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## Susan Glaspell's *Trifles* and *A Jury of Her Peers*: Woman Abuse in a Literary and Legal Context

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## Susan Glaspell's *Trifles* and *A Jury of Her Peers*: Woman Abuse in a Literary and Legal Context

### Erratum

Due to a printing error, the copyright symbol was inadvertently missing from Marina Angel's article, "Susan Glaspell's *Trifles* and *A Jury of Her Peers*: Woman Abuse in a Literary and Legal Context," located at page 779 of our last issue. The copyright owner is Ms. Angel, and the copyright notice should read "©Marina Angel, 1997."

# Susan Glaspell's *Trifles* and *A Jury of Her Peers*: Woman Abuse in a Literary and Legal Context

MARINA ANGEL†

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## INTRODUCTION

Susan Glaspell's story of an abused wife who kills her abusive husband was told in 1916, first as a play, *Trifles*,<sup>1</sup> then as a short story, *A Jury of Her Peers*.<sup>2</sup> The story is written from the

† Marina Angel, 1997. Professor of Law, Temple University School of Law. B.A., Barnard College, 1965; J.D., Columbia University School of Law, 1969; LL.M., University of Pennsylvania School of Law, 1977. My earlier article, *Criminal Law and Women: Giving the Abused Woman Who Kills 'A Jury of Her Peers' Who Appreciate 'Trifles'*, 33 AM. CRIM. L. REV. 229 (1996), analyzed the substantive criminal law doctrines involved in cases of abused women who kill their abusers and the development and impact of women's jury service in such cases. I thank Professor Daniel P. Tompkins, Chair, Department of Greek, Hebrew and Roman Classics, Temple University, for reviewing a draft of this Article, my friends Samuel A. Cherniak and Phyllis Gelman for being there for me from my first article on and especially to Sam for sharing his love of and insights into the Greek classics and Geri Lynn St. Joseph, Temple Law School '99, for her invaluable research assistance.

1. The play was first produced in 1916 and first published in 1920. Susan Glaspell, *Trifles*, in *PLAYS 1* (1920). All references to the play *Trifles* in this Article will be to Susan Glaspell, *Trifles*, in *LIFTED MASKS AND OTHER WORKS* 259 (Eric S. Rabkin ed., 1993) [hereinafter *Trifles*].

2. Susan Glaspell, *A Jury of Her Peers*, EVERYWEEK, Mar. 5, 1917, at 42, reprinted in

perspective of those closed out of a legal system—in this instance, women—and how they react when that legal system is about to destroy one of their own. Women did not make homicide law as it existed in 1916: they could not be judges; they could not be legislators; they could not vote until 1920;<sup>3</sup> they could not serve on juries in most states until the 1940s.<sup>4</sup>

Susan Glaspell's literary masterpiece, like Sophocles' *Antigone*,<sup>5</sup> has stimulated both literary<sup>6</sup> and legal commentary.<sup>7</sup> It is also a superbly crafted murder mystery that Alfred Hitchcock televised in 1961.<sup>8</sup> From college literature and women's studies courses to law school courses as diverse as Civil Procedure<sup>9</sup> and Criminal Law,<sup>10</sup> it has caused us to reexamine our moral and legal norms. In contrasting the values of men and women, Susan

THE BEST SHORT STORIES OF 1917, at 256 (Edward J. O'Brien ed., 1918) [hereinafter BEST SHORT STORIES]. All references to the short story *A Jury of Her Peers* in this Article will be to Susan Glaspell, *A Jury of Her Peers*, in *LIFTED MASKS AND OTHER WORKS* 279 (Eric S. Rabkin ed., 1993) [hereinafter *A Jury of Her Peers*].

3. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX.

4. See *infra* notes 362-63 and accompanying text (discussing resistance by the states to women jurors).

5. SOPHOCLES, *ANTIGONE* (442 B.C.E.), reprinted in SOPHOCLES 312 (F. Storr trans., Harvard University Press 1981). Aristotle in his *Rhetoric* cited Sophocles' *Antigone* as the first discussion of natural law. ARISTOTLE, *THE ART OF RHETORIC* 125 (Hugh C. Lawson-Tancred trans., Penguin Books 1991) (1926).

6. See generally Linda Ben-Zvi, "Murder, She Wrote": The Genesis of Susan Glaspell's Trifles, 44 THEATRE J. 141 (1992) [hereinafter Ben-Zvi, *Genesis of Trifles*]; Linda Ben-Zvi, *Susan Glaspell's Contributions to Contemporary Women Playwrights*, in FEMININE FOCUS—THE NEW WOMAN PLAYWRIGHTS 147, 157 (Enoch Brater ed., 1989) [hereinafter Ben-Zvi, *Women Playwrights*]; Edythe M. McGovern, *Susan Glaspell*, in AMERICAN WOMEN WRITERS 268 (Langdon L. Faust ed., 1988); Eric S. Rabkin, *Introduction to SUSAN GLASPELL, LIFTED MASKS AND OTHER WORKS* viii-ix (Eric S. Rabkin ed., Univ. of Mich. Press 1993) (1912). Arthur Waterman, Susan Glaspell's biographer, examined her life, values, and works at length. ARTHUR E. WATERMAN, *SUSAN GLASPELL* (Twayne Publishers 1966).

7. See generally ROBERT M. COVER ET AL., *PROCEDURE* 1167 (1988); RICHARD POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 113 (1988); Patricia L. Bryan, *Storytelling in Fiction and in Fact: Susan Glaspell's 'A Jury of Her Peers' and the 1901 Murder Trial of Margaret Hossack*, (manuscript at 1, on file with author); Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 YALE L.J. 1913, 1955 (1990); Robin West, *Invisible Victims: A Comparison of Susan Glaspell's 'Jury of Her Peers' and Herman Melville's 'Bartleby the Scrivener'*, 8 CARDOZO STUD. L. & LITERATURE 203 (1996); Marijane Camilleri, Comment, *Lessons From Law in Literature: A Look at the Movement and a Peer at Her Jury*, 39 CATH. U. L. REV. 557, 563-68 (1990).

8. *Alfred Hitchcock Presents: A Jury of Her Peers* (NBC television broadcast, Dec. 26, 1961).

9. COVER ET AL., *supra* note 7.

10. Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills 'A Jury of Her Peers' Who Appreciate 'Trifles'*, 33 AM. CRIM. L. REV. 229, 246-52 (1996).

Glaspell drew on the rich tradition of classical Greek literature and drama, and especially on Aristophanes' play *Lysistrata*.<sup>11</sup>

The women in Susan Glaspell's story see different evidence than the men in the story. They perceive and reason from the mundane facts of an abused woman's daily life, from "trifles," to conclude that she killed her abusive husband. They then act as "a jury of her peers" to make an actual trial difficult, if not impossible, by destroying the evidence that would convict her of murder.

The women in the story start from different facts and reach different moral and legal conclusions than the men in the story. The men's views of fact and law reflect our traditional legal system, which men created and continue to dominate. Susan Glaspell's story is about different experiences, perceptions, values, and methods of analysis—issues that we all must learn to deal with in our increasingly diverse societies.

The term "second-generation diversity issues"<sup>12</sup> is currently in vogue but means different things to different people. To the traditional outsiders, women and minority men, "second-generation diversity issues" means the world must adjust to us. To those who created the existing systems, the term means those newly admitted must adjust to them. If we continue to speak in substantially different voices,<sup>13</sup> we all will have to learn new methods of listening in order to communicate with one another.<sup>14</sup> To appreciate other views, we must learn the joy and uncertainty of valuing differences.

The major challenge of our era is understanding and including diverse perspectives and values while, at the same time,

11. ARISTOPHANES, *LYSISTRATA* (411 B.C.E.), reprinted in *THE COMPLETE GREEK DRAMA: ALL THE EXTANT TRAGEDIES OF AESCHYLUS, SOPHOCLES AND EURIPIDES, AND THE COMEDIES OF ARISTOPHANES AND MENANDER, IN A VARIETY OF TRANSLATIONS: VOL. II 809* (Whitney J. Oates & Eugene O'Neill Jr. eds., 1938) [hereinafter *COMPLETE GREEK DRAMA*]. The translation in the *COMPLETE GREEK DRAMA* is reported to be by an anonymous translator, but it is identical to one originally translated by the Athenian Society in 1912. See *ARISTOPHANES: THE ELEVEN COMEDIES 227* (Athenian Society trans., Liveright Publishing 1941) (1912).

12. See Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 99 (1994).

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

14. For analysis of problems of communications between men and women, see generally *CONSTRUCTING AND RECONSTRUCTING GENDER—THE LINKS AMONG COMMUNICATION, LANGUAGE, AND GENDER* (Linda A.M. Perry et al. eds., 1992); *GENDER AND CONVERSATIONAL INTERACTION* (Deborah Tannen ed., 1993); *CAMILLE ROMAN ET AL., THE WOMEN AND LANGUAGE DEBATE: A SOURCEBOOK* (1994); *DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990).

making the moral choices necessary to develop and enforce laws responsive to and accepted by our society. Ending the deep-seated problem of woman abuse requires a multifaceted approach that enlists the creative use of all our perspectives and abilities.

Susan Glaspell chose a literary vehicle to prompt an examination of woman abuse and its legal legitimacy. Such a narrative voice "can convey the subjective feel of experiences in a way that triggers understanding of others and an emphatic response to their plight, thereby changing our moral beliefs and our moral assessment of law . . ." <sup>15</sup> Susan Glaspell's story led me to ask who she was and how she was able to produce a story in 1916 that reflects the major legal and moral issues of today. It led me to examine the history of women's struggles to participate in the political processes of this country, including the right to vote and the right to serve as jurors.

### I. THE STORY—"FACT"

A debate currently rages about the appropriateness of stories as the basis for legal analysis. <sup>16</sup> From my first day as a law student, I thought of the cases in the law books we studied as short stories about real human beings, <sup>17</sup> selected by editors and put together in sequences of similar but slightly different stories to illuminate moral dilemmas and to show how the lawmakers of our society resolved them. Lawyers are taught to examine the facts of cases carefully so as to learn to derive rules of law from facts. There is nothing new in this. Judges made common law for centuries in this fashion, and before the common law, the Bible did it with parables. <sup>18</sup>

Value systems are built into stories, but some stories have been around so long and have been repeated so widely that they

15. ROBIN WEST, *NARRATIVE, AUTHORITY AND LAW* 11 (1993).

16. The literature discussing the use of stories in legal education is vast. See, e.g., WEST, *supra* note 15; Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 280-85 (1994); Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U. CIN. L. REV. 95, 128-54 (1994); Terree E. Foster, *But Is It Law? Using Literature to Penetrate Societal Representation of Women*, 43 J. LEGAL EDUC. 133, 136-38 (1993); Melissa Harrison, *A Time of "Passionate Learning": Using Feminism, Law and Literature to Create a Learning Community*, 60 TENN. L. REV. 393, 412-27 (1993); Heilbrun & Resnik, *supra* note 7, at 1936-42; Camilleri, *supra* note 7, at 563-68.

17. See generally James M. Vache, *The Narrative Experience: Telling Stories in School*, L. TCHR. (Institute for Law School Teaching, Spokane, Washington), Spring 1994, at 12.

18. See generally 10 NEW CATHOLIC ENCYCLOPEDIA 984 (1967) (comparing parable, simile and metaphor).

are taken as objective, scientific truth.<sup>19</sup> We have all been socialized by these stories which foreclose recognition of other perspectives.<sup>20</sup> For those who start from a different perspective, many are too overwhelmed by the power and influence of the dominant perspective to challenge the validity of the stories.

