

Is Lady Justice Gender Blind? Perceptions of Gender in Juries

BY KENDRA G. BERTSCHY, ESQ.

During jury selection, there is typically at least one prospective juror in the jury venire who will voice their frustration at the inconvenience of being summoned for jury duty. As we know, juries perform a crucial role in our justice system. President John Adams stated that, “[r]epresentative government and trial by jury are the heart and lungs of liberty.” A vital role of citizenship is to serve as a member of a jury. Initially, women were categorically disqualified from this honor based on their gender. **As we celebrate the centennial anniversary of the right to vote, it is important to recognize another important right that is inextricably linked to voting – the right to serve on a jury.**

The Debate About Female Jury Members

While women were successful in securing suffrage rights with the ratification of the 19th Amendment, this change did not automatically confer the right to serve on a jury to women in the U.S. The legality of this civic duty was determined on a state-by-state basis. Prior to ratification of the constitutional amendment, all states restricted jury service eligibility to men. Suffrage rights ignited the nationwide debate regarding whether the right to vote should naturally extend to fundamental jury service rights. After voting, the right to serve on a jury is seen as the most significant right of citizenship. By excluding women from the jury box, this practice meant that a jury of one’s peers does not extend to women and that women had not yet achieved the status of being equal citizens to men.

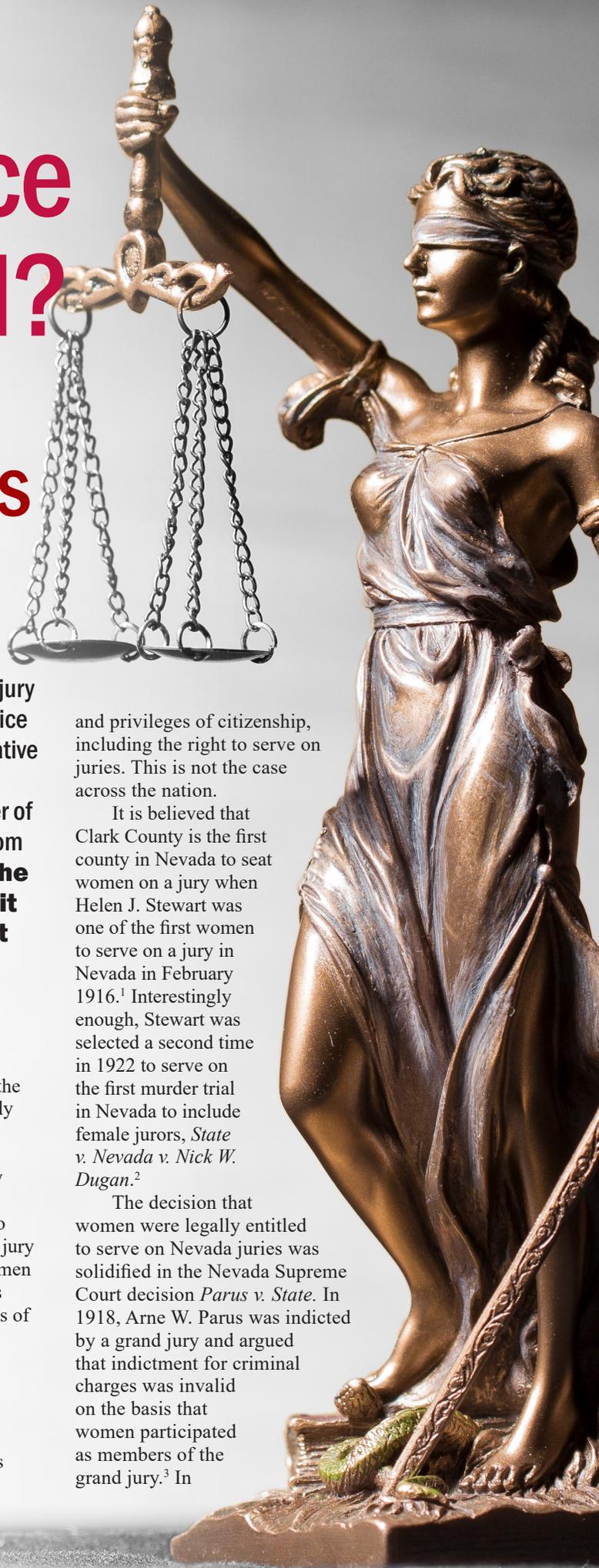
How Nevada Women Gained the Right to Serve on Juries

The passage of the 19th Amendment accomplished more than just the right to vote for Nevada women. Nevadans interpreted this amendment to include, along with the ability to vote, all the rights

and privileges of citizenship, including the right to serve on juries. This is not the case across the nation.

It is believed that Clark County is the first county in Nevada to seat women on a jury when Helen J. Stewart was one of the first women to serve on a jury in Nevada in February 1916.¹ Interestingly enough, Stewart was selected a second time in 1922 to serve on the first murder trial in Nevada to include female jurors, *State v. Nevada v. Nick W. Dugan*.²

The decision that women were legally entitled to serve on Nevada juries was solidified in the Nevada Supreme Court decision *Parus v. State*. In 1918, Arne W. Parus was indicted by a grand jury and argued that indictment for criminal charges was invalid on the basis that women participated as members of the grand jury.³ In



ruling that voting rights extended to the right to serve on juries, Justice C.J. McCarran argued that “the spirit of the constitutional amendment silence[d] such an assertion” that women could be denied the right to have the “privilege” of sitting on a jury when they are entitled to vote, seek public office, own property and must pay taxes.⁴ This ruling clearly ties the right for women to serve on a jury with the ratification of the 19th Amendment. However, women were not considered equal to men in all other aspects regarding jury service.

