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Sounds of Silence on the Civil Jury

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SOUNDS OF SILENCE ON THE CIVIL JURY

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INTRODUCTION

Juries are hallowed institutions in our constitutional system. They are mentioned not once, but three times in the Bill of Rights,[1] and had been earlier enshrined in Article III.[2] At the heart of our exalted vision of the jury trial is the sense that juries should be reflective of the community which they are supposed to represent in the courtroom.[3] Of course, many members of the relevant community have routinely been excluded from jury service, including women who comprise more than half of the population. Historically, the exclusion of women from civil jury service was a systematic and system-wide practice. Only in the last few decades has it become clear that systematic exclusion of women from jury pools is unconstitutional. Now the exclusion of

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1. U.S. CONST. amend. V (guaranteeing criminal defendants the right to indictment by grand juries); amend. VI (right to trial by jury in criminal cases); amend. VII (right to trial by jury in certain types of civil cases).

2. U.S. CONST. art. III, cl. 3.

3. This has been explicitly required in the context of criminal trials by the Supreme Court's infusion of the notion that juries must be drawn from a "fair cross section" of the community into the Sixth Amendment guarantee of trial by an impartial jury. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 530 (1975)(" . . . the fair-cross-section requirement [is] fundamental to the jury trial right guaranteed by the Sixth Amendment . . . ."). In the exercise of its supervisory power over the operation of lower federal courts, the Supreme Court has long extolled the virtue of community representativeness in civil juries:

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . this does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946)(per Justice Murphy)(striking down jury selection system that excluded daily wage earners from lists of prospective jurors).

women is accomplished more surreptitiously, through the use of peremptory challenges to members of the jury pool.

But an even more basic exclusion is going on -- one that results from the continued use of a model of decisionmaking that silences the voices of those who approach resolution differently from the traditional zero-sum-game of the civil jury verdict. Put simply, the very nature of the civil jury excludes modes of thinking that move beyond simple binary solutions. And the exclusion of these modes of thinking undermines the vision of the civil jury as a body that represents the community in the courtroom.

This essay briefly traces the history of women's exclusion from participation in jury service and explains the line of cases which abolished practices of explicit exclusion while retaining attorneys' ability to control the representativeness of the final "petit" jury through the use of peremptory challenges. Next, I briefly review the social science literature that documents different approaches to problem-solving, approaches that deviate from a traditional model that assumes the existence of objectively "rational" answers to moral problems. Influential work throughout the last decade has challenged this traditional model of moral development, which was largely based on studies of males only, and which defined the highest stages of moral development in terms of so-called "rationality" -- the very word we use in law to describe jury verdicts which survive judicial review. This recent work has shown that traditional theories fail to account for the "different voice"[4] that is often, though not exclusively,[5] associated with the approach that women use to resolve moral dilemmas. The different voice of women manifests a way of thinking that focuses on relationships, contexts, and responsibilities rather than abstract rules, isolated situations, and rights.[6] This different voice moves beyond the conventional definition of "rational" as epitomized in abstract, binary results. It demands a more complex approach to rational decisionmaking, one that situates problems in real-world contexts and considers a host of solutions.

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

5. Gilligan explains that the "different voice" she describes is gender-related rather than gender-specific: "The different voice I describe is characterized not by gender but theme. Its association with women is an empirical observation, and it is primarily through women's voices that I trace its development. But this association is not absolute, and the contrasts between male and female voices are presented here to highlight a distinction between two modes of thought and to focus a problem of interpretation rather than to represent a generalization about either sex." *Id.* at 2. *See also* Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593, 605 n.56 (1987) (citing unpublished Gilligan manuscript for phrases "gender-related" and "gender-specific").