I do not understand why there is a fight about using stories in legal analysis. I do understand that there can be a fight about whether we use my story or your story. A court's recitation of the facts of a case is always a story, an edited version of reality.<sup>21</sup> Too often, the facts that have been left out are the ones that outsiders care about. As a result, the story of facts that courts create can be fiction, and the fiction of outsiders, such as Susan Glaspell, can be fact.

Having outsiders tell their stories, often in literary terms, allows different perceptions of facts that can lead to different perceptions of law.<sup>22</sup> We must go beyond existing legal doctrines in order to see the real horror and harm of woman abuse.<sup>23</sup> When a legal system is very warped, minor adjustments have little impact and only serve to mask major faults. An outsider view is needed to reveal major faults. Traditional law allowed possessive and angry men to act out by beating and killing "their women." The law was developed by men who could iden-

19. Professor Richard Delgado notes: "Empowered groups long ago inscribed their favorite narratives—ones that reflected their sense of the way things ought to be—into myth and culture." Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 676 (1993).

20. "[J]uridical models [are] used against subordinate groups by making inequality officially nonexistent and by using apparently neutral rules that have far from neutral effects." Kim Lane Scheppele, *Manners of Imagining the Real*, 19 L. & SOC. INQUIRY 995, 997 (1994).

21. Each of us sees the world through a framework based on our experiences and relationships in the society we inhabit. Patricia Yancey Martin & R. Marlene Powell, *Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims*, 19 L. & SOC. INQUIRY 853, 859 (1994).

22. "[B]oth the law and the facts are constructed from interpretive practices . . ." Scheppele, *supra* note 20, at 1022. Robin West has explained why outsiders use narratives.

[N]arrativity . . . is a necessary part of moral claims for change made on behalf of those who have traditionally been excluded from the processes of law. If our moral convictions are grounded in conceptions of our shared nature that are in turn informed by our own experiences and the experiences of others, and if some experiences are routinely silenced by empowered groups and our moral convictions consequently skewed, then the imbalance must be corrected by the telling in narrative form of the heretofore silenced experiences.

WEST, *supra* note 15, at 10.

23. See Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1259-74 (1993).

tify with other men in pain and legitimized their abusive acts against women in such a way as to hide the horror of the behavior.

Traditionally, a veil of secrecy, of privacy, has been drawn over sexual and physical abuse of women in the family.<sup>24</sup> The failure of women in every community to tell their stories<sup>25</sup> even to each other, much less within and without their communities, has made possible, despite overwhelming statistics, the denial of such abuse by society and its laws.<sup>26</sup> Each community, each group (or is it the males of each group?) has guilt-tripped its women into maintaining privacy in order to protect the public image of the group (or is it the image of the males of each group?).

Susan Glaspell was a popular author whose works centered on women's lives in the American Midwest.<sup>27</sup> She lived from 1876<sup>28</sup> to 1948<sup>29</sup> and won the Pulitzer Prize for drama in 1931.<sup>30</sup> Susan Glaspell grew up in Davenport, Iowa,<sup>31</sup> graduated from Drake University in 1900, and began her career as a reporter for the *Des Moines Daily News* primarily covering the statehouse.<sup>32</sup>

Her major newspaper stories, however, involved the case of *State v. Hossack*.<sup>33</sup> As a young woman, Susan Glaspell covered the 1901 trial of an Iowa farm wife charged with killing her husband with a hatchet while he slept.<sup>34</sup> The wife pled not guilty, claiming she was asleep in bed with her husband but did not awaken quickly enough to see the real killer. The case affected Susan Glaspell strongly and inspired *Trifles* and *A Jury*

24. See *infra* notes 123-30 and accompanying text (discussing relegation of women and women's issues to private sphere and exclusion of women from public sphere).

25. See generally Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277 (1993).

26. See generally U.S. DEPT OF HEALTH & HUMAN SERVS., U.S. DEPT OF JUSTICE, SURGEON GENERAL'S WORKSHOP ON VIOLENCE AND PUBLIC HEALTH REPORT (Health Resources & Servs. Admin. 1986) [hereinafter SURGEON GENERAL'S WORKSHOP ON VIOLENCE AND PUBLIC HEALTH]; STAFF OF SENATE COMM. ON THE JUDICIARY, 102D CONG., 2D SESS., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 26 (Comm. Print 1992) [hereinafter VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA].

27. WATERMAN, *supra* note 6, at 93; Ben-Zvi, *Women Playwrights*, *supra* note 6, at 157; McGovern, *supra* note 6, at 268.

28. Ben-Zvi, *Women Playwrights*, *supra* note 6, at 163 n.9.

29. McGovern, *supra* note 6, at 270.

30. Ben-Zvi, *Women Playwrights*, *supra* note 6, at 147.

31. *Id.*, at 150.

32. Ben-Zvi, *Genesis of Trifles*, *supra* note 6, at 143.

33. 89 N.W. 1077 (Iowa 1902); see Ben-Zvi, *Genesis of Trifles*, *supra* note 6, at 143-45.

34. See Ben-Zvi, *Genesis of Trifles*, *supra* note 6, at 143.

of *Her Peers* fifteen years later.<sup>35</sup>

Susan Glaspell's initial reporting on the case was unsympathetic and stereotypical.<sup>36</sup> She had been socialized to accept the traditional male view of the facts and law of woman abuse. Her headline read in part, "Mrs. Hossack thought to be crazy."<sup>37</sup> She reported "Hossack was not supposed to have an enemy in the world."<sup>38</sup> Only an insane woman would have killed such a husband.<sup>39</sup> Susan Glaspell emphasized the most damaging evidence, that the wife claimed she was asleep beside her husband but did not wake up while he was murdered with a hatchet.<sup>40</sup> Her view of the wife changed after she visited the farmhouse possibly with the sheriff and the county attorney.<sup>41</sup> Mrs. Hossack went from being "cold, calm, and menacing" to "worn and emaciated," from "powerful" to "older, frailer, and more maternal."<sup>42</sup>

The facts as reported by the Iowa Supreme Court in its 1902 opinion in *State v. Hossack*, the wife's appeal from her conviction for murder, indicate some sensitivity to the situation of an abused wife. The couple had been married for thirty-three years and had nine children, five of whom were at home on the family farm at the time of the killing.<sup>43</sup> The court understood that "[t]he family life of the Hossacks had not been pleasant, perhaps the husband was most to blame. He seems to have been somewhat narrow-minded, and quite stern in his determination to control all family matters."<sup>44</sup> There was a history of conflict between husband and wife. "On one occasion, some years prior to the tragedy, she went to the house of one Haynes, and wanted him to come and quiet her husband, saying: 'He will kill some of us before morning.'<sup>45</sup> This statement indicates abuse not only of the wife but also of the children.

Motive was a key factor in the *Hossack* case,<sup>46</sup> just as it was in *A Jury of Her Peers*. If Mrs. Hossack killed her husband because of his abuse of her and their children, this would not have

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35. *Id.*

36. *Id.* at 145.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 146 n.14.

42. *Id.* at 146.

43. *State v. Hossack*, 89 N.W. 1077, 1077-78 (Iowa 1902).

44. *Id.* at 1078.

45. *Id.*; see generally *infra* notes 259-66 and accompanying text (discussing attempts by abused women to seek help).

46. *Hossack*, 89 N.W. at 1079-80.

been a reductive or exculpatory factor at her trial. In fact, it would have provided grounds for finding her guilty of premeditated murder, the highest degree of homicide. It was therefore to Mrs. Hossack's benefit to claim, with the full support of her children, that the abuse had ceased by the time of the killing, thereby eliminating a motive and allowing blame to be placed on an unknown stranger.<sup>47</sup>

A year before the killing, on Thanksgiving Day 1899, the conflict escalated and the wife left to live with a married daughter.<sup>48</sup> According to the Iowa Supreme Court: "[F]inally three neighbors were called in [sic], and through their efforts all difficulties were apparently healed" and she returned to the family farm.<sup>49</sup> The court admitted "[t]hat the wife did not place strong reliance upon the pledges made by her husband" since she asked one of the neighbors to remain all night because she was afraid that her husband would make trouble again as soon as they left.<sup>50</sup> There was a witness who stated that two months after the purported reconciliation, the wife wept and said, "It is just as bad as it ever was."<sup>51</sup> However, with one exception, no more family difficulties were made public.<sup>52</sup> The children all supported their mother, testifying that the conflict had ceased.<sup>53</sup>

There was again a family reunion at the farm on Thanksgiving Day 1900 preceding the Saturday on which the killing occurred.<sup>54</sup> The court stated, "[s]o far as known, there was no difficulty between the parents on this day."<sup>55</sup> However, an abusive situation can peak on a holiday,<sup>56</sup> as it had for the Hossacks the prior Thanksgiving. On the night of the killing, the husband and wife were in bed together. She claimed she was awakened after midnight "by a noise such as would be made by striking two boards together."<sup>57</sup> She jumped out of bed, went to the sitting room and heard the door close. "Then, hearing groans

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47. West, *supra* note 7, at 233 (citing Angel, *supra* note 10). See also Bryan, *supra* note 7 (manuscript at 58, 74-76).

48. *Hossack*, 89 N.W. at 1078.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. Police departments and women's shelters report an increase in woman abuse on holidays. See Christine Laue, *Holidays Worsen Domestic Violence, Stress Exacerbates Existing Tensions in Families*, WICHITA EAGLE, Jan. 2, 1994, at 1b; Frank Reeves, *A Season for Family Violence*, PHILA. INQUIRER, Dec. 25, 1988, at M3.

57. *Hossack*, 89 N.W. at 1078.

or strange sounds from her husband, she called the children . . . .<sup>58</sup> They entered the bedroom and found him dead.

Although the Iowa Supreme Court's rendition of the facts indicates that it understood it was dealing with an abusive husband and an abused wife and family, most of its statement of law is unrelated to abuse. Motive was the major issue in the case: the court found error in the trial court's refusal to give the wife's requested instruction on motive, but it did not discuss the requested instruction;<sup>59</sup> the court found no error in the instruction regarding the feelings between husband and wife, but did not discuss this instruction either.<sup>60</sup> The court reversed on the basis of improperly introduced evidence, ordering excluded from a retrial three photographs of the body, three hairs from the ax and the expert testimony regarding them.<sup>61</sup>

After filing her last stories in the case, Susan Glaspell abandoned journalism and turned to writing fiction.<sup>62</sup> She may never have learned that the original conviction was reversed and that the retrial of Mrs. Hossack resulted in a hung jury.<sup>63</sup> In 1902 she did graduate work at the University of Chicago and "was stimulated by the intellectual and artistic ferment of the Chicago Renaissance."<sup>64</sup> She then returned to Davenport where she met George Cram Cook, Jig, her future husband. In 1907 she used her royalties to travel in Europe and live in Paris. She then settled in New York City, where she was followed by Jig, described as a "flamboyant bohemian," who tried business, farming, play writing, acting and producing.<sup>65</sup> Susan Glaspell married George Cram Cook in 1913 and thereafter spent summers in Provincetown, Massachusetts and winters in New York City's Greenwich Village.<sup>66</sup> She mixed with major literary figures and dealt with the leading political issues of the day.<sup>67</sup> She was one of the founders of Heterodoxy, a New York feminist organization.<sup>68</sup> Her friend, Ruth Hale, founded the Lucy Stone League, an organization dedicated to the importance of women using

58. *Id.* at 1079.

59. *Id.* at 1080.

60. *Id.* at 1081.

61. *Id.* at 1079-81.

62. Ben-Zvi, *Genesis of Trifles*, *supra* note 6, at 151.

63. *Id.* at 151-52.

64. Elaine Showalter, *Common Threads*, in *SISTER'S CHOICE: TRADITION AND CHANGE IN AMERICAN WOMEN'S WRITING* 181 (Elaine Showalter ed., 1991).

