

GENDER MATTERS IN JURY DUTY: MALE AND FEMALE PARTICIPATION DURING THE DELIBERATION PROCESS

ARTICLE

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Individuals are not expected to ignore as jurors what they know as men —or women.

Today’s decision severely limits a litigant’s ability to act on this intuition, for the import of our holding is that any correlation between a juror’s gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes

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*no difference as a matter of law is not to say that gender makes no difference as a matter of fact.*¹

—Justice Sandra Day O'Connor

INTRODUCTION

THE SUPREME COURT'S DECISION IN 1994, WHICH HELD THAT GENDER-BASED peremptory challenges were unconstitutional, failed to recognize that gender does matter when it comes to jury service, and in doing so, reiterated the outdated and erroneous notion that men and women are in fact fungible. Social science research has demonstrated through empirical data how gender matters in jury duty. Furthermore, these fields of study have recognized the impact of gender differences in the jury deliberation process and subsequently, its effect on the verdict. Nonetheless, the American legal system has yet to do so.

Social scientists have noted differences between male and female jurors, in how each resolves controversies, in how each evaluates the evidence presented, in how they communicate with each other, and the manner rates of participation during the deliberation process. Part I of this paper briefly depicts women's long history of exclusion from jury service, with an overview of the Supreme Court's jurisprudence that addressed the issue of women jurors, including *J.E.B. v. Alabama ex rel. T.B.*, where the Court ruled that peremptory strikes solely based on gender violates the Equal Protection Clause.²

Part II of this paper argues how gender matters in jury duty on an individual-level basis, given the empirical data recorded of gender-based biases pertaining to the subject matter in specific controversies. These are characteristic to their experience as men or women in today's society, and, furthermore, due to the gender based distinction of their moral reasoning process. Secondly, how gender matters on a group-level basis in regards to speech participation and perceived influence during the deliberation process. Part III offers a possible solution to eliminate the gender gap in group deliberations with the employment of a decision rule conditioned to whether males or females are in majority.

This paper argues that the failure of our legal system in recognizing the effect of gender-based biases on individual-level jurors, and the effect of gender on a group level basis during the deliberation process, severely undermines the nature and duties of the jury as a legal body, and in doing so, severely limits defendants to have a fair and impartial jury, a right guaranteed under the Sixth Amendment.

I. THE FEMALE JUROR

¹ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) (emphasis added).

² *See id.* at 146 (majority opinion).

A. *Historical Account of the Exclusion of Women from Jury Service*

The history of the exclusion of women jurors in the United States “dates back to the English common law.”³ By the latter half of the twentieth century, women still were not allowed to serve as jurors in all the states.⁴ Advocates of women’s participation in jury service published their views and ideas frequently in order to build public opinion. In *The Woman Citizen*,⁵ a proponent of women’s inclusion in juries wrote: “[i]n jury service, as in other aspects of community life, I believe that it’s wholesome for both sexes, as well as for the public interest, that each sex should bear its share of the responsibility.”⁶ However, those who opposed women’s participation in juries put up a good fight.⁷ Opponents of women participation in juries claimed “that the expansion of women’s legal status signaled a threat to the family order precisely because its foremost proponents had themselves shunned the family life.”⁸

One justification, given by opponents of women’s participation in juries, was that since “women were confined to the domestic sphere of the household during the eighteenth and nineteenth centuries,” they lacked the societal experience that was esteemed “necessary to make informed decisions as jurors.”⁹ For example, *The Philadelphia Press* asserted that “women, by nature, moralized excessively and therefore did not belong as decisionmakers [sic] in a legal system that depended on discovering nuances and gradations in responsibility.”¹⁰ Advocates for women’s participation in jury service responded in turn that “[o]bjection to women jurors . . . [arose] from ancient prejudices against any broadening of women’s activities; and from devotion to that safe old good-of-things-as-they-are.”¹¹

³ Deborah L. Forman, *What Difference Does it Make? Gender and Jury Selection*, 2 UCLA WOMEN’S L.J. 35, 38 (1992).

⁴ Marjorie L. Temple published an article in 1953 urging the “few remaining states to change laws to allow women to serve on juries.” Carole L. Hinchcliff, *American Women Jurors: A Selected Bibliography*, 20 GA. L. REV. 299, 313 (1985-1986) (noting Marjorie L. Temple, *Our Greatest Privilege—To Be Tried by Our Peers*, 32 INDEP. WOMAN 197 (June 1953)).

⁵ See *The Woman Citizen*, ENCYCLOPEDIA BRITANNICA, <http://global.britannica.com/EBchecked/topic/646755/The-Woman-Citizen> (last visited Oct. 13, 2014) (illustrating that *The Woman Citizen* was a very famous suffrage newspapers that later became known as the *Woman’s Journal*).

⁶ Hinchcliff, *supra* note 4, at 307 (citing Helen Rocca, *Three Weeks in Jury Service*, WOMAN CITIZEN, Aug. 1927, at 25).

