

# Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old- Boys' Network in Nineteenth-Century America

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In May of 1884, Massachusetts lawyer Lelia Robinson arrived in Seattle, Washington Territory, at the end of a transcontinental journey with the “woman question” foremost in her mind.<sup>1</sup> The territorial legislature had just passed a women’s suffrage act, and Robinson had been drawn westward by the possibility of witnessing women serve on grand and petit juries. She arrived skeptical, believing that the scope of women’s political rights had been extended too far. “[W]hatever might be the policy and the desirability of women’s voting,” she wrote, “it was carrying the matter a little too far to force them to do jury service.”<sup>2</sup> Gradually, she became convinced that the women of Washington represented paradigmatic jurors. She described them as “ladies to whom any one might gladly entrust the settlement of any question, civil or criminal, that must be carried into a court of justice . . . .”<sup>3</sup>

Robinson’s sentiment evolved in response to the changed behavior she witnessed inside the courtroom—a development she attributed to the presence of women. Remarkably, after vigorous discussion and judicious examination of evidence, the women jurors appeared to be less tired and in better health than their male counterparts. The men of the jury found themselves at the end of the trial to have been “great sufferers in being deprived of the use of their favorite weed . . . . [W]hen women jurors came in, smoking jurors went out—or rather the cigars and pipes went out. Men found that they must be gentlemen in the jury-room as in the drawing-room.”<sup>4</sup> By Robinson’s estimation, women had entered the proverbial smoke-filled room of the law and quite literally cleared the air.

That a female attorney who herself had fought a recalcitrant bar to gain

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1. See Lelia J. Robinson, *Women Jurors*, CHI. L. TIMES, Nov. 1886, at 22.
  2. *Id.* at 23-24.
  3. *Id.* at 28.
  4. *Id.*

admission to a court of law<sup>5</sup> would approach the legal developments in Washington with trepidation may seem anomalous at first glance. Upon further consideration, Robinson's simultaneous enthusiasm for female suffrage and skepticism of women jurors suggests a more complicated picture of women's legal status in the decades after the Civil War. In her distrust of the mixed jury, Robinson revealed that opening the venire to women implicated a set of interests distinguishable from those interests at stake in the granting of female suffrage. Robinson's conclusions that the women jurors of Washington purified the air of the courtroom—literally and metaphorically—confirmed that the introduction of the woman juror radically transformed the very character of a previously all-male institution.

This Note will present a sustained examination of the postbellum experiments with women jurors conducted in the Wyoming and Washington Territories, with a view to understanding the transformative implications of the mixed jury. In presenting the jury experiments as radical challenges to nineteenth-century legal culture, this Note contests the prevailing scholarly vision of jury service as part of a set of political demands made by women's rights activists, muted by the overarching goal of obtaining the vote. The Wyoming and Washington stories instead assign the jury a unique role in our democratic legal system and in the struggle toward the ideal of egalitarian citizenship.<sup>6</sup>

The central argument of this Note proceeds as follows: First, the attempt to understand women voters and jurors as functions of each other<sup>7</sup> obscures the jury's precise role as a participatory institution of government and oversimplifies the narrative of the history of women's rights. The Western experience reveals that, historically, suffrage and jury service for women have not been mutually-reinforcing entrances into the public sphere. Instead, the transformation of the public sphere has demanded that women activists pay specific attention to the discrete cultures of the public institutions that they would invade. Throughout women's struggle for equality, the highly associational nature of jury service has distinguished it as an act separable from voting.

To comprehend why jury service has had a social significance distinct

5. See Robinson's Case, 131 Mass. 376 (1881), discussed *infra* Section II.C. Though denied access to the bar by the court in response to her initial petition, Robinson eventually became Massachusetts's first woman lawyer. See Virginia G. Drachman, *Women Lawyers and the Quest for Professional Identity in Late Nineteenth-Century America*, 88 MICH. L. REV. 2414, 2414 (1990). She eventually was admitted by legislative enactment. See Ellen A. Martin, *Admission of Women to the Bar*, CHI. L. TIMES, Nov. 1886, at 85.

6. For a discussion of the relationship between gender and citizenship in the 19th century, see Rogers M. Smith, "One United People": *Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229 (1989).

7. See, e.g., Barbara Allen Babcock, *Feminist Lawyers*, 50 STAN. L. REV. 1689, 1696 (1998) (reviewing VIRGINIA DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* (1998)). For a critique of the scholarship in this field, see also *infra* Section I.A.

from suffrage, rather than consider nineteenth-century women jurors as variations on women voters, the former should be seen in the same context as the women who sought access to the bar. Both women lawyers and women jurors can be understood as outsiders who invaded the space of the courtroom and challenged the masculinist legal culture that operated according to the internal logic of an “old-boys” or insiders’ network. Opposition to women jurors did flow in part from traditional objections to changes in the legal status of women; not only would women be distracted from their domestic duties, but the status of juror did not befit feminine nature. The primary opposition, however, emanated from a desire to preserve a particular legal culture. The mixed jury experiments in the Wyoming and Washington Territories suggest that women jurors introduced into the fluid legal culture of post-Civil War America the concept of a “gendered justice,” or the belief that women as women would perform their duties as jurors differently from their male counterparts. By disrupting the status quo of the male-dominated legal profession, the possibility of a gendered justice fueled opposition to female jury service, even as female suffrage remained grudgingly accepted.

The concept of gendered justice does not represent a normative claim about the distinctive way in which women think. Rather, it accounts for the effects people anticipated women jurors would have on the legal system and for the actual consequences of introducing women and their unique forms of reasoning into the courtroom. Conceptions of feminine reason and behavior proved to be dynamic throughout the experiments. The content that the historical actors of this Note gave to feminized justice varied depending on the time and vantage point of the person in question. Ultimately, the salient feature of gendered justice proved to be that introducing feminine reason into the courtroom challenged settled masculine legal consensus. This possibility threatened the conviviality of a profession thought to be sustainable only as an exclusive network of men.

The belief that a particular feminine form of reason existed stemmed from a number of factors. Supporters and detractors alike believed that women reasoned differently from men because their gender-defined life experiences had shaped their capacities for judgment in distinct ways. At the same time, the personalities of this narrative assessed these differences in terms of the well-established cultural construct of separate spheres ideology. According to the construct, the public sphere represented the male domain and the domestic sphere the female domain. To be sure, the everyday experiences of women on the frontier strained against popular conceptions of what the woman’s role should be. That the separate spheres did not accurately describe the dynamic gender roles of the frontier does not diminish the fact that the ideology represented a strong cultural force in the debate over the woman juror. Whether the actors in this story believed

female jury service to be a necessary part of Western development or an unnatural aberration, a common consensus emerged that women in the courtroom would transform the law's administration by introducing norms of adjudication as yet unknown to nineteenth-century legal culture.

Part I of this Note will present the details of the mixed jury experiments in Wyoming and Washington. It will consider how exactly the women jurors of the West transformed the courtroom and unsettled extant legal consensus. Part II will develop the ideological context of the mixed jury debate with a particular focus on the status of women lawyers. Finally, Part III will explore different contemporary conceptions of the jury in light of the historical narrative of Parts I and II. It will assess how nineteenth-century Americans' brief flirtation with women jurors can inform our understanding of the interplay between gender difference and the administration of justice in the context of the modern jury.

## I. WOMEN JURORS IN THE WESTERN TERRITORIES

### A. *A Bundling Approach to Suffrage and Jury Service*

In *Strauder v. West Virginia*, the Court observed that women, as nonvoters, could properly be denied jury service, but that black male voters, as voters, had the right to serve on juries.<sup>8</sup> This proposition stands for some as an indication of the crucial connection between suffrage and the right to act as juror.<sup>9</sup> Barbara Babcock, a leading scholar on women jurors and lawyers, connects jury service and suffrage as “twin indicia of full citizenship.”<sup>10</sup> She contends that those who opposed women's suffrage understood the link between voting and jury service<sup>11</sup> and characterizes jury service and the act of lawyering as “attendant” features of voting.<sup>12</sup> Babcock analogizes the woman voter to the woman juror by declaring them both to be passing unambiguously into the public sphere.<sup>13</sup> Other scholars

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8. 100 U.S. 303, 310 (1880).

9. See, e.g., Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2176-77 (1993) (arguing that *Strauder* served as important precedent after the passage of the Nineteenth Amendment for establishing that voting and jury service were intertwined for women). Even a brief consideration of the Court's opinion in *Strauder* reveals that the Court rendered the decision in the highly particularized context of the Reconstruction Amendments. The attempt to generalize jury service as a direct function of voting beyond the emancipation context is therefore not well-supported by *Strauder*.

10. Barbara Allen Babcock, *A Place in the Palladium: Women's Rights and Jury Service*, 61 U. CIN. L. REV. 1139, 1165 (1993).

11. See *id.* at 1166-74.

12. Babcock, *supra* note 10, at 1166.

13. See *id.* at 1165-66. In her analysis of the activism of the first women lawyers, Babcock argues that Virginia Drachman mistakenly portrays them as engaged in a separate and self-interested struggle, contending instead that they were “self-conscious feminists” and should therefore be understood as fused with women who battled for suffrage. See Babcock, *supra* note

conflate the discussion of suffrage and access to the jury in their narratives of the women's rights campaigns.<sup>14</sup> The debates over suffrage and jury service are presented as two examples of the same phenomenon: the debate over the extent to which gender difference and family obligations affected women's entrance into the public sphere.<sup>15</sup> Current emphasis on common "rhetorical tropes"<sup>16</sup> faced by women voters and jurors obscures the fact that different interests were at stake in each case and that there historically has been opposition to women voters and jurors for different reasons.

More general scholarship on the jury reflects these tendencies as well. For example, one scholar constructs an elaborate argument paralleling the language and structure of the Fifteenth Amendment and suffrage statutes to statutory and judicial guarantees of jury service.<sup>17</sup> By arguing that jury service has been closely linked to voting throughout history, he concludes that connecting the two rights better enables us to protect them constitutionally.<sup>18</sup> He invokes the struggle of women to gain access to the venire specifically as evidence that the two rights should be considered within the same analytical framework.<sup>19</sup> While this Note does not argue that suffrage and jury service are unrelated as forms of political participation, its purpose is to resist treating them as "twin indicia" of citizenship.<sup>20</sup> Disaggregating jury service from suffrage helps to unpack the particular nature of the associations demanded by a presence in the courtroom and assists in understanding legal culture as centered around a set of relationships distinct from those inherent within political culture.

The following exploration of the Western experiments will reveal that

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7, at 1699-1700. In her most recent work on women lawyers in the 19th century, Drachman acknowledges that women lawyers linked their cause to gain access to the bar to the suffrage struggle. See VIRGINIA DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY 2* (1998). Approaching the history of women's rights from this "bundled" perspective is not entirely inconsistent with a history according to which each of the spheres to which women sought access *related* to the others. The Western experiments reveal, however, that using suffrage as the umbrella cause diminishes the significance of the battle to gain access to the courtroom.

14. See, e.g., Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN'S L.J. 59, 63-67 (1986) (discussing the jury debate in terms of the impact women's service would have on the home); see also Shirley S. Abrahamson, *Justice and Juror*, 20 GA. L. REV. 257, 262-76 (1986) (characterizing opposition to women jurors in the 19th and 20th centuries as consisting of familiar refrains opposing women's entrance into public life); Babcock, *supra* note 7, at 1697-98 (treating women voters, lawyers, and jurors as part and parcel of the same cause).

15. See Babcock, *supra* note 7, at 1697-98.

16. See, e.g., *id.* at 1696 (paralleling practicing law with voting by noting that similar rhetorical charges were launched by opponents of both); Babcock, *supra* note 10, at 1167 (noting that "[w]hether it was the vote, jury service, or entry to the professions that women sought, they met the same contentions about their rightful roles").

17. See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

18. See *id.* at 206.

19. See *id.*

20. Put simply, suffrage has been a necessary, though by no means sufficient, condition for jury service.

courts and legal actors did not understand suffrage and jury service primarily as functions of each other. Though similar rhetoric charging impropriety and decrying women's incapacities for reasoned judgment marked opposition to both activities,<sup>21</sup> the opposition to women jurors challenged their right to be present in the courtroom and to be a part of the particular, sustained associations of legal culture.<sup>22</sup> Jury service involved a direct participation in government and legal culture that voting never could. While the settlers of Wyoming may have grudgingly accepted the female voter, the female juror proved to be a qualitatively different figure.