65. Rabkin, *supra* note 6, at viii-x.

66. WATERMAN, *supra* note 6, at 45-48, 52, 57-58.

67. Ben-Zvi, *Genesis of Trifles*, *supra* note 6, at 160-61.

68. *Id.* at 160.

their birth names.<sup>69</sup> Women's suffrage was the major feminist issue of the day, and women's jury service was closely related to it.

In 1915, Susan Glaspell and her husband founded the Provincetown Players as a vehicle for themselves and their literary friends,<sup>70</sup> who included, among others, Theodore Dreiser, Edna Ferber, Edna St. Vincent Millay, Eugene O'Neill, John Reed, and Wilbur Daniel Steele.<sup>71</sup> "In the seven years of their existence the Provincetown Players produced ninety-four plays by forty-eight authors," fifteen by Eugene O'Neill and eleven by Susan Glaspell.<sup>72</sup> Eugene O'Neill's *Bound East for Cardiff* and Susan Glaspell's *Trifles* were produced in 1916, the second season of the Provincetown Players.<sup>73</sup> Her story adaptation, *A Jury of Her Peers*, appeared in *Every Week* in 1916 and in *Best American Short Stories of 1917*.<sup>74</sup>

*A Jury of Her Peers* was the culmination of a growth process that Susan Glaspell underwent, beginning with the trial on which she reported as a young woman in 1901. By 1916, she was a well published author who had lived in major centers of American and European culture. She had a depth of understanding of feminism and woman abuse that was absent from her early newspaper reports on the *Hossack* case.<sup>75</sup> The short story was a critique of law and the legal system by a politically aware and activist woman of 1916. The viewer of *Trifles* or the reader of *A Jury of Her Peers* is forced to take the perspective of outsiders. The stories not only center on women characters but also connects their different views of facts and law to their final judgment.

Susan Glaspell's use of literature to highlight legal wrongs against an outsider group is part of a historic tradition of using literature to elucidate the law's deficiencies. Aristotle in his *Rhetoric*<sup>76</sup> cited Sophocles' *Antigone*<sup>77</sup> as a powerful statement of

69. *Id.* at 156 n.28. Lucy Stone edited the *Woman's Journal*, a feminist newspaper that exposed the plight of abused women and advocated legislative changes on behalf of abused women. ELIZABETH PLECK, DOMESTIC TYRANNY—THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT 102-03 (1987).

70. WATERMAN, *supra* note 6, at 57-58.

71. *Id.* at 52.

72. Gerhard Bach, *Susan Glaspell—Provincetown Playwright*, 4 THE GREAT LAKES REV.: A JOURNAL OF MIDWEST CULTURE, Winter 1978, at 1, 31-34.

73. McGovern, *supra* note 6, at 269.

74. BEST SHORT STORIES, *supra* note 2, at 256.

75. Ben-Zvi, *Genesis of Trifles*, *supra* note 6, at 160.

76. ARISTOTLE, *supra* note 5, at 125.

77. SOPHOCLES, *supra* note 5, at 312.

the difference between positive law and justice, between law and equity, between the viewpoint of a man in power, Creon, and a woman out of power, Antigone. Positive law is declared by an entity with the political power to make law, but such law is not necessarily just. The King, Creon, decreed that no traitor should be buried.<sup>78</sup> His niece, Antigone, insisted on following traditional religious law to provide proper burial rites for her brother.<sup>79</sup> In their conflict, Creon consistently defended his power by using the Greek word, ΝΟΜΟΣ, meaning positive law.<sup>80</sup> Antigone used ΔΙΚΗ, meaning just law, or ΝΟΜΙΜΑ, meaning traditional religious laws.<sup>81</sup> Classical Greek literature, whose study fascinated Susan Glaspell's husband, had an enormous influence on *A Jury of Her Peers*.<sup>82</sup>

Literature set the theme of the earliest article on woman abuse in an American law review.<sup>83</sup> In 1891, Irving Browne used Shakespeare's *Taming of the Shrew* and *Othello* to articulate English law on the relationship between husband and wife and to condemn woman abuse. In *Taming of the Shrew*, Petruchio says to his wife Katherine:

I will be master of what is my own;  
She is my goods, my chattels; she is my house,  
My household stuff, my field, my barn,  
My horse, my ox, my ass, my any thing.<sup>84</sup>

The housebroken Kathryn concedes:

Thy husband is thy lord, thy life, thy keeper,  
Thy head, thy sovereign;  
Such duty as the subject owes the prince,  
Even such a woman oweth to her husband.<sup>85</sup>

However, when Petruchio threatens to strike Kathryn, she says, "[i]f you strike me, you are no gentleman."<sup>86</sup> Browne pointed out that Petruchio, although he beat nearly everyone else, never laid

78. *Id.* at 319.

79. *Id.* at 347.

80. *Id.* at 349.

81. *Id.*

82. See *infra* notes 403-13 and accompanying text.

83. Irving Browne, *Wife-Beating and Imprisonment*, 25 Am. L. Rev. 551 (1891).

84. *Id.* at 553 (quoting WILLIAM SHAKESPEARE, *THE TAMING OF THE SHREW*, act 3, sc. 2, 11, 226-28 (Peter Alexander ed., 1952)).

85. *Id.* (quoting WILLIAM SHAKESPEARE, *THE TAMING OF THE SHREW*, act 5, sc. 2, 11, 146-47, 155-56).

86. *Id.* (quoting WILLIAM SHAKESPEARE, *THE TAMING OF THE SHREW*, act 2, sc. 1, 1, 219).

a hand on Kathryn.<sup>87</sup>

Analyzing *Othello*, Browne noted the shocked reaction of the characters to the report that Othello had struck Desdemona. He cited a critic, saying, "[t]his is simply the rage of the coward; [the smothering] is an act of supposed justice."<sup>88</sup> This latter statement raises the tie between woman abuse and the traditional common law doctrine that adultery on the part of the wife provides provocation to reduce murder to manslaughter, if not to justify a husband's killing completely. The only tragedy for Othello seems to be that he got it wrong.

## II. THE FIRST WAVE OF FEMINISM: HISTORY AND PHILOSOPHY

To appreciate *A Jury of Her Peers* it is necessary to understand the time in which Susan Glaspell lived and worked. The American women's movement had a first wave, dating from the mid-Nineteenth Century through the passage of the Nineteenth Amendment which gave women the right to vote in 1920, and a second wave starting in the 1960s.<sup>89</sup> Both waves were concerned about woman abuse.<sup>90</sup>

The first wave grew out of the Abolitionist Movement and adapted its rhetoric to equal rights for women.<sup>91</sup> It began at the 1840 anti-slavery convention in London when Lucretia Mott and Elizabeth Cady Stanton were denied delegate status and relegated to the balcony.<sup>92</sup> American feminists drew comparisons between abused wives and female slaves who were beaten and argued that the status of the married woman "under the Common Law, was nearly as degraded as that of the slave on the Southern plantation."<sup>93</sup> The Seneca Falls Declaration of 1848, the first wave's Declaration of Independence, stated that women were de-

87. *Id.*

88. *Id.*

89. MARY BECKER ET AL., *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 1 (1994).

90. Nan Oppenlander, *The Evolution of Law and Wife Abuse*, 3 *LAW & POL'Y Q.* 382 (1981).

91. BECKER ET AL., *supra* note 89, at 10-11; Oppenlander, *supra* note 90, at 390-91.

92. BECKER ET AL., *supra* note 89, at 1-2.

93. Nina Morais, Note, *Sex Discrimination and the Fourteenth Amendment: Lost History*, 97 *YALE L.J.* 1153, 1161 n.36 (1988) (quoting *THE CONCISE HISTORY OF WOMEN'S SUFFRAGE* 6 (Mari Jo & Paul Buhle eds., 1978)). John Stuart Mill in *The Subjection of Women* went even further when condemning marital rape, stating, "[A] female slave has (in Christian countries) an admitted right . . . to refuse to her master the last familiarity. Not so the wife . . ." Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 *YALE J.L. & FEMINISM* 207, 207 n.4 (1992) (quoting JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 32 (1869)).

prived of their "inalienable right to the elective franchise [and compelled] to submit to laws, in the formation of which [they] had no voice."<sup>94</sup> Among those laws, the Declaration specifically condemned the marriage contract in which a woman was "compelled to promise obedience to her husband [who had the power] to administer chastisement."<sup>95</sup> Chastisement was a euphemism for marital assault. In 1854, Elizabeth Cady Stanton addressed the Joint Judiciary Committee of the New York Legislature on the specific issue of wife abuse.<sup>96</sup>

The period from 1870 to 1890 represented a high point of interest in violence against women,<sup>97</sup> receiving particular attention in Chicago, the city where Susan Glaspell did her graduate work, and Boston, the capital of the state where she produced *Trifles*. The Protective Agency for Women and Children, founded in Chicago in 1885, was the major Nineteenth Century organization aiding female victims of violence.<sup>98</sup> It provided legal aid and monitored courtrooms to assure fair treatment of victims; it provided financial assistance to help battered women secure property held in their husbands' names.<sup>99</sup> The agency referred homeless abused women to a shelter operated by the Women's Club of Chicago.<sup>100</sup> In Boston, *The Women's Journal* was published by Lucy Stone.<sup>101</sup> In 1876, she started reporting a weekly list of crimes against women, highlighting wife beating and wife murder.<sup>102</sup> Noting that horses and dogs received more protection than abused wives, she called for protective legislation.<sup>103</sup>

94. THE DECLARATION OF SENTIMENTS ¶¶ 4-5 (1848), reprinted in BECKER ET AL., *supra* note 89, at 3. Approximately 300 women and men attended the Seneca Falls convention. No African American women attended. Madelyn C. Squire, *Discovering Our Connections: Reflections on Race, Gender and the Other Tales of Difference*, 23 GOLDEN GATE U. L. REV. 795, 802 (1993). The first national convention on women's rights was held in 1850. Sojourner Truth was the only African American woman present. At the 1851 convention she gave her famous "Ain't I A Woman" speech. *Id.* at 802-03.

95. THE DECLARATION OF SENTIMENTS ¶ 10 (1848), reprinted in BECKER ET AL., *supra* note 89, at 4.

96. Oppenlander, *supra* note 90, at 393.

97. PLECK, *supra* note 69, at 88-89.

98. *Id.* at 95.

99. *Id.* at 96. "In these respects, [the agency] resembled the Society for the Protection of Women and Children from Aggravated Assaults founded in England some thirty years earlier." *Id.*

100. *Id.*

101. *Id.* at 101-02.

102. *Id.* at 102.

103. *Id.* at 102-03. Aware of developments in Great Britain, Lucy Stone noted that wife beating "occurred in every country and was increasing in the United States. Boston police statistics indicated that there were five hundred arrests for wife beating every year." *Id.* at 104. Stone believed that giving women the vote could reduce wife beating.

Attacks on woman abuse took multiple forms,<sup>104</sup> including major changes in the law: reforming the civil law to allow an abused wife to legally gain her freedom from her abuser through divorce;<sup>105</sup> reforming the criminal law to eliminate "the rule of thumb"—the legal right of a husband to beat his wife with a rod no thicker than his thumb;<sup>106</sup> passing the Married Women's Property Acts to allow married women to hold property and to sue and be sued in their own right;<sup>107</sup> introducing Prohibition to eliminate wife beating attributed to drunkenness;<sup>108</sup> and, most importantly, gaining the right to vote, the symbol of full political equality that would empower women and allow them to address those problems that concerned them most, including abuse.

Both the vote and jury service are political rights that allow participation in the law-making and law-applying processes of our society. The link between the two was made clear in 1872 when Susan B. Anthony and fourteen other women voted in Rochester, New York, but then were charged and tried before a male judge and an all-male jury for violating a provision of the 1870 Civil Rights Act designed to protect African American males.<sup>109</sup> Susan B. Anthony denounced the all-male legal system that convicted her of a crime for voting and denied her a jury of

*Id.* at 106.