⁷ See *id.* at 299.

⁸ Cristina M. Rodríguez, *Clearing the Smoke-Filled Room: Women Jurors and the Disruption of an Old-Boys’ Network in Nineteenth-Century America*, 108 YALE L.J. 1805, 1817 (1998-1999).

⁹ Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 2-3 (2005-2006).

¹⁰ Rodríguez, *supra* note 8, at 1817.

¹¹ Hinchcliff, *supra* note 4, at 307 (citing Eveline W. Brainerd, *Ladies of the Jury*, WOMAN CITIZEN, July 1927, at 14).

Still, it was not until 1957 that “Congress declared [that] women [were] eligible for [participating in] federal jury service regardless of state law.”¹² “By World War II, ‘twenty-one states [still] prohibited women jurors.’”¹³ In 1962, the famous and widely read *New York Times Magazine* advocated for women jurors asserting that “[t]his need for universal representation is the real reason why woman jurors are essential to the democratic process, and why even their differences should be honored and utilized.”¹⁴ It was not until 1966 that Alabama permitted women to serve as jurors, thus becoming the last state of the Nation to allow women jurors.¹⁵

B. *Supreme Court’s Jurisprudence on Women Jurors*

i. *Ballard and Hoyt*

In 1946, the Supreme Court addressed for the first time the issue of women serving on juries in *Ballard v. United States*.¹⁶ In this case, women were systematically excluded from participating in trial in a federal court in California.¹⁷ Nevertheless, the Supreme Court’s decision in *Ballard*, supporting women’s participation in grand and petit juries, was based not on women’s constitutional right to do so, but on the right to a fair trial in having a jury that is representative of the community.¹⁸ The Supreme Court stated that:

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 community than would be true if an economic or racial group were excluded.¹⁹

Even though the constitutionality of women’s right to serve on juries was not the focal point of the Court’s decision in *Ballard*, they justified the decision

¹² Forman, *supra* note 3, at 38.

¹³ Karen L. Cipriani, *The Numbers Don’t Add up: Challenging the Premise of J.E.B. v. Alabama Ex Rel. T.B.*, 31 AM. CRIM. L. REV. 1253, 1255 (1993-1994) (quoting Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN’S L.J. 59, 60-61 (1986)).

¹⁴ Hinchcliff, *supra* note 4, at 314 (citing Louis Nizer, *Verdict on Women as Jurors*, N.Y. TIMES, March 11, 1962, at 22).

¹⁵ Shirley S. Abrahamson, *Justice and Juror*, 20 GA. L. REV. 257, 269 (1985-1986).

¹⁶ *Ballard v. United States*, 329 U.S. 187 (1946).

¹⁷ *Id.* at 189-90.

¹⁸ *Id.* at 191.

¹⁹ *Id.* at 193-94 (footnote omitted).

on the theory, which holds that each sex contributes something unique and different as jurors during the deliberation process.²⁰

In *Hoyt v. Florida*, the second case in which the Supreme Court addressed the exclusion of women from jury service, the appellant was a woman who had been convicted of second-degree murder by an all-male jury in Florida.²¹ The Florida Statute held that only those women who had voluntarily registered for jury service would be placed on jury lists.²² The appellant argued that the Florida Statute violated her rights granted under the Fourteenth Amendment's Due Process Clause.²³ The Court upheld the constitutionality of Florida's Statute, evoking, in the twentieth century, the same justification that opponents of women's inclusion in jury service used during the eighteenth and nineteenth centuries: women's place in society is in the domestic sphere.²⁴ The Court stated that they could not "say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to 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."²⁵

ii. Third Time's the Charm: *Taylor v. Louisiana*

In *Taylor v. Louisiana*, the Supreme Court revisited the issue of women's jury service.²⁶ However, this time the Court held unconstitutional a statute similar to the one upheld in *Hoyt*. In *Taylor*, the appellant challenged the constitutionality of a Louisiana statute which provided that a woman was not to be selected as a juror unless she had previously submitted a written statement in which she acknowledged her willingness to serve as juror.²⁷ The appellant, Taylor, had been convicted for aggravated kidnapping. He argued that this statute violated his Sixth and Fourteenth Amendments right to a fair and impartial jury.²⁸ The Court differentiated *Taylor* from *Hoyt* by arguing that:

It is true that *Hoyt v. Florida* held that such a system [excluding women from jury service unless they volunteer] did not deny due process of law or equal protection of the laws because there was a sufficiently rational basis for such an ex-

²⁰ Fowler, *supra* note 9, at 4. See also *Ballard*, 329 U.S. at 194.

²¹ *Hoyt v. Florida*, 368 U.S. 57 (1961).

²² *Id.* at 58.

²³ *Id.*

²⁴ The Court argued that "[d]espite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, woman is still regarded as the center of home and family life." *Id.* at 61-62.

²⁵ *Id.* at 62.