6. See GILLIGAN, supra note 4, at 19; *infra* notes 53-56 and accompanying text.

Prevailing myths about jury selection use gender as a proxy for assuming that prospective jurors are likely to *vote* a certain way.[7] But a comparison of that mythology to the reality of the impact of gender on verdicts, measured empirically by sociologists who study jury behavior, is puzzling. It turns out that the impact of gender on verdict selection is quite minimal. Moreover, research shows that women have lower participation rates during the jury deliberation process. Apparently, the "different voice" of women on civil juries is not being heard, even when they do survive peremptory challenges. It may be that the issue of whether or not it's acceptable to use peremptory challenges to strike women *qua* women is a red herring. The problem is deeper than the issue of getting women on to juries. Rather, the very nature of the civil jury function -- to reach a binary, win/lose solution -- is not one that fits the different voice described in the psychological literature. Thus, the key issue for the future of the civil jury as a representative institution is whether, given the constraints the system places on the jury's ability to determine outcomes of cases, it can ever be representative of community members, predominantly but not exclusively women, who refuse to think in terms of zero-sum-games.

The presence, absence or proportion of women on petit juries may not matter as long as the universe of possibilities for jury verdicts in most cases is limited to win/lose verdicts.[8] This rigid system is based on the notion, now discredited in psychological literature, that abstract rules can be applied by any discrete group of "rational" jurors[9] to reach a verdict that will not vary according to perspectives or contexts. Thus, the different voice[10] of those community members who think contextually is drowned out by a system that operates according to an impoverished understanding of rationality. And the jury becomes an institution that represents only the segment of the community whose thinking fits one rigid decisionmaking model.

I. THE SYSTEMATIC EXCLUSION OF WOMEN FROM JURIES AND THE CONSTITUTION

In 1920, women gained access to the political process through the right to

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7. *See, e.g.*, Clarence Darrow, *Attorney for the Defense*, ESQUIRE MAGAZINE, May 1936; MELVIN BELLI, MODERN TRIALS (1954); *cited in*, REID HASTIE ET. AL, INSIDE THE JURY 122 (1983).

8. Of course, juries sometimes modify this binary structure, in contravention of the jury instructions given to them, by issuing compromise or quotient verdicts. Those cases may represent an expression of community dissatisfaction with the basic win/lose structure of most civil jury cases.

9. That jurors are "rational" is a prevailing theme in American law; indeed, when judges believe that a jury has reached the wrong result in a case and accordingly use their power to set aside a unanimous verdict, they are required to conclude that no "rational" jury could have reached that result. *See* FED. R. CIV. P. 50.

10. *See* GILLIGAN, *supra* note 4.

vote extended in the Nineteenth Amendment.[11] Despite this victory and despite a 1946 Supreme Court ruling that women could not be arbitrarily excluded from federal jury service,[12] as late as 1961 the Supreme Court expounded the view that "woman is still regarded as the center of home and family life."[13] That was said in the course of approving a state court jury selection system that excluded women from jury pools unless they took affirmative steps to volunteer for service. In *Taylor v. Louisiana*,[14] decided in 1975, the Supreme Court finally held that jury selection procedures may not require women to take affirmative steps to serve on juries; such an approach, leading as it does to the systematic exclusion of women, violates the fair-cross-section requirement of a criminal defendant's Sixth Amendment right to jury trial. Four years later, in *Duren v. Missouri*,[15] the court held that granting women summoned to serve on juries an automatic exemption also is a violation of the fair-cross-section requirement.[16]

In the course of these opinions, the Supreme Court was quite eloquent with regard to the importance of inclusion, specifically the inclusion of women, to promote the integrity of the jury system:

> . . . who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? 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.[17]

In the federal system, the presence of women in the pool from which juries in individual trials are selected (called petit juries) has long been guaranteed by court decision[18] and statute.[19] But the Court has never held that the absence of that distinct quality contributed by women, whatever it consists of,