104. Oppenlander, *supra* note 90, at 394-400.

105. *Id.* at 393.

106. The English law of legalized wife beating was transplanted to America through Blackstone's reference to the doctrine of moderate chastisement. "For, as [the husband] is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 444 (Univ. Chi. Press 1979) (1850).

Moderation was encapsulated in the "rule of thumb," the right of a husband to beat his wife with a rod no thicker than his thumb. See generally Oppenlander, *supra* note 90, at 387 (discussing rule of thumb and subsequent rulings by American courts which allowed husbands to beat wives without fear of prosecution); Beirne Stedman, *Right of Husband to Chastise Wife*, 3 VA. L. REG. 241, 243-46 (1917) (discussing early American courts' recognition of husband's right to beat wife but concluding that as of 1917 rule was disapproved); cf. *The Right to Beat One's Wife*, 59 ALBANY L.J. 388, 388-89 (1899). But see Henry A. Kelly, *Rule of Thumb and the Folklaw of the Husband's Stick*, 44 J. LEGAL EDUC. 341, 364 (1994) (concluding that rule of thumb was no longer law in England by Blackstone's time and that early American cases miscited him).

107. See generally Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983).

108. LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE 254, 264-66 (1988); PLECK, *supra* note 69, at 98; Oppenlander, *supra* note 90, at 391.

109. BECKER ET AL., *supra* note 89, at 10-11.

her peers.<sup>110</sup>

Women were formally denied the opportunity to participate in the centennial celebration of American independence in Philadelphia on July 4, 1876.<sup>111</sup> The National Woman Suffrage Association protested by parading with the Declaration of Rights of Women. Susan B. Anthony read the section that included women's right to jury service:

The right of trial by jury of one's peers was so jealously guarded that States refused to ratify the original constitution until it was guaranteed by the [S]ixth [A]mendment. And yet the women of this nation have never been allowed a jury of their peers—being tried in all cases by men, native and foreign, educated and ignorant, virtuous and vicious. Young girls have been arraigned in our courts for the crime of infanticide; tried, convicted, hanged—victims, perchance, of judge, jurors, advocates—while no woman's voice could be heard in their defense.<sup>112</sup>

The idea that one is entitled to a jury of one's peers comes from Magna Carta<sup>113</sup> and is guaranteed by our Constitution.<sup>114</sup> Jury service allows participation in our political process by individuals, and, through those individuals, by the groups from which they emerged. Individuals have the opportunity to be tried by those who are their peers, by those who share, or have some understanding of, their realities and beliefs.<sup>115</sup> Juries made up of ordinary people protect ordinary people from governmental overreaching. Alexis DeTocqueville observed in 1835 that the American jury is "as direct and as extreme a consequence of the sovereignty of the people as universal suffrage."<sup>116</sup> He believed that "the list of citizens qualified to serve on juries must in-

110. *Id.* at 11.

111. THE CONCISE HISTORY OF WOMAN SUFFRAGE 297-300 (Mari Jo & Paul Buhle eds., 1978).

112. *Id.* at 301 (quoting DECLARATION OF RIGHTS FOR WOMEN).

113. JAMES C. HOLT, MAGNA CARTA 75-77 (2d ed. 1992).

114. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." U.S. CONST. amend. V; "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ." U.S. CONST. amend. VI; "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, . . ." U.S. CONST. amend. VII; see Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183 (1991) (emphasizing how framers of Bill of Rights saw jury as key safeguard to protect ordinary individuals against government).

115. See Richard Lacayo, *Whose Peers?*, TIME, Sept. 22, 1993, at 60; see also Mark Hansen, *Different Jury, Different Verdict?*, A.B.A. J., Aug. 1992, at 54, 56.

116. Amar, *supra* note 114, at 1185 (quoting ALEXIS DETOCQUEVILLE, DEMOCRACY IN AMERICA 293-94 (J.P. Mayer ed. & George Lawrence trans., 1969) [hereinafter DETOCQUEVILLE]).

crease and diminish with the list of electors."<sup>117</sup>

Jury service ensures participation in our law-making processes on multiple levels. It exposes individuals to the law applicable to criminal and civil cases and allows them to know and question its appropriateness. It empowers individuals to participate in the application of the law within our third branch of government, the judicial branch. It allows individuals to make law through the concept of reasonableness, which runs throughout our law, including our homicide law.

The standard of reasonable conduct is determined from the viewpoint of the reasonable person. Since each of us believes s/he is the reasonable person, jury service enables us to apply our values to determine whether conduct is legal or not. Jurors tell each other stories during their deliberations. To reach a unanimous verdict, normally all jurors must be convinced of one point of view. When there are diverse viewpoints, jurors have to work at listening to and hearing each other in order to reach a unanimous verdict. If diversity does not exist in the jury room, important stories will not be told and heard. Those who serve as jurors spread the knowledge of different stories within the jury room and within society when they return and, in turn, tell their stories of jury service to their friends and relatives.<sup>118</sup>

A jury can also engage in law-making through jury nullification when the law as explained by a trial judge does not comport with the jurors' moral beliefs.<sup>119</sup> Jurors can simply acquit in spite of evidence supporting a conviction. Jury nullification rarely occurs in practice and is not sanctioned by law. However, constitutional theorists of the late Eighteenth and Nineteenth Centuries argued that a jury could lawfully refuse to convict a defendant charged under any law it deemed unconstitutional.<sup>120</sup> Susan Glaspell's women engaged in jury nullification by making a trial of Minnie Foster Wright impossible.

The Supreme Court's denial of the vote to women in *Minor v. Happersett*<sup>121</sup> in 1874 mobilized the Suffrage Movement. After winning the vote in a number of states, suffrage was finally achieved nationally when the Nineteenth Amendment was rati-

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117. Amar, *supra* note 114, at 1188 (quoting DeTocqueville, *supra* note 116, at 293).

118. See *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); see also Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 774 (1992); Note, *Beyond Batson: Eliminating Gender-Based Peremptory Challenges*, 105 HARV. L. REV. 1920, 1930-31 (1992).

119. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, *CRIMINAL LAW* 19-20 (2d ed. 1986).

120. Amar, *supra* note 114, at 1191-95.

121. 88 U.S. (21 Wall.) 162 (1874).

fied in 1920. The debates surrounding the passage of the Nineteenth Amendment made it clear that the amendment meant more to the Suffrage Movement than the actual right to vote; it was viewed as an equal rights amendment meant to ensure women's full equality in all political processes, including jury service.<sup>122</sup> The debates provided the context and rhetoric to which Susan Glaspell responded with *A Jury of Her Peers*.

Two philosophical debates influenced the struggle for women's rights during both the first and second waves of feminism: one is whether the world can be divided into a personal, private sphere and an opposing political, public sphere; the other is whether equality is defined by sameness or differences.

The personal, private sphere has, for our society and others, included home, marriage, and family.<sup>123</sup> A defined zone of privacy is beyond the control of the state and governed by pre-existing power relationships.<sup>124</sup> However, political choices determine whether to allow a zone of privacy and, if so, how to define it.<sup>125</sup> Matters important to women—our homes, our children, our families, our marriages—have been defined as personal, private and beyond the control of the state.<sup>126</sup> Abuse in the personal, private sphere was left to the inequitable physical, economic, and political realities of women's lives.<sup>127</sup>

Laws excluded women from the public sphere by denying the right to participate in government.<sup>128</sup> Laws denied us the right to economic independence by prohibiting us from having an occupation or profession, holding property or maintaining a legal status independent of our fathers or husbands. In most families, women still take primary responsibility for raising children, nursing the ill or elderly and performing other unpaid ser-

122. See Note, *Constitutionality Under the Fourteenth Amendment and the Proposed Nineteenth Amendment of State Laws Limiting Jury Service to Male Citizens*, 6 VA. L. REV. 589 (1920), reprinted in 6 VA. L. REG. 635 (1921).

123. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 32-33, 93-102 (1987).

124. See Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1, 22 (1992).

125. Professor Catharine MacKinnon coined the slogan, "the personal is political." MACKINNON, *supra* note 123, at 100; see also Jane Maslow Cohen, *Private Violence and Public Obligation: The Fulcrum of Reason*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 349 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) [hereinafter *PUBLIC NATURE OF PRIVATE VIOLENCE*].

126. See Elizabeth M. Schneider, *The Violence of Privacy*, in *PUBLIC NATURE OF PRIVATE VIOLENCE*, *supra* note 125, at 36; *infra* notes 418-32 and accompanying text (discussing ancient Greek concepts of women's private and men's public spheres).

127. Laura W. Stein, *Living with the Risk of Backfire: A Response to the Feminist Critiques of Privacy and Equality*, 77 MINN. L. REV. 1153, 1162 (1993).

128. Gavison, *supra* note 124, at 22.

VICES in the home.<sup>129</sup> Labeling such activities as personal and private perpetuates injustice and forces "individual adjustments within the status quo."<sup>130</sup> Abuse within the home is not just the individual tragedy of one woman but also a world-wide epidemic.

The debate on the nature of equality has focused on whether we should have an equality of sameness or an equality of differences.<sup>131</sup> We can and should have both; differences do not necessarily create problems or justify negative treatment. Like the readers of Susan Glaspell's *A Jury of Her Peers*, we must broaden our perceptions to appreciate diversity by understanding that bread is made up of different but equally important ingredients; that half-done things are incomplete.<sup>132</sup> Appreciation of different but equally valuable qualities does not grow out of or result in bias but rather reflects fairness and justice.

In a related vein, lawyers and judges must supplement claims of rights with a recognition of responsibilities.<sup>133</sup> It has been said that women "are 'essentially connected,' not 'essentially separate' from the rest of human life."<sup>134</sup> But all of our lives are relational, not autonomous. Law must acknowledge the multiple ways in which people are affirmatively responsible to each other. Community and interconnection must be quilted together with privacy.<sup>135</sup> These major political and philosophical debates underlie *A Jury of Her Peers* and the context in which the story was written.

129. *Id.*

130. *Id.* at 20; see also Stein, *supra* note 127, at 1162-63.

131. See Martha L. A. Fineman, *Feminist Theory and Law*, 18 HARV. J.L. & PUB. POL'Y 349, 351 (1995); Susan P. Sturm, *Sameness and Subordination: The Dangers of a Universal Solution*, 143 U. PA. L. REV. 201, 219 (1994) (commenting on Robert A. Burt, *Judges, Behavioral Scientists, and the Demands of Humanity*, 143 U. PA. L. REV. 179 (1994)).

132. See, e.g., Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1164, 1166 (1986). See generally Ellen S. Podgor & Leonard D. Pertnoy, *Bias v. Difference: An Analysis for Those Who Just Don't Get It*, 54 ALB. L. REV. 413 (1990).

Robin West has argued,

Women are in fact the same as—and therefore equal to—men, in the only sense that should matter to liberal legal theory. Women, like men, are autonomous individuals who, if free to do so, will choose among proffered alternatives so as to fashion their own 'good life' and thereby create social value.

WEST, *supra* note 15, at 181.

133. Finley, *supra* note 132, at 1171.

134. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3 (1988). See generally Pamela S. Karlan & Daniel R. Ortiz, *In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 862 (1993).

135. See Karlan & Ortiz, *supra* note 134, at 894.

## III. THE STORY—"FICTION"

Susan Glaspell's *A Jury of Her Peers* has a reality that the court missed in its report of the actual case which inspired her.<sup>136</sup> She refined the fictional case of an abused woman who kills her abuser until it became the most dramatic and most legally difficult situation: The wife was emotionally abused but not obviously physically abused; she killed her sleeping husband sometime after the specific abusive incident took place; she killed by a means—strangulation with a knotted rope—considered difficult and abnormal for a woman, especially since there was a loaded gun in the house.

