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Not Without a Fight:

*How California Women Won the Right
to Serve as Jurors*





Above, and on front cover: In November 1911, less than a month after the California suffrage amendment, Los Angeles County seated the first all-woman jury in the state. (Courtesy George Grantham Bain Collection and the Library of Congress.)

Woman Jurors in California: Recognizing a Right of Citizenship

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ADOPTION OF THE NINETEENTH AMENDMENT TO the United States Constitution in August 1920, extending the franchise to women, has been celebrated this year with exhibits, marches and films. Less celebrated, but equally compelling, is the history of equal rights for women as jurors in civil and criminal cases.

A constitutional amendment was necessary to guarantee voting equality for women because, in 1874, the U.S. Supreme Court had held that the Constitution did not guarantee a *citizen* the right to vote.¹ Therefore, although women were recognized to be citizens, voting could be restricted to men. Prior to 1920, women had already won the right to vote in a number of states, including California, which amended its Constitution in 1911 to extend the right to women. But it took adoption of the Nineteenth Amendment to enfranchise women nationally.

Like early struggles for the right to vote prior to adoption of the Nineteenth Amendment, acceptance of women as jurors arrived on a state-by-state basis. Some states automatically coupled jury service with the voting franchise, but most, including California, treated voting rights and jury participation as separate issues, requiring women to wage separate battles to serve as jurors.²

2. In eight states (Nevada, Michigan, Delaware, Indiana, Iowa, Kentucky, Ohio and Pennsylvania), “as soon as women were accorded the right to vote in such states, their right to serve on juries, as a general rule, was automatically established.” Burnita Shelton Matthews, “The Woman Juror” (1927) 15 *Women Lawyer’s J.* 15, 15. Matthews was an attorney and judge, and had the distinction of being the first woman to be appointed a United States district judge. She served on the U.S. District Court for the District of Columbia in active status from 1949 to 1968, and in senior status until 1988. See also Ken Hooper, “History: The day of the woman juror is at hand . . .,” https://www.bakersfield.com/bakersfield_lifelhistory-the-day-of-the-woman-juror-is-atp-hand/article_3eca508d-c739-51ad-88a4-9812f4b0a7da.html, Apr. 25, 2014 [as of Sept. 22, 2020].

1. *Minor v. Happersett* (1874) 88 U.S. 162.

California, in 1917, was one of the earliest states to permit women jurors.³ By 1927, nineteen states had women serving on juries. But it was not until the late 1960s that every state authorized women as jurors.⁴ And nearly another decade passed before the United States Supreme Court invalidated discrimination in jury selection based on sex.⁵

Why did it take so long for one of the fundamental attributes of a free society to be fully available to women? Part of the answer relates to traditional cultural ideas about the role of women in society, which gradually loosened over the course of the last century. Another part is wound up with common law dictates about jury trials. As we shall see, both the California Legislature and courts contributed to the evolving national discussion about whether and how women would be authorized, permitted or compelled to serve as jurors.

Whose Right Is It, Anyway?

The right to trial by a jury of one's peers is an ancient concept, predating even the Magna Carta.⁶ Entitlement to a trial by jury is found both in the U.S. Bill of Rights and in California's Constitution, and has been lauded as one of the fundamental rights ensuring freedom and preventing tyranny. John Adams famously wrote: "Representative government and trial by jury are the heart and lungs of liberty."⁷ If jury trials are the "lungs of liberty," it is literally breathtaking to recognize that the right to

3. In 1898, Utah became the first state to authorize female jurors by statute. Joanna L. Grossman, "Women's Jury Service: Right of Citizenship or Privilege of Difference" (1994) 46 *Stan. L. Rev.* 1115, 1135. Washington followed in 1911, Kansas in 1912, Nevada in 1914, California in 1917, and Michigan in 1918. See Matthews, "The Woman Juror," *supra* 15 *Women Lawyer's J.* 15.

4. Meredith Clark-Wiltz, "Women Jurors on Trial: Popular Depictions of the American Woman Juror in Twentieth Century Newspaper Coverage" (2011) 2 *J. of Res. on Women and Gender*, available at <https://gato-docs.its.txstate.edu/jcr:97e87b0f-addb-4c9e-a3b7-40ab4ff96d17/Clark-Wiltz,%20Women%20Jurors%20on%20Trial%20FINAL.pdf> [as of Sept. 29, 2020].

