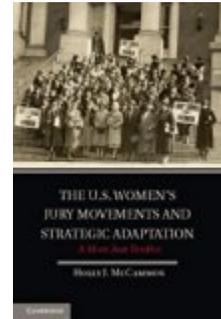


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Shoehorning American Women onto American Juries

Without question, the history of women's service on juries has been neglected. It would perhaps be logical to assume that jury service came along with suffrage, that the Nineteenth Amendment had enrobed women with political rights in addition to the guarantee of suffrage. To the contrary, as Professor Holly J. McCammon shows in this exceedingly well-researched study, jury service for the most part fell under state rather than federal jurisdiction, resulting in different treatment in different states. These chaotic state regulations, some setting different grounds for exemption for men and women, some excluding women entirely, went unreviewed until 1975, when the U.S. Supreme Court held in *Taylor v. Louisiana* that a jury pool consisting only of men deprived the accused of a fair trial by a jury drawn from a representative cross-section of the community. The right to serve on juries (or the obligation to serve on juries) thus arose not so much on behalf of the full citizenship of women but rather on the right to a fair trial guaranteed by the Sixth Amendment and applied to the states by the Fourteenth Amendment.

The Judiciary Act of 1789 specifically tied federal jury rules to the rules for state juries, another reassurance to the states that the federal government would not threaten their autonomy. If the state made women part of the jury pool, then the federal courts followed that practice. In 1946, the U.S. Supreme Court took up a California case to examine an unusual circumstance. California law permitted women to serve on juries but women were not in

fact called to be jurors. Must the federal courts in California follow state law or state practice? If state law, women should have been included in the federal jury pool; if state practice, the usual all-male jury met the standard of a cross-section of a community. Writing for the Court in *Ballard v. United States*, Justice William O. Douglas explained the importance of an inclusive jury pool:

"It is said ... that an all-male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The 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. To insulate the courtroom from either may not, in a given case, make an iota of difference. Yet a flavor, a distinct quality, is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the commu-

nity than would be true if an economic or racial group were excluded.... The systematic and intentional exclusion of women, like the exclusion of a racial group, or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society.”[1]

In this case, then, the Court dismissed the grand jury indictment of the Ballards.

In 1957, Congress changed the law with respect to jury service in federal courts. The 1957 Civil Rights Act, designed to secure the rights of African Americans to a fair trial at least in federal court, listed the qualifications for federal jurors, but neither race nor sex appeared among them. Despite the fractured movement for women’s rights, lobbying by the National Woman’s Party had ensured that women received equal rights to a fair jury in federal court.

States, however, retained their autonomy when it came to rules for jurors in state courts. The U.S. Supreme Court in 1961 denied an appeal from a Florida woman alleging that she had not had a representative jury because the jury pool skewed heavily toward men and her jury was in fact all male. Florida required men to serve while women who wanted to serve had to register their desire with the court clerk. In *Hoyt v. Florida* the U.S. Supreme Court found that Florida’s practice was reasonable given the responsibilities that women had at home, even though the practice resulted in the virtual absence of women from the jury pool. In allowing Florida’s system to stand, the Court signaled that it would not impose a requirement that states treat men and women equally with respect to jury service. The struggle to include women in the jury pool thus took place state by state.

Nineteenth-century advocates had raised the exclusion of women from juries as an injustice on many occasions, but only after the addition of the Nineteenth Amendment to the Constitution did access to jury service occupy substantial attention. As with suffrage, the first victories came in the West. The chief justice in the territorial court in Wyoming in 1870 briefly permitted women to serve as jurors, but objections from lawyers and the press ended the experiment in 1871. In 1879, the U.S. Supreme Court decided in *Strauder v. West Virginia* that states could not exclude blacks from juries, but it remarked in passing that they could exclude women. Utah empaneled women in 1898. After 1911, more states opened jury service to women, although not on the same basis as men and as a practical matter women rarely served. After 1920, some state courts took an

“emancipatory” stance, holding that suffrage implied the right/obligation to serve as a juror (Delaware, Indiana, Iowa, Kentucky, and Ohio). Courts in other states made no such assumption, deciding instead that the suffrage amendment said nothing about jury service and therefore had no impact on jury service. In 1921, women won the right to serve on juries in Arkansas, Maine, Minnesota, New Jersey, North Dakota, Pennsylvania, and Wisconsin, but the circumstances under which they would serve remained ambiguous.