The trial in Susan Glaspell's story takes place in the abused woman's kitchen. The women form the jury and also serve as investigators, prosecutors and defense counsel. Women, both the women in the story and the women in the audience, come to the story with a different database than men, both the men in the story and the men in the audience. Women's facts of life are different from those of men. The women can walk into another woman's kitchen and know things about her life, because they have a "look of seeing into things, of seeing through a thing to something else . . . ."<sup>137</sup>

Different views are inherent in dialogue.<sup>138</sup> Susan Glaspell uses dialogue powerfully to express the different views of the sexes and of characters of the same sex. Sophocles in *Antigone*,<sup>139</sup> Aristophanes in *Lysistrata*<sup>140</sup> and Euripides in *The Trojan Women*<sup>141</sup> similarly used dialogue. It has been said that Susan Glaspell's recognition of the connection between language and reality put her at the forefront of "contemporary feminist critics who see language at the heart of any possible realignment of the sexes."<sup>142</sup> Until women's reality has a name its existence is

136. The case Susan Glaspell reported was *State v. Hossack*, 89 N.W. 1077 (Iowa 1902). See *supra* notes 33-61 and accompanying text (discussing the *Hossack* case).

137. *A Jury of Her Peers*, *supra* note 2, at 294.

138. Dialogue in literature is "a compromise of the speaker's intentions, being as it is not entirely a representation to oneself, but must make its way in the world of discourse already inhabited by others." Scheppele, *supra* note 20, at 1021.

139. SOPHOCLES, *supra* note 5.

140. ARISTOPHANES, *supra* note 11, at 809.

141. EURIPIDES, *THE TROJAN WOMEN* (415 B.C.E.) reprinted in *COMPLETE GREEK DRAMA: VOL. I*, *supra* note 11, at 959.

142. Ben-Zvi, *Women Playwrights*, *supra* note 6, at 157.

The leaders of the first wave of American feminism were aware of the importance of language. "In the early part of this century, modernist women writers like Virginia Woolf and Dorothy Richardson debated the question of the 'woman's sentence,' searching for a literary language that would fit the female ex-

deniable. Sexual harassment always existed but was not recognized by society until named;<sup>143</sup> so also with woman abuse, marital rape, stalking, and separation attack.

Susan Glaspell's women have trouble finding words to convey their realities. For much of the story they are silent, and communicate through looks and pauses. They are confined in the kitchen, "the quintessential 'woman's room'"<sup>144</sup> while the men are free to explore the farm, the house and its grounds. Yet, the men are trapped by limited and rigid notions that force them to seek evidence primarily at the scene of the killing: the bedroom. They fail to find what they consider most important: motive. The women find motive while acting in their normal way in their normal room: the kitchen. Their discovery of evidence of motive and their agreement to destroy it are conveyed in silence.

Women's realities are not the legal or societal norms because they are closed out of the law-making bodies of society. Women's realities are "queer,"<sup>145</sup> a word constantly repeated in the story and used in the sense of strange when viewed from the dominant male perspective.<sup>146</sup> To the men, the wife suspected of killing her husband "looked—queer."<sup>147</sup> Women's tasks, perceptions, concerns, and values, which are critical to an understanding of the story, are defined and denigrated by the men as "trifles."<sup>148</sup>

There are seven characters in Susan Glaspell's story. The two principal ones never appear: The accused, Minnie Foster Wright, is in jail, and her husband, John Wright, is dead. On stage are Martha Hale and her husband, Lewis Hale, who discovered the body; Mrs. Peters, also referred to as the sheriff's wife, and her husband, Henry Peters, the sheriff; and George Henderson, the county attorney.

Susan Glaspell effectively uses names to convey multiple

perience they sought to express."

DEBORAH CAMERON, FEMINISM AND LINGUISTIC THEORY 1 (1992).

143. See generally WEST, *supra* note 15, at 179-80 (discussing how women's suffering is different from men's and is often "dismissed as trivial"); Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1227 (1994) (describing how phrase "sexual harassment" emerged).

144. POSNER, *supra* note 7, at 113.

145. *A Jury of Her Peers*, *supra* note 2, at 282, 284, 296, 302-03.

146. THE ENCYCLOPAEDIC DICTIONARY 3849 (1898) (defining queer as "strange").

147. *A Jury of Her Peers*, *supra* note 2, at 284.

148. See THE OXFORD ENGLISH DICTIONARY 522 (2d. ed. 1989) (defining a trifle as "[a] matter of little value or importance").

symbolic identities.<sup>149</sup> The men identify the women only through their relationship to particular men: they are Mrs. Hale, Mrs. Peters, and Mrs. Wright. As her story and characters develop, the accused wife evolves from Mrs. Wright, to Minnie Wright (a play on words),<sup>150</sup> to Minnie Foster Wright, to Minnie Foster, her birth name. Martha Hale's independence is marked by the use of her full name when she is introduced as the first character in the story who also sets the stage for the development of the story. We never learn the first name of the most conventional female character, Mrs. Peters, the sheriff's wife, although she also develops a feminist perspective as she increasingly identifies with Martha Hale and Minnie Foster Wright.

Susan Glaspell invented names and played with them in a manner similar to Aristophanes. Just as Aristophanes created the name of his protagonist, *Lysistrata*, *Unraveler of Armies*,<sup>151</sup> so too did Susan Glaspell create the names Minnie Foster Wright and John Wright. Minnie was a popular name of the time,<sup>152</sup> whose origin was the German for love.<sup>153</sup> The German Minnesingers of the Twelfth and Thirteenth Centuries, like their troubadour counterparts in France, sang of courtly love.<sup>154</sup> Minnie's birth name, Foster, connotes that she was fostered or nursed by her parents. Wright is a play on Mr. Right, whom Minnie Foster married in hopes of becoming Mrs. Right. In actuality, she becomes Mini or Minor Right. John is among the most common of names and was probably chosen by Susan Glaspell to remind us of the widespread nature of woman abuse. John Doe, a kind of Everyman, is used in legal documents when a man's name is unknown.<sup>155</sup>

Martha Hale, the first character introduced in the short story, is also its hero. Hale means hero,<sup>156</sup> but also sound and

149. Ben-Zvi, *Genesis of Trifles*, *supra* note 6, at 156.

150. *Id.* at 153-54.

151. THE OXFORD COMPANION TO CLASSICAL LITERATURE 338 (M.C. Howatson ed., 2d ed. 1989). See *infra* notes 439-51 and accompanying text (discussing Aristophanes' use of names).

152. LESLIE ALAN DUNKLING, *FIRST NAMES FIRST* 121, 125 (1977).

153. Karen Alkalay-Gut, *Murder and Marriage: Another Look at Trifles*, in SUSAN GLASPELL: ESSAYS ON HER THEATER AND FICTION 71, 72 (Linda Ben-Zvi ed., 1995); see generally *infra* note 442 and accompanying text (discussing possible reference to Minerva, Roman name for Athena).

154. ERIC PARTRIDGE, *NAME THIS CHILD: A DICTIONARY OF ENGLISH AND AMERICAN CHRISTIAN NAMES* 152 (1936) (quoting HELENA SWAN, *GIRLS' CHRISTIAN NAMES: THEIR HISTORY, MEANING AND ASSOCIATION* 403 (1900)).

155. ELOISE LAMBERT & MARIO PEI, *OUR NAMES: WHERE THEY CAME FROM AND WHAT THEY MEAN* 43 (1961).

156. PATRICK HANKS & FLAVIA HODGES, *A DICTIONARY OF SURNAMES* 235 (1988); It is

healthy and, as a verb, to pull forcibly or drag.<sup>157</sup> The name Martha recalls the sister of Lazarus who was concerned with domestic tasks.<sup>158</sup> All of these describe Martha Hale whose sound and healthy feminist approach to domestic life drags Mrs. Peters into a conspiracy to support Minnie Foster Wright.

The name Peters derives from the Greek ΠΕΤΡΟΣ, meaning rock, and is associated with solidarity. St. Peter was the rock on which Christianity was founded. The sheriff, Henry Peters, is charged with upholding society's traditional values. His first name Henry is also associated with solidarity.<sup>159</sup> George Henderson, the county attorney, is the other public official charged with upholding society's traditional values. Henderson means son of Henry, tying the county attorney directly to the sheriff.<sup>160</sup>

There are repeated images in the story of things half-done, of isolation, of abuse. The short story opens with Martha Hale in her own kitchen with "her bread all ready for mixing, half the flour sifted and half unsifted."<sup>161</sup> The things half-done, "[t]hings begun—and not finished,"<sup>162</sup> are metaphors for the incomplete nature of our law and culture that does not appreciate the different but equally valuable viewpoints and contributions of women and men.<sup>163</sup> Susan Glaspell's story demonstrates the value of diversity and the need to foster communication and cooperation among those with different viewpoints<sup>164</sup>—not to replace patriarchy with matriarchy, but to replace isolation with connection.

A sense of isolation permeates as Susan Glaspell describes

a convention of Aristophanic comedy that the first character to appear and speak is the hero. Douglas S. Olson, *Names and Naming in Aristophanic Comedy*, in 42 CLASSICAL Q. 304, 305 n.12 (1992).

157. WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 607 (Victoria Neufeldt ed., 1988).

158. THE BIBLE COMPANION: A COMPLETE PICTORIAL AND REFERENCE GUIDE TO THE PEOPLE, PLACES, EVENTS, BACKGROUND, AND FAITH OF THE BIBLE 257 (William Neil ed., 1960).

159. CHRISTOPHER P. ANDERSON, THE NAME GAME 164 (1977).

160. GEORGE F. BLACK, THE SURNAMES OF SCOTLAND: THEIR ORIGIN, MEANING, AND HISTORY 353 (1946). The name George is associated with oppressiveness. ANDERSON, *supra* note 159, at 163.

161. *A Jury of Her Peers*, *supra* note 2, at 279.

162. *Id.* at 293. There are many examples of half-finished things. "Her eye was caught by a dish towel in the middle of the kitchen table . . . One-half of it was wiped clean, the other half messy. Her eyes [turned] to the bucket of sugar and the half empty bag beside it." *Id.*

163. See Camilleri, *supra* note 7, at 582.

164. *Id.* at 585.

the "lonesome stretch of road"<sup>165</sup> leading to the "lonesome-looking place"<sup>166</sup> that is John Wright's farmhouse. Lewis Hale tells of his discovery of the body when he went to see whether John Wright would be willing to share expenses for a telephone, a form of communication that would ease the isolation of farm wives.<sup>167</sup> Our first knowledge of the strained relationship between John and Minnie Wright comes from Mr. Hale, who says John Wright had refused a telephone before and did not talk much himself.<sup>168</sup> Later in the story, Martha Hale describes Mr. Wright as "close."<sup>169</sup> Mrs. Peters reports, "They say he was a good man."<sup>170</sup> Martha Hale qualifies, "He didn't drink, and kept his word as well as most, I guess, and paid his debts. But he was a hard man . . ."<sup>171</sup> The traditional definition of a "good man" was not affected by whether that man abused his wife—a purely private and personal matter.<sup>172</sup>

When Lewis Hale strays in describing his discovery of the dead John Wright by adding, "I didn't know as what his wife wanted made much difference to John. . .,"<sup>173</sup> he is limited by the county attorney to "just what happened."<sup>174</sup> Such an attitude was displayed later in this century by another symbol of law and order, the television character Sergeant Joe Friday, who limited women with "Just the facts, ma'am, just the facts."<sup>175</sup> But the county attorney's narrow view of the facts causes him to cut off a witness who would have shed light on motive—the key element in the case.<sup>176</sup>

Throughout the tale, the county attorney takes down evidence in a notebook with a pencil. The other characters realize

165. *A Jury of Her Peers*, *supra* note 2, at 283.