5. *Taylor v. Louisiana* (1975) 419 U.S. 522.

6. See Hon. Robert von Moschzisker, "The Historic Origin of Trial by Jury" (1921) 70 *U. Penn. L.R.* 1.

7. Adams, of course, meant that white men in a society had the rights to a representative government of white men and trial by juries constituted of white men. In a 1776 exchange of letters, Abigail, wife of John Adams, urged him, when creating a code of laws for the soon to be declared independent republic, to:

Remember the Ladies, and be more generous and favorable to them than your ancestors. . . . Remember all Men would be tyrants if they could. If perticular care and attention is not paid to the Laidies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation. [Original spelling.]

Letter from Abigail Adams to John Adams, 31 March–5 April 1776 [electronic edition]. *Adams Family Papers: An Electronic Archive*. Massachusetts Historical Society. <http://www.masshist.org/digitaladams/> [as of Sept. 22, 2020].

John responded:

participate as jurors was denied to women for so long and, until recent decades, women were still not fully integrated into the process.

Currently, in California, one is qualified to be a juror if the person is a U.S. citizen, at least 18 years of age, has sufficient command of English to understand and discuss the case, resides in the jurisdiction's county, and has not served on a jury in the prior 12 months. Nobody is exempt because of the person's job, race, color, religion, sex, national origin, sexual orientation or economic status.⁸

The issue of who is eligible, and ultimately selected, for jury service has been viewed both as an inherent right of citizenship (in which sense the "right" or "privilege" belongs to the prospective juror), as well as being ancillary to the right to a fair trial (in which sense the "right" belongs to the criminal defendant or parties to a civil matter to have cases heard by a representative cross-section of the community). The role of women as jurors has been argued — both for and against — under both views of jury service; that is, as an inherent part of each woman's citizenship, or as being related to the right of the parties to receive a fair hearing by a representative group of fellow citizens, including women. Further, the issue of whether and how women can serve as jurors has been examined with respect to both state laws and the United States Constitution.

Throughout the twentieth century, discussions of women jurors — in court opinions and press reports — tended to crop up as women became eligible to serve in a particular location, and are peppered with facts and common assumptions about the traditional roles of women, particularly when the focus was on whether women were competent to serve as jurors. The stories reflected the cultural norms of their times, characterizing women, variously, as tending to act on instincts and impressions rather than evidence, being emotional, moralizing, indecisive, disruptive, unduly harsh to male defendants and unduly sympathetic to women defendants, having an innate sense of justice, and too sensitive or embarrassed to hear the sordid details of some cases. In other words, impressions were both positive and negative. However, many of the articles emphasized the novelty of women

As to your extraordinary Code of Laws, I cannot but laugh Depend upon it, We know better than to repeal our Masculine systems. Altho they are in full Force, you know they are little more than Theory. We dare not exert our Power in its full Latitude. We are obliged to go fair, and softly, and in Practice you know We are the subjects.

Letter from John Adams to Abigail Adams, 14 April 1776 [electronic edition]. *Adams Family Papers: An Electronic Archive*. Massachusetts Historical Society. <http://www.masshist.org/digitaladams/> [as of Sept. 22, 2020].

8. Judicial Council of California, *Jurors: Serving Justice, Serving the Community. Information and Instructions for Responding to your Juror Summons*, <https://www.courts.ca.gov/documents/jury-court-and-community-brochure.pdf> [as of Sept. 22, 2020].



“Women are too sentimental for jury duty.” (*Anti-suffrage cartoon by Kenneth Russell Chamberlain, 1915. Library of Congress.*) Chamberlain’s cartoon echoed arguments of the day by those opposed to permitting women to serve on juries, namely, that women were temperamentally unsuited for the serious deliberation required of jurors in civil and criminal cases.

acting as jurors, focused on their clothing or appearance, discussed seemingly frivolous concerns of some women jurors (such as whether knitting would be permitted in the jury box, or seeking a trial adjournment so that they could shop at a nylon hosiery sale), and commented on how the demands of home and motherhood conflicted with jury duty (e.g., causing women to be absent or late more often than men).⁹

Notwithstanding the prevailing cultural assumptions, for most of the legal history of the issue, courts have generally treated jury selection as a question of the litigating parties’ right to a fair trial, rather than as a right of the juror’s citizenship. Accordingly, the legal focus was on whether the presence of women on juries was either necessary or, conversely, might create an impediment to the parties’ receiving a fair trial. Not until 1994 did the U.S. Supreme Court acknowledge a connection between citizenship and jury service for women.¹⁰ By contrast, jury participation as a right of citizenship under the equal protection clause had been recognized for Black men as early as 1880 — yet all but denied in practice through much of the twentieth century.¹¹