²⁶ *Taylor v. Louisiana*, 419 U.S. 522 (1975).

²⁷ *Id.* at 523.

²⁸ *Id.* at 525.

emption. But *Hoyt* did not involve a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community and the prospect of depriving him of that right if women as a class are systematically excluded.²⁹

The justification the Court employed in *Hoyt*, regarding women's role in society as pertaining primarily to the domestic sphere, was abandoned in *Taylor*. The Court cited specific statistics from the Department of Labor which indicated "that in October 1974, 54.2% of all women between 18 and 64 years of age were in the labor force."³⁰ In *Taylor*, the Supreme Court resolved that "the Sixth Amendment's right to an impartial jury requires that the venire be drawn from a fair cross-section of the community" ³¹ Because of the differences between men and women, both sexes needed to be included to ensure this.³² Thus, it is with the Court's abandonment of the theory that women's place is in the domestic sphere and with its new focus on the rising numbers of women in the labor force, and the recognition of female perspectives as part of the cross-section representation of the community, that "the Court began to conceive of male and female jurors as equal contributors to the deliberation process."³³

C. Gender and the Jury in Peremptory Strikes: *J.E.B. v. Alabama Ex Rel. T.B.*

In *J.E.B. v. Alabama ex rel. T.B.*, the Supreme Court held the unconstitutionality of gender-based peremptory challenges because these violated the Equal Protection Clause.³⁴ The facts of *J.E.B.* involve a paternity suit filed by the State of Alabama with an order to make the petitioner, J.E.B., pay for child support.³⁵ An all-female jury found that the petitioner was the father of the child.³⁶ He appealed arguing that the State had violated the Equal Protection Clause of the

²⁹ *Id.* at 533-34 (footnote omitted) (citation omitted).

³⁰ *Id.* at 535 n.17. The Court added that:

While these statistics perhaps speak more to the evolving nature of the structure of the family unit in American society than to the nature of the role played by women who happen to be members of a family unit, they certainly put to rest the suggestion that all women should be exempt from jury service based solely on their sex and the presumed role in the home.

Id. See also Forman, *supra* note 3, at 40.

³¹ Forman, *supra* note 3, at 40.

³² Fowler, *supra* note 9, at 8. See also Forman, *supra* note 3, at 40.

³³ Fowler, *supra* note 9, at 8.

³⁴ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994).

³⁵ *Id.* at 129. See also Sandra Benlevy, *Venus and Mars in the Jury Deliberation Room: Exploring the Differences that Exist Among Male and Female Jurors during the Deliberation Process*, 9 S. CAL. REV. L & WOMEN'S STUD. 445, 445 (1999-2000).

³⁶ *J.E.B.*, 511 U.S. at 129.

Fourteenth Amendment by using nine of its ten peremptory challenges to strike men from serving on that jury panel.³⁷

The Supreme Court held that “the Equal Protection Clause prohibits discrimination in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man.”³⁸ The Court based its decision “on the theory that doing otherwise would perpetuate the discrimination that excluded women from the jury pool for so long.”³⁹ In doing so, the Court abandoned the notion they upheld approximately fifty years earlier in *Ballard v. United States*, which is the idea that including women in jury service would contribute something different and unique to the process of jury deliberation.⁴⁰ Notwithstanding, this time around the Supreme Court refused to acknowledge the differences between what a male juror and what a female juror can bring to the table.

In Justice O’Connor’s concurrence in *J.E.B.*, she recognized what the majority in this decision could not, that “like race, gender matters.”⁴¹ Even more so, Justice O’Connor cited empirical studies that demonstrate how gender does matter in jury service. For example, “in rape cases . . . female jurors are somewhat more likely to vote to convict than male jurors.”⁴² Justice O’Connor stated that:

[T]hough there have been no similarly definitive studies regarding, for example, sexual harassment, child custody, or spousal or child abuse, one need not be a sexist to share the intuition that in certain cases a person’s gender and resulting life experience will be relevant to his or her view of the case.⁴³

Justice O’Connor concluded by arguing “that criminal defendants should be allowed to use gender-based peremptory strikes because gender-based assumptions about juror attitudes are ‘sometimes accurate.’”⁴⁴

³⁷ *Id.*

³⁸ *Id.* at 146.

³⁹ Cipriani, *supra* note 13, at 1254. *See also* *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (concluding that peremptory challenges used to strike jurors solely on the basis of race violated the Equal Protection Clause).

⁴⁰ *Ballard v. United States*, 329 U.S. 187, 194 (1946).

⁴¹ *J.E.B.*, 511 U.S. at 148 (O’Connor, J., concurring).

⁴² *Id.* at 149. However, in the majority opinion, Justice Blackmun stated that there was not enough to support “the notion that ‘women and men may have different attitudes about certain issues justifying the use of gender as a proxy for bias.’” Benlevy, *supra* note 35, at 445-46 (quoting *J.E.B.*, 511 U.S. at 138 n.9).