Advocates voiced two arguments in favor of equal jury service for women: the Progressive belief that women would improve the legal system, offering women defendants a genuine “jury of her peers,” and thus bringing about a more just result; and the newer “equal rights” argument—that as citizens women had both a right and a responsibility to serve on juries. Excluding them from jury service marked them as lesser citizens. Often, the duties of women in the home constituted the rationale for excluding women from jury service but proponents objected to circumscribing their sphere of influence on those grounds.

Opponents voiced different views. Businesses feared that women jurors would be less sympathetic to their claims, lacking the knowledge needed to decide on business matters. Male lawyers also objected: women on juries might not respond to their standard methods of jury persuasion. Traditional women’s organizations also resisted jury service for women. Jury service would pull women away from their duties as wives, mothers, and homemakers. They would be exposed to unseemly matters that would disgust decent women. In agricultural areas in particular, jury service meant travel and several days’ absence from the farm; farm women could well find jury service more onerous than warranted.

Determined to continue the mission of equipping women to become active citizens, the League of Women Voters (LWV), the successor to the National American Women’s Suffrage Association, often played a leading role in the state struggle for jury access. Although its membership had suffered a deep decline after the Nineteenth Amendment was added to the Constitution, it still had chapters in every state and experience in sharing tactics and information. In some states, the Business and Professional Women’s Club (BPW) and the Women’s Bar Association took prominent roles. The women fighting this battle were generally white, middle-class, self-described homemakers. They formed coalitions, lobbied legislators, wrote letters, gave speeches, testified at hear-

ings, wrote pamphlets and flyers, sought media attention. They argued their case for both women's rights and for the diverse perspectives women would add. Interracial efforts, as in the suffrage fight, were undertaken rarely and with caution.

McCammon has chosen fifteen of the fifty states in order to analyze the politics of jury inclusion.[2] Her meticulous research serves as the basis for the vignettes of the states; her narrative is based in large measure on copious unpublished primary materials in state and organization archives. The states McCammon discusses empaneled women from 1917 (California) to 1967 (South Carolina).

In 1911, California granted suffrage to women by referendum and several key players assumed that suffrage included jury service. Since agreement was not universal, leaders of the California Civic League drafted a jury bill stipulating that women must serve on juries when either the plaintiff or the defendant was a woman. This requirement generated dissent and prompted meetings by many combinations of groups, resulting in a new bill offered in the California legislature in 1915. There, it met ridicule from state senators who defeated the bill in that session, leading several advocates to press for electing progressive women to the state legislature. However, male legislators insisted that their women constituents did not want to serve on juries. Advocates believed the problem lay in the inadequate education among the new women voters, and they launched an educational campaign explaining the need for women to serve on juries and persuading them to inform their legislators to vote in favor of jury service for women. In 1917 state legislators, now convinced that their women constituents did support the woman juror bill, passed the bill that year. A similar pattern of initial defeat followed by educational campaigns yielding success also appeared in New York, Tennessee, and Wisconsin.

Reformers met with stronger resistance in the Illinois legislature, which insisted that Illinois women did not want to serve on juries; an attempt to achieve jury service through the state court system also failed. Despite a new concerted effort to pressure the legislature, in 1930 advocates won only a law to hold a state referendum on the subject. The referendum results favored jury service for women, although it was far more popular in Chicago than in the more rural southern part of the state. The division didn't matter: a court challenge produced a ruling that the Illinois state constitution could be altered only by the legislature, not by referendum. The state legislators

from southern Illinois reflected the negative view of their constituents and so the coalition of advocates turned to a new strategy of encouraging support for the bill in every county in southern Illinois and having those constituents contact their representatives directly instead of lobbying those legislators. This campaign succeeded and in 1939 women won the right to sit on juries in Illinois.

In the states of Montana and Nebraska, however, initial defeats thwarted the jury advocates. In the 1920s and 1930s, Montana legislators insisted that only a minority of the states' women wanted to serve on juries. Advocates seemed to agree and they simply reintroduced the same unsuccessful bill year after year. Finally, at the end of the decade, women's organizations in the state created a more effective coalition and in 1939 the legislature voted in favor of jury service for women. In Nebraska, beginning in 1924, the state LWV proposed a jury bill and canvassed candidates for the legislature but when the legislators asked for evidence that women wanted such an obligation, League members failed to provide it. After defeat in 1931, the state took no action until 1941. Finally, World War II created the opening: men were in short supply and Nebraska therefore decided to admit women to jury service.

Advocates in New York encountered both opposition and indifference. New York judges and lawyers stated plainly that they thought that women on juries would gum up the works. Expanding the coalition of supporters helped, especially in upstate New York's rural regions. But the activists were disappointed: The law that the legislature passed in 1937 permitted, but did not require, women to serve on juries. A woman could be excused from jury duty if she wished solely on account of her sex, a practice that continued through the 1960s. In Tennessee, indifference constituted more of a barrier than opposition. The Business and Professional Women's Club, formed in 1920, took the lead in advocating jury service beginning in 1934. The women's section of the Tennessee Bar Association worked on their male colleagues. Tennessee finally passed a juror service statute in 1951.

Advocates in Maryland and Massachusetts continued to use the same unsuccessful tactics for years. Maryland women did not appear interested in jury service. Activists nevertheless failed to turn their attention from the legislature to generate enthusiasm among constituents and persuade them to pressure legislators. Opponents of jury service were well organized and more strategic, relying on the argument that southern woman needed to

act as domestic caregivers, protected in the public arena by the men in their family. Finally, in 1947, advocates created a broad coalition and countered opposition arguments about women in the home by pointing to the changes in women's lives: the idea of women bound to the home was outdated.

Massachusetts advocates also faced apathy. The state supreme court decided that suffrage did not turn women into jurors. Activists lobbied the legislature, but their opponents claimed that women would be confronted with unseemly matters as jurors. The National Woman's Party tried a lawsuit over a woman tried by an all-male jury, but neither the state nor federal court decided in its favor. In 1946, the few female legislators succeeded in getting the legislature to agree to a referendum, which came out two to one in favor of jury service for women, but the legislature still failed to agree on a bill. According to McCammon, the activist coalition began to work harder at educating women, drafting bills, and using new arguments: women had taken all kinds of jobs in the war; jurors participated in creating the healthy community. Both houses of the legislature finally agreed on a new juror service law in 1949.

McCammon offers similarly detailed descriptions of the battles in Vermont, Wisconsin, and Georgia, to help make her point that activists engaged in "frame-blending": "*simultaneously* draw[ing] on and challeng[ing] hegemonic beliefs" (p. 127). Women needed to be on juries because they were the experts on family and childcare. During WW II, activists talked about justice, freedom, and equality as causes for which we were fighting.

Wisconsin's campaign was led by a well-organized chapter of the National Woman's Party, which succeeded in 1921 in having the state pass the first general "equal rights" statute in the country. Jury rights, as well as property and custody rights and the ability to sign contracts, all fell within its scope. Implementation of Wisconsin's statute played a key role in the debate over the national Equal Rights Amendment campaign.

In Georgia, as in other southern states, opponents pointed to "ideals of Southern womanhood" (p. 136). They played on racial animus, invoking the specter of white women sitting in a racially mixed jury, a most unlikely possibility. Opponents ridiculed the women seeking jury service and there was little response to the issue until more women were elected to the Georgia legislature. The Georgia Association of Women Lawyers proved to be the most effective advocate. Senator Iris Blicht ar-

gued that if the courtrooms were too seamy for women, women should clean them up. Proponents declared that they no longer wanted men to treat them chivalrously; newspapers began to support jury service for women. Georgia was a laggard, conceding only in 1953, but Texas, West Virginia, Alabama, South Carolina, and Mississippi waited even longer, Mississippi until 1968.

Both Colorado and Missouri included women as jurors in 1945, at the end of World War II. Even though Judge Ben Lindsay, an important progressive jurist, succeeded in having the Colorado state legislature pass a bill in 1914, using the new initiative and referendum process, a subsequent campaign failed to amass the 20,000 signatures needed to place the measure on the referendum ballot. The Colorado Federation of Women's Clubs and later the Colorado League of Women Voters argued in favor of jury service for women, but the public showed little interest until World War II. By then, two dozen states had placed women in jury pools, and the lack of men to serve on juries proved to be a valuable lobbying tool. In Missouri, the drafting of a new constitution in wartime opened the way for activists to use arguments similar to those that succeeded in Colorado. Both states approved of women jurors in 1945.

McCammon comments that "the South Carolina movement became strategic very late in the history of women's struggle to sit on juries. This, along with the traditional gender culture in this southern state helps explain why South Carolina was one of the last states to grant women jury rights" (p. 162). The Civil Rights Act passed by Congress in 1957 seemed to present the worst case for many South Carolinians. The federal law permitted white women to sit next to black men on federal juries. The more jury service for women became entangled in civil rights for African Americans, the more fraught the issue became. In 1966, however, a federal court held that both racial and gender distinctions in state jury service violated the U.S. Constitution and South Carolina at last capitulated. In 1967, South Carolina voted to allow women on state juries.

Texas granted women juror service thirteen years earlier, in 1954. McCammon nevertheless ranks Texas with South Carolina because the Texas campaign, begun in 1920, took thirty-four years while South Carolina's active campaign started in 1936 and took thirty-two years. In 1937, Sarah Hughes, a state judge, and state chair of the Texas BPW's Special Committee For Women Jury Service, began an educational campaign on equality. Nevertheless, voters defeated a 1949 referendum on women's

jury service. After activists focused on the congruence between traditional roles for women and their need to serve as jurors, as well as the dearth of eligible jurors created by World War II, they were more successful. The 1954 referendum succeeded. McCammon concludes that although jury activists in Colorado, Missouri, South Carolina, and Texas missed signals and missed opportunities for collective action, they succeeded after a “turning point” that led to their becoming more “strategically adaptive” actors.

By the late 1960s, every state permitted or required women to serve on juries. California, Colorado, Illinois, Maryland, Montana, South Carolina, and Vermont had women participate as jurors exactly as did men. Georgia, Massachusetts, Missouri, Nebraska, New York, Tennessee, Texas, and Wisconsin made jury service voluntary for women. In Florida, Louisiana, and New Hampshire, women had to come down to the courthouse to register themselves as jurors. In Massachusetts, a judge could bar women if he thought that the matter of the trial was likely to embarrass them. Equal jury service responsibility came with the U.S. Supreme Court’s 1975 decision in *Taylor v. Louisiana*, when the Court held that states must treat men and women in the same way with respect to jury service. (As was often the case in the 1970s, the state legislature changed the law before the U.S. Supreme Court ruled on the matter.) In 1994, in *J.E.B. v. Alabama*, the Court held that lawyers could not use peremptory challenges (i.e., challenges without explanation) to influence the proportion of men and women on the jury.

McCammon leaves aside many questions a historian might ask, because her mission is not so much to write a history of the contest over jury service for women as to demonstrate her theory that “strategic adaptation” by activists hastens the advance of social movements. The “strategic” actors, she observes, “built coalitions with other women’s groups, took advantage of political opportunities, had more past experience in seeking legal reforms, and confronted tensions and even conflict with their ranks in ways that bolstered their action” (p. i). In doing so, they sped up the pace of reform. In contrast, less strategic activists in other states tended to simply repeat unsuccessful tactics, such as filing the same bill year after year, slowing the process of including women in the jury pool. The theory that smart advocacy helps a cause would, I think, make sense to most scholars from any discipline, but McCammon goes on to argue that the strategic adaptation of activists is the most significant factor in the success of a social movement.

Historians may well argue with this assertion. The states that won acceptance for women on juries in fewer than nineteen years—those that McCammon labels “swift” state—(Wisconsin, California, Vermont, New York, Tennessee, and Illinois)—were smaller states east of the Mississippi River, except for California, which had a large concentration of population in urban centers. Those where the struggle took between twenty-two and thirty-four years—the “slow” states (Nebraska, Missouri, Montana, Colorado, Texas, Georgia, Maryland, Massachusetts, and South Carolina)—were, with the exception of Massachusetts, either large, agricultural, or sparsely populated states or states located in the southern United States. Perhaps geography made more of an impact than strategy.