Early Recognition of Women Jurors: An “Awful Bugbear” of Woman’s Rights”

One of the first jurisdictions to permit women to serve as jurors was the Washington Territory.¹² For four years,

from 1883 to 1887, women served as jurors. The territorial law was challenged by Millie Rosencrantz, a Tacoma woman who was charged with running a bordello. The grand jury that indicted her had included married women. Rosencrantz claimed her indictment was invalid because, under the applicable statute, grand jurors were required to be “electors and householders.” Although Washington Territory women had the right to vote, and were thus “electors,” Rosencrantz argued they were not “householders” because, by definition, the head of a household of a married woman must be the husband.¹³ The three judge panel that considered the case held that, pursuant to governing community property legislation, married women and men were both “householders” — and thus upheld the indictment.

The Washington experiment with female jurors was controversial. It generated far-flung interest, and was the subject of commentary by several reporters who traveled to the Territory to see for themselves trials heard by mixed juries. A female observer from Massachusetts “noted as a pleasant side-effect that the male jurors were less likely to smoke in court when ladies were present.”¹⁴ A reporter from Chicago, whose column was reprinted in the *Sacramento Daily Union* in 1896, recounted his memories of having observed women jurors years earlier in the Washington Territory. He had “talked a good deal to the lawyers as to how the women jurors were performing their duties. All agreed that they were conscientious, that they listened carefully to the evidence, and that they gave closer attention to the arguments of the lawyers than the average man juror did.” That said, the reporter was told that none of the lawyers wanted women on the jury because there was a “lack of the logical faculty in the female mind. The women didn’t seem able to weigh conflicting evidence or to follow closely a line of dry argument, or to give the proper weight to the statutes explained to them. . . . Their tendency was to take everything in a personal way.”¹⁵

There was also concern regarding the physical inconveniences of having women on juries. It was “necessary to provide some sort of retiring-rooms for them,” and female bailiffs were needed. “When the jury was locked up to force a verdict the men whose wives were thus incarcerated with a miscellaneous lot of masculine jurors were naturally furious. . . . Out of courtesy to the women members the men came to an agreement sooner than is usually the case, and didn’t resort to the general and

9. Clark-Wiltz, “Women Jurors on Trial,” *supra* 2 *J. of Res. on Women and Gender*, pdf 14–18.

10. *J.E.B. v. Alabama ex rel T.B.* (1994) 511 U.S. 127. See Grossman, “Women’s Jury Service,” *supra* 46 *Stan. L. Rev.* 1115, 1116.

11. *Strauder v. West Virginia* (1880) 100 U.S. 303.

12. Washington Territory allowed women jurors before Utah became the first state (in 1898) to enact a woman jurors statute.

Previously, in 1870–71, the Wyoming Territory had also briefly permitted women to sit as jurors. <https://www.wyohistory.org/encyclopedia/women-jury-wyoming-makes-history-again> [as of Sept. 22, 2020].

13. Aaron H. Caplan, “The History of Women’s Jury Service in Washington” (Mar. 2005) *Washington State Bar News* 13.

14. *Ibid.*

15. “Women on Juries. How the Experiment Failed in Washington,” *Sacramento Daily Union*, Sept. 5, 1896.

venerable custom of tiring out the minority by all-night sessions with cigars and pipes.”¹⁶

One of the people who ventured to see these early female jurors in action was California attorney Clara Shortridge Foltz. Foltz was well known as the first woman admitted to the bar in California, and had also lent her considerable talents to the woman suffrage movement. In 1885, she traveled to Western Washington and observed a mixed jury trial. A contemporary article, entitled “Testimony of an Eye-Witness,” stated:

