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family and society.*

BY AARON H. CAPLAN

## The History of Women's Jury Service in Washington



he lobby of Seattle's new federal courthouse features a mural by artist Michael Fajans that portrays 12 citizens from various walks of life.<sup>1</sup> These 12 randomly chosen adults — including a bus driver, an architect, a musician, a construction worker, and a computer programmer — represent a jury. Five of the jurors are women. To contemporary eyes, the presence of women on a jury is entirely unremarkable. A jury with no women would be anomalous, or even suspicious.

From 1883 to 1887, women in the Washington Territory served as jurors just as they do today. But unlike today, their presence was a source of great legal and social contention. Critics claimed that allowing women to serve as public decision-makers in the state's courts was a misguided experiment that violated the laws of nature, and would lead to dire consequences for family and society. A backlash followed that removed women from juries. If a mural of the ideal jury had been commissioned any time during Washington's first 20 years of statehood, it would have contained only men. The three-steps-forward, two-steps-back history of women's jury service in Washington, largely forgotten today, show how a society's sense of what seems natural or obvious can change over time.

### Women on Juries in the Washington Territory

Before statehood, trials in the Washington Territory were heard by territorial judges appointed by the President. Each judge rode circuit to hear trials within a judicial district, and appeals were taken to a three-judge territorial supreme court. There were at first three judges, but a fourth was added to spread the load and to avoid the appearance of partiality that arose when a trial judge sat in review of his own decisions.<sup>2</sup> Women first began to serve as jurors in these courts after 1883, when Washington became the third territory (after Wyoming and Utah) to grant women the right to vote.<sup>3</sup> In permitting what were then called "mixed juries," the territory was providing greater equality than required under existing federal law. The U.S. Supreme Court held in *Strauder v. West Virginia* (1879)<sup>4</sup> that a state could not exclude black men from jury service, because it is "practically a brand upon them, affixed by the

law, an assertion of their inferiority," but states were free to establish other types of qualifications for jurors, including laws that "confine the selection to males."

Territorial Chief Justice Roger S. Greene praised female jurors because he thought they would be more likely than scruffy frontier men to uphold law and order: "Vices that one sex will tolerate, both sexes, if together, will abominate and punish." A female observer who traveled from Massachusetts to observe the innovative mixed juries noted as a pleasant side-effect that the male jurors were less likely to smoke in court when ladies were present.<sup>5</sup> Outside the courtroom, female voters were credited with electing local officials committed to cracking down on moral offenses involving alcohol, prostitution, and gambling.<sup>6</sup>

The first legal challenge to female jurors was brought by a female defendant: Mollie Rosencrantz of Tacoma, who was charged in 1884 with running a bordello.<sup>7</sup> As was the practice in Justice Greene's courtroom, the grand jury that indicted Ms. Rosencrantz included married women. Whatever the defendant's views may have been on women's suffrage — or whether she feared that wives on a jury would enforce vice laws more vigorously than would wayward husbands or bachelors — her lawyers knew that the presence of married women on the grand jury was a potential source of reversible error. The jury statute said that petit jurors hearing the trial must be "electors" (eligible voters) and that the grand jurors issuing the indictment must be "electors and householders." Defense counsel conceded that women were now electors, but argued that a married woman could not be a "householder," because that term connotes the head of the household, who could only be a husband.

The conviction and its accompanying \$400 fine were affirmed in a 2-1 decision that pitted Justice John Philo Hoyt of Olympia against Justice George Turner of Spokane.<sup>8</sup> Justice Hoyt, joined by Justice Samuel Wingard, affirmed the *Rosencrantz* conviction in an opinion that is a paean to women's equality. Justice Hoyt explained that in the bad old days, "the relation of the wife to the husband was such that while she was living with him she was not such a householder, as her identity was largely lost in that of her husband, and she had no right to be heard as to the disposition of the property or children that resulted

from her marriage, so long as her husband survived." This "harsh rule of the common law" had been overridden by the Washington Territory's community-property law of 1879, which declared: "All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby abolished."<sup>9</sup> Justice Hoyt explained that this statute was not limited to ownership of property, but was instead "imbued with [the] spirit of progress," and created a marital relationship "of absolute equality before the law." Women and men were both "householders," because "each, acting for himself or herself, but in conjunction with his or her companion, is the keeper of the entire household."