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11. U.S. CONST. amend XIX (ratified August 18, 1920).
12. *See* Ballard v. United States, 329 U.S. 187 (1946).
13. Hoyt v. Florida, 368 U.S. 57, 62 (1961).
14. 419 U.S. 522 (1975).
15. 439 U.S. 357 (1979).
16. *Id.* at 370.
17. *Ballard*, 329 U.S. at 193-94, *quoted in Taylor*, 419 U.S. at 531-32. The *Taylor* Court further noted that "women bring to juries their own perspectives and values that influence both jury deliberation and result." 419 U.S. at 532 n.12.
18. *See* Ballard v. United States, 329 U.S. 187 (1946).
19. Jury Selection and Service Act of 1968 (codified as amended at 28 U.S.C. § 1861-1869 (1988)).

undermines the validity of a jury verdict. In fact, last term the Court made explicit its view that the fair-cross-section requirement does not extend to the petit jury.[20] Thus, the current state of the law is that although it is unconstitutional to "stack the deck"[21] by using a system to assemble the jury pool that excludes a distinct group in the community,[22] there is no constitutional requirement that the final jury chosen represent the community in terms of a makeup of distinct groups that mirrors proportionality in the general population.[23] Thus, litigators may use their peremptory challenges to exclude jury pool members without concern about the proportional representativeness of the final jury chosen.

The only constitutional limit on litigators' use of peremptory challenges is the Equal Protection Clause. The Supreme Court held in *Batson v. Kentucky*[24] that peremptory challenges may not be used to exclude African Americans from petit juries solely on account of their race.[25] In later cases, the Court made clear that racially discriminatory use of peremptory challenges violates the Equal Protection rights of excluded jurors.[26] To date, the Court has not extended this protection to jurors excluded because they are women.[27] In fact, the justices have been careful to distinguish racial discrimination in the selection of petit juries from other forms of discrimination. Dissenting in the recent case in which the Supreme Court made clear that the *Batson* rule applies to civil jury trials as well as criminal ones, Justice Scalia characterized the rule as exclusively concerned with race: courts now have "the obligation to assure that race is not included among the other factors (sex, age, religion, political views, economic status) used by private parties in exercising their peremptory challenges."[28] Several recent lower courts have been careful to limit the *Batson* Equal Protection argument to racial exclusions.[29] In a decision last summer, a panel of the Seventh Circuit declared that the *Batson* requirement "is limited to the question of racial discrimination,"[30] prompting Judge Ripple to note that there had been no need to "definitively and gratuitously [announce] that

20. Holland v. Illinois, 493 U.S. 474 (1990).

21. The phrase is from the *Holland* majority, 493 U.S. at 481.

22. *See* Duren v. Missouri, 439 U.S. 357, 364 (1979).

23. *Id.* at 364 n.20. *Cf. Thiel, supra* note 3 at 220 (Justice Murphy extols the importance of jury representativeness).

24. 476 U.S. 79 (1986).

25. Last term, the Court extended the applicability of the *Batson* rule to civil jury trials in federal court. *See* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991).

26. *See* Powers v. Ohio, 111 S. Ct. 1364 (1990).

27. *See* United States v. Hamilton, 850 F.2d 1038 (4th Cir. 1988) (excluding black women held not violative of *Batson* rule).

28. *Edmonson*, 111 S. Ct. at 2096 (Scalia, J., dissenting).

29. *See* United States v. Nichols, 937 F.2d 1257 (7th Cir. 1991); *Hamilton, supra* note 27.

30. *Nichols*, 937 F.2d at 1262.

the rationale of *Batson* is not applicable to gender based discrimination."[31]

At this point, the future direction of the debate as to the peremptory challenge is unclear. The tension is between the parties' traditional right to some control over the makeup of the jury that will decide their case and the obvious potential for discriminatory use. The use of the peremptory challenge to accomplish outright exclusion of women from petit juries is obviously troublesome. In the next section, however, I posit that the exclusion may continue even when women are seated on petit juries. If so, then our focus has to move beyond the peremptory challenge debate to a reevaluation of the civil jury as an institution.