Mrs. Foltz . . . says that it has seldom been her lot to see as careful, earnest note taken of evidence as that taken by the women who she saw in the jury-box. As regards their disinclination for this service, she says that after careful inquiry she found that most women are not only willing, but many of them are anxious, to perform this service. The exception is found among women of fashion and frivolity, whose uselessness in all active channels is their only passport to “womanliness,” as they have been trained to view it. Said she: “I thought I had been fully prepared to see women acting in the capacity of jurors, but when I entered the court-room and saw that awful bugbear of ‘woman’s rights’ — women among men in the jury-box — I was so overcome with this grand evidence of progress that I felt for a moment quite hysterical, and in my desire to laugh and cry, and my determination to do neither, I had hard work to maintain my self control. One of the ‘ladies of the jury,’ whom counsel with polite, deferential and earnest manner was addressing, was a motherly-looking, intelligent woman who, with hands encased in cotton gloves and bonnet strings tied snugly under her chin, listened with conscientious intent to the argument, her face written all over with earnest determination to discharge her sworn duty in the premises, according to the light furnished by the evidence.”¹⁷

A backlash followed. Critics viewed the Washington Territory’s use of women as jurors to be an abomination. One of the justices of the Territorial Supreme Court objected to jury duty for women primarily because “the labor and responsibility which it imposes [is] so onerous and burdensome, and so utterly unsuited to the physical condition of females.”¹⁸ An 1887 decision of the Supreme Court of the Territory held that women were not really

electors, and thus were not qualified to serve as jurors.¹⁹ Women on juries in Washington thus disappeared until their eligibility for service was restored by statute in 1911.²⁰

California Seats Women Jurors

After the California Constitution was amended on October 10, 1911 to permit women to vote, many assumed that inclusion of women in jury service would not be far behind. Indeed, an editorial in *The Bakersfield Californian* from October 26, 1911, stated: “The day of the woman juror is at hand in this state . . . and it may be predicted that in the next six months members of the gentler sex will be found in the jury box and when they are they will determine the questions submitted to them quite as sensibly as do the men that now make up the juries.”²¹

In fact, in Los Angeles County, women constituted a jury much sooner than the Bakersfield newspaper had forecast. In November 1911, less than a month after the California voting amendment, Los Angeles County seated the first all-woman jury in the state. The question in the case was whether A.A. King, editor of *The Watts News*, should be convicted for printing assertedly obscene and indecent language after he repeated, verbatim, the intemperate words of a Watts city councilman.²² The jurors deliberated only 20 minutes before finding King “not guilty.” The youngest member of the jury, Nellie Moomau, age 22, later said, “Our verdict did not mean that we approved of such language. It meant that we believed the defendant was honest in his endeavor to aid the public when he printed the article. . . . It isn’t half so shocking to read such language in the privacy of our homes as it is to hear it on the streets.”²³

Despite the prompt and apparently reasonable verdict, the female jury was attacked by a Los Angeles Police Court judge and George Cryer, an assistant U.S. attorney for the City of Los Angeles. At the time, Code of Civil Procedure section 192 stated that a grand jury was “made up of men,” while Section 7 of the Civil Code stated that “[w]ords used in the masculine gender include the female and the neuter.” Ignoring the Civil Code’s clarification, L.A. Police Judge Frederickson maintained that “a man is a man, not a woman” and held that if a code was meant to include women, it would have specifically said so.²⁴ Assistant U.S. Attorney Cryer stated that, in his opinion, “women are not qualified to

16. *Ibid.*

17. Sally Roesch Wagner, *The Women’s Suffrage Movement*, New York: Penguin Random House, 2019, 325–26 (quoting Clara Foltz, “Testimony of an Eye-Witness,” *New Northwest*, Dec. 12, 1885).

18. Caplan, *supra* “Women’s Jury Service,” *Washington State Bar News* 13, 15.

19. *Harland v. Territory of Washington* (Wash. Terr. 1887) 13 P. 453.

20. Caplan, *supra* “Women’s Jury Service,” *Washington State Bar News* 13, 19.

21. See Hooper, ULR *supra* “History: The day of the woman juror is at hand”

22. Los Angeles Almanac, <http://www.laalmanac.com/crime/cr54b.php> [as of Sept. 22, 2020].

23. *Ibid.*

24. Hooper, *History*, URL *supra* “History: The day of the woman juror is at hand”

serve as jurors in this state . . . unless the constitution is specifically amended to so provide.”²⁵

Opinions of attorneys and judges around California continued to differ concerning whether women were eligible to be empaneled as jurors. Prohibition politics also appears to have played a role in juror eligibility discussions.²⁶ Prohibition had been a hot political topic for decades, and the women’s suffrage movement had long been linked to efforts to improve the state’s moral climate.²⁷ In 1896, the state Liquor Dealers League had actively worked to defeat a referendum on women’s suffrage, believing that, if able to vote, women would try to limit alcohol sales and consumption.²⁸ Although the liquor interests had defeated women’s suffrage in 1896, they had not succeeded in stopping the 1911 constitutional amendment giving women the vote. Now that women voters were at hand, they were still keenly interested in whether women would also be permitted to act as jurors.