166. *Id.* at 280.

167. *Id.* at 282-83.

168. *Id.* at 283.

169. *Id.* at 291. A dictionary of the time defined close as "stingy" or "penurious". 2 THE CENTURY DICTIONARY AND CYCLOPEDIA 1054 (1913). See *infra* note 280 and accompanying text (discussing how abusive men often use money as a device to control abused women).

170. *A Jury of Her Peers*, *supra* note 2, at 298.

171. *Id.* at 299.

172. JUDITH FETTERLEY, *Reading About Reading: "A Jury of Her Peers," "The Murders in the Rue Morgue," and "The Yellow Wallpaper,"* in GENDER AND READING: ESSAYS ON READERS, TEXTS, AND CONTEXTS 147, 153 (Elizabeth A. Flynn & Patrocínio P. Schweickart eds., 1986).

173. *A Jury of Her Peers*, *supra* note 2, at 283.

174. *Id.*

175. See Kim Lane Scheppele, *Just the Facts Ma'am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. Sch. L. Rev. 123 (1992).

176. *A Jury of Her Peers*, *supra* note 2, at 289, 293.

that whatever was written down and preserved as evidence could be used against Minnie Wright. "Hale did speak guardedly, as if the pencil had affected him too."<sup>177</sup> Mr. Hale starts to describe Minnie Wright as looking "scared," but "[a]t [the] sound of a moving pencil" he changes his mind.<sup>178</sup> This may be a reference to one of the most famous verses of Omar Khayyám's *Rubáiyát*,<sup>179</sup> a work popular at that time.

The Moving Finger writes; and, having writ,  
 Moves on: nor all your Piety nor Wit  
 Shall lure it back to cancel half a Line,  
 Nor all your Tears wash out a Word of it.<sup>180</sup>

That Mr. Wright "died of a rope round his neck"<sup>181</sup> is clear; the method of killing is not clear. There are references to knotting the rope,<sup>182</sup> to "slippin' that rope under his neck,"<sup>183</sup> to "chok[ing] the life out of him,"<sup>184</sup> but the method of killing is described as "clumsy,"<sup>185</sup> as "strange."<sup>186</sup> In *Trifles*, it is described as a "funny way to kill a man, rigging it all up like that."<sup>187</sup> The sense one gets is of a legal execution by hanging; of choking the life out of John Wright in retribution for his symbolically choking the life out of Minnie Foster Wright. The hanging could have been accomplished by throwing a rope over a rafter, slipping the noose under his head, and then pulling him up to hang. This method would have provided the leverage for Minnie Wright to surprise John Wright and yet stay out of his reach.

The sheriff and county attorney are suspicious of Minnie Wright's story that she didn't wake up, because she was sleeping in bed with her husband when he was strangled.<sup>188</sup> She explained "but I was on the inside."<sup>189</sup> This is yet another reference to the position of women in society; on the inside is the personal, private sphere<sup>190</sup> as opposed to the political, public sphere.

177. *Id.* at 284.

178. *Id.* at 286.

179. OMAR KHAYYÁM, *THE RUBÁIYÁT OF OMAR KHAYYÁM*, (Edward Fitzgerald trans., Walter J. Black 5th ed. 1942) (1889).

180. *Id.* at 146.

181. *A Jury of Her Peers*, *supra* note 2, at 285.

182. *Id.* at 301, 306.

183. *Id.* at 293.

184. *Id.* at 302.

185. *Id.* at 304.

186. *Id.* at 293.

187. *Trifles*, *supra* note 1, at 268.

188. *A Jury of Her Peers*, *supra* note 2, at 286.

189. *Id.* at 285.

190. See Alkalay-Gut, *supra* note 153, at 74.

The women are inside the kitchen while the men look for a motive for the killing, "[s]omething to show anger—or sudden feeling,"<sup>191</sup> in the bedroom, the barn, and outside the house. They do not look carefully in the kitchen, dismissing it with, "[n]othing here but kitchen things."<sup>192</sup>

Both the men and women know that the two sexes operate differently, and they are uncertain of each other. The men disdain the women's concern for "trifles,"<sup>193</sup> for the tasks left undone. However, they sense that they might not have noticed something in the kitchen and worry about leaving the women there alone.<sup>194</sup> However, the sheriff contemptuously asks, "But would the women know a clue if they did come upon it?"<sup>195</sup> Even if they did, the county attorney describes Mrs. Peters, the sheriff's wife, as "one of us,"<sup>196</sup> as "married to the law."<sup>197</sup> As such, Mrs. Peters could be counted on to maintain the male value system and keep Martha Hale in line.

The women, left in the kitchen, wonder what prevented Minnie Foster Wright from finishing her tasks.<sup>198</sup> They have a growing awareness of abuse. However, in her role as sheriff's wife, Mrs. Peters says, "the law is the law."<sup>199</sup> Martha Hale responds, "[t]he law is the law—and a bad stove is a bad stove."<sup>200</sup> This exchange echoes Antigone's call for respect to a higher law, as opposed to the positive law of Creon.<sup>201</sup> In both cases man-made law does not encompass women's realities. The mundane, everyday essentials, the proper burial of the dead in one case and the preparation of food for the living in the other, are not adequately addressed or barely acknowledged by the law.

The women find that Minnie Foster Wright, when interrupted, was sewing quilt pieces.<sup>202</sup> The women quilt together the story of what really happened from bits and pieces, from trifles.<sup>203</sup> The women find one uneven quilt piece that looks "as if

191. *A Jury of Her Peers*, *supra* note 2, at 293.

192. *Id.* at 287.

193. "'Oh, well,' said Mrs. Hale's husband, with good natured superiority, 'women are used to worrying over trifles.'" *Id.*

194. *Id.* at 288-89.

195. *Id.* at 289.

196. *Id.*

197. *Id.* at 305.

198. *Id.* at 290.

199. *Id.* at 294.

200. *Id.*

201. See SOPHOCLES, *supra* note 5; see also POSNER, *supra* note 7, at 112 (comparing Antigone's natural law to Creon's positive law).

202. *A Jury of Her Peers*, *supra* note 2, at 294-95.

203. Ben-Zvi, *Genesis of Trifles*, *supra* note 6, at 153.

she didn't know what she was about!"<sup>204</sup> There is concern. "Their eyes met—something flashed to life, passed between them . . ."<sup>205</sup> An unstated conspiracy to destroy evidence is born. Martha Hale then pulls out stitches "that [are] not sewed very good,"<sup>206</sup> and proceeds to "replace bad sewing with good."<sup>207</sup>

The men dismiss the women's interest in the quilting as a trifle.<sup>208</sup> However, the women wonder about the final covering that was to be made from the quilt pieces and whether "she was going to quilt it or just knot it?"<sup>209</sup> This question leads the women to make the connection between the quilt and the method by which the husband was killed, strangulation with a knotted rope. The men never do.

Quilting and knotting, also called tying, are two different methods of holding the soft filler in place in the individual pieces that make up a quilt.<sup>210</sup> Quilting is a more artistic, but time-consuming, method of in-and-out stitching.<sup>211</sup> Knotting is a simple, quick, single stitch.<sup>212</sup> That Minnie Wright was going to knot rather than quilt the individual pieces is symbolic both of the joyless, spartan life Mr. Wright had forced on her and her method of killing him. The story ends with the county attorney facetiously asking about the quilt and Martha Hale responding that Minnie Foster Wright was going to "knot it, Mr. Henderson."<sup>213</sup>

The quilt was a log cabin design,<sup>214</sup> with a red patch<sup>215</sup> at the center symbolizing a lighted hearth and the surrounding strips the "logs" of the cabin.<sup>216</sup> From ancient times, the hearth was the exclusive domain of the woman of the house. But Minnie Wright's hearth was a cold, bad stove.<sup>217</sup>

The women find a bird cage with a broken door; it looks as

204. *A Jury of Her Peers*, *supra* note 2, at 295.

205. *Id.*

206. *Id.* at 296.

207. *Id.*

208. *Id.* at 295.

209. *Id.*

210. THELMA R. NEWMAN, *QUILTING, PATCHWORK, APPLIQUE, AND TRAPUNTO* 62, 74, 238 (1978).

211. CARTER HOUCK, *THE QUILT ENCYCLOPEDIA ILLUSTRATED* 131 (1991).

212. *Id.* See generally JUDY HOPKINS, *FIT TO BE TIED* (1990).

213. HOPKINS, *supra* note 212, at 306.

214. *A Jury of Her Peers*, *supra* note 2, at 294.

215. *Id.* at 299.

216. Elaine Hedges, *Small Things Reconsidered: A Jury of Her Peers*, in SUSAN GLASPELL: *ESSAYS ON HER THEATER AND FICTION* 49, 58, 64 (Linda Ben-Zvi ed., 1995).

217. *Id.* at 65.

if someone had been "rough with it."<sup>218</sup> The symbolism is again clear. Minnie Foster "was kind of like a bird herself."<sup>219</sup> She sang in the church choir as a young girl 20 years before,<sup>220</sup> but Mr. Wright had been rough with her, at least emotionally if not physically. When the women open her sewing basket to take her quilt pieces and sewing things to her in jail, they find a dead bird with a broken neck wrapped in a piece of silk inside a pretty box.<sup>221</sup> Martha Hale knew "Wright wouldn't like the bird . . . a thing that sang. She used to sing. He killed that too."<sup>222</sup>

There is an increasing sense of solidarity between the women; a recognition of shared experiences. "And then again the eyes of the two women met—this time clung together in a look of dawning comprehension, of growing horror. Mrs. Peters looked from the dead bird to the broken door of the cage. Again their eyes met."<sup>223</sup> Mrs. Peters recalls that when she was a girl a boy had killed her kitten with a hatchet:<sup>224</sup> "If they hadn't held me back I would have . . . hurt him."<sup>225</sup> Mrs. Hale concludes: "We all go through the same things—it's all just a different kind of the same thing! If it weren't—why do you and I *understand*? Why do we *know*—what we know this minute?"<sup>226</sup>

A value system based on concern, fear, intervention, and care drives the women. Their fear includes fear of psychological and physical harm to themselves and others but also fear they will fail to act to protect themselves or others. Martha Hale fears she let Minnie Foster "die for lack of life."<sup>227</sup> She should have taken the initiative and intervened earlier; she should not have passively allowed abuse to occur and continue. She cries, "Oh, I *wish* I'd come over here once in a while! . . . That was a crime! That was a crime! Who's going to punish that?"<sup>228</sup>

The women exhibit the same kind of uneasiness and uncertainty that the men had earlier exhibited as to whether the two sexes would see the same facts and draw the same conclusions. Mrs. Peters feels the men would laugh at their concern about

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218. *A Jury of Her Peers*, *supra* note 2, at 297.

219. *Id.* at 299.

220. *Id.* at 303.

221. *Id.* at 299-300.

222. *Id.* at 302.

223. *Id.* at 300.

224. *Id.* at 301-02.

225. *Id.* at 302.

226. *Id.* at 303.

227. *Id.*

228. *Id.*

the dead canary,<sup>229</sup> but Martha Hale is not so sure. "Maybe they would, . . . maybe they wouldn't."<sup>230</sup> Mrs. Peters admits, "it seems kind of *sneaking*; locking her up in town and coming out here to get her own house to turn against her!"<sup>231</sup> When the county attorney wonders what happened to the canary, Martha Hale lies, "We think the cat got it."<sup>232</sup> Mrs. Peters supports her even though both women know there is no cat. When the men later return to the kitchen, Mrs. Peters tries to hide the dead canary in her handbag, but it doesn't fit.<sup>233</sup> Martha Hale stuffs it in the pocket of her coat.<sup>234</sup> The unstated conspiracy between the two women is now complete. Ultimately, the members of the audience join in the conspiracy when they applaud at the end of the play.<sup>235</sup>

The dead canary is central to Susan Glaspell's story and to the reality of women's lives. The image of a bird in a cage has long been used as a symbol of the constraints that surround the lives of women.<sup>236</sup> For the pioneer farm wife left at home every day, the canary in the cage simultaneously symbolized both the

229. *Id.* at 304.