Justice Turner dissented vigorously, arguing that women could not be "householders," because the husband is "the head and the only head of the family. ... The idea of a double head in nature or in government is that of a monstrosity." The community-property act dealt only with property, and the suffrage act dealt only with voting; neither one changed Justice Turner's abiding belief that women were legally incompetent to act as jurors. At common law, a juror must be *liber et legalis homo*, which Blackstone and other commentators translated as "a free and lawful man." Just as unnaturalized aliens were disqualified from jury service by defect of birth, women were disqualified *propter defectum sextus*, by defect of sex. To Justice Turner, "the advanced ideas of the nineteenth century" regarding sex equality could not salvage this inborn defect.

Legislative enactment would not make white black, nor can it provide the female form with bone and sinew equal in strength to that with which nature has provided man. No more can it reverse the law of cause and effect, and clothe a timid, shrinking woman, whose life theater is and will continue to be, and ought to continue to be, primarily the home circle, with the masculine will and self-reliant judgment of man.

Justice Turner also expressed his "repugnance" at the notion that women would be exposed to the grisly details of criminal trials, for doing so "must, in my opinion, shock and blunt those fine sensibilities, the



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possession of which is [woman's] chiefest charm, and the protection of which, under the religion and laws of all countries, civilized or semi-civilized, is her most sacred right."

The question arose again in *Hays v. Territory* (1884),<sup>10</sup> an appeal from one of Justice Hoyt's trials where the defendants were charged with violating a Thurston County ban on hunting deer with dogs. Justice Greene, joined by Justice Wingard, rejected the idea that the federal constitutional right to trial by jury required a jury of men. The federal constitution incorporated the common law concept of jurors as *liber et legalis homo*, which Justice Greene understood to encompass "freedom, law, and humanity; in other words, the juror must be free, lawful, and of the human race." He noted that some common law trials, such as those involving determination of pregnancy, had exclusively female jurors. Even though "ordinary issues" were decided at common law by male juries, the Legislature could expand the uses of female jurors without violating the common law or the U.S. Constitution. Justice Turner again dissented.

### Jury and Voting Rights Rescinded

In 1887, defendant Jeff J. Harland was charged with cheating J.C. Livensparger out of \$610 through a swindle known variously as "Bunko," "Twenty-one," or "Top and Bottom Dice."<sup>11</sup> He challenged his indictment in Justice Hoyt's courtroom by a grand jury that included married women, making the same arguments that had been rejected in *Rosencrantz* and *Hays*. The prosecutor considered it an open-and-shut case on appeal, submitting a one-and-a-half page brief that dispatched the female-juror question with a simple citation to *Rosencrantz*.

Luckily for Mr. Harland, the makeup of the Court had changed. Although three of the Court's four justices in 1884 had favored women on juries, the substitution of Justice William Langford for Justice Wingard created a Court that was evenly divided: Justices Greene and Hoyt favored women on juries, while Justices Turner and Langford opposed them. As the trial judge, Justice Hoyt could not sit on the appellate panel, so after years of dissent Justice Turner found himself in the majority. His opinion began by noting the difference of opinion among the four judges, but found no need to be constrained by precedent because the luck

of the draw had placed his views in the majority, and Justices Greene and Hoyt were about to retire anyway. Justice Turner shed a few crocodile tears for the impending departure of his learned colleagues, noting how “they have honorably illumined our judicial history by great learning and ability, and by the purity of their lives and the uprightness of their official conduct.”

Justice Turner reiterated his primary objection to jury duty for women: “the labor and responsibility which it imposes [is] so onerous and burdensome, and so utterly unsuited to the physical condition of females,” that the Legislature could not have intended to impose such an obligation. It did not matter that this limitation was not found in the statute, because “[w]hen a man becomes a lawyer he does not have to lose his wits, nor does a judge have to be a fool.” Whether the statute says so or not, “when legislatures have prescribed the qualifications of jurors, the requirement that they should be males has always been implied.” At common law, *homo* meant man, not mankind.

But Justice Turner’s opinion was not finished. Perhaps to avoid the charge that the new majority lacked suitable regard for *stare decisis*, he needed to find a method to distinguish *Rosencrantz* and not just overrule it. He therefore explained that “a new question, not argued or passed on in the first case, arises in this case, and is decisive of it.” The new question was whether the 1883 Suffrage Act making women “electors” was valid. Under the 1853 Organic Act that served as the equivalent of a constitution for the Washington Territory, “every act of the legislature shall contain but one object, and that shall be expressed in its title.” The title of the Suffrage Act was: “An act to amend section 3050, c. 238, of the Code of Washington Territory.” While this title contained one subject and was accurate, it did not say on its face that the bill involved women’s suffrage. Justice Turner explained that legislators tend to vote on bills without reading them, so full disclosure in the title is essential to prevent them from doing something drastic (like giving women the right to vote) without ample warning. “Females, then, are not voters in this territory, and, not being voters, they are not competent to sit on juries.”