### B. *The Contours of the Wyoming Experiment*

On December 10, 1869, Wyoming Governor John Campbell signed a bill hailed by settler Grace Raymond Hebard as parallel to Magna Carta.<sup>23</sup> The Act to Grant to the Women of the Wyoming Territory the Right of Suffrage and to Hold Office guaranteed that:

[E]very woman of the age of twenty-one years, residing in this territory, may, at every election . . . cast her vote. And her rights to the elective franchise and to hold office shall be the same under the elective laws of the territory, as those of electors.<sup>24</sup>

#### 1. *Motivations for the Act*

A variety of motives have been ascribed to the legislature that inaugurated the nation's first experiment with women's suffrage. "One man told me that he thought it right and just to give women the right to vote. Another man said he thought it would be a good advertisement for the territory. Still another said that he voted to please someone else."<sup>25</sup> Colonel

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21. For a discussion of popular reactions to women's suffrage, see generally ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA, 1848-1869* (1978).

22. See *infra* Section I.C. (describing the range of reactions to the experiments).

23. An Act to Grant to the Women of the Wyoming Territory the Right of Suffrage and to Hold Office, ch. 31, 1869 Wyo. Terr. Laws 371 [hereinafter Wyoming Suffrage Act]. A group of middle-class men and women lobbied the legislature to pass the Act, and to the surprise of many in the legislature, women's suffrage prevailed. See Grace Raymond Hebard, *The First Woman Jury*, 7 J. AM. HIST. 1293 (1913). In addition to the Suffrage Act, the Wyoming legislature passed a married women's property act, borrowing statutory language from Colorado—the first territory to enact such legislation. The legislature also passed laws forbidding sex discrimination in the hiring of teachers and a resolution allowing women to attend legislative sessions. An amendment to the suffrage law granting "colored women and squaws" the right to vote did not pass. See T.A. LARSON, *HISTORY OF WYOMING 78-79* (1978). The Washington Territory engaged in similar mixed jury experiments in the 1880s. See *infra* Section I.D. In 1898, Utah became the first state to permit women to serve on juries. See Abrahamson, *supra* note 14, at 264.

24. Wyoming Suffrage Act, 1869 Wyo. Terr. Laws, at 371.

25. Letter from C.G. Coutant to Frank W. Mondell (n.d.), reprinted in LARSON, *supra* note

William H. Bright, the legislator who introduced the bill, echoed Eastern feminists in his declaration that if blacks had the vote, women such as his wife and mother should have the same right.<sup>26</sup> Some members of the legislature affirmed that the bill had been passed to advertise Wyoming and to entice Eastern ladies of refinement to venture west, bringing “civilization” to the developing territory.<sup>27</sup> Indeed, by the 1880s, the territories had witnessed a rise in drinking rates and in saloons and slums, along with the poverty and crime that attended such houses of vice.

For those who believed that granting women political rights would enhance public order in the territories, experiments with women jurors seemed a logical extension of the Suffrage Act. The Western experiments show, however, that although the grant of suffrage had always been a necessary condition for jury service, it was not a sufficient condition. Settlers in Wyoming discovered quickly that voting and jury service had distinct meanings as political rights and that the consequences of granting each of them to women would be different. The Wyoming experiments thus represent a crucial battleground for historians seeking to determine if public and legal culture could sustain as radical departure from American traditions as the mixed jury, given the recognition that the “degenerate” conditions of the frontier required drastic action. Did the integrity of Wyoming’s legal culture require “shield[ing] women, children, and the body politic from the ravages of drunken men”<sup>28</sup> or incorporating women into the body politic to counteract the decline in morals?

## 2. *The First Mixed Jury Is Impaneled*

The repeated failure of all-male juries to convict those prosecuted for a wide variety of public order offenses and violent crime threatened to perpetuate the lawlessness that settlers feared would become emblematic of the Territory. The passage of the suffrage statute, coupled with growing concern over disorder in the Territory, forced the issue of women’s participation on juries. During the term of court beginning in March of 1870, the first mixed jury in America was impaneled in Laramie, Wyoming, and through 1871, women served on both grand and petit juries.<sup>29</sup>

The territorial courts have been described by historians as agents of “acculturation,” or as institutions that linked the East Coast establishment with the newly incorporated regions of postbellum America. The courts’

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23, at 80.

26. See LARSON, *supra* note 23, at 80 n.10.

27. See, e.g., JOHN D.W. GUICE, *THE ROCKY MOUNTAIN BENCH: THE TERRITORIAL SUPREME COURTS OF COLORADO, MONTANA AND WYOMING, 1861-1890*, at 131 (1972).

28. ROGERS SMITH, *CIVIC IDEALS* 386-87 (1997).

29. See LARSON, *supra* note 23, at 84-85. Mixed grand and petit juries were formed in Cheyenne in 1871 as well. See *id.* at 85.

primary purpose was to meet the “paradigmatic demands of organization and the establishment of order” raised by the developing territories.<sup>30</sup> In striving to establish the legitimacy of the territorial courts, some judges, like the legislators who passed the Suffrage Act, supported the woman juror for what was perceived to be her potential civilizing effect. Contemporaneous commentators noted the irony of the judges’ efforts; in trying to make their courtrooms reflect the sober adjudication of the East, the territorial bench supported reforms that Eastern courts would have rejected.<sup>31</sup>

Justice Howe, who presided over the mixed juries, construed the suffrage statute to have enlarged the legal status of women to include jury service. He held that “whatever may have been . . . thought of the policy of admitting women to the right of suffrage and to hold office, they will have a fair opportunity, at least in my Court, to demonstrate their ability in this new field . . . . Of their right to try it I have no doubt.”<sup>32</sup> Proponents of the experiments projected that if women could be persuaded to sit on juries, they would operate unconstrained by the same external conditions that beset male jurors and would act as their judgment and consciences dictated.<sup>33</sup> Justice Howe concluded that by serving on juries, women would have the best possible opportunity to “aid in suppressing the dens of infamy which curse the country.”<sup>34</sup> In his remarks to the first mixed jury, Howe characterized the experiment as a test of the women jurors’ power to defend themselves against crime.<sup>35</sup> He counseled the women to immunize themselves against the hostile public and assured them that they would be protected, in body and in reputation, from the improprieties that the public feared, as well as from the public itself.

Associate Justice John W. Kingman conceived of the enterprise as a great experiment in the administration of justice. He imagined himself a social engineer, ensuring that women were given “fair play”<sup>36</sup> in light of

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30. GUICE, *supra* note 27, at 9.

31. See Percy L. Edwards, *Constitutional Obligations and Woman’s Citizenship*, 75 CENT. L.J. 244, 245, 247 (1912) (discussing the relationship between developments in the West and settled custom in the East).

32. Letter from J.H. Howe to S.W. Downey (Mar. 3, 1870), reprinted in 3 HISTORY OF WOMAN SUFFRAGE 732 (Elizabeth Cady Stanton et al. eds., 1886). Court battles over women jurors a decade later would revisit whether a statute granting women suffrage could also give women status as jurors. See *infra* Subsection I.D.2.

33. See Hebard, *supra* note 23, at 1304; 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 32, at 733.

34. 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 32, at 733. Though Justice Howe was not an initial advocate of the mixed jury, he approached the execution of the experiments as part of his judicial duty and gradually came to feel satisfaction with and admiration for the work of the women jurors. See Letter from J.H. Howe to Myra Bradwell (Apr. 4, 1870), reprinted in CHI. LEGAL NEWS, Apr. 9, 1870, at 220.

35. See 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 32, at 733.

36. Letter from Judge John W. Kingman to Seth Paine (n.d.), reprinted in *Judge Kingman and Woman Jurors*, CHI. LEGAL NEWS, Apr. 3, 1870, at 213.



the changes to the legal system engendered by suffrage.<sup>37</sup> Justice Kingman's confidence that women would not shy from jury service consciously linked women's participation in the administration of power to the development of the character traits traditionally considered necessary to that power's exercise—the capacities that the mixed jury's opponents claimed women lacked. The Wyoming experiments would be tests to see if women could succeed as members of the body politic.<sup>38</sup> Kingman regarded the women jurors as Albany County's means of "prevent[ing] jury trials from degenerating into a perfect farce and burlesque."<sup>39</sup>

Myra Bradwell's journal, the *Chicago Legal News*, regarded the judiciary overseeing the experiment with great respect.<sup>40</sup> The female legal community believed the territorial bench had enabled the conscientious administration of justice, as signified by changed courtroom behavior:

On petit Juries the women held the men up to a higher tone of morality and stricter sense of honesty than they would have exercised if left to themselves . . . . Lawyers took their heels off the table, and quit whistling and expectorating; the judge put his legs and feet under the bench . . . instead of on top of it; the attendants and spectators came better dressed; the room was kept . . . clean.<sup>41</sup>

Similarly, the few members of the legal community who supported the woman lawyer did so in the belief that she would bring civility to the courtroom. "We observed fewer boot soles resting upon tables and railings, and less lounging in uncouth attitudes [because of the woman lawyer]."<sup>42</sup> Women lawyers and jurors alike portended smokeless courtrooms.<sup>43</sup>

The first mixed petit jury presided over the celebrated murder trial of

37. See GUICE, *supra* note 27, at 132. Guice discusses Kingman's role in the movement as an active supporter and excerpts a letter, written on September 22, 1874 by John W. Kingman to Lucy Stone. Kingman wrote: "A woman will not consent to be a butterfly when she can of her own choice become an eagle! Let her enjoy the ambitions of life; let her be able to secure its honors, its riches, its high places, and she will not be its toy or its simple ornament." *Id.*

38. See Letter from Judge John W. Kingman to Seth Paine, *supra* note 36, at 213.

39. *Judge Kingman and Woman Jurors*, *supra* note 36, at 213. John D.W. Guice describes the judges of the territory as "thrust into perhaps the wildest political scramble in American history." GUICE, *supra* note 27, at 48.

40. *Judge Kingman and Woman Jurors*, *supra* note 36, at 213 (referring to the justices as "firm, honest men").

41. *Woman Suffrage in Wyoming*, 7 WOMAN'S J. 36 (1876) (providing an account of Justice Kingman's testimony before the Joint Special Committee of the Massachusetts Legislature on Woman Suffrage). In their account of the Wyoming experiments, the editors of *History of Woman Suffrage* noted similar changes. The bar seemed to have been on its best behavior, such that "wrangling, abuse, and buncombe speeches were not heard. When men moved about they walked quietly, on tip-toe, so as to make no noise, and forebore to whisper or make any demonstrations in or around the court-room." 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 32, at 734.

42. *A Lady Among the Lawyers*, CHI. LEGAL NEWS, Oct. 29, 1870, at 36, *quoted in* DRACHMAN, *supra* note 7, at 87-88.

43. See *supra* notes 1-5 and accompanying text.

Andrew Howie.<sup>44</sup> During the trial itself, the attorneys in the case tuned their tactics to what they thought would be the tendencies of the six female jurors. The lawyers believed that women would know nothing of the dangers that confronted men in the territories—dangers that sometimes demanded that men kill in self-defense. Defense attorneys therefore sought to appeal to the women jurors' sympathies, rather than their reasonable intuitions about what kinds of actions might be justified.<sup>45</sup> In addition to requiring that lawyers change their strategies, the trial immediately raised the specter that had been brandished by opponents: overnight sequestration of the jury. Yet, with minimal fanfare, the court housed the jury in sex-segregated rooms guarded by gender-appropriate bailiffs at the Union Pacific Hotel.<sup>46</sup> The matter-of-course way in which the trial proceeded deflated the opposition's predictions of the law's decline and neutralized whatever apprehensions remained among the public—at least for a time.<sup>47</sup>

### C. *Assessing the Experiments' Consequences*

Whereas a branch of separate spheres ideology dictated that women would be too sympathetic to serve as qualified jurors, the Howie trial revealed that the variable of the woman juror was not a predictable one: As the experiments unfolded, the content of feminized justice evolved from “too soft” and frivolous to “too hard” and severe.

#### 1. *The Range of Legal and Popular Reactions*

The American public's response to the experiments suggests that the progress the mixed jury signified remained predicated on hotly contested understandings of the qualifications necessary for the possession of civil liberty. Not surprisingly, the mixed jury presiding over the Howie trial

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44. See Hebard, *supra* note 23, at 1313; Letter from J.H. Howe to Myra Bradwell (Apr. 14, 1870), *reprinted in* 3 HISTORY OF WOMAN SUFFRAGE *supra* note 32, at 736-37.