Supporters of California’s Amendment 8 which granted women the right to vote. (Photo: FoundSF.)

In San Diego County, a 1914 committee of three women from the Women’s Christian Temperance Union (W.C.T.U.) sought a determination from the county supervisors that the list of eligible persons to serve as jurors for the coming year would include women. The supervisors refused the request, stating that at common law, only men could be jurors. Plus, said the men,

25. *Ibid.*

26. The Prohibition Era in the United States, during which the production and sale of alcohol was banned nationally by the Eighteenth Amendment to the federal Constitution (proposed 1917 and ratified in 1919), ran from 1920 to 1933 when it was repealed by the Twenty-first Amendment.

27. For example, in 1912, the California Civic League had sponsored a measure to eradicate red light districts in the state.

28. Mae Silver, “Women Claim the Vote in California” (1995) *Found SF* (digital archive), http://www.foundsf.org/index.php?title=WOMEN_CLAIM_THE_VOTE_IN_CALIFORNIA [as of Sept. 22, 2020].

deliberating jurors were frequently locked up overnight, and they were concerned that “domestic complications” were foreseeable if men and women served on juries together. As reported in the *San Diego Union* under the headline “Supervisors Disappoint Women With Decision Ruling Fair Sex Off Juries in Criminal Courts”:

Three disappointed women left the chambers of the Board of Supervisors yesterday when they were told that the members of the fair sex could not sit upon criminal juries in the Superior Court. They are not satisfied, however, and intend looking up the law and procedure in other cities, and if necessary they will appeal to the legislature. The women were Mrs. Cora G. Carlton, Mrs. E.F. Lynch, and Mrs. Emma G. Kinne of the public welfare committee of the W.C.T.U.

In a speech to the supervisors, Mrs. Carlton said it was the opinion of members of her club that women should be allowed to sit upon juries in cases in which women were involved, especially in assault cases, where the word of a girl, unsupported, might send a man to the penitentiary.

Supervisor Thomas Fisher explained that the names of prospective jurors are picked indiscriminately and that a jury might turn out to be half men and half women. He also explained that, when jurors are not able to agree, they were frequently locked up together for the night and not allowed to separate; all of which, he said, might lead to domestic complications in the families of men and women on a mixed jury. The three advocates of the woman juror admitted that such an arrangement would have drawbacks, and they are going to have an attorney seek some method of eliminating the objectionable features.²⁹

At the time that the San Diego W.C.T.U. delegation was told that women would not be included in the jury pool, the supervisors were receiving legal advice from San Diego District Attorney Harry S. Utley. Utley, a naturalized Englishman, was known to enjoy his Guinness, and was presumably anti-temperance. At the beginning of 1915, Utley was replaced by a new district attorney, H.W. Mahoney. The supervisors asked for a formal opinion regarding whether women were eligible to serve as jurors. Mahoney provided that in January 1915, through his deputy Spencer M. Marsh (later a San Diego County Superior Court judge). Both Marsh and Mahoney were known to be on the “dry” side of prohibition.

Perhaps not surprisingly, the Mahoney/Marsh duo supported the Temperance Union women. Their opinion stated: “[T]he fact that (one) is a woman does not

29. *San Diego Union*, Sept. 9, 1914, 3 (as quoted in L. G. Stanford, “Early Women Jurors in San Diego” (Mar. 1965) 11 *San Diego Hist. Soc. Qtrly.*, sandiegohistory.org/journal/1965/March/women-2/) [as of Sept. 22, 2020].

disqualify her to be selected and to serve as a juror.”³⁰ Thus, in the annual jury panel for San Diego County, drawn in January 1915, eighty persons were listed, of whom six were women. However, no women were actually chosen for jury service until September of that year.