⁴³ *J.E.B.*, 511 U.S. at 149 (O’Connor, J., concurring).

⁴⁴ Fowler, *supra* note 9, at 13 (quoting *J.E.B.*, 511 U.S. at 150).

II. WHAT SOCIAL SCIENCE AND SOCIAL PSYCHOLOGY CAN BRING TO THE DELIBERATION ROOM: HOW DOES GENDER MATTER AS A MATTER OF FACT?

A. *Gender Matters on an Individual-Level*

In saying that gender does not play a key role on an individual-level basis of those male and females that serve as jurors, our legal system fails to recognize the existence of gender-based biases that are characteristic to their experience as men or women alike, and which affect the verdict just as well as any other bias particular to a specific juror. For example, female jurors tend to favor the victim of particular cases that are considered gender specific in our society, such as in cases of rape and sexual harassment.⁴⁵ Whereas male jurors are more accepting of aggression than their female counterparts.⁴⁶ Moreover, the work of pioneer psychologist Carol Gilligan recognized a distinction between male and female and their moral reasoning process, an aspect which hits at the very core of a juror's duty in trial, and which supports the notion that the sexes are in fact not fungible.

i. Female and Male Jurors Generally React Differently on Particular Issues and To Particular Evidence

In rape cases, studies “have generally shown that female jurors are more likely . . . to convict the defendant” than male jurors.⁴⁷ On the other hand, male jurors “are more likely to [place the] blame [on] the rape victim.”⁴⁸ Also, as jurors, women, more so than men, have recommended longer sentences for the defendant in a rape trial.⁴⁹ However, other empirical evidence has demonstrated that some female jurors are actually more skeptical towards the rape victim.⁵⁰ Authorities have contended that women are harder on their own sex than on the opposite sex, a view that has been shared in the past with prosecutors.⁵¹ A study based on a mock trial of a woman who killed her supposedly abusive partner found that similarly to cases of rape, in murder trials where the defendant claims battered woman syndrome, female jurors viewed a defense of battered woman

⁴⁵ See Forman, *supra* note 3, at 51. See also Lisa Blue & Robert B. Hirschhorn, *The Psychology of Women's Influence on Juries*, 49 *ADVOC. (TEXAS)* 47, 48 (2009).

⁴⁶ Benlevy, *supra* note 35, at 453-54.

⁴⁷ *Id.* at 448.

⁴⁸ *Id.* at 449.

⁴⁹ Fowler, *supra* note 9, at 21.

⁵⁰ Benlevy, *supra* note 35, at 468.

⁵¹ *Id.* at 468-69.

syndrome more positively than the male jurors.⁵² In cases where a child has been a victim, researchers have noted that “female jurors are more sympathetic” than male jurors towards defendants who are still children, “and are more likely . . . to convict” a defendant that is accused of hurting a child.⁵³

On the other hand, studies have found that male jurors are more accepting towards the use of force than their female counterparts.⁵⁴ That is, male jurors tend to sympathize with a defendant’s use of force in defending either his family or himself alluding that they would have used a similar amount of force against the victim too.⁵⁵ Nonetheless, female jurors could not understand nor sympathize with the defendant’s use of force in that situation.⁵⁶ Moreover, male jurors tend to employ a more aggressive manner in the deliberation room than the female jurors “and are more likely to use force to persuade the other jurors,” often insulting their fellow jurors with derogatory comments.⁵⁷ Likewise, male jurors approve of male attorney’s aggressive style more than female jurors.⁵⁸

In terms of the evidence presented at trial, studies have demonstrated that female jurors are more likely than male jurors “to rely on and be persuaded by evidence that is emotional in nature.”⁵⁹ Research findings have indicated that, likewise, “women are more likely . . . to experience emotion” than male jurors.⁶⁰ Women’s belief that “they are better than men at reading . . . body language and . . . non-verbal” communication, even if this is true or not, in turn causes female jurors to be more likely influenced by the former than male jurors.⁶¹ In considering scientific evidence presented at trial, male jurors are more likely than female jurors to participate during deliberations, even if the majority of the jurors are female.⁶² This is due in part because of women’s belief that they lack competence when evaluating scientific evidence.⁶³

⁵² Fowler, *supra* note 9, at 22-23. However, the gender difference that appeared in the outcome of the verdict was due because women were more likely to hold prior viewpoints before the mock trial began, whereas men did not. Thus, it was “not because of gender per se.” *Id.* at 23.

⁵³ Benlevy, *supra* note 35, at 450. *See also* Blue & Hirschhorn, *supra* note 45, at 48 (“Perhaps because of their experience as mothers, women may feel more empathy toward witnesses who evoke sympathy.”).

⁵⁴ Benlevy, *supra* note 35, at 453.

⁵⁵ *Id.* at 453-54.

⁵⁶ *Id.* at 454.

⁵⁷ *Id.* at 452.