230. *Id.*

231. *Id.* at 293.

232. *Id.* at 301.

233. *Id.* at 306.

234. *Id.*

235. Ben-Zvi, *Women Playwrights*, *supra* note 6, at 154.

236. The image was used powerfully by Maya Angelou in *I KNOW WHY THE CAGED BIRD SINGS* (1969). See generally Roberta Smith, *Space is Spare for Women's Work at the Modern*, N.Y. TIMES, June 24, 1994, at C26 (noting that women artists use the symbolism of bird cages).

Justice Brennan stated in *Frontiero v. Richardson*, "[t]raditionally, such [gender] discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." 411 U.S. 677, 684 (1973) (plurality) (allowing military dependent benefits to female spouses but not to male spouses violated equal protection).

Two incidents highlighted the symbolism of the bird in a cage for me. While lecturing on woman abuse at two Australian universities in 1992, I visited Australia's capital, Canberra, where I saw a traveling exhibition of paintings of Mexican women artists. In one painting a woman was framed in the window of her house with the shutters half-closed, resembling the bird in a cage on the ledge in front of her. In the second incident, the wife of a colleague responded to *A Jury of Her Peers* by sending me an article by an author who had researched American frontier architecture. Roger Welsch, *A Song for the Pioneers*, AUDUBON, Nov.-Dec. 1992, at 112. After examining more than one thousand photographs of sod huts, he discovered dozens of photographs of caged canaries. He mentioned the canaries when lecturing to a group of farm families. A member of the audience shared the story of her great-grandparents who were sod busters in Nebraska. Her great-grandmother's few final possessions included a small wooden box containing a dead canary. The photographs of the family's first sod house showed the outline of a bird cage and the canary. *Id.* at 113.

constraints on her life and the only light, color, and song in her life.<sup>237</sup>

Farm men, like Lewis Hale, could regularly travel to town to sell crops or pick up needed supplies.<sup>238</sup> One of the few public social opportunities for a farm woman came from belonging to a Ladies Aid Society, a women's group sponsored by a church which met regularly to sew and quilt to raise money for charitable causes.<sup>239</sup> In *Trifles*, Martha Hale says of Minnie, "She didn't even belong to the Ladies Aid."<sup>240</sup> Martha Hale and Mrs. Peters provide their own brand of "ladies aid" for Minnie Wright.<sup>241</sup>

It is never openly stated that Minnie Foster Wright was an abused wife or, if abused, whether the abuse was emotional or physical. It is never openly stated that Minnie Foster Wright was pushed too far by her husband's abuse and her complete isolation. Mr. Hale refers to her as looking "queer," "as if she didn't know what she was going to do next."<sup>242</sup> "And kind of—done up."<sup>243</sup> The rate of insanity of farm women in rural areas was extensively discussed in the late Nineteenth Century.<sup>244</sup> But the women never consider Minnie "queer." They uncover evidence of the abuse that permeated Minnie Foster Wright's life and led her to kill her husband. They destroy evidence, "replace bad sewing with good;"<sup>245</sup> lie about evidence, "[w]e think the cat got it;"<sup>246</sup> and conceal evidence, the final hiding of the dead canary.<sup>247</sup> The women see different facts and believe in different laws than the men.

It is not clear whether the women found Minnie Foster Wright not guilty of any crime in light of all the facts or whether they believed a fair trial was not possible under the law as it then existed. If the latter, it is not clear whether that was because no women would have been on the jury or because existing man-made law could not result in justice for an abused woman.<sup>248</sup> Avoiding the trial would prevent harm; it would free

237. Welsch, *supra* note 236, at 113.

238. Hedges, *supra* note 216, at 58.

239. *Id.* at 91 (1988).

240. Hedges, *supra* note 216, at 61.

241. SANDRA M. GILBERT & SUSAN GUBAR, *NO MAN'S LAND: THE PLACE OF THE WOMAN WRITER IN THE TWENTIETH CENTURY: VOL. I: THE WAR OF THE WORDS* 91 (1988).

242. *A Jury of Her Peers*, *supra* note 2, at 284.

243. *Id.*

244. Hedges, *supra* note 216, at 59.

245. *A Jury of Her Peers*, *supra* note 2, at 296.

246. *Id.* at 301.

247. *Id.* at 306.

248. See MARTHA MINOW, *MAKING ALL THE DIFFERENCE* 220 (1990).

Minnie Foster Wright and avoid exposing John Wright as an abuser, an exposure that would not help Minnie.

#### IV. THE FACTS OF WOMAN ABUSE

The studies, the statistics, and the names for woman abuse finally exist to provide the documentation for Martha Hale's statement to Mrs. Peters: "[W]hy do you and I *understand*? Why do we *know*—what we know this minute?"<sup>249</sup> Woman abuse was rediscovered by the second wave of feminism after Alcoholics Anonymous opened the first modern shelters for abused women and their children in 1973.<sup>250</sup> By 1985 the Surgeon General of the United States warned that violence was a major public health risk to adult women in the United States.<sup>251</sup> The Senate Judiciary Committee in 1992 exposed the myth of violence by strangers. Women are six times more likely than men to be the victim of a violent crime committed by an intimate.<sup>252</sup>

The homicide statistics for spousal killings are frighteningly high. A recent five-year study by the New York City Department of Health showed that more women were killed by their husbands or male intimates than in robberies, drug violence, random attacks or any other crime.<sup>253</sup> Six and one-half percent of all murder victims are killed by their spouses,<sup>254</sup> husbands kill wives in 60% of these cases and wives kill husbands in 40%.<sup>255</sup> Only in this one category, women killing husbands or male intimates, does the rate of female violence begin to equal the male rate. In all other instances, it is substantially lower.<sup>256</sup> Many of

249. *A Jury of Her Peers*, *supra* note 2, at 303.

250. See GORDAN, *supra* note 108, at 264.

251. See generally SURGEON GENERAL'S WORKSHOP ON VIOLENCE AND PUBLIC HEALTH, *supra* note 26. A recent study of the U.S. Department of Health and Human Services revealed that the leading cause of occupational injury death varied by sex, with homicide accounting for 42% of the deaths of female workers but only for 11% of male workers. U.S. DEP'T OF HEALTH AND HUMAN SERVS., VIOLENCE IN THE WORKPLACE: RISK FACTORS AND PREVENTION STRATEGIES 3 (1996).

252. VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA, *supra* note 26, at 2. "The number of women attacked by those they loved, those they knew and those they had just met far outweighed the number of women attacked by strangers." *Id.* at 6.

253. See SUSAN A. WILT ET AL., NEW YORK CITY DEP'T OF HEALTH, FEMALE HOMICIDE VICTIMS IN NEW YORK CITY 1990-1994, (1997); Pam Belluck, *Women's Killers Are Very Often Their Partners, A Study Finds*, N.Y. TIMES, Mar. 31, 1997, at B1.

254. JOHN M. DAWSON & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: MURDER IN FAMILIES 1 (1994).

255. *Id.* at 3 & tbl. 2.

256. In 1986 I delivered a presentation at the Association of American Law Schools (AALS) Annual Meeting on Battered Women. I contrasted male and female rates of violent crimes, where the female rate was substantially lower, with the rate for homicides

these homicides are self-defense killings not adequately identified or dealt with by our legal system.<sup>257</sup> The recent large number of grants of clemency to battered women who killed their abusers recognizes this fact.<sup>258</sup>

A 1994 study by the Department of Justice provides answers to the question "why didn't she leave?" and supports the conclusion that abused women who kill do so in self-defense.<sup>259</sup> Police are slower to respond and less likely to make a formal report if the offender is known to a female victim than if the offender is a stranger.<sup>260</sup> Without adequate police protection, women must rely on their own resources. Women are twice as likely to fight back when attacked by an intimate or other family member than when attacked by a stranger;<sup>261</sup> women are twice as likely to be injured by an intimate than by a stranger;<sup>262</sup> and women are more likely to receive injuries requiring medical care when attacked by an intimate than by a

involving spouses or male intimates, where the female rate (3.9%), although lower than the male (5.5%), approximated it. Marina Angel, Address at the Association of American Law Schools Annual Meeting (Jan. 5, 1986).

257. See Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 121-22 (1985) (finding that homicide rate for women is substantially higher than their rate of violent crime, indicating these homicides are not all violent killings initiated by women). As Richard J. Gelles and Murray A. Straus have noted: "Every one of the women we have met who has slain her husband did so after years of cruel physical and mental punishment." RICHARD J. GELLES & MURRAY A. STRAUS, *INTIMATE VIOLENCE* 19 (1988); see also Angela Browne & Kirk R. Williams, *Exploring the Effect of Resource Availability and the Likelihood of Female-Perpetrated Homicides*, 23 L. & SOC'Y REV. 75, 76 (1989) (finding that homicides committed by women are more likely to be in response to male violence than male perpetrated homicides are in response to female violence).

258. Linda L. Ammons, *Discretionary Justice: A Legal and Policy Analysis of a Governor's Use of the Clemency Power in the Cases of Incarcerated Battered Women*, 3 J.L. & POL'Y 1, 53-61 (1994); Comment, *Developments in the Law—Legal Responses to Domestic Violence*, 106 HARV. L. REV. 1498, 1589-91 (1993).

259. See RONEI BACHMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 8* (1994); see also Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 5-6 (1991) (explaining that many women do not leave abusive situations because abuser is most acutely violent and potentially lethal at moment of separation).

260. See BACHMAN, *supra* note 259, at 8, 10, tbl.17, tbl.18 (1994) (reporting that of all police responses to assaults on women within first ten minutes of notification, 43% were assaults by intimates compared to 64% which were assaults by strangers).

261. *Id.* at 10, tbl.19 (reporting that of all attackers against whom women physically fight back, 20% were strangers compared to 40% who were intimates of assaulted victims).

262. *Id.* at 7 (reporting that 59% of women attacked by intimates were likely to be injured compared to 27% of women attacked by strangers).

stranger.<sup>263</sup>

Leaving is dangerous and can be deadly. Only recently has the name "separation attack" been given to the phenomenon that women are most at risk at the point of or after separation from their abusers.<sup>264</sup> Seventy-five percent of women reporting battering are divorced or separated.<sup>265</sup> If a woman cannot leave, death can occur, either hers or his.<sup>266</sup>

Men who kill their female partners often have a history of violent behavior. Roughly 70% to 75% of male domestic homicide offenders have been previously arrested, about 50% have been convicted of violent crimes,<sup>267</sup> and police have been called to the home numerous times.<sup>268</sup>

Abuse cuts across class, racial, ethnic and geographic lines.<sup>269</sup> Full-time housewives experience a higher rate of wife beating than women working outside the home.<sup>270</sup> Those with less education and lower family income levels are more likely to be abused than college graduates and women with higher incomes.<sup>271</sup> This is not surprising, because women with little or no money and few marketable skills have nowhere to go. The

263. *Id.* (reporting that 27% of women attacked by intimates were likely to require medical care compared to 14% of women attacked by strangers).

264. See Mahoney, *supra* note 259, at 83 (naming separation attack); see also Martha R. Mahoney, *Victimization or Oppression: Women's Lives, Violence and Agency*, in PUBLIC NATURE OF PRIVATE VIOLENCE, *supra* note 125, at 59, 79 (elaborating further on separation attack).