The judicial disenfranchisement of women was even more remarkable because the lawfulness of the Suffrage Act was never

briefed by the parties. Justice Turner’s careful phrasing — that the suffrage question “arises” in the case — implied that the appellant had asserted the issue as grounds for reversal. In fact, Mr. Harland’s brief said nothing about women as electors, and at most suggested that they were not householders. Justice Turner nonetheless found that the question of women’s suffrage “meets us squarely, [and] ought to be decided.” The accused swindler got a new trial, but it was the women of Washington who were bilked.

As if to remind his colleagues that he had not actually retired yet, Justice Greene

submitted an acid one-sentence dissent: “From all that is decisive, and from much that is not decisive, in the very able opinions just read by Messrs. Associate Justices Turner and Langford, I totally dissent, and will in due time, if circumstances admit, file a dissenting opinion.”

Justice Hoyt did not have the opportunity to dissent in *Harland*, but he took his revenge on Justice Turner’s reasoning in *Marston v. Humes* (1891).<sup>12</sup> Now one of the five justices on the newly created Washington State Supreme Court, Justice Hoyt considered whether a statute titled “An act to amend sections 76, 77, and 109

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of the Code of Washington of 1881" would comply with the statutory title requirement of Art. II, § 19 of the Washington State Constitution. His opinion declaimed at length on the errors of *Harland*: the result was determined by the happenstance of which panel assembled to decide the appeal, and, furthermore, "at that time very few books were accessible to the court, and ... a large number of the cases cited in said opinion are said to have been so cited from digests thereof, rather than from the cases themselves." Marston demonstrated in painstaking detail how Harland had misinterpreted each of the cases it purported to rely upon.

Justice Hoyt's masterful performance was praised a few years later by a federal judge as an "able and exhaustive opinion,"<sup>13</sup> but as a later Washington State Supreme Court opinion noted, it was all *dicta*.<sup>14</sup> The actual title of the bill in Marston was longer and more informative than the portion Justice Hoyt discussed.

#### Voting Rights Restored and Rescinded

Justice Turner's opinion in *Harland* unanimously suggested that the Legislature could re-enact a women's suffrage law with a proper title if it was reckless enough to insist upon a law that "many men and women

believe [to be] so disastrous." The sitting Legislature — which had been elected in part by female voters — called his bluff in January 1888, enacting a new statute clarifying that all residents of the state, "male or female," were entitled to vote. The law was quickly put to the test when Mrs. Nevada Bloomer sued election judges in Spokane Falls for refusing to allow her to vote in April 1888. Unlike the better-known Amelia Bloomer of Seneca Falls, Nevada Bloomer of Spokane was no suffragist. The alcohol industry was one of the chief opponents of women's suffrage, believing that women were more likely than men to vote for prohibition. Mrs. Bloomer's husband owned a tavern, and defendant John Todd was the beer bottler who supplied him, so it is widely believed that the lawsuit was collusively arranged as a vehicle to invalidate the suffrage statute and thereby protect the Bloomer family business.

Justice Turner, now retired from the bench, represented the election officials in *Bloomer v. Todd*.<sup>15</sup> He argued that the 1888 Suffrage Act violated the terms of the Organic Act. It specified that the right of suffrage in the Washington Territory "shall be exercised only by citizens," and women were not the citizens Congress had in mind. The Territorial Supreme Court agreed. Justice Richard Jones, joined by Justices William Langford and Frank Allyn, agreed. "When this act was passed, the word 'citizen' was used as a qualification for voting and holding office, and, in our judgment, the word then meant and still signifies male citizenship, and must so be construed." The job of the Court is to divine the intent of the Legislature, but "such intention is not always found in the mere words." Not beholden to the "plain meaning" school of statutory interpretation, Justice Jones believed that "[i]t is the duty of the court, in construing a statute, to give effect to the intent of the legislature, even though in doing so a seeming violence is done to some of the words employed."

The 1888 decision in Bloomer set the stage for considerable debate over women's suffrage during the constitutional convention of 1889. Justice Hoyt edged out Justice Turner for the position of chair. The convention could not reach agreement on women's suffrage, so it was presented to (male) voters as a separate question on the ratification ballot. An alcohol-prohibition measure was also on the ballot. The consti-



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tution passed, but prohibition and women's suffrage did not. As a result of this election, Art. VI, § 1 of the new Washington State Constitution limited the status of electors to "male persons." Not until Amendment 5 passed in 1910 was the section revised to grant the vote to "all persons" and to state that "there shall be no denial of the elective franchise at any election on account of sex." With that amendment, Washington became the fifth state (after Colorado, Idaho, Utah, and Wyoming) to grant women's suffrage. The U.S. Constitution did not guarantee that right until the 19th Amendment was enacted in 1920.