⁵⁸ *Id.* at 453.

⁵⁹ Blue & Hirschhorn, *supra* note 45, at 48.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

ii. Gender Differences in the Moral Reasoning Process

The work of renowned psychologist Carol Gilligan supports the notion, promulgated today by cultural feminists, that gender differences do exist and in fact should be valued, as opposed to the traditional liberal feminists, which persevered to achieve equal treatment of the sexes under the law.⁶⁴ Gilligan's theory suggests that "women use a different method and approach to moral decision-making than men. The male approach, and the one traditionally recognized by psychological theory, emphasizes rights, abstract justice, equality, and fairness. Women, in contrast, focus on context, care, and responsibility to resolve moral conflicts."⁶⁵ In Gilligan's book, *In a Different Voice*, she uses as an example of this male traditional approach of moral reasoning, the work of Sigmund Freud. Freud believed that men's part of the brain that led the moral decision-making, the superego, was more developed than the women's superego.⁶⁶ Therefore, women had a lesser understanding of what justice entailed.⁶⁷

In the first of three studies in Gilligan's book, she interviewed two eleven-year olds, Jake and Amy, to resolve a hypothetical dilemma concerning a man, Heinz, whose wife was gravely ill.⁶⁸ Heinz could not afford to buy the medicine his wife needed because it was too costly, and the druggist refused to reduce its price.⁶⁹ The dilemma was whether or not Heinz should steal the drug in order to save his wife.⁷⁰ Jake decides "that Heinz should steal the drug" to save his wife.⁷¹ Even though there is a law which prohibits stealing, Jake concludes that the reason for Heinz's theft and violation of the law is justified because, in doing so, he saves his wife's life.⁷² For that reason, the judge would understand Heinz's circumstances, and therefore would give him the minimum sentence, given that Heinz's actions are justified to achieve a greater good.⁷³

Jake constructs the "dilemma as a hierarchy of rights," between the value of life and the value of property.⁷⁴ On the other hand, Amy employs the *ethic of care*, which encompasses how women define themselves in relation to others,

64 See Forman, *supra* note 3, at 48-49. See also Fowler, *supra* note 9, at 16.

65 Forman, *supra* note 3, at 49 (footnote omitted).

66 See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 7 (1982).

67 *Id.*

68 *Id.* at 25.

69 *Id.*

70 *Id.*

71 *Id.* at 26.

72 *Id.*

73 *Id.*

74 Fowler, *supra* note 9, at 18. See also GILLIGAN, *supra* note 66, at 26.

while on the contrary men define themselves through autonomy and separation from others.⁷⁵ Gilligan states that:

Women's voices suddenly made a new sense and women's approaches to conflict were often deeply instructive because of the constant eye to maintaining relational order and connection. It was concern about relationship that made women's voices sound *different* within a world that was preoccupied with separation and obsessed with creating and maintaining boundaries between people

Within the context of U.S. society, the values of separation, independence, and autonomy are so historically grounded, so reinforced by waves of immigration, and so deeply rooted in the natural rights tradition that they are often taken as facts: that people are by nature separate, independent from one another, and self-governing.⁷⁶

Women's concern about relation, mentioned above, can be evidenced with Amy's moral reasoning to Heinz's dilemma. Amy suggested that Heinz, his wife and the druggist communicate with each other to explain their circumstances and the importance of the drug for Heinz's wife.⁷⁷ Amy also considered that if Heinz were to steal the drug and consequently face charges and be imprisoned, he would not be able to take care of her.⁷⁸ In opposition to a hierarchy of values, Amy constructs a world that is both characterized and comprised of relationships "that coheres through human connection rather than through systems of rules"⁷⁹ In support of Gilligan's theory, studies have found that women establish better relationships with others, while men find it easier to establish their competence, and command respect and authority.⁸⁰

According to Gilligan, these two differing constructions of Jake and Amy are distinctive in their own way. She writes that the "dialogue between fairness and care not only provides a better understanding of relations between the sexes but also gives rise to a more comprehensive portrayal of adult work and family relationships."⁸¹ Furthermore, Gilligan's work on the difference with gender and moral reasoning is of particular significance in the discussion of male and female jurors. That is, "[i]f men and women use different methods of moral reasoning, they should bring these differences into the jury room and use distinct modes of thinking to decide upon a verdict."⁸² Thus, it is during the deliberation process that the different aspects of moral reasoning particular to male and female jurors

75 GILLIGAN, *supra* note 66, at 42-44. See also Cipriani, *supra* note 13, at 1270-71.

76 GILLIGAN, *supra* note 66, at xiv.

77 *Id.* at 28-29.

78 *Id.* at 28.

79 *Id.* at 29.

80 See Linda L. Carli, *Gender, Interpersonal Power, and Social Influence*, 55 J. SOC. ISSUES 81, 83 (1999).

81 GILLIGAN, *supra* note 66, at 174.

82 Fowler, *supra* note 9, at 20.

can be greater appreciated, given this is when they have to resolve the dilemma central to the case before them.