45. This claim that women would be incapable of administering justice for men as the result of an inability to “relate” dominated the rhetoric of women's rights advocates who agitated for women's jury service, in an inverse form. Their arguments stemmed from the premise that women should be judged by their peers and not their sovereigns. In a speech to a women's rights convention in Syracuse, activist Antoinette Brown offered this sentiment:

When woman is tried for crime, her jury, her judges, her advocates, are all men; and yet there may have been temptations and various palliating circumstances connected with her peculiar nature as woman, such as man can not [sic] appreciate. Common justice demands that a part of the law-makers and law executors should be of her own sex.

1 HISTORY OF WOMAN SUFFRAGE 525 (Elizabeth Cady Stanton et al. eds., 1881); *see also* *A Flaw in the Jury System*, 24 WOMAN'S J. 188 (1893) (noting that the average woman, as a woman, would be better able to judge other women and that the “nineteenth century would seem to be old enough now to concede that a woman on trial for her life or liberty has the right to have equal sex representation on the jury that is to pass upon her guilt or innocence”).

46. See 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 32, at 736-37.

47. See *id.* at 736-37.

elicited a range of emotional commentary. At the heart of the opposition to the female jury experiment in Wyoming lay a popular appreciation for the culture of law. The realm of social interactions that surrounded the legal system bore strong masculinist features—features that the Western experiments reveal to be at the core of the internal workings of the jury.

Opponents of the experiments began by lobbying to undermine the selection of women jurors. “As this [selection] was not done by the friends of woman suffrage, there was evidently an intention of making the whole subject odious and ridiculous, and giving it a death-blow at the outset.”<sup>48</sup> Threats and ridicule were hurled by opponents not only at the women summoned to the venire, but at their husbands, in an attempt to shame the men of the community into demanding domestic obedience from their wives.<sup>49</sup> In an effort to cause confusion that would keep women off the jury, prosecuting attorneys loaded the venire with women. They anticipated that women would refuse to serve, thereby compromising the procedural integrity of the jury selection and undermining the experiment altogether.<sup>50</sup> In light of this uproar, defense attorney Stephen Downey urged Justice Howe to order the women discharged.

The legal press—save the portion controlled by women—proved “outspoken and vigorous in its objections.”<sup>51</sup> Though not evincing outright hostility toward the experiment, the *Central Law Journal* described the events in Wyoming as merely reflective of frontier society. Men and women, *by necessity*, and not by egalitarian political design, labored side by side in multiple spheres, not the least of which was in the administration of the criminal law. Rather than take legal developments in the territories as signals of progress parallel to the country’s expansion, commentators defined the political culture of the West in opposition to longstanding legal traditions of the East that consisted of well-defined hierarchies.<sup>52</sup>

The popular press echoed these sentiments. The *Cheyenne Daily Leader* expected that women would regard the masculine courtroom “with disfavor” and resign from the jury, unable to tolerate either the trial itself or the company they would be forced to keep. It richly described the courtroom as a world very much apart from the idealized domestic sphere:

The prospect of being compelled to sit with a lot of strange men, cooped up in a conspicuous corner day after day, listening to

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48. *Id.* at 731.

49. *See id.*

50. *See* GUICE, *supra* note 27, at 132.

51. CHI. LEGAL NEWS, July 30, 1870, at 351 (quoting LAW TIMES (London)). The London paper advocated jury service by women on the premise that it would allow “busy tradesmen” to send their wives and daughters as substitutes, indicating a conception of jury service as a burden, or as a public function secondary to the plying of one’s trade. *Id.*

52. *See* Edwards, *supra* note 31, at 244.

tiresome legal harangues; a target for the impudent stare of hundreds of masculine loafers; breathing the foul air of a court room reeking with a conglomeration of vile smells—is not the most inviting to a refined and sensitive woman.<sup>53</sup>

This vision of women entering a foul-smelling jury room inhabited by unclean men and dirty business recurs in the literature describing the first mixed juries, much in the same way that it marked opposition to women lawyers.<sup>54</sup> The view of jury service and the criminal trial as the undersides of democratic politics battles with Lelia Robinson's account of a purified courtroom in which men felt obligated not to smoke at the same time that they felt constrained from allowing lawless behavior to slide. Ultimately, everyone involved imagined the courtroom transformed.

Critics also argued that women in the courtroom would distract men by changing the legal discussion into “a charming tete-a-tete with the best looking young man on the jury. . . . [S]ession[s] . . . would witness a delightful but wicked flirtation between good-looking juryman and the volatile wife.”<sup>55</sup> Unable to focus on the “legal harangue,” women jurors would instead introduce frivolous conversation, emblematic of their domestic sphere, into the sober proceedings. Similarly, opponents of the woman lawyer portrayed her as a seductress. Men, constrained by chivalry, would not be able to attack her arguments in the usual way, freeing the woman lawyer to use her feminine wiles on judge and jury alike.<sup>56</sup>

Across the country, journalists and concerned citizens, through their letters to the editor, pondered what “female justice”<sup>57</sup> meant. The *New Orleans Times* wrote that the confusion of “dress” and “rights” brought on by the mingling of the sexes in the courtroom threatened to obliterate distinctions between men and women.<sup>58</sup> The daily charged that the jury experiment was premised on a fictitious female “masculinity,” concluding that the mixed jury would actually yield beneficial results by proving women to be incapable of sitting “as the peers of men without setting at defiance all the laws of delicacy and propriety.”<sup>59</sup>

The *Philadelphia Press* offered an alternative view consistent with the

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53. N.A. Baker, *Females in the Jury Box*, CHEYENNE DAILY LEADER, Mar. 1, 1870, at 1.

54. See, e.g., DRACHMAN, *supra* note 7, at 73; Virginia G. Drachman, *Entering the Male Domain: Women Lawyers in the Courtroom in Modern American History*, 77 MASS. L. REV. 44, 45 & n.5 (1992) (quoting William P. Rogers as expressing doubts about women lawyers' capacities to withstand the “continual contest” of the courtroom and noting that men believed women's purity made them unfit for the sordidness of trial work).

55. Baker, *supra* note 53, at 1.

56. See Drachman, *supra* note 54, at 45.

57. PHILA. PRESS (n.d.), *reprinted in* 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 32, at 735.

58. NEW ORLEANS TIMES (n.d.), *reprinted in* 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 32, at 735.

59. *Id.*

outcome of the Howie trial. The paper asserted that women, by nature, moralized excessively and therefore did not belong as decisionmakers in a legal system that depended on discovering nuances and gradations in responsibility. "Is it possible for a jury of women, carrying with them all their sensitiveness, sympathies, predilections, jealousies, prejudices, hatreds, to reach an impartial verdict?"<sup>60</sup> Regardless of whether opponents believed the woman juror to be "too soft" or "too hard," a consistent argument ran through all of the criticism: The woman juror, by defying the separate spheres construct, dangerously conflated gender roles in a manner incompatible with prevailing legal culture.

Dispatches from Laramie described such a male-female role reversal and asked, "[a]nd then what must be the reflections of their lords—lords no more, but nursery maids henceforth?"<sup>61</sup> Allowing married women to serve as jurors would force the husband to perform domestic duties to the detriment of family stability and his own sanity; the married woman would be seduced away from her responsibilities by the trappings of power.

The husband must remain at home and care for the little ones . . . . [M]any families . . . must be seriously inconvenienced by the absence of the wife and mother upon her "public duties." Just imagine papa at home administering cold comfort . . . to the fretful baby which won't go to sleep . . . .<sup>62</sup>

Many opponents argued that the expansion of women's legal status signaled a threat to the family order precisely because its foremost proponents had themselves shunned the family life.<sup>63</sup> Similarly, opponents of women lawyers feared that such women would neglect their husbands—a fear that in fact led many female attorneys either to join their husbands in practice or to abandon practice altogether upon marriage.<sup>64</sup>

In the end, media accounts abounded with five predictable conclusions: (1) women's exalted moral natures rendered them ill-suited for the dirty world of the courtroom; (2) the characteristic emotions that made women good mothers would operate to cloud their judgment; (3) incapable of apprehending abstractions, women would be unable to decipher the technicalities of the law and the intricacies of evidence; (4) inherently frivolous, women jurors would be too distracted to perform their duties,

60. PHILA. PRESS, *supra* note 57, at 735. For the Howie verdict, see *infra* Subsection I.C.2.

61. Baker, *supra* note 53, at 1.

62. *Id.*

63. In response to Susan B. Anthony's claim that motherhood could be compatible with political participation by women, a young Wyoming settler wrote, "So it appears that this old maid whom celibacy has dried . . . would apply to the human species 'the same laws that govern lower animals.' What does she know about it?" *Ridiculousity*, CHEYENNE DAILY LEADER, Feb. 15, 1870, at 1.

64. See DRACHMAN, *supra* note 7, at 101-06.

distracting male jurors in the process; and (5) the demands of women's domestic responsibilities made jury service a logistical impossibility.

## 2. *The Wyoming Verdicts*

The results of the jury experiments confirmed that women would change the nature of the justice dispensed in court. Those who had anticipated that women jurors would advance a law-and-order agenda had most accurately predicted the effects of gendered justice. In her account, Grace Raymond Hebard recorded that the mixed juries had insisted that "all laws should be enforced that related to the suppression of gambling, the regulation of saloons, and the observance of Sunday."<sup>65</sup> In the Howie trial, the verdict demonstrated a similar impulse. "The attorneys for the defense . . . succeeded in touching the women's sympathies to such an extent that copious tears were shed, but beyond that the attorney stormed at the gate in vain—the women all voted for conviction."<sup>66</sup> Constituted by six men and six women, the jury defied attorneys' expectations and returned with a verdict of manslaughter in the first degree.<sup>67</sup> In his early assessments of the mixed juries, Justice Howe noted that the women jurors had rid the territory of the perpetrators of vice. "After the grand jury had been in session two days, the dance-house keepers, gamblers and *demi-monde* fled out of the city in dismay, to escape the indictment of women grand jurors!"<sup>68</sup> He concluded that in twenty-five years as a judge across the country, he had never seen such faithful and honest jury service.<sup>69</sup>

Other responses to the results of the experiments demonstrate that the women jurors had indeed caused confusion over the connection between gender and the administration of law. An editorial in the *Laramie Daily Sentinel* simultaneously confirmed the expectations of the experiment's proponents and the underlying fears of its detractors. While those who supported the experiments wished them to succeed, they had not intended them to demonstrate that women were *better* qualified for these duties and positions than men.<sup>70</sup> Justice Howe found that after three or four criminal trials, defense attorneys, unable to use their "usual tricks and subterfuges"<sup>71</sup> began using the peremptory challenge to strike female jurors who were too

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65. Hebard, *supra* note 23, at 1313.

66. *Id.* at 1316.

67. It was not until 50 years after the trial that the original breakdown of the jury vote became known: One woman voted for first degree murder, two women voted for second degree murder, three women voted for manslaughter, three men voted for manslaughter, and three men pronounced Howie not guilty. *See id.* at 1315.

68. Letter from J.H. Howe to Myra Bradwell, *supra* note 44, at 736.

69. *See id.*

70. *See Judge Kingman and Woman Jurors*, *supra* note 36, at 213 (quoting *Laramie Daily Sentinel*).

71. 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 32, at 734.

much in favor of “enforcing these laws” and punishing crime.<sup>72</sup> Lawyers began making different kinds of gendered assumptions about potential jurors to avoid what they believed could be a feminized outcome at trial.

Hebard attributed the gender-based disparities in the verdicts to the fact that, in the Wyoming of the 1870s, men regarded murder as a less serious offense than cattle theft. In the Howie case, the conviction proved to be one “that the people were convinced could not have been obtained with the usual kind of jury when one considered the times and the sentiment against conviction for murder. Had it been a case of stealing a horse, there would not have been any question of the ultimate outcome.”<sup>73</sup> Yet, while crediting the female jurors with the establishment of a law and order precedent, Hebard nevertheless attributed the severity of one juror’s assessment of the crime to a masculine impulse.

[S]he who cast her vote for murder in the first degree . . . sat knitting by the stove, the soft, womanly click of her needles as they flew in and out of her skillful fingers seemed to keep time with the rather unfeminine verdict she was frequently repeating. ‘Whoso sheddeth mans blood by man shall his blood be shed.’<sup>74</sup>

That the women jurors handed down verdicts that defied the initial expectation that women would be too weak-willed to be good jurors only enlarged the threat they posed to the conventional administration of justice.