II. DIFFERENT VOICES AND THE ZERO-SUM-GAME OF THE CIVIL JURY VERDICT

The notion that men and women think differently and approach problem-solving in different ways is not new.[32] What *is* new is a willingness to view the moral thinking of women as different and valuable rather than inferior or immature. Carol Gilligan is largely responsible for this new respect for an alternative mode of thinking largely associated with women. Her 1982 book, *In a Different Voice*, undertook to demonstrate that moral development theorists had failed to account for the fact that women tend to construe moral problems differently: "The disparity between women's experience and the representation of human development, noted throughout the psychological literature, has generally been seen to signify a problem in women's development. Instead, the failure of women to fit existing models of human growth may point to a problem in the representation, a limitation in the conception of human condition, an omission of certain truths about life."[33]

My argument grows out of this basic insight: the civil jury is an institution that privileges abstract rule application as the best method for resolving disputes. Thus, civil juries are required in most cases to play a zero-sum-game. They are told they must either decide that defendant wins, in which case plaintiff loses, or that plaintiff wins, in which case defendant loses. This sort of thinking, focused on exclusively binary solutions, is a nearly perfect fit with the so-called higher stages of moral development described in traditional models, which

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31. *Id.* at 1264 (Ripple, J., concurring).

32. *See* Susan Moller Okin, *Thinking Like a Woman*, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE (Deborah Rhode, ed., 1990). Okin traces the uniformly unpleasant history of this notion from Plato through Hegel, Bentham and Freud to modern scholars of moral development like Kohlberg, emphasizing that all viewed women's moral thinking as inferior to men's. *Id.* at 145-49.

33. GILLIGAN, *supra* note 4 at 19.

typically used males as their standard for tracing the development of moral thought from childhood through adolescence to adulthood.

Early this century, Jean Piaget studied children at play, and concluded that morality develops as children learn respect for rules by playing rule-bound games.[34] Piaget noted differences between little girls and little boys in their play. Girls have a more tolerant, pragmatic attitude toward rules; they are more open to rule changes and willing to recognize needed exceptions.[35] Boys, on the other hand, seem fascinated with the legal aspect of their game playing and in developing procedures for resolving the disputes that arise.[36] From this Piaget concluded that the legal sense "is far less developed in little girls than in boys."[37] In the 1960s, moral development theorist Lawrence Kohlberg hypothesized that the moral and legal lessons children learn through play are a product of role-playing. Traditional girls' games, like hopscotch and jumprope, differ from traditional boys' games in that they are not directly competitive -- each child has her opportunity in turn to play.[38] Significantly, there is no need for winners and losers to be declared.

Kohlberg went on to describe moral development, based on studies exclusively of males,[39] as progressing through six hierarchical stages.[40] Gilligan describes the lowest two Kohlberg stages as involving choices made according to "an egocentric understanding of fairness based on individual need;"[41] the middle two levels as "a conception of fairness anchored in the shared conventions of societal agreement," and the highest two levels as "a principled understanding of fairness that rests on the free-standing logic of equality and reciprocity."[42]

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34. *See* GILLIGAN, *supra* note 4, at 10 (explaining work of Jean Piaget and its impact on our understanding of the moral development of boys and girls).

35. *Id.*

36. This idea was advanced in later research done by Janet Lever. See GILLIGAN, *supra* note 4, at 10.

37. *See* GILLIGAN, *supra* note 4, at 10, *citing* JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 77 (1932).

38. *See* GILLIGAN, *supra* note 4, at 10 (describing Kohlberg's work).

39. *See* Carol Gilligan, *In a Different Voice: Women's Conceptions of Self and of Morality*, 47 HARVARD EDUCATIONAL REVIEW 481-517 (1977); Okin, *supra* note 31, at 149.

40. LAWRENCE KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT: MORAL STAGES AND THE IDEA OF JUSTICE 17-19 (1981); *See also* Lawrence Kohlberg and R. Kramer, *Continuities and Discontinuities in Childhood and Adult Moral Development*, 12 HUMAN DEVELOPMENT 93-120 (1969) [hereinafter Kohlberg and Kramer].