Interestingly so, male and female jurors have demonstrated differences during the deliberation process in relation with the evidence presented at trial. Female jurors are more inquisitive with the facts of the case; they want to comprehend on a deeper level the context in which the situation in question was carried out.⁸³ Whereas male jurors have demonstrated to be satisfied with the evidence and the law presented and do not feel the need to go beyond these to reach a verdict.⁸⁴ In turn, this need of female jurors to seek additional information strongly resonates with Gilligan's theory of the *ethic of care*, and how in female jurors morality plays a greater role in their deliberation process, all this in contrast with the male hierarchical system of values.

In a "study of mock jury deliberations," researchers identified two distinct and opposing deliberation styles: the *verdict-driven* and the *evidence-driven*.⁸⁵ The verdict-driven style is associated with male jurors, whereas the evidence-driven with female jurors.⁸⁶ The verdict-driven style kicks off with a public ballot and each individual juror assumes a position with its corresponding supporting evidence.⁸⁷ Whereas the evidence-driven deliberation style depends on a more open communication, which makes "all members feel that they have had a fair chance to influence the decision. Those who have a different recollection of the facts or who hold a minority opinion in the group speak because others are willing to listen and to consider what they are saying."⁸⁸ On the contrary, the verdict-driven style involves fewer participants and silences those who are not in agreement.⁸⁹

B. Gender Matters on a Group-Level

Gender on the individual-level supports the argument that men and women are not fungible as a matter of fact. Nevertheless, given that the nature of a jury lies on the will of a group of members of the community who were selected and

⁸³ Benlevy, *supra* note 35, at 455.

⁸⁴ *Id.*

⁸⁵ Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 602 (1986-1987) (citing R. HASTIE ET AL., *INSIDE THE JURY* 163-65 (1983)).

⁸⁶ *Id.* at 603.

⁸⁷ *Id.* at 602. See also Blue & Hirschhorn, *supra* note 45, at 49.

⁸⁸ Marder, *supra* note 85, at 602 (footnote omitted).

⁸⁹ *Id.* at 602-03. Additionally:

In all-male groups, those who missed a session became inactive speakers upon rejoining the group and were subsequently unable to assume important positions in the group. In contrast, in all-female groups, those who missed a session were encouraged to play a more active role in the group during the following session.

Id. at 603 n.47.

came together to solve the issue before them, not as individuals but rather as a group, makes imperative that gender be studied collectively as well. Therefore, in order for gender on an individual level to have an effect on the verdict, both male and female jurors need to participate to the fullest on equal footing during the deliberation process. Otherwise, if male jurors continue to be the dominant voice of the deliberation, women's different voice, the *ethic of care*, will be inexistent, and therefore gender differences could not be appreciated as beneficial for those who are involved in the case.

i. Unequal Participation Rates during Deliberation

Some theorists maintain that "speaking is a crucial type of political act in a democracy, and all the more so in deliberative settings."⁹⁰ Particularly, if "less speech leads to less authority within the group," thus unequal speech participation translates into unequal influence and authority during the deliberation process.⁹¹ For jurors to have equal participation in the deliberation process is at the very center of a jury's main functions and cannot function properly if this is not achieved. A jury has several purposes that must be set forth. For example, a jury serves as fact-finder, a jury has to decide whether or not to apply the law to the facts of the case, and a jury has an educational purpose to teach American citizens on the value and responsibility of democracy.⁹² The absence of equal and full participation of both male and female jurors entails a great risk in our American legal system given that:

As juries decrease in size, the number of jurors who might remember different pieces of evidence is reduced. Accordingly, the risk of convicting an innocent person increases. If women systematically choose not to speak or men choose not to listen when women do speak, then the jury is, in effect, reduced in size. Memory gaps in the group's collective knowledge increase.⁹³

There have been numerous studies where the issue of unequal participation on a collective level between men and women has been researched, questioning whether an increase in the proportion of women in the group would raise their speech participation and perceived influence.⁹⁴ Some of these studies examine "speech participation and perceived influence as forms of symbolic authority that reflect and reinforce the broad civic capacity of a disadvantaged social group."⁹⁵ Chattiness, unlike speaking, can be "a randomly distributed personality

⁹⁰ Christopher F. Karpowitz *et al.*, *Gender Inequality in Deliberative Participation*, 106 AM. POL. SCI. REV. 533, 534 (2012) (citation omitted).

⁹¹ *Id.*

⁹² Marder, *supra* note 85, at 599.

⁹³ *Id.* at 600.

⁹⁴ Karpowitz, *supra* note 90, at 533.