### Equality of Jury Service

Amendment 5 did not by itself resolve the issue of women on juries in Washington, since jury service had been unlinked from the right to vote. The 1888 territorial statute designed to overrule *Harland* limited itself to voting, and contained a proviso that "nothing in this act shall be so construed as to make it lawful for women to serve as jurors." In 1911, the state Legislature revised the jury statute to provide that all electors, including women, would be placed on the list of eligible jurors. This made Washington the first state in the nation to authorize female jurors by statute. (The Wyoming Territory had experimented with women on juries in 1870-71, but had abandoned the practice before statehood.)

While far ahead of the rest of the nation in securing this form of civic participation for women, Washington's 1911 jury law did not guarantee that men and women would serve equally. Any woman had a right to opt out of jury duty by signing a notice that she desired to be excused. By statute, the person serving the jury summons was required to inform women that a sex-based exemption was available.<sup>16</sup> Automatic exemption of women from jury duty was not an unusual arrangement for most of the 20th century. The prevailing notion that a woman's place was in the home meant that it would be ungentlemanly for the state to force her from the domestic sphere against her will — not to mention burdensome to her domestically helpless husband and children, who would have to cook their own dinners.<sup>17</sup>

Sometimes women were excluded from jury duty in Washington for more mundane reasons. As revealed *W.E. Roche Fruit Co. v. Northern Pacific Railway*,<sup>18</sup> for

many years before 1942 "no women had served as jurors in Yakima County, due to a complete lack of facilities to take care of mixed juries." Jury pools containing a fairly representative number of women were evidently not worth the cost of the plumbing. When a new courthouse (which presumably had more than one restroom) opened in that year, the court clerk placed an ad in the newspaper asking women to volunteer to add their names to the jury list. This opt-in procedure was the mirror image of the opt-out procedure specified in the jury statute. The appellant objected that volunteer jurors were not to be trusted,

but the Washington State Supreme Court affirmed, holding that the opt-in method for women substantially complied with the statute and that the appellant had not shown prejudice from the presence of female volunteers on the jury.

Neither the parties nor the Court in *Roche Fruit* confronted the reality that an opt-in or opt-out exemption for women would typically result in far fewer women than men on the state's juries. The 1911 statute as applied or misapplied created an unrepresentative jury pool that did not match the vision of justice expressed in the brief of the territorial prosecutor in *Rosencrantz*:



- CATASTROPHIC INJURY
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It is the right also of every person who is or may be charged with a violation of the laws to have such charge made and tried by a grand and petit juries of his peers, selected in the manner provided

by law from all the persons who are electors and householders. This is the protection of the innocent as well as the terror of the guilty.<sup>19</sup>

The problem of representativeness was squarely presented to the US Supreme Court in *Hoyt v. Florida* (1961),<sup>20</sup> where a woman accused of murdering her philandering husband with a baseball bat pleaded temporary insanity. Mrs. Hoyt's attorneys believed that the gender-charged facts of the case made female jurors particularly important, but the Florida jury statute summoned men for duty

while calling only those few women who had affirmatively opted in. The result was an all-male jury, but the Supreme Court was untroubled. "Despite the enlightened emancipation of women," said the Court, "woman is still regarded as the center of home and family life." As a result, "a State, acting in pursuit of the general welfare, [may legitimately] conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."

## Conclusion

Social change does not always occur in a linear or predictable fashion, but with work change can and does occur. Although the federal Constitution as interpreted in *Hoyt* did not require it, Washington passed a statute to eliminate its women's exemption from jury duty in 1967.<sup>21</sup> The jury statute was later amended to its current form, which declares that "a citizen shall not be excluded from jury service in this state on account of race, color, religion, sex, national origin, or economic status."<sup>22</sup>

As it was with suffrage, Washington was ahead of the national trend regarding equality of jury service. Not until 1975 did the U.S. Supreme Court hold that opt-in jury service for women violated the right to a fairly representative jury.<sup>23</sup> Opt-out statutes giving women an automatic exemption were found unconstitutional in 1979.<sup>24</sup> And not until 1994 did the U.S. Supreme Court strike down the use of peremptory challenges to disqualify petit jurors on the basis of sex.<sup>25</sup> In these decisions, the Court recognized that its earlier judgments about social roles, expressed not long before as if they were natural laws, "are no longer consistent with our understanding of the family, the individual, or the Constitution."<sup>26</sup> Through its own circuitous path to that same understanding, Washington helped lead the way to our current national consensus. ✍

*Aaron Caplan is a staff attorney for the American Civil Liberties Union of Washington. He has only once been summoned for jury duty, where he was the object of a peremptory challenge.*

## NOTES

<sup>1</sup> Kathie Werner, "Artist gets massive murals

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<sup>2</sup> Charles H. Sheldon, *A Century of Judging: A Political History of the Washington Supreme Court* (1988), at 15-17.

<sup>3</sup> T.A. Larson, "The Woman Suffrage Movement in Washington," 67 *Pacific Northwest Quarterly* 49 (1976). The 1883 act did not emerge overnight. The first territorial legislature in 1854 came within one vote of granting the vote to white women. Some observers speculated that the bill might have passed if it had not had a racial exclusion, since at least one of the legislators voting *no* was married to a Native American woman. An 1866 statute gave the vote to "all white citizens," not specifying gender. An 1869 proposal for an explicit women's suffrage statute was defeated. Nonetheless, some precincts in King County relied on the 1866 law to allow women to vote. The ambiguity was resolved in 1871 with a statute that permitted women to vote only in school board elections. Other women's suffrage proposals failed in 1875, 1878, and 1881.

<sup>4</sup> *Strauder v. West Virginia*, 100 U.S. 303, 308 & 310 (1879).

<sup>5</sup> Cristina M. Rodriguez, "Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old-Boys' Network in Nineteenth Century America," 108 *Yale L. J.* 1805, 1805 & 1822 (1999).

<sup>6</sup> Mildred Tanner Andrews, *Washington Women as Path Breakers* (1989), at 5.

<sup>7</sup> *Rosencrantz v. Territory*, 2 Wash. Terr. 267, 5 P. 305 (1884).

<sup>8</sup> Biographical information on Justices Hoyt and Turner may be found in Charles K. Wiggins, "John P. Hoyt and Women's Suffrage," *Washington State Bar News* (January 1989), available online at [www.c-wiggins.com/constitution/hoyt.html](http://www.c-wiggins.com/constitution/hoyt.html); Charles K. Wiggins, "George Turner and the Judiciary Article," *Washington State Bar News* (September-October 1989), available online at [www.appeal-law.com/constitution/turner.html](http://www.appeal-law.com/constitution/turner.html); and Charles H. Sheldon, *The Washington High Bench: A Biographical History of the State Supreme Court* (1992), at 220-22.

<sup>9</sup> Laws of 1879, p. 151, § 1.

<sup>10</sup> *Hays v. Territory*, 2 Wash. Terr. 286, 5 P. 927 (1884). The rule of *Rosencrantz* was also relied upon to uphold convictions for running a gambling house, *Schilling v. Territory*, 2 Wash. Terr. 283, 5 P. 926 (1884); and running a brothel, *Walker v. Territory*, 2 Wash. Terr. 286, 5 P. 313 (1884).

<sup>11</sup> *Harland v. Territory*, 3 Wash. Terr. 131, 13 P. 453 (1887).

<sup>12</sup> *Marston v. Humes*, 3 Wash. 267, 28 P. 520 (1891).

<sup>13</sup> *In re Moore*, 81 F. 356, 358 (E.D. Wash. 1897).

<sup>14</sup> *State ex rel. Seattle Electric Co. v. Superior Court*, 28 Wash. 317, 322, 68 P. 957, 959 (1902).

<sup>15</sup> *Bloomer v. Todd*, 3 Wash. Terr. 599, 19 P. 135 (1888).

<sup>16</sup> Remington's Revised Statutes, § 95.

<sup>17</sup> Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998), at 217-18.

<sup>18</sup> *W.E. Roche Fruit Co. v. Northern Pacific Railway*, 18 Wn.2d 484, 139 P.2d 714 (1943).

<sup>19</sup> Brief for Respondent in *Rosencrantz v. Territory*.

<sup>20</sup> *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

<sup>21</sup> Laws of 1967, ch. 39, § 1.

<sup>22</sup> RCW 2.36.080(3).

<sup>23</sup> *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Daniel v. Louisiana*, 420 U.S. 31 (1975). See also *Alexander v. Louisiana*, 405 U.S. 625, 634 (1971) (Douglas, J., concurring) (citing Justice Turner's dissent in *Rosencrantz* as an example of sexism).

<sup>24</sup> *Duren v. Missouri*, 439 U.S. 357 (1979).

<sup>25</sup> *J.E.B. v. Alabama*, 511 U.S. 127 (1994).

<sup>26</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 896-897 (1992).

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