41. *See* Okin, *supra* note 31, at 149: "The first [of Kohlberg's stages] considers the avoidance of punishment. The second is characterized by the notion 'I'll scratch your back if you'll scratch mine.'"

42. GILLIGAN, *supra* note 4, at 27.

Though Kohlberg's original database consisted exclusively of males, later studies involving women showed that many more adult women than men are at level three on the scale, in which "Behavior is frequently judged by intention -- the judgment 'he means well' becomes important for the first time. One earns approval by being 'nice.'"[43] Gilligan explains this stage as morality "conceived in interpersonal terms and [in which] goodness is equated with helping and pleasing others."[44] Kohlberg himself concluded from this finding that adult morality is a function of socialization rather than development, and that stage three is a "functional morality for housewives and mothers" who made up a large percentage of the women studied.[45]

What happens when these purportedly immature decisionmakers are called to jury service? Professor Okin notes that "since Kohlberg argues that our society is progressing toward the highest and most liberal stages of moral reasoning, it seems strange that he does not concern himself with the half of the adult population that seems to constitute something of an obstacle in the way of such progress, being socialized for a sex role that requires a stage of moral thinking that men pass through or bypass in late childhood."[46]

The early common-law system prized the close interaction of human stories and moral reasoning and the lay members of the jury played a crucial role in marking the point of interaction between law and the lives of those who came before the court. But as the law began to privilege abstract rule application as the best method for resolving disputes, juries became agents for implementing an impoverished notion of abstract rationality. Thus, our civil juries now are expected to follow the law, to not be swayed by empathy or sympathy, and above all to be "rational."[47] In fact, "rationality"[48] is the touchstone by which we measure a jury's performance. It is only when the trial judge concludes that no reasonable or rational jury could have reached the verdict

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43. KOHLBERG, *supra* note 40, at 18; 147-68.

44. GILLIGAN, *supra* note 4, at 18.

45. Kohlberg & Kramer, *supra* note 40, at 108, *cited in* Okin, *supra* note 31, at 150. Kohlberg and Kramer apparently believed that when women enter spheres that are traditionally male, they will progress to the higher stages. *See* GILLIGAN, *supra* note 4, at 18.

46. Okin, *supra* note 32, at 150.

47. *See, e.g.*, EDWARD J. DEVITT, CHARLES B. BLACKMAR & MICHAEL A. WOLFF, FEDERAL JURY PRACTICE AND INSTRUCTIONS Sec. 71.01 (General Introduction -- Province of the Court and Jury)(1987).

48. The quote marks around the words rational and rationality are meant to convey my view that the terms have been coopted in the legal literature to connote a type of abstract decisionmaking that is off the mark from a proper definition of the terms. Indeed, one could better conclude that a more "rational" decision may be reached when more contextual information is considered.

actually returned that he[49] is permitted to set the verdict aside.[50] Presumably, the jury members best able to fulfill that role, to be rational decisionmakers, are those people who have moved past stage three, where many women are, and have reached at least stage four on the Kohlberg scale. At stage four, the thinker becomes legalistic; decisions are made with a view toward obedience to the law and respect for authority.[51] A later researcher applying Kohlberg's scale observed that stage four reasoning is not "compatible with the traditionally expressive female role" while stage three "is not compatible with the traditionally instrumental American male role."[52] Here, the intersection between empiricism and jury function becomes very problematic: if we expect our juries to perform a decisionmaking function that mirrors stage four and up thinking, then the logical conclusion is that those with a different approach -- usually women -- *should* be excluded from civil juries.