Not everyone agreed with the Mahoney/Marsh view of women’s juror qualifications, and among the dissenters was California Attorney General Ulysses S. Webb. In December 1916, Webb sent a letter to Marsh (who had succeeded Mahoney as D.A.), enclosing an opinion that Webb had sent, in 1912, to the Sacramento County district attorney. The opinion³¹ pointed out that the California code in several different places defined a jury as “a body of men” and that at common law, those words meant men *only*; that the constitutional guarantee of a trial by jury was universally recognized to mean the right as it existed at common law, and that if women were to be eligible for jury duty, the legislature would have to change the law.³²

California’s Legislative Action

A push in the state legislature began. The California Civic League, a precursor to the California League of Women Voters, focused on the argument that a fair jury trial must include a fair cross-section of the community, including women. It drafted a bill stating that women must be permitted to serve on a jury when one of the parties, plaintiff or defendant, was a woman. That suggestion generated disagreement. A new bill was prepared for the 1915 California Legislature, but was “met with ridicule from state senators who defeated [it] . . . in that session, leading several advocates to press for electing progressive women to the state legislature.”³³ Ironically, as a result of the 1911 amendment to the California Constitution, women could not be prohibited from holding office, but they could still be excluded from juries.

Not having heard an outcry from their female constituents, male legislators believed that women did not want to serve on juries. Proponents of women’s rights thought that women’s apparent indifference to the issue

30. *San Diego Union*, *supra* 3.

31. Webb’s 1912 opinion was actually authored by Deputy Attorney General J.T. Nourse, who later became a San Francisco County Superior Court judge — and thereafter justice and presiding justice from 1919 to 1957 on the District Court of Appeal. See Stanford, “Early Women Jurors,” *supra* 11 *San Diego Hist. Soc. Qtrly*.

32. Stanford, “Early Women Jurors,” *supra* 11 *San Diego Hist. Soc. Qtrly*. The rule that constitutional provisions guaranteeing the right to a trial by jury established the right to a trial by jury as known at common law was well established, and remains the guiding rule today.

33. Cynthia Harrison, *Shoehorning American Women onto American Juries*, H-Law (Nov. 2013) <https://networks.h-net.org/node/16794/reviews/17304/harrison-mccammon-us-womens-jury-movements-and-strategic-adaptation>, reviewing Holly J. McCammon, *The U.S. Women’s Jury Movements and Strategic Adaptation: A More Just Verdict*, New York: Cambridge U. Press 2012.

was attributable to an absence of education concerning the ramifications for women litigants if they continued to be excluded from juries. The Civic League launched a campaign to persuade women voters to call on their elected representatives to vote in favor of jury service for women. Finally, in 1917, “the state legislators, now convinced that their women constituents did support the women juror bill, passed the bill that year.”³⁴ Women in California now had statutory authority to be eligible for jury service.

Response in the California Courts

It did not take long for a challenge to the new statute to make its way to the California Supreme Court. In 1918, a prisoner named Eban Mana filed a habeas corpus petition seeking his release from custody.³⁵ He had been convicted of rape by a jury that included seven women.³⁶ In his petition, Mana repeated the familiar argument that California’s authorization of women to sit as jurors violated the California Constitution³⁷ because, under the common law, juries were composed only of men. Mana’s argument rested on several sources, “including the Webster’s dictionary definition of a jury as a ‘body of men,’ historical description of the common law jury, and the Magna Carta, which did not allow women to serve.”³⁸

In a unanimous opinion authored by Justice Curtis D. Wilbur, the California Supreme Court rejected this challenge. The opinion acknowledged that constitutional provisions guaranteeing a right to trial by jury refer to trial as known at common law. However, the Court approached the question of constitutionality by asking whether the state legislature had the authority to prescribe qualifications for jurors that are different from those established by the common law. The *Mana* court noted that the U.S. Supreme Court, in *Strauder v. West Virginia*,³⁹ construing the Fourteenth Amendment, had declared unconstitutional a West Virginia law that excluded Blacks as jurors because the state law “deprived [the litigant] of a trial by jury composed of his ‘neighbors, fellows, associates, persons having the same legal

34. Harrison, *Shoehorning American Women onto American Juries*, URL *supra* H-Law.

35. *In re Mana* (1918) 178 Cal. 213.

36. Grossman, “Women’s Jury Service,” *supra* 46 *Stan. L. Rev.* 1115, 1141. Interestingly, the same U.S. Webb who had concluded in 1912 that, if women were to be eligible as jurors, the legislature would have the change the law, was still California’s attorney general — and he defended the State of California against Mana’s petition.

37. California’s Constitution provided, in article I, section 7: “The right of trial of jury shall be secured to all, and remain inviolate; . . .” Although subsequently amended, the provision remains substantively similar. See present art. I, § 16.

