnerable to an attack that they were fundamentally unsuited to judge men. Thus in 1904, Ida Harper noted that men would think well of women jurors in cases against women and children, but were most "strongly opposed to them where men are on trial," particularly in relation to crimes against women. Harper, *supra* note 35, at 44.

<sup>54</sup> It is not an easy matter to define a woman's case. If the category includes cases in which women were parties or complaining witnesses, it also included cases in which women were interested, e.g., "liquor cases"—hardly a rigid or fixed group of cases.

<sup>55</sup> See Stone, *A Flaw in the Jury System*, 24 WOMAN'S J. 188, 188 (June 17, 1893) ("a woman especially should have a jury of her peers, not her sovereigns, as in the case of Lizzie Borden"). At the time of sentencing for her attempt to vote, Susan B. Anthony protested against the court's directed verdict of guilty, saying that the prosecutors and judges were her "political sovereigns," not her peers. See 2 HISTORY OF WOMAN SUFFRAGE 1861-1876 687-88 (E.C. Stanton, S.B. Anthony & M.J. Gage eds. 1970) (unabr. repub. of 1881 Rochester ed.). See also Higginson, *Women and Her Wishes*, 4 WOMAN'S RTS. TRACTS 21 (1854) (arguing that "no woman's cause had ever a trial by a jury of her peers; she may not even have half the jury composed of such as herself, though this privilege is given to foreigners under the English laws."). The comparison between women and alien jurors was noted decades later in England. 83 JUST. P. 181 (April 19, 1919).

<sup>56</sup> See, e.g., Harper, *supra* note 35, at 40-41 (women probation officers impeached in case relating to possible separation of a mother and child); see also Train, *Twelve Good Women and True*, *supra* note 3, at 10 (women's jury for woman defendant raising insanity defense). For discussions of female jurors and committees of women in witchcraft trials, see *supra* note 3.

<sup>57</sup> Sawyer, *supra* note 31, at 143.

Inherent in some of these arguments is not only the idea that women could better understand and therefore better judge other women, but also the assumption that women may judge each other according to a different standard than men would use. The 1917 Susan Glaspell story, *A Jury of Her Peers*,<sup>58</sup> illustrates both of these ideas. The story describes a visit to a farmhouse in which a man has been found strangled. His wife, Minnie, is in jail, accused of the murder. Three men, including the sheriff and the county attorney, visit the couple's home, accompanied by two women: one, the sheriff's wife, a woman "married to the law," the other, a neighbor of Minnie. The men are looking for evidence of motive but are unsuccessful. The women look at various domestic items and discover the motive. As Glaspell's biographer Arthur Waterman says, they "are able to reconstruct the incidents that led up to the murder by discovering in the everyday facts of their women's world the motive that led Minnie to kill."<sup>59</sup> The facts noticed by the women relate to exclusively female and domestic matters, such as housekeeping and sewing. Thus, tiny domestic hints discovered by other women's unique perceptive abilities provide the critical missing evidentiary link relating to motive. The motive relates broadly to Minnie's unhappiness with her husband, a cold man whose temperament is suggested by the fact that he broke open the bird cage and strangled Minnie's songbird. Minnie, like the canary, had sung when she was a young girl—"He killed that too."<sup>60</sup>

The "judgment of her peers" is to keep silent about the evidence they uncovered. Since the men pay little attention to Minnie's domestic items—and would probably not have recognized their meaning even if they had—the effect of the women's silence is to keep the men ignorant of the motive. Without such evidence, the men fear that the jury will tend to acquit ("you know how these juries are with women").<sup>61</sup> The men are identified with the

---

<sup>58</sup> Glaspell, *A Jury of Her Peers*, reprinted in *THE BEST SHORT STORIES OF 1917* 256–82 (E.J. O'Brien ed. 1918). For an analysis of other fictionalized accounts of juries, see E. Watts, *From American Literature*, in *THE JURY SYSTEM IN AMERICA* 161–77 (1975) (discussing jury trials of characters in American fiction, poetry and drama from 1823 to 1970). Watts states that the jury in American literature is generally represented as an "alien tribe" or group of "Odd Fellows." *Id.* at 175–76.

<sup>59</sup> A. WATERMAN, *SUSAN GLASPELL* 29 (1961).

<sup>60</sup> Glaspell, *supra* note 58, at 277.