Carol Gilligan's work is at the forefront of challenges to this conventional description of women's moral thinking. The "different voice" she describes is not stuck at halfway up the Kohlberg ladder. It is a voice that thinks in terms Kohlberg's ladder does not even contemplate. This voice is "contextual and narrative rather than formal and abstract,"[53] and conceives moral development as the "understanding of responsibility and relationships, just as the conception of morality as fairness ties moral development to the understanding of rights and rules."[54] In terms that mirror legal language about the role of civil juries, Gilligan notes that "whereas the rights conception of morality that informs Kohlberg's principled level (stages five and six) is geared to arriving at an

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49. The use of the male pronoun here is quite intentional. Given that the majority of judges are men, the application of a standard based on "rationality" to judge the quality of a jury's performance might be especially troubling.

50. *See* FED. R. CIV. P. 50(a)(1) & (b)(as amended effective December 1, 1991)("If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a *reasonable* jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party . . . (b) Such a motion may be renewed by service and filing not later than 10 days after entry of judgment [upon jury verdict]."). In criminal cases, the standard explicitly centers on the "rationality" of the jury verdict. See Jackson v. Virginia, 443 U.S. 307 (1979)(conviction may be upheld only if a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

51. Okin, *supra* note 32, at 149.

52. Constance B. Holstein, *Irreversible, Stepwise Sequence in the Development of Moral Judgment: A Longitudinal Study of Males and Females*, 47 CHILD DEVELOPMENT 51, 59 (1976). In so concluding, Professor Holstein argued that this finding, together with data that measured the liberality of the subjects studied, indicated that Kohlberg's system privileges cognitive thinking and fails to consider "morally relevant emotions such as compassion, sympathy, and love. . . ." *Id.* at 61.

53. GILLIGAN, *supra* note 4, at 19.

54. *Id.* at 19.

objectively fair or just resolution to moral dilemmas upon which all rational[55] persons could agree, the responsibility conception focuses instead on the limitations of any particular resolution and describes the conflicts that remain."[56] Here the law's impoverished definition of rationality comes into focus. Dissatisfaction with abstract win/lose solutions to problems that come up in the real world certainly seems far from irrational[57] -- by seeking results that reflect a larger contextual picture, the different voice of women enlarges the potential for just decisionmaking in legal disputes.

The question we can now pose is this: is the "flavor", the "distinct quality" that the Supreme Court says we lose when we exclude women from jury pools the "different voice" described by Gilligan? If so, does the distinctiveness that women bring translate into results that look different at the end of trials?

Here another set of empirical data becomes significant. Sociologists who study jury behavior have analyzed the impact of gender on jury verdicts. They have been unable to document any difference between male and female verdict preferences in either criminal or civil cases.[58] In light of the correspondence drawn above between so-called "male" patterns of decisionmaking and the civil jury function, this empiricism might be interpreted in one of two ways. It may be that women rise to the occasion, so to speak, when serving on juries, and become stage four and up thinkers,[59] at least for the moment.

Or it could be that women's different voice is silenced by the structure of the verdict reaching process. Empirical research would tend to support the latter interpretation. Studies show that male jurors speak proportionately more often that female jurors, making up to forty percent more comments.[60] Male jurors are also more likely than female jurors to be elected foreperson, a role that is often critical in the jury room dynamics.[61] It has been suggested that because

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55. Here again the language describing "male" decisionmaking tracks legal descriptions of the civil jury's function.

56. GILLIGAN, *supra* note 4, at 21-22.

57. To the contrary, we should be suspicious of any system that uses abstract, formalistic thinking to solve real-world problems.

58. REID HASTIE ET AL., *supra* note 7, at 140-41. The authors catalog the major studies and note that no gender differences were found in either student or citizen jury simulations.

59. This would comport with Kohlberg's assumption, as described by Gilligan, that "if women enter the traditional arena of male activity [they will] recognize the inadequacy of [their] moral perspective and progress like men toward higher stages where relationships are subordinated to rules (stage four) and rules to universal principles of justice (stages five and six)." GILLIGAN, *supra* note 4, at 18.

60. *See* HASTIE, ET AL., *supra* note 7, at 145-46; *see generally* Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593 (1987).