⁹⁵ *Id.* at 534 (citation omitted).

dimension, but when speaking is the mechanism for deciding political matters, gender differences in speech participation are a relevant marker of social and political inequality.⁹⁶

Researchers have found that women are perceived both as less influential and less competent than men are.⁹⁷ In evaluating the correlation between sex and social influence, a study found that women were in fact less influential when using a dominant form of communication.⁹⁸ Women are also perceived by society to possess a lower degree of leadership than their male counterparts.⁹⁹ Given that:

The status that society at large assigns to men contributes to the difference in men's and women's participation rates in the jury room. When men and women enter the jury room, they do not leave behind the lessons that society teaches about appropriate behavior for men's and women's interaction. Power relations of male dominance and female subordination are manifested in the jury room through gender-related behavior.¹⁰⁰

Empirical data suggests that women are perceived to be more emotional than men are, and that they tend to display emotions on a greater scale.¹⁰¹ However, since this is regarded by society in a negative manner, others poorly value those who share and express their emotions.¹⁰²

Thus, in negating that any such differences between gender do exist, the legal system itself continues to promulgate an inadequate realization of the jury, and furthermore jeopardizes a criminal defendant's right to be judged fairly and impartially, a right granted by the Sixth Amendment. Social scientists and psychologists have proved, with overwhelmingly convincing empirical data, the differences in moral reasoning, for example, a task that every individual, male or female, that serves on a jury must go through. It has become evident that a trial achieves great justice when all jurors participate on equal standing because male's and female's distinct and particular methods of deliberation contribute to finding the truth among the facts of the case.

Recognizing the differences between males and females, and furthermore the celebration of these differences (i.e., cultural feminists), results as a matter of great controversy and debate for liberal feminists who seek to achieve equality of the sexes before the law. However, and understandably so, for liberal feminists these differences are a matter of concern. These differences between male and

96 *Id.* at 533.

97 Charles Elliott, *Juries, Sex, and Emotional Affect*, 35 L. & PSYCHOL. REV. 37, 42 (2011).

98 Linda L. Carli, *Gender and Social Influence*, 57 J. SOC. ISSUES 725, 735 (2001).

99 Marder, *supra* note 85, at 596.

100 *Id.* at 597 (footnotes omitted).

101 Monique Timmers *et al.*, *Ability Versus Vulnerability: Beliefs about Men's and Women's Emotional Behaviour*, 17 COGNITION & EMOTION 41, 59 (2003).

102 Elliot, *supra* note 97, at 42.

female can start up a revival of those decades and centuries of female subordination, when men and women were thought to be different because each sex belonged to opposite spheres that were part of a presumed natural order of life. Given that:

Most problematic is the seeming impossibility of forcing a change in societal attitudes to accommodate and appreciate whatever different qualities women may possess. A society that has historically discriminated against women cannot be trusted to effectively value the differences it once held in contempt.

The solution to this problem lies in the second prong of cultural feminism and its requirement that we embrace and value the woman's different voice. However, it is imperative that *value* be carefully defined.¹⁰³

Notwithstanding, the concern of liberal feminism rests mainly on whether the differences cultural feminists exalt are valued if gender based preemptory strikes would be allowed.¹⁰⁴ However, this is precisely what cultural feminists promote, that is to value those differences and join both methods in order to gain a better understanding of the facts of the case and in the decision-making. For this reason, cultural feminism is not a legal theory that would undermine women's progress in society.

III. WHAT POLITICAL SCIENCE BRINGS TO THE DELIBERATION ROOM: ELIMINATING THE GENDER GAP DURING JURY DELIBERATIONS

A. *The Gender-Role Hypothesis*

Political scientists have studied gender relations and dynamics, adding to the latter "the notion that the institutional rules under which men and women participate in collective decision making have a significant effect on gender dynamics."¹⁰⁵ Researchers in this field of study have argued that the reason for doing so is their consideration of gender as a part of "political under-representation" on a historical level and a current level.¹⁰⁶ Therefore, political science researchers view women's political participation as a symbol of authority and civic standing.¹⁰⁷ This type of investigation is especially relevant when analyzing the deliberation process of a jury. In doing so, the gender composition of a jury becomes a factor of the utmost importance. The process of deliberation must concern itself with the need of "the equal opportunity to speak and with

¹⁰³ Cipriani, *supra* note 13, at 1272.

¹⁰⁴ *Id.* at 1273 (alluding to the Supreme Court's decision in *Hoyt v. Florida*).

¹⁰⁵ Karpowitz, *supra* note 90, at 545.

¹⁰⁶ *Id.* at 533 n.1. "[P]olitics is still widely viewed as a *man's game*, and there are continued gender gaps in participation and representation." *Id.* (noting NANCY BURNS *ET AL.*, *THE PRIVATE ROOTS OF PUBLIC ACTION: GENDER, EQUALITY, AND POLITICAL PARTICIPATION* (2001)).

