

The Constitutional Road to Equality by Jury

by Jessica Martin

Tracing our history on jury service qualifications and how they have been achieved has shown that, historically, participation in jury service and voting has always been enmeshed and intertwined, politically and civically, since before the writing of the constitution. Jury service and voting were actions only allowed to a select few – wealthy, white, property-owning or taxpaying, twenty-one or older, free men. Jury service has always been revered as an intricate part of our democracy and the basis of our moral society. These fundamental laws are deeply seeded and embedded within our domestic walls of justice that continually strive to balance the scales, by establishing the rules of a self-governing democracy. New York State and the Supreme Court have not always been in agreement over jury qualifications. The state and national governments, along with the civil rights and women's movements, have given us jury qualifications that are more impartial, diverse, and fair cross-section of the community than ever before in our history.

The role of the jury service has always been of great importance within our society and to our democracy, even with the conflicting opinions of who should be allowed to serve. From New York's earliest beginnings, the state (then just a colony) has honored the right of the trial by jury; the problem, however, has been who is allowed in the jury pool. Following the revolution, at the time of the development of the first New York Constitution in 1777, a jury system already existed through the common law of the land. This common law was carried over from the Dutch rule with the Days of Duke's Law and the English rule with the Charters of Liberties and Privileges, dating back ancestrally, at least, as far as the Magna Carta of 1215.¹ Trial by jury, as

described in the Charters of Liberties and Privileges of 1683, and then later revised in 1691, set the path of jury service for the common law of the colony of New York.²

"That . . . a freeman . . . of the said Amercements shall be Assessed but by the Oath of twelve honest and Lawfull men of the Vicinage provided the faults and Misdemeanors be not in Contempt of Courts of Judicature. All tryalls shall be by the verdict of Twelve men and as nere as many be Peares or equals of the neighbours of the place where the fact shall arise or grow; whether the same be by Indictment declarant or Information or otherwise against the person or defendant. That in all cases capitall or criminall there shall be a grand Inquest who shall first present the offence; and then twelve good men of the neighbourhood, to try the offender, who after his plea to the Indictment shall be allowed his reasonable challenges" ³

The 1777 New York Constitution contained many of the Charters of Liberties and Privileges legislatures, but also left some of the common laws untouched, with little or no alterations or mentions.⁴ These common laws were already recognized and in practice when the Constitution was written and adopted. This first state Constitution did not specifically mention the makeup of the jury, only the right of a trial by jury, as used in the colony of New York to "be established and remain inviolate forever"⁵ in section XLI (41), along with the voting requirements in section VII (7) and VIII (8). These omissions may have been intentionally due to the difficulty of achieving a size quota or a unanimous verdict considering the limitations on the jury pool, which was drawn from the list of qualified voters, or because trial by jury was a fundamental law and was thought to be already securely preserved.⁶ Nonetheless, these voting qualifications were limited to every male of full age that lived in the state for six months, and was a freeholder or owner of land valued at twenty pounds or paid rent of at least forty shillings a year, who paid taxes to the state, and was free before October of 1775, after he swore an oath of allegiance to the state and was not a criminal.⁷

The second Constitution of New York, dated 1821, Article VII, sec. two states the trial by jury is continued and "shall remain inviolate forever; and . . . proceeds according to common

law, except such courts of equity as the legislature is herein authorized to establish."⁸ In some areas, with the qualifications and requirements of voters becoming stricter, there was a narrowing of the already short list of potential jurors.

"Every male citizen of the age of twenty-one years, who shall have been an inhabitant of the state one year preceding any election, and the last six months a resident of the town or county . . . paid a tax to the state or county, assessed upon his real or personal property; or shall by law be exempted from taxation; or being . . . (militia or military duty, fireman within the state, or public highway laborer) . . . but no man of color, unless he shall have been for three years a citizen of this state, and for one year preceding any election, shall be seized and possessed of a freehold estate of the value of two hundred and fifty dollars, over and above all debts and encumbrances charged thereon; and shall have been actually rated, and paid a tax thereon, shall be entitled to vote at any such election. And no person of color shall be subject to direct taxation unless he shall be seized and possessed of real estate as aforesaid. excluding from the right of suffrage all persons who have been or may be, convicted of bribery, larceny, or of any infamous crimes"⁹

These elections were conducted by ballot with pre-registration requirements, to establish proof of entitlement of right to vote.¹⁰ This qualifications list was amended in 1826, with the exception of the persons of color section, which stayed the same. The amendment read:

". . . every male citizen of the age of twenty-one year, who shall have been an inhabitant of this state one year next preceding any election, and for the last six months a resident of the county where he may offer his vote shall be entitled to vote in the town or ward where he actually resides, and not elsewhere, for all officers that now are or hereafter may be elective by the people."¹¹

These changes remained until the third Constitution of New York, in 1846, where trial by jury remained vague and embedded in the common law of the land, and voter qualifications showed little change – white, taxpaying or property-owning, and wealthy males remained, with slight changes in length of citizenship and residency, and no change to persons of color qualifications.¹²

But times were changing. In 1865, following the Civil War, the federal government added the 13th Amendment to the United States constitution abolishing slavery.¹³ Three years

later, in 1868, the 14th Amendment with the equal protection clause was added.¹⁴ Then, in 1869, the 15th Amendment proclaiming voting rights cannot be denied due to "race, color, or previous condition of servitude" was passed, giving black men the right to vote and eligibility for jury service.¹⁵ The United States Supreme Court stated that black men had to be allowed to vote, because to disallow them this right would be like "branding them as an inferior class of citizens, and deprive them of equal protection of the law, which is guaranteed by the National Constitution."¹⁶ Then, in reference to *Plessy v. Ferguson* (1896), the Supreme Court upheld a decision on segregation that gave way to the Separate but Equal Doctrine.¹⁷ Lawmakers, also in an attempt to protect the rights of the blacks, passed several civil rights acts.¹⁸ This progress spurred women to join together and strive for equal rights, like voting and jury service, as well. But, the Supreme Court's response was that the privileges and immunities clause of the 14th Amendment did not grant "all citizens the right to vote" nor obligate the states to let women vote.¹⁹ The Supreme Court also claimed a lack of authority over state and private actions where these amendments were concerned, because the states were not required to accept the "national" rights of citizenship.²⁰

The abolition movement and the 14th Amendment had lead women to openly push for their rights to equal citizenship.²¹ Susan B. Anthony convinced a U.S. senator to introduce an amendment for women's suffrage in 1878.²² This amendment was voted down many times before ratification in 1920, but, in the meantime, several states began ratifying suffrage legislation and lifting their ban on women jurors.²³ Nevertheless, New York held out, not wanting to endorse an "experimental legislation."²⁴ By 1894, the fourth Constitution of the State of New York was adopted, coming with changes in voting requirements, as the "persons of color" section was removed from the document,²⁵ because the 15th Amendment no longer

allowed "race, color or servitude" to differentiate a citizen's voting qualifications.²⁶ In most states, when women were rendered the right to vote, they could automatically serve on a jury.²⁷ New York State conceded to women's suffrage rights in 1917,²⁸ but resisted qualifying women as jurors.²⁹ That same year, groups of women amassed and converged upon the White House picketing and rallying for the passage of a national women's suffrage amendment.³⁰ Hundreds were arrested from twenty-six states,³¹ yet little changed. When President Woodrow Wilson began showing his support for the amendment, a political shift took place,³² and the 19th Amendment of the Constitution of the United States was ratified in 1920; thus, giving women the right to vote across the nation but, ironically, not the right to serve on a jury.³³

The civil rights of women had been repressed and restrained with the so-called "protectionism" laws,³⁴ for a very long time. Far before the Declaration of Independence or Thomas Jefferson's utterance of his belief that "were our state a pure democracy, there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men."³⁵ These laws of discrimination have lain deeply rooted in our culture for centuries. Sir William Blackstone, a famous English jurist, claimed that based on his interpretation of the common law of jurors,³⁶ *venire facies*, "under the word *homo* (as in *homo sapiens*) . . . though a name common to both sexes, the female is excluded, *propter defectum sexus* or defect of sex."³⁷ This coarse mode of thinking may have contributed to women's jury exclusions and later exemptions.

Nonetheless, the views on jury qualifications were historically changing. A 1921 New York bill giving women eligibility of jury service failed to pass.³⁸ In *re Grilli*, the contention was, that since women's suffrage had passed in New York State and jury service was an "incidental" part included in suffrage, every woman in the county should be made a juror. The

courts declared this incorrect due to discrepancies in voter and juror qualifications. Citing historically that "jurors have always been voters, but, voters are not always jurors" and New York requires jurors to be "male" citizens. Therefore, the court ruled against Grilli.³⁹

But, not long after the Grilli case, the Supreme Court proclaimed that the women's suffrage or nineteenth constitutional amendment, along with an added policy stating jurors should be drawn from elector qualifications, will make women eligible but not liable for jury lists.⁴⁰ This forced New York to accept women into the juror box, but with an allowed exemption. In March of 1927, the President signed a bill qualifying women of D.C. (although not a state) with the right to serve as jurors, as well as the right to request exemption.⁴¹ The fifth version of the New York State constitution, adopted in 1938, has been amended and revised several times, yet is still in use today.⁴² Both voter and juror qualifications began to include women, but women jurors were granted an exemption if they chose.⁴³

These women's exemptions lead to controversy. Because of the ever-increasing case load, New York State developed two jury panels to draw from. First, a general, fair cross section from the community commonly selected from voter registration and used in most cases,⁴⁴ like, in the *Fay v NY*:

"To qualify as a juror a person must be an American citizen and a resident of the county, not less than 21 nor 70 years old, the owner of property of value of \$250; in possession of his or her natural faculties and not infirmed or decrepit; not convicted of a felony or a misdemeanor involving moral turpitude intelligent; of sound mind and good character; well-informed; able to read and write the English language understandingly. From those qualified the following classes are exempt from service; clergymen, physicians, dentists, pharmacists, embalmers, optometrists, attorneys, members of the Army, Navy or Marine Corps, or of the National Guard or Navel Militia, firemen, policemen, ship's officers, pilots, editors, editorial writers, sub-editors, reporters and copy readers Women are equally qualified with men, but as they also are granted exemption, a woman drawn may serve or not as she chooses."⁴⁵

Then, a special or "Blue Ribbon" panel was drawn from the first panel, which was screened for more impartial qualifications than the average juror.⁴⁶ New York State enacted these "Blue Ribbon" jury panels in 1896, later repealed them, and then re-enacted them again in 1901.⁴⁷ This special jury panel was used in highly populated areas of one million or more, like the New York City area, primarily for murder or infamous trials.⁴⁸ In the 1947 case of *Fay v NY*, Fay contested the constitutionality of the "Blue Ribbon" jury used by New York State in his conspiracy and extortion trial because there was only one women juror. New York was justified due to the inability to make women who choose exemption serve. The Supreme Court concluded, that because "Blue Ribbon" jury panels are used in New York continuously, New York State did nothing wrong; but due to the way this jury was drawn, with women-allowed exemption, a choice not given to men, the panel was no longer a cross-section. The judge ruled the case be reversed, due to a shortfall in the constitutionality of the jury selection.⁴⁹

This affirmed the exemption for women on a state and national level, which was reaffirmed in 1961, by the Supreme Court in *Hoyt v. Florida*.⁵⁰ However, by 1975, the Supreme Court no longer conceded to automatic exemptions due to sex.⁵¹ The court ruled that women must serve in order to have "an impartial jury, drawn from a fair cross section of the community;" without them the defendant's 6th Amendment right is violated or defied, due to a practically all male jury.⁵² Prior to 1975, in 1971, the 26th Amendment was added to the United States Constitution giving eighteen-year-olds the right to vote and, therefore, giving them jury eligibility.⁵³ On January 1, 1996, New York State repealed all automatic exemptions.⁵⁴ Today, a New York State juror must be a U.S. citizen, at least 18 years old, a resident of the county summoned from, able to read and understand English, and have no felony convictions.⁵⁵ The jury pool is drawn randomly from lists gathered from State income tax filings, voter registration,

driver's licenses or ID's issued by the DMV, as well as recipients of welfare or family assistance, unemployment insurance, and volunteers.⁵⁶

Jury service has always played a vital role in our society. It is a valued and obscure part of our democracy that epitomizes and represents constitutional equality, is at the core of our democratic society, and is the essence of being an American citizen – emphasized even more by the political and civil strife and struggles that have been fought. Each encounter or battle that we endured, state or national, sharpens and defines our political ideals and identities, and establishes an alliance and respect for our government and laws. Jury service is a civic duty and a way "we the people," the masses, can directly participate in the governmental process and even spur policy changes. The participation of the general masses as jurors enables and defends everyone's right to have a fair and impartial trial, a safety net, if we should ever need one. As a self-governing democracy, the jury service has had a great impact on almost every aspect of our lives, either directly or indirectly, by changing society through participation.

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Footnotes

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