The gender-based ambiguities resulting from the experiments found expression in the press as well. An editorial in the *Laramie Daily Sentinel* stopped short of casting the successful results of the mixed jury as an aberration, but it refused to construe them as a precedent for women’s permanent involvement in the administration of the law. That the women jurors had “demonstrated their *capacity and ability* to discharge any duties and trusts” did not commit Wyoming residents to “the *policy* of all the so-called reforms advocated by the ‘women’s rights’ champions.”<sup>75</sup> In other words, something *more* than a demonstration of their capacity to enforce the law would be required for women to achieve a complete transformation in their legal status. The “frailties” or “inabilities” of women traditionally cited to exclude them from political participation had been exposed as a smoke screen for a more deeply-rooted power dynamic. That inconsistent rhetoric and confusion surrounding proper gender roles abounded *after* the experiments reveals that opposition to the mixed jury responded to perceived shifts in power. The conflation of gender roles—a source of

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72. *Id.*

73. Hebard, *supra* note 23, at 1316.

74. *Id.* at 1315 (quoting *Genesis* 9:6).

75. *Judge Kingman and Woman Jurors*, *supra* note 36, at 213.

explicit commentary at the time—doomed the experiments.<sup>76</sup>

Eventually, the mixed jury fell into disuse. Hebard's account dissolves into a paean to the righteous woman who in the midst of her domestic duties goes to the polls.<sup>77</sup> Rather than emphasize the discontinuation of the jury experiment after Justice Howe's retirement, Hebard leaves her readers with a genteel vision that collapses the various elements of the experiment into a single statement on the purity of the female voter.

Putting on a fresh, clean apron over her house dress, she walked to the polls early in the morning, unaided, carrying a little bucket for yeast to be bought at the bakeshop on her return home. It is interesting to note that the domestic instinct was not consumed by the new political obligations, and that the judge of elections recorded the vote of this gentle, determined, white-haired woman with more than an ordinary degree of reverence.<sup>78</sup>

Similarly, Stanton and Anthony's chapter on the Wyoming episode in the *History of Woman Suffrage* ends with a discussion of the changes brought to the territory by women's suffrage but does not offer an explanation for the end of the jury experiments. To reconcile the fact that women in Wyoming were once again excluded from grand and petit juries after 1871 with the peaceful and largely unchallenged perpetuation of female suffrage, the woman juror must therefore be understood as distinct from the woman voter. She should be seen as a figure, who like the woman lawyer, threatened to transform the courtroom dynamic. Though the Wyoming Territory willingly embraced political participation by women in the form of suffrage,<sup>79</sup> a feminized legal culture appears to have been beyond the reformist capacities of the fledgling state.

#### D. *The Washington Experiments as Further Context for Wyoming*

Though they presided over the most well-known nineteenth-century mixed juries, inhabitants of the Wyoming Territory abandoned the enterprise before legal challenges could be mounted.<sup>80</sup> Whether suffrage

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76. *See id.* at 1008-09.

77. Hebard, *supra* note 23, at 1293.

78. *Id.* at 1341.

79. On the subject of female suffrage in the Western territories, the editors of the *History of Woman Suffrage* wrote:

The prospect was, that it would either remain a dead letter, or be swept away under the ridicule and abuse of the press, and the open attacks of its enemies. But it had withstood all these adverse forces, and from small beginnings has grown to be a permanent power in our politics, a vital institution, satisfactory to all our people.

3 HISTORY OF WOMAN SUFFRAGE, *supra* note 32, at 747.

80. It was not until 1892, when a criminal defendant sought to have his conviction overturned on the novel grounds that women had been excluded from his jury, that the Wyoming Supreme



granted by implication the right to serve on juries remained largely unexplored by the courts. The Washington Territory followed Wyoming's lead by passing a suffrage law in 1886, and women soon thereafter began to serve on grand and petit juries. The sources available for evaluating the Washington experiments are neither as plentiful nor as detailed as the evidence of the Wyoming experiments. Nevertheless, the existing accounts enhance the picture of the woman juror as a challenge to male-dominated legal culture. Most importantly, the Washington experiments produced case law defining jury service as a right separable from suffrage and therefore help explain why the Wyoming experiments may have ended.

### 1. *Observers Evaluate the Mixed Jury*

In judging the Washington experiments, Lelia Robinson expressed deep satisfaction that the women impaneled had brought to the jury box the "intelligent, conscientious care . . . that they had given for years to their domestic affairs within the four walls of home."<sup>81</sup> Stories of women's changing courtroom character appear throughout Robinson's account. One woman, unable to find someone to care for her child, served with her son, who eventually became a court mascot, in tow.<sup>82</sup> Robinson recounted one of the trials in which the mother participated: A mixed jury acquitted an exceptionally beautiful defendant for stabbing a "vile and ugly" victim.<sup>83</sup> According to Robinson, though the jury acquitted the defendant for lack of evidence, the defense attorney played to the sympathies of the woman juror who presided with her son by her side. He believed that because the defendant herself had a child, natural maternal sympathies would inform the mother-juror's decision.<sup>84</sup> "[I]t didn't seem possible that the jury-woman with her little one by her side, could help to find a verdict of guilty against that other woman with her little one in her arms."<sup>85</sup>

Justice Greene, who presided over mixed juries in Washington, like Justices Howe and Kingman, lauded the transformations in the courtroom dynamic; never before had his court been able to elicit such reliable jury

Court had the opportunity to pass judgment on the issue. *See infra* Subsection I.D.2.

81. Robinson, *supra* note 1, at 24.

82. *See id.* at 28-29. Robinson describes the presence of children in the courtroom vividly and with emotion, suggesting that the courtroom had begun to acquire a more domestic feel:

The prisoner also had a little child, just about the age of the little jury-boy: one of the prettiest blue-eyed and flaxen-haired baby-girls that I ever saw, and she was with her mother through the entire trial, running about inside the bar making friends with the lawyers and officers of the court, looking longingly up at the kind-faced judge, but not quite daring to mount the steps of the bench, and then returning to her frightened, black-robed mother, to fall asleep on her breast.

*Id.* at 30.

83. *Id.* at 29.

84. *See id.* at 29-30.

85. *Id.* at 30.

service. His praise stemmed from a belief that the combination of male and female qualities made possible by the mixed jury represented the most secure basis for the law's administration. The conflation of gender identities criticized by opponents in Wyoming proved desirable to Greene. "The honest truth is, that in 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>86</sup>

Though Justice Greene located women in the household first and foremost, he believed the integration of domestic interests into the affairs of state would add a new and vital dimension to legal culture.<sup>87</sup> In defending the woman juror, Greene articulated the need for a feminizing and purifying influence in the administration of justice to complement female voters' newfound influence in the legislature. He hoped to avert the possibility that laws passed with the imprimatur of the woman voter would be rendered contentless by permissive all-male juries.<sup>88</sup> Given the premium he placed on women's capacities to enforce the law as written, Justice Greene's resistance to decoupling voting from jury service comes as no surprise.

## 2. *Courts Take an Incrementalist Approach to Women's Rights*

Though the judge-led, pro-woman juror line held sway in Washington longer than it did in Wyoming, the progressivism of the Washington judges eventually fell victim to the persuasive power of legal and popular custom. In *Rosencrantz v. Washington*,<sup>89</sup> a grand jury composed of five women and seven men returned an indictment against a Tacoma resident for running a brothel. The defendant challenged the conviction by challenging the mixed jury. The court held that married women residing with their husbands constituted competent grand jurors.<sup>90</sup> The court reasoned that the legislature's inclusion of "electors" and "householders" in the original grand jury statute did not exclude those who had not been electors or householders when the statute was passed. Rather, the legislature had intended to create classifications with changeable content such that when it designated certain persons as being within a classification, the associated rights would accrue to the newly elevated persons.<sup>91</sup>

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86. *Judge Greene and Women Jurors*, CHI. LEGAL NEWS, Oct. 4, 1884, at 30 (quoting from Justice Greene's charge to the grand jury).

87. *See id.*

88. *See id.*

89. 2 Wash. Terr. 267, 268 (1884). Lelia Robinson, traveling through the Washington Territory at the start of the *Rosencrantz* litigation, appears to have been asked to provide legal assistance to Mollie Rosencrantz, the brothel proprietor challenging the mixed grand jury. *See Robinson, supra* note 1, at 31.

90. *See Rosencrantz*, 2 Wash. Terr. at 275.

91. *See id.* at 273. The court concluded that not only were women electors, even married women could be considered householders, given recent changes to the law of coverture. *See id.*

The dissent in *Rosencrantz*, which would eventually carry the day, offered an alternative vision of the jury. Rather than link jury service to a particular status, i.e., elector or householder, the dissent characterized jury service as a civic obligation that women did not need to protect the rights that they had been granted by the progressive spirit of the times. Instead, the public associations required by jury service—associations that did not attend voting—would expose women to influences that could “shock and blunt those fine sensibilities, the possession of which is her chiefest charm, and the protection of which, under the religion and laws of all countries, civilized or semi-civilized, is her most sacred right.”<sup>92</sup> By serving on juries, women would actually compromise the attributes that sustained their status in the domestic sphere; by straying from their natural social positions, women would undercut the purposes for which their newly granted political rights had been intended. No statute granting suffrage could prepare women for the rigors of the courtroom, nor could it “clothe a timid, shrinking woman, whose life theater is . . . and ought to continue to be, primarily the home circle, with the masculine will and self-reliant judgment of a man.”<sup>93</sup>

Three years later, the Washington Territorial Supreme Court made explicit the *Rosencrantz* dissent’s connection among a woman’s physical capacities, her appropriate social sphere, and her legal status. In *Harland v. Washington*, the plaintiff in error challenged his indictment for feloniously carrying on a “twenty-one” or “dice swindling game” on the ground that five impaneled jurors were women living with their husbands.<sup>94</sup> Citing *Robinson’s Case*<sup>95</sup> and *Bradwell v. Illinois*,<sup>96</sup> both cases denying women the right to join a state bar, the appellant presented a claim, tied to common-law understandings of marital relations, that changes in common-law legal relationships could only be made by explicit statutory enactment.<sup>97</sup> The court, citing a change in its membership since *Rosencrantz*, declared itself unable to accept the proposition that married women represented qualified jurors. The territorial bench thus resumed the task of sustaining a separate spheres justification for its evaluation of the legal capacities of women.<sup>98</sup>

Referring to Blackstone’s declaration of *propter defectum sexus*,<sup>99</sup> or the admonition that women lacked certain legal capacities by reason of

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For a discussion of changes in coverture, see Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 *YALE L.J.* 1073 (1994).

92. *Rosencrantz*, 2 Wash. Terr. at 279 (Turner, J., dissenting).

93. *Id.* at 281 (Turner, J., dissenting).

94. *Harland v. Washington*, 3 Wash. Terr. 131, 133 (1887).

95. 131 Mass. 376 (1881) (finding also that the legislature did not undertake to reform jury laws when it amended the state’s election laws).

96. 83 U.S. (16 Wall.) 130 (1872) (concluding that a radical revolution in the relations in family government could only be effected by *express* statutory enactment).

97. *See Harland*, 3 Wash. Terr. at 134.

98. *See id.* at 136.

99. 3 WILLIAM BLACKSTONE, COMMENTARIES \*362.

“defect of sex,” the court offered the typical contention that at common law, a jury could be constituted by men alone.<sup>100</sup> The court expressly denied that suffrage and jury service represented functions of each other:

Whatever may be thought of . . . making females voters, there is but one opinion among the great mass of the people, male and female, concerning the imposition on the latter of jury duty, and that opinion is firmly and unalterably against such imposition.<sup>101</sup>

Because the legislature represented the people, it could not have intended the Suffrage Act to give women the right to serve on juries—a right of which public opinion “universally disapprove[d].”<sup>102</sup>

The court concluded that jury service, like professional life, interfered with women’s obligations to the domestic sphere in a way that voting did not. The court cited *Bradwell* and *Robinson’s Case* to support the holding that women had no right to enter the courtroom as jurors. The courts’ invalidation of female jury service depended not on an understanding of the implications of female suffrage, but on an awareness of the consequences of a female presence in a court of law. The Washington court invalidated women’s right to serve on juries through an analysis of women’s abilities, as legal actors, to perform in the prevailing culture of the courtroom.<sup>103</sup> Women had no place in the courtroom as active decisionmakers in any capacity.

Finally, almost two decades after women ceased serving on juries in Wyoming, the Wyoming Supreme Court grappled with whether jury service represented a political right distinct from suffrage. Given its timing, then, this final word of the century on women jurors can be best understood in the context of the Washington court decisions. In *McKinney v. State*,<sup>104</sup> the supreme court of Wyoming denied the request of the petitioner to have his conviction overturned on the grounds that, because women had been excluded from the venire, he had been denied a legitimate jury trial.

The court began its analysis by rejecting *Strauder* as precedent, finding that the design of the Fourteenth Amendment “was to protect an emancipated race, and to strike down all possible legal discriminations

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100. See *Harland*, 3 Wash. Terr. at 137.

101. *Id.* at 138.

102. *Id.*

103. Women’s jury service came to an end in 1888 with *Bloomer v. Todd*, 3 Wash. Terr. 599 (1888). In a long discourse on the importance of stable statutory interpretation, the court invalidated the territorial law granting suffrage to women as a violation of the Organic Act—Washington’s founding “charter” as a state. See *id.* at 619. Though the court found that suffrage formed a necessary prerequisite for jury service, the court nevertheless demonstrated that the right to participate in courtroom proceedings had implications for citizen participation in government that extended well beyond the act of voting. See *id.*

104. 3 Wyo. 719 (1892).

against those who belong to it.”<sup>105</sup> Despite the existence of a Wyoming constitutional provision entitling women to all political and civil rights, the court held that a male citizen, on a prosecution against him, could not complain that women were excluded from the jury. “[I]f women have the right, if it is a right, to serve as jurors, and to ‘assist in the administration of justice’ . . . it seems that no one but a woman . . . can assert that right.”<sup>106</sup> The court further found that women had never been eligible for jury service under territorial statutes, suggesting that the Wyoming jury experiments actually had been illegal. The rights to vote and hold office had never been coterminous with the right to sit on juries.<sup>107</sup> Because jury duty constituted a particular kind of political activity—assistance in the administration of justice—and no statute had provided for the admission of women to the jury box, the challenge brought by the petitioner failed.<sup>108</sup>

The *McKinney* court’s conclusions can be characterized as follows: The court acknowledged the *possible* propriety of the female juror in terms of the right of a female defendant to a jury of her peers and not in terms of the woman’s right to be a juror. Therefore, *if* the court had been willing to concede that the right to jury service existed by implication from suffrage guarantees, it still likely would have found that only women defendants could assert that right when faced by an all-male jury.<sup>109</sup> The act of excluding women from the venire generally could not be said to constitute an infringement of the constitutionally protected rights of excluded women. For the *McKinney* court, the female defendant’s right to a mixed jury would never translate into a right to participate in courtroom proceedings for all women in the community. This distinction makes it possible to conclude that the court imagined that men and women might apprehend the law in qualitatively different ways. Men and women dispensed different brands of justice and therefore deserved different forms of adjudication.

## II. THE IDEOLOGICAL CONTEXT OF THE NINETEENTH-CENTURY JURY DEBATE

### A. *The Parameters Set by the Separate Spheres*

Scholars of frontier development have succeeded in demonstrating that insofar as public and private spheres existed in the West, they proved to be highly permeable. The reality of women’s status on the frontier can be located somewhere between the popular conception of the stoic pioneer

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105. *Id.* at 725 (citing *Strauder*, 100 U.S. 303, 310 (1879)).

106. *Id.* at 726-27.

107. *See id.* at 724.

108. *See id.* at 724-25.

109. *Cf. id.* at 726-28 (providing the basis for this interpretation).

women who worked diligently alongside their men and the “genteel civilizer[s]” reflective of the Eastern, upper-class lady.<sup>110</sup> The salient feature of the separate spheres construct for the Western experiments, however, was not that it described reality, but that it exerted cultural force in response to changes in public life.<sup>111</sup>

At the same time that developing frontier society demanded that women labor and engage in activities inconceivable in the established East,<sup>112</sup> the cultural assumptions of the separate spheres perpetuated by the Eastern establishment organized public discourse in the West. Women themselves clung to the ideal of the “true woman” as the marker of respectability and status.<sup>113</sup> Though the experiments themselves may be attributable to the unique rough-and-tumble nature of frontier life, understandings of traditional gender roles pervaded the participants’ attempts to understand the mixed jury and define the possible transformative effects of a feminized courtroom.

In their observations of the jury episodes, the organs of public opinion offered layers of justification for excluding women from the venire.<sup>114</sup> Each layer represented a common trope of the nineteenth-century woman’s sphere that also characterized opposition to female lawyers.<sup>115</sup> Observations included: (1) the publicly active woman as neglectful of her family; (2) women as too delicate to handle the burdens of jury service; (3) the female intellect as overly emotional and incapable of abstract or logical thought; and (4) the weak-willed woman as easily seduced by power and by the men who possess it. Each of these visions clashed with the conception of the woman as the irreproachable conscience of the race, idealized and above the legal and political fray.<sup>116</sup> The common thread in each of these versions

110. See Elizabeth Jameson, *Women as Workers, Women as Civilizers: True Womanhood in the American West*, in *THE WOMEN’S WEST* 145, 145-46 (Susan Armitage & Elizabeth Jameson eds., 1987). Jameson describes the women’s work of the frontier as contributing to an “interdependent economic unit,” *id.* at 150, and concedes that, though women did work, labor remained divided along gendered lines. Men plowed and planted, women raised smaller gardens. Women participated in wage labor, but through traditional acts such as cooking and sewing. See *id.* at 150-51.

111. Cf. NANCY COTT, *THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND, 1780-1835*, at 197-206 (1977) (describing how separate spheres ideology could be used by women to serve their own purposes); DUBOIS, *supra* note 21, at 1-40 (describing separate spheres ideology as a historical phenomenon that shaped women’s rights activism and the cultural conditions from which it grew); LINDA K. KERBER, *Separate Spheres, Female Worlds, Woman’s Place: The Rhetoric of Women’s History*, in *TOWARD AN INTELLECTUAL HISTORY OF WOMEN* 159, 171 (1997) (explaining that separate spheres constituted at once a culture imposed on women and a culture created by women).

112. See, e.g., Edwards, *supra* note 31, at 244.

113. *Introduction to SO MUCH TO BE DONE: WOMEN SETTLERS ON THE MINING AND RANCHING FRONTIER* at xi, xv (Ruth B. Moynihan et al. eds., 1990).

114. For a detailed discussion of popular reaction, see *supra* Subsection I.C.1.

115. Cf. DRACHMAN, *supra* note 7, at 73-78 (describing the struggles of women lawyers in separate spheres terms).

116. For a discussion of womanhood that defined women as morally beyond the law, see

of the separate spheres was the belief that once women were allowed simultaneously to undermine and be undermined by the “business as usual” of the courtroom, no one would be left to sustain a domestic sphere untouched by the vagaries of politics.

That the elements of the separate spheres wove through assessments of the jurors reveals that the fledgling legal system of the frontier was not prepared for the level of departure from established ideologies required by the woman juror. Justices Howe and Kingman, who sought to legitimate their courts as institutions where the rule of law governed, cast the female juror as the frontier’s civilizing influence. Yet, in trying to emulate the Eastern legal establishment, could the use of methods inconceivable in the East really have achieved the desired result? Frontier lawyers seeking to preserve existing legal networks traded in a multitude of assumptions about female capacities that undercut those assumptions proffered by the bench. The assertiveness of the first women jurors strained the prevailing ideology of the legal system beyond its capacity for change. Though suffrage could have seemed consistent with the view that women played an important role in frontier development, this recognition need not have coincided with a willingness to incorporate women into legal associations.<sup>117</sup> That women worked, and worked hard, did not change the nature of legal institutions.

For the Western experiments, then, these nineteenth-century ideological constructs form a critical context. The separation of spheres helped sustain the exclusive dynamics of the legal community, which in turn assured that the administration of justice would reflect gendered assumptions about the law. To understand how this interplay affected the women jurors of the Western territories, no better analogy exists than the struggle of women to become members of the bar. Women lawyers like Lelia Robinson, in defying the neat separation between public and private, challenged the masculinist legal culture that depended heavily on the existence of the two spheres of life—no matter how fictional.

#### B. *Women Lawyers Enter the Universe of Masculinist Legal Culture*

Scholars have noted that, “[a]s the paradigmatic public profession, law

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Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966). In its presentation of the Wyoming jury experiment, the *History of Woman Suffrage* reprinted various defenses of the woman juror, each of which predicated its remarks on the proposition that women would dispense a particular kind of justice. See 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 32, at 726-48.

117. Some scholars have argued that women were granted suffrage in the West not because they agitated for it, but because it proved consistent with the interests of men on the frontier. Moreover, the grant was a conservative one, predicated on the notion that women represented the domestic sphere. In describing the debates over women’s suffrage, other scholars contend that a proto-feminist, reformist spirit existed among women of the frontier, rendering suffrage a more radical political guarantee. See Jameson, *supra* note 110, at 157.

[in the nineteenth century] had little connection with the domestic sphere, or with the ideal world of nurturance and tender feeling that nineteenth century women were supposed to inhabit.”<sup>118</sup> As legal culture took shape after the Revolution, it began to take on its own distinct forms; the profession gradually separated from its origins in the “life of letters” and became more “manly” and autonomous, with its own characteristic dynamics and language.<sup>119</sup> Indeed, the bar had become a group of people who could “assemble at the tavern for a social meeting”—a group of insiders.<sup>120</sup> For women lawyers, the trend toward specialization in legal practice and pervasive social prejudice combined to keep them segregated from these insider networks.<sup>121</sup> The vision of “responsible manhood served as an internal mechanism of guild control and an external depiction of lawyers as trusted public servants.”<sup>122</sup>

A story written by attorney Charles Moore and published in the *Hartford Daily Times* in 1886 suggests a conception of women as incompatible with this legal culture. Despite her most energetic efforts inside the courtroom, would-be attorney Mary Padelford, the story’s tragic heroine, succumbs to brain fever and renounces the legal profession.<sup>123</sup> To be sure, Moore’s account contains myriad references to women’s physical incapacities. The more significant feature of the tale, however, is that this physical weakness renders the woman lawyer unfit for the rigors of the courtroom. While Padelford possesses the intellectual capacity to draft legal arguments, she cannot meet the harshest demands of legal practice—the adversarial confrontation of the trial.<sup>124</sup> Moore’s story presents a picture in which the features of a woman’s identity disrupt the proceedings of a court of law. A similar urge to defend the “masculine” features of the courtroom dynamic from feminine forms of behavior animated the flurry of debate that surrounded the Western jury experiments.

The records of the first national organization of women lawyers in the United States corroborate this picture of a highly masculinized profession. Known as the Equity Club, the group developed in the latter half of the nineteenth century as a support network for female attorneys. Throughout

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118. Barbara Allen Babcock, *Clara Shortridge Foltz: “First Woman,”* 28 VAL. U. L. REV. 1231, 1284 (1994).

119. Michael Grossberg, *Institutionalizing Masculinity: The Law as a Masculine Profession*, in MEANINGS FOR MANHOOD: CONSTRUCTIONS OF MASCULINITY IN VICTORIAN AMERICA 133-36 (Mark C. Carnes & Clyde Griffen eds., 1990).

120. *Id.* at 138.

121. *See id.* at 148-49.

122. *Id.* at 138. Drachman argues that the legal community was even more masculinized than other male-dominated professions. Unlike the medical profession, in which women could assume roles as caretakers, the law “provided no obvious way for women to claim their place.” DRACHMAN, *supra* note 7, at 11.

123. *See* Charles Moore, *The Woman Lawyer*, HARTFORD DAILY TIMES (1886), reprinted in 26 *Green Bag*, 523-31 (1914) (cited in Grossberg, *supra* note 119, at 133).

124. *See* Grossberg, *supra* note 119, at 29.



the nineteenth century, women struggled to gain admission to law schools. Even as they became part of the academic community, they remained isolated among law students.<sup>125</sup> And once they left the confines of the classroom, this isolation deepened. As of 1880, only 200 women lawyers existed across the country.<sup>126</sup> The Equity Club proved vital in counteracting the isolation resulting from their small numbers and their exclusion from the club-like associations of the profession. The Club's existence enabled the creation of a professional identity for women lawyers, a particularly significant function at a time "when membership in legal associations became a new professional standard . . . ." <sup>127</sup>

The correspondence of the members of the Equity Club demonstrate that women lawyers shared a number of gender-based concerns.<sup>128</sup> Ellen Martin observed that men had ready-made networks in business and private clubs through which they could sustain their practices and develop their reputations. "The freedom with which boys move about in public places enables them to gather up a great deal of practical information before they reach the business age."<sup>129</sup> Women, on the other hand, had to struggle with how to be at once women and lawyers. How women should dress in court and whether they could withstand the physical rigors of the courtroom consistently preoccupied Equity Club members.

Wisconsin attorney Margaret Wilcox articulated the challenges facing women lawyers in the courtroom and offered a radical solution.

[I]t is hard to show the need of women as lawyers without insisting also on the need of women as jurors. . . . The more clearly we can make this lack of justice appear to the mind of the average man and woman, the more readily shall each of us be allowed to do our chosen work. . . . Try to imagine [the] energy [that] would be saved . . . if the young woman who enters on the profession of the law could do so without . . . fighting down the prejudice which now meets her both in and out of court.<sup>130</sup>

Wilcox argued that women lawyers and jurors would face the same

125. See DRACHMAN, *supra* note 7, at 4-8.

126. See *id.* at 44. In 1870, five women lawyers were reportedly practicing in the United States. By the turn of the century, 20 states had allowed women to join the bar, raising the total of female attorneys to just over 1000. See DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 23 (1989).

127. VIRGINIA G. DRACHMAN, *WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA: THE LETTERS OF THE EQUITY CLUB, 1887 TO 1890*, at 2 (1993).

128. See DRACHMAN, *supra* note 7, at 78-97 (discussing "double consciousness" or the battle between gender and professional identities that plagued women lawyers).

129. Letter from Ellen A. Martin to Miss Pearce (May 25, 1888), *reprinted in* DRACHMAN, *supra* note 127, at 113.

130. Letter from Margaret L. Wilcox to Equity Club (Apr. 20, 1888), *reprinted in* DRACHMAN, *supra* note 127, at 140.

challenges; the fate of the former was intertwined with the latter. The introduction of the female juror would bring into the courtroom feminine forms of reason. Women jurors would begin the process of dismantling the gender prejudice that marked the courtroom dynamic and thereby make life easier for women lawyers. Women's rights depended on the presence of women in the courtroom in all capacities.

To be sure, many of the women who became lawyers went into practice with their lawyer husbands; the wife would handle the private office work and the stenography while the husband would undertake the litigation and courtroom work.<sup>131</sup> Lelia Robinson, who marveled over her opportunity to address mixed juries in Washington, nevertheless advised women lawyers to develop their stenography skills as the best means to a job in the legal profession.<sup>132</sup> In her account of women seeking access to state bars across the country, Ellen Martin revealed that to the extent that some women were admitted to practice, they remained confined to areas such as family law and "Orphans' Court" and were excluded from the burgeoning law of corporate transactions.<sup>133</sup>

The women who did appear in court evinced ambivalence over the propriety of their presence there. For example, Lettie L. Burlingame wrote that she felt "dreadfully (?) about Prof. H.W. Rogers' [of Michigan Law School] letter . . . in which he hinted that women were unfit for the contentions of the forum . . . . Skillful questioning and honest logic have charms for me that filling in prescribed forms with parrot like precision never could have."<sup>134</sup> Burlingame's call for women to use their hearts as they entered the courtroom suggests that she rejected the notion that the female litigator had to suppress her femininity while practicing. Other female attorneys, such as Martin, cautioned that the trial placed a strain on the nervous system that women could not handle unless they were in "first class physical condition."<sup>135</sup>

Women lawyers' wide-ranging concerns demonstrate that their presence in the legal profession in general and the courtroom in particular could only change the dynamics of both. A gendered conception of justice gradually developed as women lawyers strengthened their associations and grew in number. Women lawyers themselves understood that their

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131. See DRACHMAN, *supra* note 7, at 104-05, 108.

132. See Letter from Lelia Robinson to Equity Club (Apr. 7, 1888), *reprinted in* DRACHMAN, *supra* note 127, at 122.

133. See Martin, *supra* note 5, at 76; see also Grossberg, *supra* note 119, at 150 (noting that law became "hard" if it dealt with economic relations such as contract and property law and "soft" if it dealt with more problematic social relations like family law).

134. Letter from Lettie L. Burlingame to Equity Club (May 17, 1888), *reprinted in* DRACHMAN, *supra* note 127, at 92.

135. Letter from Ellen Martin to Equity Club (May 25, 1888), *reprinted in* DRACHMAN, *supra* note 127, at 114.

particular experiences as women in a male-dominated society had shaped their world views such that distinctly feminine forms of association, public behavior, and decisionmaking defined who they were as lawyers. For example, the concern of Equity Club members over whether they could simultaneously pursue the benevolent work of charity and the sometimes hard-hearted work of the lawyer gave way to a vision of the lawyer who ministered to the whole client, rather than just his legal problems.<sup>136</sup> The Equity Club advocated an open courtroom to complement the thriving female legal associations, but in a way that challenged masculine legal culture by defending the legitimacy of feminine forms of reason.

### C. *The Courts Rule on the Woman Lawyer*

In the latter half of the nineteenth century, women across the country petitioned a wide variety of state and federal courts for access. In her survey of women's efforts to join the bar, Ellen Martin estimated that the movement took "practical shape and became a success . . . in the year 1869."<sup>137</sup> The battle to gain access proved ongoing and complex. Women applicants rejected by one court would often be admitted in an alternative forum.<sup>138</sup> In some cases, though initially rejected by their state supreme courts, after gaining admission to lower courts and practicing for a number of years, women would eventually be admitted to the supreme courts that had previously denied them access.<sup>139</sup> Some judges, though apprehensive about opening the bar to women, found that admitting them proved consistent with "the spirit of the age."<sup>140</sup>

Though Martin chronicled a number of successes in diverse states,<sup>141</sup> the community of women lawyers remained small and isolated. Women who succeeded in becoming certified lawyers faced a professional culture and a bench hostile to their presence. An examination of the many cases of women petitioning for access to the bar reveals what the courts of the day considered to be the costs—for women, the profession, and the trial—of admitting women into the courtroom.

In *Bradwell v. Illinois*, the most famous of the women lawyer cases,

136. See DRACHMAN, *supra* note 127, at 23-24.

137. Martin, *supra* note 5, at 76.

138. For example, Belva Lockwood, who was denied admission in 1874 to the U.S. Court of Claims, was admitted in the same year to a U.S. Court for the Western District of Texas. Lavinia Goodell, though admitted to the Circuit Court of Rock County Wisconsin, was refused admission to the Supreme Court of Wisconsin. See *id.* at 80.

139. See *id.* at 81 (describing the case of Carrie Burnham Kilgore; two years after gaining admission to Orphan's Court and the Common Pleas Court, she was finally admitted to the supreme court of the state, which had previously denied her admission).

140. *Id.* at 78.

141. The states and other entities that admitted women to their bars included: the District of Columbia, Indiana, Iowa, Michigan, Missouri, Ohio, Pennsylvania, and the Utah Territory. See *id.*

Justice Bradley wrote that the “natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”<sup>142</sup> The Court further asserted that the decisions denying women entrance to the bar had been predicated on a vision of family organization that was in the nature of things. “The harmony . . . which belong[s], or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct . . . career from that of her husband.”<sup>143</sup> *Bradwell* and the many cases like it portrayed women attorneys as a “contradictory consciousness in the legal community.”<sup>144</sup> The image of a “bold . . . incisive, and ruthless” female advocate could not have been more at odds with the ideal of true womanhood.<sup>145</sup>

Several recurrent themes emerge from the case law generated from women’s petitioning of various state bars. First, courts grappled with the status of the lawyer as a public officer. Courts concluded that because the lawyer participated directly in the administration of justice, he held a quasi-public trust, and women should therefore remain excluded.<sup>146</sup> In *In re Ricker*, the New Hampshire Supreme Court found that because lawyers acted as officers of the court, not of the government, courts could establish their own rules for governing the legal profession and courtroom activities.<sup>147</sup> In detailing courtroom proceedings, the court described a network of insiders who operated according to their own codes of behavior. “These proceedings are, according to our laws and usages, conducted by a distinct class of men specially appointed . . . by the courts.”<sup>148</sup> The combination of these internal rules and the taking of the oath rendered the courtroom a very particular public place.<sup>149</sup> Similarly, in denying Lelia Robinson’s application to the bar, a Massachusetts court found that being an attorney at law paralleled holding public office.<sup>150</sup> That lawyers subscribed to oaths in open court and that at common law women could not take part “in the administration of justice, either as judges or as jurors” of whom oaths were required, cemented the proscription against women lawyers.<sup>151</sup>

Second, courts searching for customs that might establish women’s

142. 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

143. *Id.*

144. Grossberg, *supra* note 119, at 148.

145. Babcock, *supra* note 118, at 1284.

146. *See, e.g., In re Ricker*, 29 A. 559, 559 (N.H. 1890) (holding that the petitioner had not presented the appropriate evidence for a final determination of her ability to enter examination).

147. *See id.* at 561; *see also Bradwell*, 83 U.S. (16 Wall.) at 139 (holding that the right to practice a profession does not constitute one of the privileges or immunities of citizenship guaranteed by the Fourteenth Amendment).

148. *In re Ricker*, 29 A. at 578.

149. *See id.*

150. For an extended discussion of the parallels between women jurors and women in politics, see *infra* notes 164–68 and accompanying text.

151. Robinson’s Case, 131 Mass. 376, 377 (1881).

fitness to serve as lawyers concluded that absent specific legislative enactment, women could not be admitted to practice law.<sup>152</sup> In *In re Ricker*, the court reasoned that “[w]hensoever the legislature had intended to make a change in the legal rights or capacities of women, it has used words clearly manifesting . . . the extent of the change intended.”<sup>153</sup> Similarly, the court in *Robinson’s Case* found that when the legislature had sought to change the rights of women, that desire had been made clear through specific legislation.<sup>154</sup> Much as the Washington and Wyoming courts declared women jurors to be alien to developed legal custom, women lawyers found no support in the states’ common law heritage.

Finally, like the opponents of women jurors, the courts warned that “[d]iscussions are habitually necessary, in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety.”<sup>155</sup> In other words, the presence of women inside the courtroom would disrupt the social dynamic sustained by legal custom whereby crime and social degeneration were handled behind closed doors, a compartmentalization that was part and parcel of the separate spheres construct. Propriety depended upon the illusion of the domestic world as existing apart from public life. In retreating to the standard capacities argument, the courts also portrayed the courtroom as a place of “forensic strife” and “juridical conflict,” suggesting that both the “nastiness of the world” and the demands of the adversarial system operated to keep women out of the guild of lawyers.<sup>156</sup> That women would have to confront “unclean issues,” such as “sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation . . . [and] divorce”<sup>157</sup> served as proof that women could not make fit lawyers—as if women in the private sphere had no knowledge of these social maladies. The courts’ “appropriateness” arguments suggest that in a court of law, where the public and domestic spheres collided, it remained the province of men to

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152. In her article on women lawyers, Ellen Martin describes three types of state statutes that regulated women’s admission to the bar: (1) those that allowed the admission of women voters; (2) those that provided for the admission of male citizens; and (3) those that allowed the admission of persons without specification of gender. See Martin, *supra* note 5, at 87. Martin notes that most states that admitted women did so under the third type of statute. Nevertheless, many of the states with such statutes appealed to the common law to argue that the lack of gender-specific language did not imply that women could be admitted, finding instead that because women at common law could not hold office, and given that the attorney was an officer of the court, women could not serve as attorneys. States used the common-law disabilities of women, which prohibited them from entering into contracts, to deny them admission as well.

153. *In re Ricker*, 29 A. at 559.

154. See *Robinson’s Case*, 131 Mass. at 380-81; see also *In re Goodell*, 39 Wis. 232, 244 (1875) (denying the application of Lavinia Goodell to the state bar of Wisconsin).

155. *In re Ricker*, 29 A. at 560.

156. *In re Goodell*, 39 Wis. at 245.

157. *Id.* at 246.

resolve the dysfunctions of the private sphere according to the special professional standards set by the courts. A feminized justice, whether it be the result of a mental incapacity to understand the law or a behavioral inability to withstand the courtroom joust, proved unacceptable to many state courts.

### III. THE JURY AS A MORE MEANINGFUL CONSTRUCT

By drawing an analogy between the woman lawyer and the woman juror, Parts I and II of this Note concluded that both the jury and the juror should be understood as facets of a legal culture whose professional dynamics have been inflected historically by gendered understandings of citizenship. The experiences of the first women jurors challenge the tendency to bundle political rights into a set of coterminous interests. The Western experiments reveal that jury service should be understood as having its own particular political and social meanings. It is the interplay between courtroom dynamics and differing conceptions of community justice that shape the decisions jurors make. In light of the story just told, then, the leading scholarship on the history of women jurors in the nineteenth century offers an anemic picture of the jury. To make the jury a more meaningful construct, this Part explores two questions. First, how does other scholarship on the jury enable us to unpack the bundle in a manner consistent with what has been learned from the women jurors and lawyers? Second, how does reaching an understanding of these academic debates through a historical lens enhance comprehension of contemporary debates over gender in the courtroom?

#### A. *Unpacking the Bundle*

Contemporary scholarship on the jury treats it as a forum for community governance. Akhil Amar holds as instructive Alexis de Tocqueville's observations on the American jury: While Tocqueville recognized jury service as a direct consequence of the sovereignty of the people, parallel to suffrage,<sup>158</sup> he located in jury service a direct citizen participation in the administration of government, through which citizens developed the habits that sustained free institutions.<sup>159</sup> The trial constituted a kind of give-and-take between the legal system and community values. In fact, the courtroom design, with jury box and gallery surrounding the

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158. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1185, 1188 (1991) (quoting 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 293-94 (Vintage ed. 1945)).

159. See *id.* at 1186-87 (quoting 1 DE TOCQUEVILLE, *supra* note 158, at 295-96).

bench, reflected the intention to infuse public knowledge into the trial.<sup>160</sup>

### 1. *Jury Service as Participation in Government Distinct from Voting*

The picture of the jury as a site of direct participation in government contrasts with the act of voting in several ways that help explain why the mixed jury disappeared even as female suffrage became increasingly accepted. First, when considered as functionally similar to the legislature,<sup>161</sup> the jury provides ordinary citizens, unable to serve in office, with the opportunity to assist in making the law. The courts, through the jury, need not wait until election day to make a popular difference.<sup>162</sup> As the citizens of Wyoming and Washington quickly discovered, women jurors had an immediate impact on law enforcement. The mixed juries fell into disuse precisely because the experiments had demonstrated the jury's power to govern. At the same time, the existence of a female voting population by no means meant that politicians would have appealed to women's interests as a political group; the suffrage grant was simply too new to inject this level of sophistication into Western politics. To the extent that women were understood as an interest group, it was through the lens of the family, such that appealing to the "woman's vote" would have been perfectly consistent with perpetuating separate spheres ideology. Indeed, Wyoming Governor Francis E. Warren, in marked contrast to assessments of the mixed jury, noted that "[t]he women of Wyoming have been exceedingly discreet and wise in their suffrage."<sup>163</sup>

Second, the sustained association required by jury service—or the "habitual presence" identified in *In re Ricker*—and the prospect of sequestration brandished by opponents of the Howie jury contrast with the private, almost atomistic act of voting. Of course, forms of association that demand sustained interaction with others, such as office holding and participation in political parties and interest groups, have historically attended voting. These associations proved qualitatively different, however, from the interactions required by jury service. Nineteenth-century women's suffrage activists had ambivalent relationships with the dominant political parties of the day, always remaining a fringe or special interest.<sup>164</sup> Even as feminists and labor reformers warmed to each other as political allies, the

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160. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 113 (1998).

161. See Amar, *supra* note 158, at 1188.

162. See AMAR, *supra* note 160, at 112.

163. 4 HISTORY OF WOMAN SUFFRAGE 1006 (Susan B. Anthony & Ida Husted Harper eds., 1902).

164. See DUBOIS, *supra* note 21, at 105-10 (describing women's rights activists' alienation from Republicans and ultimately unfruitful efforts to integrate their issues into the Democratic Party platform).

former remained unintegrated into the male-dominated associations of the latter.<sup>165</sup> Scholars who have studied the political culture surrounding women's suffrage have noted that more often than not, its organizations remained segregated along gender lines. "[C]laims for female civic equality stayed narrowly confined within notions of naturally based social orders."<sup>166</sup> Men assessing the effects of female suffrage thus could have understood the female office holder as an exception, supported by male political know-how. Female political organizations, while outside the male sphere of influence, proved consistent with separate spheres ideology.

In assessing the consequences of suffrage in Wyoming, the editor of the *Laramie Daily Sentinel* noted that though women did exercise power through their votes, they took no active part in nominating candidates for office.<sup>167</sup> Even the few women who actually held office in Wyoming were considered to have been "manfully sustained" throughout their terms.<sup>168</sup> Moreover, while women voters may have been able to participate in political culture through activity such as working the polls, much like office holding, such activity could have been easily proscribed, despite the existence of the suffrage guarantee. By contrast, the popular and legal communities of the West considered the women jurors to be invaders of male territory whose power had to be circumscribed. The women jurors of the West, as ordinary citizens and not as elected officials, directly changed the course of law enforcement in the territories. Integrated association inhered in the act of jury service

Yet, while this picture of the jury as the ultimate democratic institution meshes well with a theory of popular sovereignty, the Western experiments complicate any understanding of what the community justice component of that sovereignty has meant historically. The advent of a gendered justice as a new variable in legal culture requires a theoretical approach that understands the jury as more than a site of political participation or governance. The first women jurors' impact on the law extended far beyond increasing the number of convictions. The women jurors of the West not only helped solve public order crises, the jurors sent symbolic signals to the

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165. See *id.* at 111-25 (describing women's rights activists' efforts to ally their cause with the National Labor Union Party).

166. SMITH, *supra* note 28, at 386, 386-90 (describing the numerous women's clubs, suffrage associations, and social reform networks that enhanced women's civic equality but that nevertheless kept that equality circumscribed in gender-specific, separate spheres terms); see also Jameson, *supra* note 110, at 156-58. Jameson describes recent studies that have challenged the conventional view of Western women as passive participants in the processes that led to female suffrage across the territories. Yet, though women in the West participated in the Grange and the Farmers' Alliance, Jameson notes that these organizations were unusual among male-dominated groups in admitting women. As in the Eastern suffrage campaigns, Western women formed gender-exclusive groups of their own that, while political, differed from the integrated associations inherent in jury service and lawyering inside the courtroom.

167. See 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 32, at 747.

168. *Id.* at 731.



community concerning one potential course of Western development.

In her study of jury deliberations, Nancy Marder defines the justice dispensed by jurors as carrying this element of the symbolic.<sup>169</sup> As a participatory entity, rather than govern directly, the jury “speaks through its verdict.”<sup>170</sup> Having been assigned the task of reaching a judgment on behalf of the community, the jury’s verdict has symbolic public significance.<sup>171</sup> The jury therefore governs semiotically, or through signals to the community of what should constitute a just interpretation of the law. The verdicts of the first mixed juries signaled to residents of Wyoming that women jurors would not tolerate the moral decline of the territory and would give the law a content different from an all-male jury. Changes in courtroom proceedings and a shift in law enforcement signaled that a gendered justice had taken root—and the community balked.

By allowing the mixed jury to disappear, the legal communities in the West prevented the parameters of community justice from being reset permanently. Much in the same way that opponents of women lawyers resisted the introduction of feminine qualities into the sparring of opposing counsel, the legal and political communities of the West rejected the symbolic implications of the first women jurors. The decisions made by women voters, *because* they lacked this public, symbolic content, did not resonate like the mixed juries’ verdicts. Thus, though the experiments underscored the capacity of citizens as jurors to participate in the literal and symbolic acts of government, the Western episodes suggest that this governance was by no means synonymous with community participation.

## 2. *Competing Communities Vie for Control of the Jury*

Several different communities vied for control of the jury box in the West. This debate made clear that competing conceptions of community justice existed—one that prized the legal community’s settled consensus and one that argued for inclusion in order to advance an alternative law-and-order agenda. The Western experiments thus problematize the view of the jury as enabling community-based governance, revealing the jury to be an instrument of a legal culture incapable of sustaining conceptions of community justice that differed radically from its own.

The Western experiments suggest that a distinction should be made between the jury as a forum for community participation and the jury as a place where individual people *as jurors*, and not people *as citizens*, could participate directly in making the law. A public/private distinction within

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169. See Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 472-73 (1997).

170. *Id.* at 472.

171. *See id.*

the courtroom itself underscored this divide. The inward-focused qualities of the courtroom joust, which depended on a masculinist vision of identity, strained against the open and public ideal of the historical jury reconstructed by Amar and the integrative ideal at the heart of the mixed jury. The experiments of Justices Howe, Kingman, and Greene, conducted in the name of community, succumbed to oppositional pressure from the community itself. Each side of the women jurors debate offered a view as to which elements of the community should participate in administering the laws. The judiciary and those who supported its efforts linked justice with the inclusion of women and their feminine forms of reason. The legal community and the overwhelming public opinion supporting it demanded exclusion. In the end, the opposition defined the outer limits of community participation, excluding half of the community at large to preserve the particular relationships of one of the community's most powerful sectors.

The construction of the jury as a forum for democratic community governance therefore seems too optimistic. Historical understandings of jury service have had as much to do with cultural ideology as with theories of political participation. A more accurate construction of the jury, consistent with the Western history, begins from the premise that various communities may be at war for control of the jury's power to govern, and the parameters of this battle may well be drawn around the identities of those who seek access.

Much scholarly literature on the jury explores this possibility. For example, Marianne Constable finds that at common law, in the interests of balancing the rights of the defendant and the community, courts gave explicit consideration to the ways in which the identities of jurors might affect their judgment.<sup>172</sup> At the same time, she documents a nineteenth-century transformation in the function of the jury that separated it from its community roots in favor of a system of legal and evidentiary rules. As the community spirit behind the jury dissolved, justification for the mixed jury disappeared and identity ceased to be relevant to the proceedings.<sup>173</sup> Constable's work highlights the tension between the historical function of the jury as the dispenser of community justice and a competing contemporary understanding of the juror as being required to relate the facts presented at trial to rules given by judges.<sup>174</sup> Inherent within this tension lies ambivalence concerning how and whether identity should shape the judgments that juries make.

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172. See MARIANNE CONSTABLE, *THE LAW OF THE OTHER: THE MIXED JURY AND CHANGING CONCEPTIONS OF CITIZENSHIP, LAW, AND IDEOLOGY* 55 (1994). Constable explores the phenomenon of the mixed jury in medieval England whereby non-citizens served on the juries of non-citizen defendants. See *id.* at 16-25.

173. See *id.* at 132-33.

174. See *id.* For an example of a construction of the jury as an institution required to receive and follow the law as given by the court, see *Sparf v. United States*, 156 U.S. 51, 65-80 (1895).

The literature on jury nullification also grapples with this central dilemma: How can the jury as a community institution be preserved in the face of the “rationalization” of the trial? Some scholars have argued that juries be instructed of their power to nullify in order to reconcile this tension.<sup>175</sup> Such proposals stem from the belief that to maintain the legitimacy of the judicial system, the power of the community to check the state’s administration of the law must be integrated into the very mechanisms of the legal system.<sup>176</sup> These commentators have further recognized that for community justice to be meaningful, jury service and the power to nullify must be understood as being shaped by the race and gender identities of the members of the community.<sup>177</sup>

Because race and gender can indeed “speak to differences in interests,”<sup>178</sup> identity will affect the outcome of decisions made inside the courtroom on behalf of the community outside the courtroom. Social stratification has led certain communities to feel excluded from the power that the people are supposed to possess; the instruction to nullify offers a remedy.<sup>179</sup> For instance, at the heart of Paul Butler’s call for race-based jury nullification stands an understanding of the jury as a forum for community participation, loaded with symbolic, identity-laced meaning.<sup>180</sup> He seeks to salvage an element of the historical jury within which community and identity acted as mutually-reinforcing elements in adjudication.<sup>181</sup> He combines a vision of jury service within which citizens practice the law with an understanding that such practice can, will, and should be shaped by racial identity.

The women lawyers and jurors of the nineteenth century advanced the idea that community interests demanded the introduction of gender identity into the courtroom. In defense of women’s rights specifically and the

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175. See, e.g., David Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89 (1995) (defending nullification from the standpoint that the jury represents an intermediary between the people and the government); Jack B. Weinstein, *Considering Jury “Nullification”: When May and Should a Jury Reject the Law To Do Justice*, 30 AM. CRIM. L. REV. 239 (1993) (arguing that nullification, because it is used sparingly, generally reflects urgent social needs that cannot be remedied within the context of existing law, which only frustrates those needs). Cf. David N. Dorfman & Chris Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REF. 861, 865 (1995) (arguing that nullification is best understood as a community check on judicial and prosecutorial discretion), and Richard St. John, Note, *License To Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 YALE L.J. 2563, 2577-89 (1997) (arguing that nullification is undemocratic because juries are minoritarian bodies that thwart the will of the people embodied in legislative enactments when they engage in nullification).

176. See Brody, *supra* note 175, at 106-07.

177. See Weinstein, *supra* note 175, at 247.

178. Gretchen Ritter, *Modernity, Subjectivity and Law: Reflections on Marianne Constable’s The Law of the Other*, 22 L. & SOC. INQUIRY 809, 810 (1997) (book review).

179. See Dorfman & Iijima, *supra* note 175, at 896.

180. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 701 (1995).

181. See *id.* at 703-05, 715-18.

interests of justice generally, their version of community justice recognized the importance of identity in two ways. Those who supported women in the courtroom evinced a willingness to (1) upset the masculinized atmosphere of the courtroom; and (2) disrupt the settled consensus between the law and other norms, such as morality, propriety, and sympathy—norms whose relations to the law were reoriented by women jurors and lawyers.<sup>182</sup> This alternative, identity-based view of the jury clashed not only with the inward-focused dynamics of legal culture but with the dominant view of the community interest that rejected the first women jurors. Ultimately, whether the story's actors were concerned with refining the legal system, establishing law and order, advancing the political rights of women, or preserving a masculine legal consensus, the mixed jury experiments demanded a recognition of the differentiable consequences of the genders' participation in public life.

Current scholarship on the jury thus offers useful analytical tools for unpacking the bundle of political rights presented by the historical literature on women jurors. Studying women's invasion of the "old boys'" network enables a three-tiered understanding of the jury as an element of legal culture: (1) the jury does, in fact, represent a form of direct governance separable from voting and suggestive of a robust participation in the rights and duties of citizenship; (2) the people's participation in government through the jury has not, historically, been coterminous with principles of community justice; and (3) identity helps explain this disjunct and proves vital in shaping the jury's status as a community institution.

### B. *Understanding the Modern Significance of the Western History*

The Western experiments offer a conception of the jury that has deep contemporary significance. The mixed jury episodes help explain the courts' prolonged efforts to reconcile movements to end the exclusion of women from a form of political participation with the legal system's apprehension over the possibility of gendered justice. Since the era of the Nineteenth Amendment, women's struggle to gain comprehensive access to the courtroom via the jury has been marked by incrementalism.<sup>183</sup> Women have no *Strauder v. West Virginia* of their own to define jury service as a

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182. For an example of this kind of reorientation, see *supra* note 136 and accompanying text, discussing the conflicts between charity work and legal work.

183. In the wake of the Nineteenth Amendment, some states enacted statutes that made jury service for women automatic. Not only did the majority of states not take such action, however, but the Supreme Court did not challenge the validity of excluding women jurors until 1946 in *Ballard v. United States*, 329 U.S. 187. See Abrahamson, *supra* note 14, at 264-65. Just as lawyers in Wyoming used peremptory challenges to strike women jurors, in the 20th century, lawyers used the peremptory to exclude women, even after their right to serve had been secured. See LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 215 (1998).

quintessential political right. Instead, courts have given shape slowly to the woman juror as a legal actor.

In 1946, the Court recognized that “the two sexes are not fungible.”<sup>184</sup> In 1961, consistent with the view of jury service as a burden, rather than a right, the Court sustained a differential exemption policy for women, on the grounds that women occupied a unique position within the family.<sup>185</sup> In 1975, suggesting the possibility of a changing tide, the Court held that excluding identifiable segments of the population from the administration of justice might be inconsistent with the nation’s democratic heritage.<sup>186</sup> The question for modern jury law, as courts have sought to make the jury as inclusive as possible, has become: Should inclusion be based on the assumption that identity matters in the decisions jurors make or that identity has no bearing on how the people act as jurors?

These issues find their most recent expression in *J.E.B. v. Alabama*.<sup>187</sup> Arguably its first effort to protect a comprehensive right for women to jury service, the Court held in *J.E.B.* that intentional discrimination on the basis of gender by state actors in the use of peremptory strikes violates the Equal Protection Clause.<sup>188</sup> When understood in light of the historical evolution of women jurors, the fundamental tensions at war in *J.E.B.* become clear: At what stage can gender bias legitimately enter courtroom proceedings, and is it ever appropriate to acknowledge such difference? It is in the Court’s struggle to define how gender difference relates to principles of egalitarian citizenship that the concept of gendered justice introduced by the first women jurors and lawyers acquires contemporary significance.

Though gender bias in the law remains a well-documented phenomenon,<sup>189</sup> the modern debate over the woman juror revolves less around changing the character of the “masculine” courtroom than its nineteenth-century counterpart. The battle between protecting extant legal consensus and expanding the jury to include women replicates itself in *J.E.B.* in the form of the struggle between preserving traditional legal tools used to protect defendants’ rights and pushing to make the jury as inclusive and representative as possible.<sup>190</sup> Within modern jury law, the debate over

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184. *Ballard*, 329 U.S. at 193-94. Kerber notes that in *Ballard*, the Court struggled over the way in which gender difference played into the decisions women made as jurors, concluding that women reasoned differently. See Kerber, *supra* note 183, at 50-51.

185. See *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

186. See *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

187. 511 U.S. 127 (1994).

188. See *id.* at 146 (citing *Powers v. Ohio*, 499 U.S. 400, 407 (1991)).

189. See, e.g., *Babcock*, *supra* note 7, at 1706 (detailing the wide variety of task forces that have been created and academic studies that have been done identifying gender bias in the law).

190. For a discussion of the tension between the “anachronistic” features of the jury and contemporary egalitarian aspirations, see Kate Stith-Cabranes, *The Criminal Jury in Our Time*, 3 VA. J. SOC. POL’Y & L. 133, 136 (1995). She argues that as the courts have circumscribed the use of the peremptory challenge and as public pressure has built to abolish the unanimity requirement and open the black box of the deliberation room in the name of accountability, much of what is

the peremptory challenge, like the debate over nullification, is marked by a mixture of egalitarian citizenship principles and identity politics. In the selection of the jury, judgments must be made about the female juror. In one sense, striking a woman need not imply that she cannot reason; it suggests instead that the legal system is entitled to exclude the types of reason prosecutors and defense attorneys imagine women might introduce into the proceedings. The Court in *J.E.B.* ultimately was required to weigh the utility of a trial device, designed to protect both defendants and the integrity of the common-law system, against the harm done to a class of potential jurors *and* the gendered effects on the administration of justice of a gender-based peremptory challenge.

Writing for the Court in *J.E.B.*, Justice Blackmun presented an abbreviated narrative of the history of gender discrimination in jury selection, a problem that he contended did not arise until the twentieth century, as women had been excluded from the jury entirely for most of the nation's history.<sup>191</sup> Blackmun observed that intentional discrimination based on gender "serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes."<sup>192</sup> Yet his conclusion that the "equal opportunity to participate in the administration of justice is fundamental to our democratic system"<sup>193</sup> flowed from a narrative detailing the Court's gradual realization that women are not fungible and might indeed have unique perspectives to bring to the courtroom.<sup>194</sup> The historical episodes that Blackmun overlooked only deepen this tension between the history of courts' treatment of the woman juror and Blackmun's rejection of deeply gendered assumptions, or what he called "archaic stereotypes."<sup>195</sup> In coming to terms with the presence of women and their gender in the jury box, Blackmun displayed a historically rooted ambivalence and confusion as to gender's proper role in the administration of justice.

The Court compounded this indecision in its discussion of the peremptory challenge as a legal device. Blackmun rejected the conception of the peremptory as a courtroom institution and instead defined it as a device to assist litigants and nothing more.<sup>196</sup> When weighed against the

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unique about the jury as a legal institution has been lost. *See id.* at 145.

191. *See J.E.B.*, 511 U.S. at 131.

192. *Id.*

193. *Id.* at 145.

194. *See id.* at 133 ("The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables . . . a distinct quality is lost if either sex is excluded." (quoting *Ballard v. United States*, 329 U.S. 187, 193-94 (footnotes omitted))).

195. In his concurring opinion, Justice Kennedy appeared to be responding to the Court's recognition of the historical role of gender difference in opening the jury to women, characterizing gender difference in contemporary jury deliberations as a form of "prejudice." *See id.* at 154 (Kennedy, J., concurring in the judgment).

196. *See id.* at 137.

Court's commitment to eradicating discrimination, the diminished trial tool emerged on the losing end. Though she concurred, Justice O'Connor loaded her opinion with a historical defense of the peremptory, seeking to salvage a more robust device than the Court's opinion allowed. She contended that "[t]he essential nature of the peremptory challenge is that it is one exercised without a reason stated . . . ." <sup>197</sup>

In Justice O'Connor's opinion, the resistance exerted by the trial system's internal logic against persistent efforts to make the administration of justice as inclusive as possible thus comes into acute relief. Though sufficiently convinced of the constitutional necessity of barring gender-based peremptories, Justice O'Connor cautioned against the total demise of the legal system's particular institutions—rules predicated on exclusivist and sometimes gender-based assumptions. "[A]s we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable." <sup>198</sup> In his dissent, Scalia made explicit Justice O'Connor's implicit hesitation over the complete removal of gender-based assumptions from jury selection, accusing the Court of being excessively "unisex" in its opinion. <sup>199</sup>

Women were categorically excluded from juries because of doubt that they were competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case. There is discrimination and dishonor in the former, and not in the latter . . . .

The right of peremptory challenge "is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose." <sup>200</sup>

A profound conflict between the rules of the legal system, the internal logic of the trial, and the view of the jury as a forum for inclusive community participation has been at work in the case law defining women's right to serve on juries throughout the twentieth century. This Note has aimed to demonstrate that this dilemma has grown from deep historical roots. The mixed jury's historical pedigree reveals that the courtroom operates according to a system of logic that sometimes challenges our commitments to egalitarian citizenship. But the Western jury experiments do more than help explain the origins of the debates underlying *J.E.B.* The understanding of legal culture and gendered justice they enable demonstrate that as women have been recognized as capable of

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197. *Id.* at 147-48 (O'Connor, J., concurring) (quoting *Swain v. Alabama*, 380 U.S. 202, 220 (1965)).

198. *Id.* at 148.

199. *Id.* at 157-58 (Scalia, J., dissenting).

200. *Id.* at 160-62 (citations omitted).

withstanding the legal harangue, they have also altered that harangue's character by reorienting the courtroom dynamic.

#### IV. CONCLUSION: LESSONS LEARNED

Four basic lessons can be drawn from the history detailed in this Note. First, the Western experiments do not undercut the conclusion that suffrage has served historically as a prerequisite for voting. Though suffrage may have been a necessary condition for jury service, however, it by no means constituted a sufficient condition. Second, the appropriate historical analogy for the woman juror is the woman lawyer. Both sets of legal pioneers invaded the insiders' network of the courtroom. Third, the Western experiments confirm that conflating all political rights into a bundle obscures the true status of the juror, who, like the lawyer, disrupted the carefully constructed performances of a masculine legal culture. Finally, unpacking the bundle of political rights enables scholars of the jury, as well as scholars of women's rights, to appreciate both the incrementalist approach to egalitarian citizenship historically taken by state and federal courts and the complex nature of community participation.

A complete defense of egalitarian citizenship demands that attention be paid to how constitutive identities, such as gender difference, affect the public sphere's diverse spaces on an institution by institution basis. However, whether identity should be considered *relevant* to how the people perform in those public institutions remains unsettled. The text of Justice Blackmun's opinion in *J.E.B.* suggests that identity does not matter, but the subtext reveals that it has. Behind the historical and scholarly movements to define the jury as a community institution lies a theory of inclusion that treats identity as relevant. Precisely because identity figures into definitions of community, the march toward inclusion collides today with the peremptory strike, just as it threatened the masculine legal consensus of the nineteenth century. The challenge presented by the Western history now becomes: How can women jurors and lawyers enter the courtroom armed with the recognition that gendered conceptions of justice might exist, without replicating the historical, exclusivist assumptions upon which the insider/outsider divide has always been predicated? Reconciling these warring elements contained within the construct of the jury remains the unfinished business of the first women jurors.