38. Grossman, “Women’s Jury Service,” *supra* 46 *Stan. L. Rev.* at 1142, n. 157.

39. (1880) 100 U.S. 303.

status in society as that which he holds.”⁴⁰ The *Strauder* Court had gone on to note that the Fourteenth Amendment did not prohibit states from establishing qualifications for its jurors, including age, gender and educational conditions.

Justice Wilber recognized in this dicta from *Strauder* the key to resolving the *Mana* case: state legislatures may, within the limits of the Fourteenth Amendment, establish juror qualifications that differ from the common law. Under the California Constitution, women could not, on account of their sex, be disqualified from entering into any lawful business, vocation or profession. Also, as of 1911, women could not be prevented from voting and holding office. Accordingly, the *Mana* opinion concluded:

If the contention of the petitioner is well grounded, we would then have a situation where a woman on trial for a crime might be brought to trial before a woman judge, prosecuted by a woman district attorney, defended by a woman lawyer, brought in court by a woman bailiff, and yet forced to a trial before a jury of men, because men only were considered as eligible for jury duty at common law.

The legislature of the state in providing that a woman might act as a juror evidently believed that there was no longer any necessity of discriminating against her as a citizen of the United States because she was disqualified. The constitution having recognized her as in all respects the equal of man, the legislature was justified in doing away with the discrimination which had theretofore existed against her in the matter of jury service.⁴¹

Thus, the rationale of the *Mana* decision reflected an important hybrid view of participation in the jury process. *Mana* was based both on the idea of fairness in the representative composition of the jury (it would be as unfair to exclude women from jury panels as it was to exclude Black men), and on the idea of jury service as one of the rights of citizenship, in which the woman is “in all respects the equal of man.”⁴²

The U.S. Supreme Court Invalidates a California District Court Procedure

Meanwhile, in federal courts, different rules prevailed. Congress had provided that jurors in federal courts would have the same qualifications as those imposed by the highest court of the state in which they sat, but the method of determining who would be selected for jury service was subject to federal court procedures.

In 1946, a case that arose in a federal district court in California made its way to the U.S. Supreme Court.

40. *In re Mana*, *supra* 178 Cal. 213, 215.

41. *Id.* at 216.

42. *Ibid.*

Edna Ballard and her son had been convicted in the district court for the Southern District of California of mail fraud in connection with promoting an allegedly fraudulent religious program. On both the grand jury (which indicted the defendants) and on the trial jury (which had convicted the defendants), women had been intentionally and systematically excluded from the panel, by order of the trial judge. The defendants moved to quash the indictment and challenged the jury array because of the intentional exclusion of women. On appeal, the Ninth Circuit summarily held that, “in the circumstances of this case,” there was no error in excluding women.⁴³

When that determination reached the U.S. Supreme Court on review, Justice William O. Douglas authored the 6–3 opinion. The Court recognized that federal courts were, by mandate of Congress, to follow the state rules concerning qualification of jurors, but held that, in addition, “[w]hether the method of selecting a jury in the federal court from those qualified is or is not proper is a question of federal law.”⁴⁴ Prior Court decisions had established that the aim of Congress in enacting statutes concerning the qualification of jurors was to make the jury a representative “cross-section of the community.”⁴⁵ Congress had explicitly prohibited disqualification of jurors on the bases of race, color, previous condition of servitude, and party affiliation. But Congress had not prohibited disqualification on the basis of sex.

A recent Supreme Court decision, *Thiel v. Southern Pacific Co.*,⁴⁶ had held that it was an error to exclude from a jury panel in a common carrier liability case all persons who worked for a daily wage. The *Thiel* decision had focused on the imperative that a fair trial requires an impartial jury drawn from a cross-section of the community. The opinion stated:

This does not mean, of course, that every jury must contain representatives of all the economic,

43. *Ballard v. United States* (9th Cir. 1945) 152 F.2d 941, 944; see also *id.* at 950–53 (Denman, J., dissenting, asserting the exclusion of women jurors constituted reversible error).

44. *Ballard v. United States* (1946) 329 U.S. 187, 192.