Notable Supreme Court Cases

Despite great strides in Nevada, the tradition of excluding women from jury service was slow to change throughout the country. Up until 1975, jurisdictions continued to categorically exclude women from jury service on the basis of their gender. It was not until *Taylor v. Louisiana*, 419 U.S. 522 (1975), when the U.S. Supreme Court forbade the categorical exclusion of women from jury service.

A few years later, the Supreme Court in *Duren v. Missouri*, 439 U.S. 357 (1979) expanded the ruling by finding the accused’s request to exempt all women from the jury as unconstitutional.

Until recently, some jurisdictions continued to allow the use of a preemptory challenge based solely on gender. However, the practice was not stopped until the U.S. Supreme Court in *J.E.B.*

v. Alabama, 511 U.S. 127 (1994)

ruled that preemptory challenges based solely on the potential juror’s gender is unconstitutional. The legal analysis forming the basis of those rulings are built upon the principles of the Equal Protection clause of the 14th

Amendment of the U.S. Constitution and an accused’s right to a fair trial pursuant to the Sixth Amendment. It is interesting to note that all three of those landmark cases involved male litigants.

Perceptions About Female Attorneys

The current debate is whether gender bias and stereotypes still exist in jurors’ perceptions. Gender norms, biases and stereotypes have changed rapidly over the years. There has been an increase in females in the legal profession, in the courtroom and behind the bench. Currently, Nevada has a majority female Supreme Court. In speaking with several female attorneys, many prominent women in the legal field believe that gender bias is no longer an issue, while others believe that we still have to overcome obstacles to start at the same level as our male counterparts in front of jurors. Researchers studying this issue provide conflicting results.

The Goldilocks Problem

Female attorneys are taught to be very cautious in front of juries. Even in 2018, law professors like Lara Brazon instruct their female students “that their body and demeanor will be under relentless scrutiny from every corner of the courtroom. That they will have to pay close attention to what they wear and how they speak and move.”⁵ This issue regarding gender bias is referred to as “the Goldilocks Dilemma,”

because women attorneys “are often seen as too tough, too soft, but rarely just right.”⁶ Due to changing societal norms regarding gender bias, the question is whether this dilemma still exists.

Being Aware of Implicit Bias

Recent studies indicate that women may not automatically start at a disadvantage compared to their male colleagues when arguing a case in front of a jury. While reviewing recent empirical studies, researchers at the University of Nevada, Reno, found that there are mixed outcomes regarding the impact of an attorney’s gender on the outcome of a case. They found that some studies show that male attorneys are advantaged

while others indicate that females are more likely to win cases.⁷ They opine that there is no “universal bias” against a specific gender, but that “observers do not always perceive male and female attorneys equally.”⁸ Further, they indicate that these differential outcomes between the sexes may have more to do with speech patterns, speech interruptions, presentation style and case type than gender bias.⁹

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As such, female trial attorneys, just like men, need to be aware of implicit bias when presenting their case. However, there are tools that can be utilized to overcome those perceptions. Female litigators can continue to improve perceptions of jurors to overcome bias by utilizing positive persuasive rhetoric rather than anger, building rapport with the jury, being respectful, showing confidence through body language, case preparation and by continuing to show that women are skilled litigators by chairing difficult cases.¹⁰

In Nevada, the right for women to serve on a jury was established through the ratification of the 19th Amendment. Although much has changed over the years in terms of gender bias involving juries, women are not completely on equal footing as men in terms of how female litigators are perceived. By continuing to break the gender barriers, women have made vast strides in the legal field. Women in the justice system enhance our ability to have a more balanced democracy. In order to keep paving the path for the advancement of women, we need to

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continue to challenge stereotypes, fight biases, broaden perceptions and celebrate women’s achievements. As eloquently stated by Supreme Court Justice Ruth Bader Ginsberg: “Women belong in all places where decisions are being made ... it shouldn’t be that women are the exception.”

1. Carrie Miller Townley, *Helen J. Stewart: First Lady of Las Vegas*, Nevada Historical Society Quarterly XVII, 22 (1974), available at <http://epubs.nsla.nv.gov/statepubs/epubs/210777-1974-1Spring.pdf> (last visited May 28, 2020).
2. *Id.*
3. *Parus v. Dist. Court*, 42 Nev. 229, 239-240 (1918).
4. *Id.*

5. Lara Bazelon, “What it Takes to be a Trial Lawyer if You’re Not a Man,” *The Atlantic* (2018), <https://www.theatlantic.com/magazine/archive/2018/female-lawyers-sexism-courtroom/565778> (last visited May 28, 2020).
6. Gail Golden, “How to fight gender bias: Author Andie Kramer shares her tips,” <https://www.gailgoldenconsulting.com/how-to-fight-gender-bias/> (last visited May 28, 2020).
7. Tyler N. Livingston, et al., “Psychological Explanations of How Gender Relates to Perceptions and Outcomes at Trial,” in *Advances in Psychology and Law* 137-185, 144 (Brian H. Bornstein & Monica K. Miller vol. 4 2019).
8. *Id.*
9. *Id.* at 144-146.
10. See Shaana A. Rahman, “Wanted: Women Trial Attorneys,” *Plaintiff Magazine* (2013), <https://www.plaintiffmagazine.com/recent-issues/item/wanted-women-trial-lawyers> (last visited May 28, 2020); Jessica Baer, “A

View From the Jury Box: Managing Jurors’ Beliefs About Women Attorneys,” *Litigator Insights* (2012), <https://www.litigationinsights.com/a-view-from-the-jury-box-managing-jurors-beliefs-about-women-attorneys/> (last visited May 28, 2020).

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