Moreover, twenty-one states included women in jury pools in the ten years before and after the suffrage amendment was added to the Constitution in 1920. Perhaps the momentum from the suffrage campaign played the key role in jury inclusion. Another thirteen states called women to serve as jurors during World War II or in the five years immediately after. McCammon in fact repeatedly mentions the shortage of men to serve as jurors as a compelling argument. Perhaps expanding the jury pool to include women resulted more from such shortages than from clever advocacy. Finally, twelve states added women to jury pools from 1950 to 1968. Of these twelve, ten had been slave-holding states. Perhaps the key role in this change came in the form of federal legislation affecting federal juries in 1957 and the push of the civil rights movement.

No one would argue with the contention that advocacy helps move legislation along, but McCammon’s analysis ignores some political realities. No matter how “strategic” an activist in Georgia would have been, Georgia would never have passed the equal rights law that Wisconsin did in 1921, and no matter how lax Wisconsin advocates were, that state would have been deeply embarrassed to find itself the forty-fourth state to grant women jury (and other) rights.

A historian might ask if the outcome with respect to jury service could be more persuasively explained by looking at the specific history, geography, and demographics of each state. In particular, one would expect that a discussion of jury service in a particular state would refer to the experience of women’s gaining suffrage in that state. In New York State, for example, strong opposition from businesses that feared granting suffrage to progressive women made it one of the last states to

cave to suffrage pressure. Presumably, the same interests would hold jury service up and, indeed, New York waited until 1937 to add women jurors. If the story of suffrage in a state is different from the story of jury service, a historian would want to find the reasons for the difference.

An additional feature of McCammon's analysis is that she dates the length of time to win jury service not from a common date, such as the granting of suffrage, but from the first activist attempt to win jury inclusion for women. The longest time it took a swift state to grant access to jury service was, in her schema, nineteen years (Illinois in 1939). The shortest time it took a slow state was twenty-two years (Nebraska in 1943). The "swift" states took seventeen, eighteen, or nineteen years of activism and the "slow" states took twenty-two to thirty-four years, which doesn't seem like such a significant difference. This categorization also leads to a confusing result: Montana, a slow state, admitted women to jury service in 1939 after twenty-five years of active campaigning. On the other hand, Tennessee, which admitted women to jury service in 1951 after a campaign of eighteen years, is classed by McCammon with the swift states. Moreover, she fails to tackle the question of why women in some states appear not to have cared about jury service for a longer time than women in another state. She does observe that southern states were slower in general to empanel women because southern women hewed to the domestic ideal longer than did women in the North. But why did Georgia outpace South Carolina by fourteen years?

McCammon claims that the tool of "qualitative comparative analysis," or QCA, a system employing Boolean logic, permits her to make more precise systematic comparisons among her states to discern "recurring patterns

as well as the differences among the state movements" (p. 10). Using this technique, she concludes that advocacy strategies had the most powerful impact on outcomes.

Her discussion of this tool is not for the faint-of-heart historian but for her theoretically adroit colleagues in sociology. Still, her conclusion that "state histories suggest that strategic adaptation played a primary role in bringing about ... more rapid changes in law" (p. 189) overlooks historical context, in particular the shifting roles of women, accelerated by WWII. Moreover, her explanation begs the question: McCammon asserts that her assessments are "all derived from the movement narratives appearing in the earlier chapters as well as from [her] theoretical argument about the importance of strategic adaptation. [Both] theory and history indicate that strategic adaptation played a pivotal role in helping organized women win jury rights" (p. 207). The assertion of a theory cannot be proof of the theory and thus there is a tautological cast to her argument. Finally, in her conclusion she fails to bring racism into her account of the struggle for jury service.

However sound or questionable McCammon's theorizing, historians should still find the evidence she has amassed about the struggle for jury service for women valuable. If not the last word, she has nevertheless fleshed out the history of a little-known but important part of the struggle for full equality for women as American citizens.

Notes

[1]. 329 U. S. 187 at 193=194 (1946).

[2]. California, Colorado, Georgia, Illinois, Massachusetts, Maryland, Missouri, Montana, Nebraska, NY, South Carolina, Tennessee, Texas, Vermont, and Wisconsin.

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