<sup>61</sup> *Id.* at 279.

law, and the story assumes that the (presumably male) jury of the outside world would have judged the wife guilty of her husband's murder despite any amount of provocation or derangement. The women are identified as love or forgiveness, but also perhaps as a kind of higher law or higher justice.<sup>62</sup>

The story thus contains both of the assumptions found in the historical literature: that women see things that men do not see, at least in relation to other women, and that women and men evaluate those discoveries differently. Although the murder is excused by the female jury of peers, the story suggests that it would not be justified in the actual judicial system. The women are not merely more sensitive than men in what they see about the woman defendant; they also seem to operate under a different moral code. As the story is told, the crimes of neglecting Minnie, destroying her spirit and happiness, and killing her songbird are all related to her crime of killing her husband. These crimes by her husband are offered as moral justification when the jury of women decides, in effect, to acquit a murderess.

Opponents of women's jury service feared that this different moral code might make women's verdicts unfairly biased. One questioned: "Are women as good jurors as men? Would a jury of twelve women reach as many unbiased decisions as one composed only of men?"<sup>63</sup> A newspaper in 1870 suggested that women so fundamentally differ from men that "female justice" might be something quite different from male justice:

Will women revolutionize justice? What is female justice, or what is it likely to be? Would twelve women return the same verdict as twelve men, supposing that each twelve had heard the same case? Is it possible for a jury of women, carrying with them all their sensitiveness, sympathies, predilections, jealousies, prejudice, hatreds, to reach an impartial verdict?

---

<sup>62</sup> Shall we view the behavior of the jury here as lenient (toward a murderess) or harsh (in the sense that it involves the proposition that if A kills B's bird, B can kill A)? Or, was it "truly just and equitable," a taking into account of a wide range of highly individualized factors?

<sup>63</sup> Rose, *Justice is a Woman*, 157 THE OUTLOOK & INDEPENDENT 154 (Jan. 28, 1931). In Washington State, it was suggested that women's bias in trials for "social crimes" fluctuated, depending on the nature of the case: the sympathy of women jurors was "largely with the accused man, where the woman complainant [was] of a vicious or depraved character," but "young and innocent" victims were defended. Farley, *Women on Washington Juries*, 75 THE INDEPENDENT 50, 52 (July 3, 1913).

Would not every criminal be a monster provided not a female?<sup>64</sup>

Women, then, were supposed to contribute something other than what men provided. Yet in dealing with the familiar argument that women's participation in public life would be beneficial and ennobling, it is necessary to recognize the scattered but serious discussions of the idea that women's contributions would conflict with strongly held public values. The domestic sphere was not in fact perfect in terms of the qualities it produced in women.

First, some values were not encouraged in the private sphere at all, at least not for women. Charlotte Perkins Gilman, writing in 1903, commented on "honour" in the separate sphere, asking, "apart from [chastity], what sense of honour do we find in the home-bound woman? Is it to keep her word inflexibly?"<sup>65</sup> "A woman's privilege is to change her mind."<sup>66</sup> Others wrote of women's use of lies, though perhaps lies for good reasons. We see this point in Dorothy Sayer's reference in 1947 to a time when "to 'manage' a husband by lying and the exploitation of sex was

---

<sup>64</sup> *Women as Jurors*, The Philadelphia Press, cited in *WOMAN SUFFRAGE 1876-1885*, *supra* note 3, at 735.

In 1911, the sociologist Georg Simmel described women's bias as toward male law, rather than toward law itself:

Frequently the "legal antipathy" of women is stressed: their opposition to legal norms and judgments. However there is no sense in which this necessarily implies an animus against the law itself; instead, it is only against *male* law, which is the only law we have, and for this reason seems to us to be the law as such . . . . The female "sense of justice," which differs from the male in many respects, would create a different law as well.

G. SIMMEL, ON WOMEN, SEXUALITY, AND LOVE 68 (G. Oakes trans. 1984) (emphasis in original). See also Horney, *The Flight from Womanhood*, 7 THE INT. J. OF PSYCHO-ANALYSIS 324 (1926), reprinted in K. HORNEY FEMININE PSYCHOLOGY 54 (1967) (interpreting Simmel's theory as not implying that women are inferior).

<sup>65</sup> C. GILMAN, THE HOME 182 (1972) (reprint of 1903 ed.). See also *Woman's Defective Sense of Honor*, 44 CURRENT LIT. 410 (Apr. 1908) (discussing growing skepticism about women's moral superiority); see generally Bromley, *Diogenes Looks at the Ladies*, 155 HARPER'S MAG. 671, 701 (Nov. 1927) (arguing that "there is no congenital difference between men's and women's ethical sense" although "social and economic forces working through the ages have dowered men with a code of fair play which, imperfect as it is, is superior to the standards of women, whose lives have been more circumscribed").

<sup>66</sup> C. GILMAN, *supra* note 65, at 182.

held to be honesty and virtue."<sup>67</sup> Arthur Train suggested a contrast between the commitment to law and justice of women as a class, and the lawlessness of women as individuals.<sup>68</sup> The general issue of the tension between the male and female values of the public and private spheres is clear in Gilman's comment that "[j]ustice was born outside the home, and a long way from it; and it has never even been adopted there."<sup>69</sup>

Second, making the public world "homelike" by extending the "purity" and "morality" of the private sphere might itself be a doubtful good, constituting a kind of repression in the public sphere. Clear examples relate to temperance and social purity goals that were often supported by advocates of women's political rights.<sup>70</sup> As to these goals, women were for some too successful:

---

<sup>67</sup> D. SAYERS, ARE WOMEN HUMAN? 37, 44 (1947). See also S. DE BEAUVOIR, THE SECOND SEX 468-69 (Parshley trans. 1975) (discussion of ways in which wives control their husbands); WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN 36 (1967) ("Women are, in fact, so much degraded by mistaken notions of female excellence, that I do not mean to add a paradox when I assert, that this artificial weakness produces a propensity to tyrannize, and gives birth to cunning, the natural opponent of strength, which leads them to play off those contemptible infantine airs that undermine esteem even whilst they excite desire.").

On women and lies, see A. TRAIN, *supra* note 31, at 333 (women "are more ready, if it be necessary, to commit perjury"). See generally Michaëlis, *Why Are Women Less Truthful Than Men?*, 49 MUNSEY MAG. 185 (May-June 1913) (discussing women and lies).

The Glaspell story also provides an example of women lying. The two women debate whether to tell Minnie that her canning was ruined. They decide to bring her the one surviving jar to convince her that nothing went wrong: "If I was you I wouldn't tell her her fruit was gone! Tell her it *ain't*. Tell her it's all right—all of it. Here—take this [the one surviving jar] in to prove it to her!" Glaspell, *supra* note 58, at 279. It is a progression from concealment to a lie, to, finally, a truth put forward to prove a lie, so that the woman in jail will not know that her fruit has been ruined. The scene anticipates the women concealing the evidence. For a lie in the form of forgery, see the first act of Ibsen's *A Doll's House*. Nora attempts to justify her act as follows: "Do you mean to tell me that a daughter has no right to spare her dying father worry and anxiety? Or that a wife has no right to save her husband's life?" Ibsen, *A Doll's House*, reprinted in SIX PLAYS BY HENRIK IBSEN 29 (E. Le Gallienne trans. 4th ed. 1957).

Others argued that women were honest in their role on juries, see Allen, *supra* note 43, at 15 ("From every direction I hear the same thing, that the women are intelligent; that they do not allow their sympathies to sway them in the consideration of the evidence, and that they are extremely honest in voting upon the verdicts.").

For an English discussion of the personal and domestic morality of women, see A. WRIGHT, THE UNEXPURGATED CASE AGAINST WOMAN SUFFRAGE 40-48 (1913). See also Webb, *Introduction to Special Supplement on the Awakening of Women*, THE NEW STATESMAN, Nov. 1, 1913, at iii (commenting that Wright argued "in a circle—deducing from the very effects of subjection on the subject sex, class, or race a justification for continued subjection").

<sup>68</sup> A. TRAIN, *supra* note 31, at 348. Train ascribes the "lawlessness" of individual women to their sense that they are "privileged and exceptional." *Id.*

<sup>69</sup> C. GILMAN, *supra* note 65, at 172.

<sup>70</sup> The 18th and 19th amendments to the United States Constitution related to each

Emma Goldman referred to the anti-obscenity crusader Anthony Comstock when she described the moralism of women reformers in the West and asked, "Could Brother Comstock do more?"<sup>71</sup>

It seems, in short, that the question of whether women could "do justice" related to complex matters. Such matters included concern about the impact on larger social processes of the maternalism and compassion of the private sphere sensibility, and more negatively, a concern about the narrowness, ignorance, and petty tyranny of the figure we might recognize as Philip Wylie's "Mom."<sup>72</sup>

Such observations were, perhaps, at the root of another mode of arguing for women's jury service, one based less on the special contribution that women could make to the public sphere than on the broadening influence jury service would have on women themselves. Thus, it was argued that women's presence on juries would produce a "new conception of government and of [women's] rights and privileges, as well as their duties and responsibilities under it."<sup>73</sup> Suffrage and jury service, in freeing the talents and energies of women, held the potential of bringing a "female renaissance" with them.<sup>74</sup>

## CONCLUSION

In 1946, the Supreme Court held in *Ballard v. United States*<sup>75</sup> that "the exclusion of women from jury panels may at times be

---

other in a way which is often now forgotten. Woman suffrage and prohibition were linked in a number of countries. See R. PAULSON, *WOMAN'S SUFFRAGE AND PROHIBITION: A COMPARATIVE STUDY OF EQUALITY AND SOCIAL CONTROL* (1973).

<sup>71</sup> E. GOLDMAN, *ANARCHISM AND OTHER ESSAYS* 209-11 (1970).

<sup>72</sup> P. WYLIE, *GENERATION OF VIPERS* 184-204 (1942) (novelist and critic Wylie developed several social types including "Mom" and "Cinderella"). See also T. BEER, *THE MAUVE DECADE* 17-64 (3d ed. 1980) (the "Titaness" as an American phenomenon). This image is sometimes visible in personal accounts of jury service. See Rose, *supra* note 63, at 154.

<sup>73</sup> Sawyer, *supra* note 31, at 144.

<sup>74</sup> *Women Jurors*, 15 *LAW NOTES* 1 (Apr. 1911). See also J. HICKS, *supra* note 21, at 15 (arguing that jury service would enlighten women about the judiciary and responsibilities of citizenship).

Similar points were made about legal education. See Pettus, *supra* note 47, at 327 (legal education is as useful to women as it is to men and "tends to make the mind more reasonable, consistent, logical and well-balanced").

<sup>75</sup> 329 U.S. 187 (1946).

highly prejudicial to the defendants."<sup>76</sup> In dismissing the indictment against a mother and son for a religious mail-fraud scheme because women had been excluded from their jury, Justice Douglas emphasized gender differences: "The truth is, that the two sexes are not fungible; a community made up exclusively of one is different than a community composed of both."<sup>77</sup>

The *Ballard* opinion presents the image of a woman juror who is motherly, spiritual, sensitive, and religious.<sup>78</sup> The Court reasoned that such a woman might well evaluate a mother's religious activities differently than would men. Although the Court believed that the testimony in the case established that Mrs. Ballard's pursuits in the name of Christian Science constituted a "vile conspiracy,"<sup>79</sup> it thought a religious woman juror might respond very differently. She might, as "a sensitive woman, highly spiritual in character, rationalize all the money income acquired by Mrs. Ballard as being devoted to the teachings of . . . Jesus."<sup>80</sup>

One possible modern response to these judicial statements is to dismiss them as the sexist product of an earlier time. As the historical materials discussed here illustrate, however, to label these judicial statements "sexist" is to miss the point that such "antiquated prejudices"<sup>81</sup> were reflections of the assumptions of many in the woman's movement, as well as of the larger society. The arguments for the political rights of both the vote and jury service were associated with an argument based on women's special social role. Although even supporters of political rights for women sometimes saw the female contribution in negative terms, the particular values women might bring to the jury were generally classified positively in terms of compassion, maternalism, sensitivity, and understanding.

Another possible response to the *Ballard* opinion might be to recognize that the Court's assumption that women and men may indeed bring a different moral calculus to jury deliberations involves more than sexism. In the current discussions of the public

---

<sup>76</sup> *Id.* at 195.

<sup>77</sup> *Id.* at 193-94.

<sup>78</sup> *See id.* at 194-95 (quoting Judge Denman's Circuit Court dissent).

<sup>79</sup> *Id.* at 194 (quoting Judge Denman's Circuit Court dissent).

<sup>80</sup> *Id.* at 195 (quoting Judge Denman's Circuit Court dissent).

<sup>81</sup> *Jury Service Deferred*, 14 WOMAN'S J. 28 (1929).



relevance of gender, Carol Gilligan's "different voice"<sup>82</sup> relies on similar images.

The implications of Gilligan's analysis have been widely discussed. On the one hand, Gilligan's work supports a version of feminism that, for some, is richer than gender-neutral approaches. Her argument seems consonant with many women's sense of their own experiences, particularly in relation to children—experiences which some feel have either been denied or denigrated by some feminists. Gilligan's theory also fits with the works of some current legal writers who emphasize experience and "consciousness." These authors do not focus on the internal aspects of legal doctrine as is typical of legal writing. Instead they emphasize people's subjective perceptions of law and the law's treatment of individuals.<sup>83</sup> Gilligan's discussion is also supported by work in anthropology and other disciplines that views women as operating in a separate but important sphere. These approaches have found that women are not merely victims relegated by men to an inferior role,<sup>84</sup> but are also leaders of a separate and significant sphere, with a power base of their own which is different from men's, but no less important to the society as a whole.<sup>85</sup>

On the other hand, the inquiry raised by difference feminism was highly troublesome for some feminists, and continues to be so.<sup>86</sup> First, they are concerned that the entire inquiry is premised on group behavior, and therefore, may reintroduce stereotyping.<sup>87</sup>

<sup>82</sup> See *supra* text accompanying notes 10–12.

<sup>83</sup> See, e.g., Minow, "Forming Underneath Everything That Grows": Toward a History of Family Law, WISC. L. REV. (1986) (forthcoming) (on divergence of legal and self-image); J. NOONAN, PERSONS AND MASKS OF THE LAW 1 (1976) ("central place of the human person in any account of law").

<sup>84</sup> For legal discussions of sex discrimination, see B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 5 (1975); Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 117 (D. Kairys ed. 1982). See generally Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1 (1975) (discussing the constitutional aspects of the American sex role debate). As a general point, it seems that the legal discussion has tended to focus on breaking down sexual stereotyping and the discrimination based on stereotyping. See generally Karst, *Woman's Constitution*, 1984 DUKE L.J. 447 (1984) (recognizing that women tend to perceive social relations and approach moral issues in distinctive ways and speculating on the consequences of a reconstruction of constitutional law to include that distinctive morality and worldview).

<sup>85</sup> See Rosaldo, *The Use and Abuse of Anthropology: Reflections on Feminism and Cross-cultural Understanding*, 5 SIGNS 389 (1980).

<sup>86</sup> See *supra* text accompanying note 13.

<sup>87</sup> For discussions of the harms of stereotyping, see Johnston & Knapp, *Sex Discrimi-*

The research, though descriptive of many women, could easily lead to a normative conclusion regarding what women should be. Such a conclusion could reinforce the position espoused by Justice Bradley in his concurring opinion in *Bradwell v. Illinois*,<sup>88</sup> the 1872 case denying Myra Bradwell's claimed right to practice law. The law, Bradley stated, was adapted to the generality of things. While there were of course women who were different and thus not like the majority of women, he argued that there was no reason for the law to take particular cognizance of them.<sup>89</sup> It is all too clear that assumptions about gender differences can be used by the opponents of women's rights to limit women's role in the political world.

This Article has attempted to complicate our own images of the current controversy over women's differences by demonstrating the long history in America of emphasis on the relevance of gender—emphasis both by feminists and by those opposing political participation by women. This historical background can perhaps provide a clearer, if more complex, understanding of the current discussion of gender.

---

*nation by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971) (arguing that American judges have a poor record on sex discrimination because they make "unjustified (or at least unsupported) assumptions about individual capabilities, interests, goals, and social roles solely on the basis of sex differences"). See also Note, *Toward a Redefinition of Sexual Equality*, 95 HARV. L. REV. 487 (1981) (courts should use alternatives to the dominant assumptions about sex roles). Cf. T. SOWELL, *ETHNIC AMERICA* 293 (1981) (stereotyping, i.e., judging individuals on the basis of group characteristics, may be unjust to individuals who deviate, but is efficient way for employers to make judgments in the absence of infinite resources for gathering information).

<sup>88</sup> 83 U.S. (16 Wall.) 130 (1873).

<sup>89</sup> Many women, he wrote,

are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.

*Id.* at 141–42. See Kay, *The Equal Protection Clause in the Supreme Court 1873–1903*, 29 BUFFALO L. REV. 667 (1980).

The sexism of the Bradley, Swayne, and Field concurrence in *Bradwell* is often mentioned. Perhaps we might recall also the sexist stereotyping of Matthew Hale Carpenter, arguing for Myra Bradwell: "There may be cases in which a client's rights can only be rescued by an exercise of the rough qualities possessed by men. There are many causes in which the silver voice of woman would accomplish more than the severity and sternness of man could achieve." 83 U.S. at 137.