61. *See* Marder, *supra* note 60 at 595 n.9 (surveying empirical literature).

women on juries are often outnumbered by men, they may fall back on traditional sex roles, a problem easily solved by increasing numbers of women.[62] But the relative silence of women on juries may indicate a larger problem with the jury system -- namely, that there is no room on the jury for thinking that goes beyond simple binary "you win/I lose" results.

Professor Menkel-Meadow has observed that the female voices described by Gilligan "have trouble judging disputes in a male-created context because of their difficulty in perceiving one right answer . . . ."[63] Like Portia in Shakespeare's Merchant of Venice, who disguised herself as a male to make a legal argument focused on mercy rather than justice,[64] Menkel-Meadow posits that women in the legal profession will demand a reexamination of the utility of the adversarial system as a whole, with increasing focus on alternative methods of dispute resolution. She describes the litigation process as "relatively similar [and not coincidentally] to a sporting event -- there are rules, a referee, an object to the game, and a winner is declared after the play is over."[65] She notes that the game model plays out not just in the courtroom, but also in the way lawyers plan, negotiate, and advise their clients.[66] As to the function of the jury in the game, she apparently sees it as a beacon of hope: she asks "Does the use of a jury provide a useful framework for a kind of judging where no single perception of the truth must prevail, but where a verdict is the product of a mediated consensus?"[67]

Given the current use of civil juries, the answer to that question, I fear, is no. The civil jury's role in litigation is to referee the facts and decide which party should win the zero-sum-game. The verdict they render is a sort of scoreboard. Like the boys at play in Piaget's study, they must decide in favor of one party and against the other, thereby keeping the litigational ball in play. The jury is instructed that it may not function like the little girls at play, by reconsidering the rules in the context and suggesting innovative solutions. As far as the civil jury is concerned, no other possibilities for resolution exist. In fact, if the jurors cannot agree that one party should win, the jury is said to be "hung" -- and before a judge will allow the trial to end in such a stalemate he will send the jury back to deliberate again and again -- sudden death decisionmaking.

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62. *See* ROSABETH M. KANTER, MEN AND WOMEN OF THE CORPORATION 208 (1977) *cited in* MARDER, *supra* note 59, at 597 n.20.

63. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S LAW JOURNAL 39, 59 (1985).

64. *Id.* at 42 n.23, *citing* WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE, Act IV, Scene 1, *reprinted in* THE COMPLETE SIGNET CLASSIC SHAKESPEARE 630 (S. Barnet ed., 1963).

65. *Id.* at 51.

66. *Id.*

67. *Id.* at 59.

The rigidity of the system may best explain the relative silence of women on civil juries. And if the distinctive flavor that women supposedly bring to the civil jury has anything to do with a different, more contextual and responsibility-oriented method of problem-solving, then simply increasing numbers of women on civil juries (by limiting peremptory challenges) is not the sole answer.

III. THE SEVENTH AMENDMENT, REPRESENTATIVENESS, AND THE POSSIBILITY OF CONTEXTUAL JUSTICE

So what does all this mean for our celebration of the Bicentennial of the Seventh Amendment? The answer turns, I think, on what we want from our civil juries. If the constitutionally guaranteed right to a civil jury trial means that we value the participation of the community in the resolution of disputes between two private parties, and if that in turn reflects a judgment that a communitarian model of dispute resolution is superior to having a single legally-trained judge decide private disputes, then the question becomes whether we should be satisfied with a system so rigid that it drowns out the voices of perhaps a majority of the community.

Of course, the civil jury developed and was enshrined in the Seventh Amendment during a time when men were the sole players in the courtroom game. The spare history of the incorporation of the civil jury trial guarantee into the Bill of Rights indicates that our forebears generally agreed on the need for civil juries as a check on potentially corrupt judges, and that the general language of the amendment reflects both that basic concern and the concomitant lack of concern about the precise nature of the right.[68] To say that the drafters could not have dreamed of changing the basic win/lose structure of the civil jury trial is probably accurate, but it is no less true that they did not envision other modern modifications, such as the division of authority between judge and jury.[69] The point is that by confining the role of civil jurors to reaching only zero-sum-game results, we are not fully implementing the vision of community participation that is at the heart of the civil jury guarantee. To the contrary, we are undermining the communitarian function by our continued use of a rigid system that demonstrably squelches the voice of a large and important segment of the community.