¹⁰⁷ *Id.* at 534 (noting BURNS, *supra* note 106, at 6).

the equal use of that opportunity, much as democracies consider both the formal right to political participation and social inequalities in who actually participates.”¹⁰⁸

The gender-role hypothesis entails that “the lower the number of women in a group, the less that women participate in and influence it, and the bigger the gender gap is in participation and influence.”¹⁰⁹ Previous studies have provided three reasons for the gender-role hypothesis. The first reason is because it understands that “[t]he fewer women in the group, the lower their status, the less they may speak, and the lower their influence.”¹¹⁰ Thus, researchers can expect that the gender gap will minimize when there are more women in the group.¹¹¹ Secondly, as the number of women decreases in the group, women speak, participate, and therefore influence less than men.¹¹² Thirdly, women may speak less in a group setting when women are the minority, given that “gendered norms of interaction [tend to] vary with gender composition,” thereby facilitating or impeding women’s participation.¹¹³

The three reasons of the gender-role hypothesis all intercept on the same expectation, which is that “[i]n mixed-gender discussions, women will speak less and be less influential than men. These disadvantages will increase as the group gender composition [tilts] . . . toward males.”¹¹⁴ Furthermore, when a woman is the “lone female member” of a group, studies have found that she is specially disadvantaged.¹¹⁵ On the other hand, the gender role hypothesis indicates “that women will flourish in all-female settings” in given groups that are exclusively composed of women, which will increase their speech participation and influence.¹¹⁶

B. Gender Composition & Decision Rule: Unanimity versus Majority

Karpowitz, Mendelberg and Shaker theorize that both the “decision rule and gender composition will” interrelate and consequently shape the patterns and rates of speech participation and therefore of perceived influence within a deliberative group setting.¹¹⁷ Their interaction hypothesis held that when applying the

¹⁰⁸ *Id.* at 533-34 (citation omitted).

¹⁰⁹ *Id.* at 534.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* The reason for this is because of “[t]he notion is that girls and boys are socialized to different gendered cultures of interaction, and they carry these implicit scripts of behavior with them into adulthood.” *Id.* (citations omitted).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 535.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

unanimous rule in a group setting, the various types of minorities would be more included in the group dynamic than they would have been otherwise.¹¹⁸ In comparison with the majority rule, they state that:

[U]nanimous rule benefits both genders when they are in the numerical minority of the group. However, the effects of unanimity are best understood in contrast to the speech participation of each gender minority under majority rule. Minority women will be included more under unanimous than majority rule, and this will decrease the gender gap. Minority men will also be included more under unanimous than under majority rule, but this will enhance rather than close the gender gap. The effect of unanimity will be roughly equal for both genders, but women will shift from under-representation to equality, whereas men will shift from equality to over-participation.¹¹⁹

Thus, in testing out this hypothesis, the empirical data corroborated their hypothesis as certain. That is, that when men outnumber women in a group setting, using the unanimous rule would prove to be more inclusive and beneficial to the disadvantaged minorities.¹²⁰ However, when women outnumber men, using the majority rule is of greater benefit.¹²¹ Furthermore, in order to avoid the greatest degree of inequality, the majority rule should not be applied when there are few women in the group.¹²² However, in order “[t]o minimize male advantage, assemble groups with a supermajority of women and use majority rule. To maximize women’s individual participation, gender-homogeneous groups are best.”¹²³

CONCLUSION

In understanding juries, the deliberation process and its reached verdict, one factor becomes inevitably distinct: gender. That is to say that a juror’s gender has an effect on the case’s outcome due to individual biases that are gender based, but more so, on a collective level during the deliberation process. Thus, what our Supreme Court decided back in 1994 is a clear and evident negation of a criminal defendant’s Sixth Amendment right to fair trial. Moreover, the nature of a jury, which involves a deliberative process, requires the existence of equal participation and influence as key factors in order to achieve the democratic principle

¹¹⁸ *Id.* at 536. They also argue that “unanimous rule helps female tokens, closing the gender gap in those groups, but it also helps male tokens, exacerbating the gender gap in their groups.” *Id.*

¹¹⁹ *Id.* at 535.

¹²⁰ *Id.* at 545.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* “[I]n practice, however, disadvantaged groups often need the full representation that proportionality allows in order to achieve several goals: deliberative synergy, critical mass, dispersion of influence, and a range of views within the group.” *Id.* (quoting Jane J. Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes”*, 61 J. OF POL. 628, 636 (1999)).

that has served as a pillar for the American legal system. However, due to gender inequality in speech participation rates and perceived influence, this cannot be farthest from the current reality.

Overwhelmingly so, gender matters in all aspects of jury duty whether our legal system recognizes it or not. Gender will continue to have a key-contributing role in a jury's deliberation process. For this reason, the gender composition and decision rule data, reached in the political science study mentioned, becomes a possible solution to the unequal reality that takes place in the deliberative setting of a trial by jury. One answer becomes evidently clear, and that is the notion, which Justice Sandra Day O'Connor asserted in *J.E.B. v. Alabama*, that gender matters as a matter of fact.¹²⁴

¹²⁴ See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring).