

**Chicago-Kent College of Law**

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**From the Selected Works of Nancy S. Marder**

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# The Changing Composition of the American Jury

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"First woman jury, Los Angeles," photo by Bain News Service, 1911, Bain Collection, Library of Congress.

## THE CHANGING COMPOSITION OF THE AMERICAN JURY

*Nancy S. Marder*

When IIT Chicago-Kent College of Law was founded 125 years ago, many of our key legal institutions, such as the jury, were well established. By 1888, the year of our school's founding, the jury was seen as an institution that provided justice in a nation created by a revolution of "we the people." Although it no longer seems remarkable to us today, the jury system gave ordinary citizens, untutored in the law, the power to decide cases and to dispense justice.

Today, reinforced by movies, television shows, and constant media coverage, the American people

have two deeply-held views about the jury. The first is that the jury is meant to represent all of us—"we the people"—by reflecting our diversity as much as is practical. In every high-profile jury case, much attention is paid to the diversity of the jury. In particular, we care about race and gender more than almost any other characteristics. Although the diversity of the venire is enshrined in several Supreme Court cases, the diversity of the petit jury is reinforced by the portrayal of the jury in popular culture.

The second widely-held view is that the jury has one job, and that is to determine the facts. Although a

jury trial is presided over by a judge and involves decision-making about the law, the jury ostensibly plays no role in determining which laws apply or what standards should be met. This arrangement seems sensible because the judge and lawyers bring to the trial legal expertise that the jurors do not have.

While these two views are well accepted, the students in our first law class in 1888 would be shocked to learn what our first-year students now take for granted. Though our modern impulse is to assume that a jury should reflect the diversity of our community, at one time that diversity was limited to white men of property. Our broader understanding of diversity has been the result of a hard-fought struggle to extend the rights of jury service to African-American men and later to women. This expansion of jury rights, however, has not been continuous; rather, it has proceeded in fits and starts. In fact, African-American men in some states in the South were given the right to serve as jurors during Reconstruction only to have that right stripped away by the end of the 1800s before being restored decades later. So, too, with women in the Western territories; they had the right to serve as jurors in the late 1800s, but it was short-lived.

It will also surprise the modern reader to discover that the role of the jury was initially to decide *both* the law and the facts. The diminution of

the role of the jury, so that it decided only the facts, happened gradually from about 1850 to the 1930s. Some researchers believe that as the practice of law became more professional, the distinction widened between judges and lawyers who knew the law and ordinary citizens who did not, until it made little sense for jurors to decide the law.

I offer a more radical theory in which I see a connection between the growing diversity of the jury and the declining power of the jury. My theory is that the white, male legal establishment began to curtail the power of the jury as African-American men and women had the right to serve on juries. Although African-American men and women lost that right by the late 1800s, they regained it, albeit after much struggle, many decades later. For both groups, however, even when official barriers were eliminated, other practices kept them from actually being seated on juries. Some of these practices, such as the peremptory challenge, are still used today in a discriminatory manner, in spite of Supreme Court cases to the contrary, in an effort to keep African-American men and women from being seated on juries.

### *The Exclusion of African-American Men from the Jury*

Albert Alschuler and Andrew Deiss, in an article entitled *A Brief History of the Criminal Jury in*

the United States, identified 1860 as the year in which African-American men first served on a jury. In that year, two African-American men sat on a jury in Worcester, Massachusetts. In 1864, Congress passed legislation that allowed African-American men to testify in federal courts, and this was followed by legislation that allowed them to testify in state courts. Jury service was soon to follow.

During Reconstruction (1863–1877), African-American men served on juries in some states. For example, in South Carolina in 1869, the legislature mandated not only the integration of grand and petit juries, but also that the racial composition of the jury should approximate that of the community. Similarly, in New Orleans between 1872 and 1878, one-third of the citizens summoned for jury duty were African-Americans, and this percentage matched their representation in Orleans Parish. Between 1870 and 1884 in Washington County, Texas, where African-Americans were approximately 50 percent of the population, they constituted about 30 percent of those who served on juries. During the 1870s, in Warren County, Mississippi, African-Americans were about 35 percent of the grand jurors, and even though that percentage did not approximate their percentage in the community (where they were 70 percent of the community), it was a significant improvement over their

total exclusion in the past.

Newspapers, in their reporting of jury trials during this period, noted when an African-American man (and they were only men) served as a juror. On January 15, 1884, in the *Chicago Daily Tribune*, one story questioned whether South Carolina jurors in a particular case had voted to convict based on their political parties; it included the following observation: “Three of the jurors, one a negro and two white men, refused to find a verdict of guilty.” On February 16, 1885, in the *Chicago Daily Tribune*, a story described a murder trial in New Orleans and mentioned the sole African-American juror on this jury: “The only juror who stood out from the very beginning in favor of conviction was one Edwards, a negro, and the only negro on the jury, and he maintained his manly and honest position to the end, notwithstanding that [the defendant’s] friends went to his house while he was serving and threatened his family with violence.”

The newspaper accounts also noted when the African-American juror was the first African-American to serve in that locale. A brief story on May 6, 1891, in the *New York Times* announced that a man named Nelson Stark, described as “colored,” had been selected as the eleventh juror in the Garrison murder trial. The story noted that “[it] is the first time in the history of that county [in West Virginia] that a col-

## **NEGROES AS JURORS.**

### **TWO COLORED MEN SERVING ON A GRAND JURY AT LOUISVILLE.**

**LOUISVILLE, Ky., Nov. 2.—A great deal of comment has been caused to-day by the presence of two colored men on the Grand Jury impaneled in the Circuit Court. It is the first**

*"Negroes as Jurors," New York Times headline, Nov. 3, 1885.*

ored man has sat on an important case in the State court." Similarly, on September 7, 1880, the *Chicago Daily Tribune* noted that "[f]or the first time in the history of Kentucky the panel of jurymen for the duty in a criminal court included in the list of the Louisville Circuit Court to-day three colored men." Two of those men were selected to serve on a grand jury and the third man was selected for a petit jury. The article noted that there were a number of African-Americans at court that day and "they evidently took great satisfaction in seeing representatives of their race assume privileges heretofore denied them."

The inclusion of African-American men on the jury was not limited to Southern states. A notice in the *New York Times* on November 19, 1890, announced that "[a]mong the jurors in a case in the Circuit Court this morning was Abe Peterson, a Grafton blacksmith, who is the first colored man to sit on a jury in Rensselaer County[, New York]." On July 9, 1893, a lengthy story in the *Chicago Daily Tribune* reported that for

the first time in Madison, Wisconsin, an all-African-American jury (six jurors) heard a civil case involving an assault and battery; the article noted that this jury marked "an inauguration of a new judicial era."

Newspaper accounts of jury trials also reported on perceived differences between white jurors and African-American jurors. According to one story in the *Chicago Daily Tribune* on July 10, 1880, "[t]he first negro juror in Atlanta, the other day, promptly joined in convicting a negro who was put on trial." As a result of African-Americans' seeming proclivity to convict, "[t]he next prisoner, also a negro, objected to having one of his own race on the jury." Another story, published in the *New York Times* on November 3, 1885, also observed that African-American jurors had been "decidedly in favor of the Commonwealth as against colored offenders." The article suggested that African-American jurors wanted to show that they were committed to law and order—so much so that older lawyers who had African-American clients would not

select African-American jurors because “they claim[ed] that colored jurors are more severe in meting out punishment to offenders of their race.”

In spite of constitutional protections provided by the Fourteenth Amendment (1868) and the Fifteenth Amendment (1870), statutory protections provided by the Ku Klux Klan Act of 1871, the Federal Civil Rights Act of 1875, and the Federal Jury Selection Act of 1879, and a U.S. Supreme Court case, *Strauder v. West Virginia*, 100 U.S. 303 (1880), which held that a state statute dis-

qualifying African-American men from jury service was unconstitutional, African-American men lost their place on juries in the South in the 1890s. Booker T. Washington observed at the end of the nineteenth century: “In the whole of Georgia & Alabama, and other Southern states not a negro juror is allowed to sit in the jury box in state courts.” According to a 1910 study, African-Americans rarely served on juries in Florida, Louisiana, Mississippi, Missouri, South Carolina, and Virginia, and they never served on juries in Alabama and Georgia. In

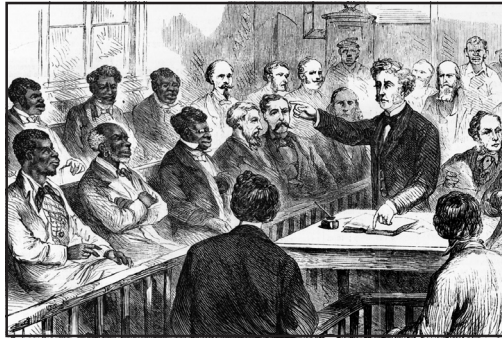
sum, according to another commentator, Douglas Colbert, “[a]lthough it was common for blacks to have served as jurors during Reconstruction, they virtually disappeared from the southern jury box by 1900, even in counties where they constituted an overwhelming majority of the local population.”

Even though statutes could no longer prohibit African-American men from serving on the jury after

*Strauder*, other practices kept them from the jury box. James Forman, in *Juries and Race in the Nineteenth Century*, described the violence di-

rected toward African-Americans and white Republicans that kept African-American men in the South from serving as jurors or witnesses, or seeking or being afforded the protection of the legal system. All-white Southern juries failed to convict the white perpetrators of these crimes.

Non-violent and more subtle practices also kept African-Americans from actually being seated on a jury, even if they had been summoned to serve. These practices ranged from color-coding by race the names placed in the wheel from which jurors were selected to the discretion exercised by white jury commissioners in selecting only



*“Jury of Whites and Blacks,” illustration by James E. Taylor, 1867, Library of Congress.*



white men whom they knew to serve as jurors. Mississippi's 1892 law, which allowed three state officials to select jurors based on their "good intelligence, sound judgment, and fair character," was another way to keep African-Americans off the jury; other Southern states followed suit.

The practice of discriminatory peremptory challenges, which continues to this day, was another way to keep African-Americans from being selected for petit juries. Each party could exercise a certain number of peremptories and use them to remove prospective jurors without giving any reason at all. Parties used their peremptory challenges to remove African-Americans from the jury. Prosecutors, in particular, exercised race-based peremptories to remove African-Americans from the jury in criminal cases in which the defendant was African-American. Even after a number of cases, from the mid-1960s to the mid-1990s, in which the Supreme Court developed an elaborate framework to attempt to counter the exercise of race-based peremptory challenges, the practice continues today. Lawyers have simply learned ways to avoid discovery. In some courts in the South, defense lawyers in capital cases will not even challenge the prosecutor's use of a race-based peremptory because they know the judge will never find a peremptory to be discriminatory. The practice of exercising discriminatory peremptory challenges persists, even

though it is undertaken in more subtle ways than it once was.

### *The Exclusion of Women from the Jury*

Women's experience in serving as jurors tracked African-American men's experience in some ways, but lagged behind by many years. Before 1888, women in at least two Western territories were permitted to serve as jurors, and in 1898 women in Utah were permitted to serve as jurors. Wyoming Territory gave women the right to vote and to sit on juries in 1869, with the first woman sitting on a jury in Laramie, Wyoming in 1871. However, there is some dispute as to when Wyoming women lost their right to sit on juries. Albert Alschuler and Andrew Deiss point to 1872 as the year that "Wyoming's experiment in equality in the courtroom" came to an end, and a *New York Times* article on November 19, 1883, claimed that "no woman [in Wyoming] is ever seen nowadays in the jury box." However, in an article in the *Chicago Daily Tribune* on October 26, 1891, the first Governor of the State of Wyoming was interviewed and said that there had been "several women jurors in the courts of Cheyenne, the Capital of Wyoming." The *Wyoming Almanac of Politics* included an article from the *Cheyenne Daily Leader*, dated September 17, 1891, describing a trial in which the defendant was female as were two of the jurors.

In 1884, women in Washington Territory had the right to vote and to serve on juries. However, in 1887, after a change in personnel on the Supreme Court of Washington Territory, women lost their right to sit on juries. In 1898, Utah allowed women to serve as jurors, and has traditionally been credited as the first state to do so, though women rarely served as jurors until the 1930s.

Although there were few women serving as jurors in the 1880s, there were occasional ruminations about what women jurors would be like and what difference they would make on juries. In a brief note in the *Chicago Daily Tribune* on April 21, 1888, entitled *Call for Feminine Jurors*, the writer suggested that it is difficult to convict a female defendant on the West Coast, and perhaps if women were permitted to serve as jurors this situation would change. The writer offered the following recommendation: "It would be a good thing if the rights of women could be so extended that in cases where a woman is accused of crime she might be tried by a jury of her own sex." On June 28, 1893, there was a brief article in the *Chicago Daily Tribune* entitled *Women as Jurors*, which raised the question whether Lizzie Borden should have been tried by a jury that included women because "a woman on trial for her life should have the right to demand an equal representation of women on the jury." However, the same ar-

ticle also suggested that whenever the defendant is a woman, "there are few men not predisposed to regard the opposite sex with tender consideration." In 1893, the Senate Judiciary Committee held a hearing to consider a bill that would allow women to serve as jurors if they "are wives of men who are duly qualified so to act," according to an article in the *New York Times* on February 1, 1893. The article reported that Dr. Mary Walker spoke in support of the bill, but the bill did not go forward.

Women thought the passage of the Nineteenth Amendment in 1920, which gave them the right to vote, would also give them the right to serve on juries, but this proved not to be the case in most states. According to Professor Gretchen Ritter, around the time of the Nineteenth Amendment, 14 states granted women the right to serve on the jury. In seven of these states, new laws were passed that gave women the right to serve. In the other seven states, jury-qualification statutes described jurors as "electors," so once women became electors under the Nineteenth Amendment, they automatically became eligible to serve as jurors. However, other states, like Illinois, rejected this idea. The Illinois Supreme Court reasoned that at the time when the Illinois General Assembly used the term "electors" only men could be electors. If women were to be included as "electors," then it was up to the Illinois General



Assembly to say so, which it did, though not until 1939.

States decided whether to allow women to serve on juries in their own courts, and the federal courts followed the practice of the state in which the federal court was located. It was not until the Civil Rights Act of 1957 that federal courts allowed women to serve as jurors in federal courts regardless of the practice of that state's courts. State courts, even when they ostensibly permitted women to serve as jurors, followed practices that kept many women from actually serving. In some states, women had automatic exemptions from jury duty. In other states, such as Florida and Louisiana, women could serve as jurors, but only if they went down to the courthouse and affirmatively registered for service, which was an extra step that men did not have to take. States that adhered to this practice claimed that it respected women's role in the home and that most women would be unable to serve because of their duties at home. The effect of affirmative registration was that very few women registered for jury service. As late as 1961, this practice was upheld in *Hoyt v. Florida*, 368 U.S. 57 (1961), and was not found to be unconstitutional until *Taylor v. Louisiana*, 419 U.S. 522, 533 (1975).

Even after the demise of affirmative registration, the exercise of peremptory challenges was another way to keep women from serving

as jurors. Although women were summoned to serve, they could be struck from the petit jury by lawyers exercising gender-based peremptory challenges. Whereas race-based peremptory challenges were addressed by the Supreme Court in a series of cases spanning from the mid-1960s to the mid-1990s, this line of cases did not become applicable to gender until *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Although there are many reasons that lawyers defend the peremptory challenge—from giving defendants control over jury selection to ridding the jury of an outlier who could not be dismissed for cause—the peremptory challenge also should be seen as a practice that has been, and continues to be, used to keep women and African-Americans from serving on juries.

### *A Decline in Jury Power*

Back in 1888, when African-American men had for all intents and purposes lost their right to serve on juries and the few women in Western territories still had their short-lived right to serve on juries, the jury had begun to experience a decline in power. Whereas the jury—from colonial times until the 1850s—had always had the power to decide the law and the facts, the jury started to lose its power to decide the law and was reduced to deciding only the facts. This loss came about

through state court interpretations of state statutes and constitutions. This loss could be seen in a number of states, including Massachusetts in 1855 and Louisiana in 1871, and soon spread to other states, including Georgia in 1879 and Vermont in 1892. Today, only two states, Indiana and Maryland, still instruct jurors that they have the right to determine the law as well as the facts. Although these two states' constitutions provide for this right, the judiciary in both states has narrowed this right through case law.

My own theory is that as African-American men and women sought to serve on juries, there was a move on the part of judges to limit the power of juries. Some commentators suggest that this move came about because of the growing professionalization of judges. As judges received legal training and saw themselves as professionals, they began to see the functions of judges and juries as distinct, and attempted to limit juries to the fact-finding function only. Another possibility is that as the law grew more complex, it seemed appropriate for professionals with training and knowledge to decide it, rather than citizens who had only common sense and experience to guide them. My own theory is that the move to limit the function of the jury to fact-finding came about at a time when outsiders—women and African-Americans—were trying to claim a right to serve as jurors. Al-

though African-American men and women had not yet been able to secure their right to serve, the writing was on the wall.

Thus, the late 1880s were a time of transformation for the jury. Juries in many states had lost their power to decide the law, and were officially limited to finding the facts. It is no coincidence that this occurred at a time when African-American men and women had experienced the right to serve as jurors, albeit briefly, and sought to recover that right, even though it would take them many years to do so. ♦

#### Sources and Further Reading

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