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68. *See generally* Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966).

69. *See generally id.; see also* Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 N.W. U. L. REV. 486, 487 (1975)(The Supreme Court "has attempted to accomplish the original broad purposes of the [seventh] amendment by taking into account how changed circumstances and conditions affect the accomplishment of those purposes.").

As explained above, the Supreme Court has consistently expressed the view that juries cannot fulfill their constitutionally protected functions when they are not selected from a pool that fairly reflects the community. My argument here makes a parallel point: the final verdict reached in any given civil jury case may not fairly reflect the kind of community input that the very existence of the civil jury was supposed to ensure.

If the structure of the civil jury trial is so basically flawed, then is there a future for the civil jury? That can be answered with a resounding yes. If we understand the purpose of the Seventh Amendment to ensure community participation in the resolution of private disputes, then one can imagine many formats that would facilitate that kind of participation. Obviously, modes of dispute resolution must be calibrated to the substance of the dispute. For some types of cases, one can imagine a civil jury functioning as a sort of collective mediating body, a role that would require much greater latitude during the courtroom proceedings for direct juror interaction with parties and attorneys, now largely forbidden. But even without such fundamental changes in the way trials are conducted, great progress could be made simply by expanding the choices available to juries in their decisionmaking process. An accepted version of this goes on already in comparative negligence cases, in which the jury is asked to compare and quantify the relative fault of the parties.

Professor Kenneth Karst has proposed that the sort of moral thinking described by Gilligan could inform constitutional debates on a doctrinal level.[70] He notes that "[i]n constitutional litigation, as elsewhere, a look at the human context in which legal relations are embedded may alter our sense of justice in a particular case."[71] My proposal is that we reevaluate the trial *process*, and more particularly the function of the civil jury, to see whether it might be modified to accommodate approaches to dispute resolution that focus on contextual justice. In light of our more sophisticated understanding of ourselves, it seems appropriate that we re-structure the civil jury to manifest more than just one abstract, rules-based approach to decisionmaking.

CONCLUSION

The presence of women on juries is a relatively recent phenomenon.[72] The jurisprudence of inclusion with regard to jury service has developed in two doctrinal strands -- the requirement that the jury be drawn from a fair cross section of the community and the Equal Protection limit on the use of

70. Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447, 499.
71. *Id.*
72. *See supra* notes 11-23 and accompanying text.

peremptory challenges.[73] In developing this jurisprudence, the Supreme Court has extolled the distinct flavor that women can bring to the jury room. At the same time, psychologists who study women's thinking[74] have documented an approach to decisionmaking that goes beyond abstract application of rules and seeks to enlarge the possibilities for resolution beyond simple binary solutions.[75] I have argued that the future of the civil jury requires bringing these two disciplines together. The simple goal of placing women on juries, laudable though it is, does not go far enough in manifesting the Seventh Amendment vision of community participation in private dispute resolution. As long as the system requires the civil jury to play a zero-sum-game, the different voice of jurors who think of more creative resolution possibilities will not be heard. Our tradition of placing unnecessary limits on the resolution possibilities available to juries is itself a choice to privilege a particular model of decisonmaking primarily associated with only one segment of the community. The jury does not fully represent a fair-cross-section of the community when its very structure silences the voices of perhaps the largest group within it.

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73. *See supra* notes 14-31 and accompanying text.

74. Again, it is important to stress that this is not an exclusively female phenomenon. *See supra* note 5. All community members who think in the "different voice" described in the psychological literature may suffer exclusion from civil jury participation.

75. *See supra* notes 53-56 and accompanying text.