45. See, e.g., *Glasser v. United States* (1942) 315 U.S. 60, 85–86. The *Glasser* case also presented the question of whether the district court jury had been properly constituted when it included both men and women, but when the women permitted to serve as jurors were limited to members of the Illinois League of Women Voters, which had trained women concerning how to be jurors. Relying on an article published in the *ABA Journal*, the defendants claimed that the training was prejudicial to them because it was biased toward the prosecution, and they were consequently deprived of a fair jury panel. At the time of trial, Illinois had recently amended its jury rules to permit all women to serve, but the jury rolls were still being updated. The Supreme Court held that although limiting jury participation to members of certain groups (i.e., the League) was not consistent with the ideal of a fair jury trial, the defendants had failed to present sufficient evidence to prove the hearsay allegations contained in the *ABA Journal* article.

46. (1946) 328 U.S. 217.

social, religious, racial, political and geographical groups of the community; . . . [b]ut it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.⁴⁷

In *Ballard*, the Court expanded on the rationale of *Thiel*, and concluded that the “purposeful and systematic exclusion of women from the panel . . . was a departure from the scheme of jury selection which Congress adopted.”⁴⁸ In response to the suggestion that an all-male panel drawn from the various sociological groups mentioned above would be as truly representative as if women were included, Justice Douglas asked: “But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel?” The systematic and intentional exclusion of women, like the exclusion of a racial group, or social or economic class, “deprives the jury system of the broad base it was designed by Congress to have in our democratic society.”⁴⁹

The *Ballard* Court viewed the injustice of excluding classes of people as jurors to be an “injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.”⁵⁰ The error of the California federal district judge in excluding women from the jury panels was irremediable. The trial verdict was nullified, the indictment by the improperly constituted grand jury was invalidated, and all charges against Ballard and her son were dismissed.

Who Really Serves?

Women were now recognized to be qualified to sit as jurors, but this did not translate to many women actually serving on juries, even in “early adoption” states such as California. In some states, such as Washington, women had a right to “opt out” of jury service simply by requesting in writing to be excused. This exemption upon request was not changed in Washington until 1967.⁵¹ In other states, such as Florida, women who

wanted to serve as jurors had to affirmatively “opt in” to be included. The U.S. Supreme Court upheld Florida’s statute in 1961.⁵² In 1975, the Court finally held that opt-in jury rules for women violated a defendant’s Sixth Amendment right to a fairly representative jury,⁵³ and state opt-out provisions were struck down under the same authority in 1979.⁵⁴ It was not until 1994 that the use of peremptory challenges to constitute a jury of only one gender was prohibited by the U.S. Supreme Court as a violation of the equal protection clause of the Fourteenth Amendment.⁵⁵ Against this background, it is hardly surprising that a popular and acclaimed mid-1950s jury room drama, which was produced both as a stage play and movie, was entitled *Twelve Angry Men*. Featuring only white men, the composition of the jury was, at the time, unremarkable.

Conclusion

More than one hundred years have passed since California first recognized women’s eligibility to be seated on juries. The road to full inclusion of women in jury pools has been a long one, mirroring the radical changes in our society over the same period. The social justice movement of 2020, especially the calls for police and other reforms following the custodial suffocation of George Floyd, reminds us that many citizens of the United States have long had to struggle for equal treatment in society and under the law. We are reminded that to be preserved, even fundamental civil rights — such as voting, demonstrating publicly, and free speech — must be guarded and exercised. Neither relief from oppression nor from exclusion from the organs of democracy can be taken for granted.

The California Supreme Court, in 1918, held that jury service for women is a right inherent in their citizenship. The “lungs of liberty” are not fully expanded unless they also include the oxygen delivered by women’s voices. The body politic, addressing questions of justice, is animated by that air. Long may it breathe. ★

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52. *Hoyt v. Florida* (1961) 368 U.S. 57.

53. *Taylor v. Louisiana* (1975) 419 U.S. 522 (53 percent of the venire were women, but fewer than 1 percent served).

54. *Duren v. Missouri* (1979) 439 U.S. 357 (53 percent of the venire were women, but only 14.5 percent served).

55. *J.E.B. v. Alabama* (1994) 511 U.S. 127. The opinion in *J.E.B.* relied on *Batson v. Kentucky* (1986) 476 U.S. 79, which held that peremptory strikes based on race violated a defendant’s equal protection rights. Yet the use of peremptory challenges continues to this day.

47. *Id.* 220.

48. *Ballard*, *supra* 329 U.S. 187, 193.

49. *Id.* 195.

50. *Ibid.*

51. Caplan, “Women’s Jury Service,” *supra* *Washington State Bar News* 19–20.