265. See *Caroline Wolf Harlow*, U.S. DEPT. OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 5 (1991) ("Separated or divorced women were 14 times more likely than married women to report having been a victim of violence by a spouse or ex-spouse. Although separated or divorced women comprised 10% of all women, they reported 75% of the spousal violence."). Homicide statistics provide further support for separation attack: "In 1981 [in Chicago] over half of all intersexual killings involved prior intimate or familial relationships . . ." Franklin E. Zimring et al., *Intimate Violence: A Study of Intersexual Homicide in Chicago*, 50 U. CHI. L. REV. 910, 916 (1983).

266. Mahoney, *supra* note 259, at 83. "The facts behind many, perhaps most, self-defense cases reveal that the woman . . . ha[d] been repeatedly and successfully attacked before she finally kill[ed] her abuser." *Id.* (footnotes omitted).

267. Donna K. Coker, *Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill*, 2 S. CAL. REV. L. & WOMEN'S STUD. 71, 89 (1992). "About 1 in 5 women victimized by their spouse or ex-spouse reported that they had been the victim of a series of similar crimes . . ." HARLOW, *supra* note 265, at 2-3.

268. Coker, *supra* note 267, at 89.

269. See PATRICK A. LANGAN & CHRISTOPHER A. INNES, BUREAU OF JUSTICE REPORT: FAMILY VIOLENCE 1 (1984) ("White and Black women experienced equivalent rates of violence committed by intimates and other relatives.").

270. Murray A. Straus & Richard J. Gelles, *Societal Change and Change in Family Violence from 1975 to 1985 As Revealed by Two National Surveys*, 48 J. MARRIAGE & FAM. 465, 473 (1986).

271. BACHMAN, *supra* note 259, at 7.

United States has three times as many animal shelters as battered women's shelters.<sup>272</sup> Abused women and their children make up an exceptionally high percentage of homeless women; estimates go up to 50%.<sup>273</sup>

There is a high correlation, at least a 30-40%, between woman abuse and child abuse.<sup>274</sup> Susan Glaspell knew this from the *Hossack* case. Her 1912 collection of her short stories, *Lifted Masks*, includes *The Plea*,<sup>275</sup> which focused on the legislative conflicts surrounding the vote on a pardon for an abused boy who killed his father.

Jealousy, including sexual jealousy, is a major factor in woman abuse.<sup>276</sup> Men who beat and kill "their women" try to justify their acts by alleging the women were unfaithful.<sup>277</sup> Marital rape is a form of woman abuse that reaffirms sexual control.<sup>278</sup> Jealousy also exhibits itself as exclusive possessiveness over a woman's time, attention, and activities. As the abuser exerts his power and control, the abused woman, and Minnie Wright was a typical example, often loses interest in activities she used to enjoy, becomes less involved with family and friends, and hides the fact that she is being hurt.<sup>279</sup> She becomes isolated within her home.

Jealousy is a part of a context that includes multiple control tactics. Violent husbands generally handle all the money.<sup>280</sup> Without money it is difficult, if not impossible, for a woman to leave an abusive situation. Susan Glaspell's description of Minnie Foster Wright's isolation and her husband's miserliness—

272. VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA, *supra* note 26, at 26.

273. Peter Margulies, *Representation of Domestic Violence Survivors as a New Paradigm of Poverty Law: In Search of Access, Connection, and Voice*, 63 GEO. WASH. L. REV. 1071, 1076 (1995).

274. Alan J. Tompkins et al., *Children Who Witness Woman Battering*, 14 LAW & POL'Y 169, 170 (1992).

275. Susan Glaspell, *The Plea* in LIFTED MASKS AND OTHER WORKS 26 (Eric S. Rabkin ed., 1993).

276. Coker, *supra* note 267, at 71-72.

277. *Id.* at 85.

278. Victoria M. Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense and Expert Testimony*, 39 MERCER L. REV. 545, 555 (1988).

279. *Id.* at 556. Social isolation can include locking a woman up in her home, making sure she never goes out alone, and selecting her friends.

280. See DEL MARTIN, BATTERED WIVES 83 (1976); see also Karla Fischer et al., *Procedural Justice Implications of ADR in Specialized Contexts: The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 S.M.U. L. REV. 2117, 2121-22 & n.17 (1993); Mather, *supra* note 278, at 555-56.

"Wright was close"—aptly depicts the type of controlling behavior exhibited by an abusive male.

There are strong indications that women, given a choice between death, either their own or their abusers, and separation, choose to leave. Female rates of homicides of husbands and male intimates are significantly lower in states with good domestic violence legislation and more resources for abused women.<sup>281</sup>

To effectively deal with woman abuse we must recognize a continuum: from the beliefs and actions of the parties in abusive situations; to the responses and non-responses of the official players in the system of criminal justice, the police, prosecutors, and judges; and finally to the application of our current laws by jurors, the laypeople who represent the community.<sup>282</sup> Throughout this continuum individuals' perceptions of reality determine their actions.

Efforts to deal with woman abuse have focused on the official players and have often ignored the two ends of the continuum, the parties and the jurors, critical to any final solution. Many laypeople come into the process with beliefs about woman abuse that do not tally with reality. It may be that lay perceptions are being changed by unofficial means through the media, which produce shows such as *The Burning Bed*<sup>283</sup> and which report highly visible cases, such as those of the Bobbitts and the Simpsons.

Recent news reports document domestic violence among both the knowns and unknowns of American society. President Clinton's mother suffered it.<sup>284</sup> Miss America, Carolyn Suzanne Sapp, played herself in a movie about her intimate relationship with a pro football player who took out his frustrations with his fists.<sup>285</sup> Peter Martins, the head of the New York City Ballet, was charged with third-degree assault on his wife, Darci Kistler,

281. See Browne & Williams, *supra* note 257, at 91.

282. Some authors have emphasized the need to change the community's "cultural and epistemological construction of gender and violence." Lisa Frohmann & Elizabeth Mertz, *Legal Reform and Social Construction: Violence, Gender, and the Law*, 19 LAW & SOC. INQUIRY 829, 834 (1994). Cf. WEST, *supra* note 15, at 15-18 (criticizing those who place the entire blame for problems on the community and none on the law).

283. See John O'Connor, *Fawcett in "Burning Bed,"* N.Y. TIMES, Oct. 8, 1984, at C18 (reviewing television drama about abused wife who killed her sleeping husband).

284. See Joyce Carol Oates, *The Woman Before Hillary*, N.Y. TIMES, May 8, 1994, § 7 (Book Review), at 1 (reviewing VIRGINIA KELLEY, *LEADING WITH MY HEART* (1994)); Todd S. Purdum, *At Home With Virginia Kelley*, N.Y. TIMES, Aug. 13, 1992, at C1 (reporting Kelley's recollection of being shot at by husband).

285. Gail Shister, *Miss America Plays Herself in a Movie About Abuse She Suffered*, PHILA. INQUIRER, July 13, 1992, at D3.

a principal dancer with the company.<sup>286</sup>

The most celebrated cases involve the Bobbitts and the Simpsons. On June 23, 1993, Lorena Bobbitt cut off her sleeping husband's penis with a kitchen knife and minutes later, while driving to a friend's home, threw it into a field.<sup>287</sup> This battered and sexually abused wife cut off the object that had caused her repeated pain during multiple marital rapes.<sup>288</sup> The case engendered strong reactions from both men and women and led to a barrage of newspaper accounts, editorials, and jokes.<sup>289</sup>

Lorena Bobbitt's defense counsel opted for a temporary insanity defense despite extensive proof of a long history of abuse and repeated threats of separation attack if she ever left.<sup>290</sup> Although there were grounds for self-defense under Virginia law, defense counsel feared the effect on the jury of the fact that John Bobbitt was asleep at the time of the attack.<sup>291</sup> The jury was composed of seven women and five men and originally split seven to five.<sup>292</sup> After a reenactment they acquitted her by reason of temporary insanity.<sup>293</sup>

On June 12, 1994, Nicole Brown Simpson and Ronald Goldman were murdered.<sup>294</sup> Evidence showed that Nicole Brown Simpson was an abused wife who lived in an abusive situation for years.<sup>295</sup> O.J. Simpson had been a football star. Athletes may have a higher propensity for woman abuse.<sup>296</sup> There was also evidence that Nicole's killing was a separation attack. Although divorced in 1992, Nicole Brown Simpson and O.J. Simpson at-

286. Alessandra Stanley, *Ballet Master, Held on Charge He Beat His Wife*, N.Y. TIMES, July 22, 1992, at B3.

287. Lawrence K. Altman, *Artful Surgery: Reattaching a Penis*, N.Y. TIMES, July 13, 1993, at C3.

288. David Margolick, *Psychiatrist Says Years of Abuse Led Woman to Cut Husband*, N.Y. TIMES, Jan. 19, 1994, at B7.

289. *Battle of Sexes Joined in Case of a Mutilation*, N.Y. TIMES, Nov. 8, 1993, at A16.

290. Robert Nigro, *Kemler Says Hype Overshadowed Real Issues in Lorena Bobbitt Trial*, PHILA. B. REP., Feb. 28, 1994, at 1.

291. *Id.*

292. *Bobbitt Jurors Recount Case*, N.Y. TIMES, Jan. 23, 1994, § 1, at 20.

293. Patricia Davis & Jane Seaberry, *Bobbitt Jurors Did A Re-enactment to Reach Verdict*, PHILA. INQUIRER, Jan. 23, 1994, at A3.

294. See, e.g., Seth Mydans, *Simpson is Charged, Chased, Arrested*, N.Y. TIMES, June 18, 1994, § 1, at 1.

295. Tamar Lewin, *The Simpson Case: The Syndrome; Case Might Fit Pattern of Abuse, Experts Say*, N.Y. TIMES, June 19, 1994, § 1, at 21; see also Jane Gross, *Simpson Case Galvanizes U.S. About Domestic Violence*, N.Y. TIMES, July 4, 1994, § 1, at 6 (reporting that abuse hotline calls made by battered women rose significantly after Simpson murder charges).

296. Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1050 (1996).

tempted a reconciliation that failed.<sup>297</sup> On the evening of the killing, Nicole celebrated her independence in a very public way at a dinner where she was surrounded by her parents, children, siblings and friends.<sup>298</sup>

A mixed jury that did not hear extensive testimony about her former husband's prior abuse or expert testimony on woman abuse, acquitted O.J. Simpson of murder.<sup>299</sup> It was clear that O.J. Simpson was a violent and abusive husband but without context evidence and expert testimony, a woman juror could explain, "This was a murder trial, not domestic abuse . . . . If you want to get tried for domestic abuse go in another courtroom and get tried for that."<sup>300</sup>

A veil of silence has traditionally surrounded woman abuse.<sup>301</sup> Every group has used privacy to limit discourse about abuse within the group and the "honor of our community" to prevent discourse in the society at large. The same private/public distinction that has been used to screen woman abuse from public condemnation and control within a country has been used on the international level as the "cultural defense."<sup>302</sup>

The United Nations finally recognized violence against women as a violation of human rights in 1993<sup>303</sup> when it included battering and marital rape within the definition of violence against women and warned member states that they "should not invoke any custom, tradition or religious consideration" to avoid their obligations.<sup>304</sup> In 1995, the U.S. Immigration and Naturalization Service recognized domestic abuse and other forms of violence against women as grounds for obtaining legal immigrant status.<sup>305</sup>

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297. Sara Rimer, *Nicole Brown Simpson: Slain at the Dawn of a Better Life*, N.Y. TIMES, June 23, 1994, at A1, A20.

298. *Id.* at A1.

299. Myrna S. Raeder, *The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond*, 69 S. CAL. L. REV. 1463, 1474-76 (1996). See generally Timothy Egan, *Not Guilty: The Jury; One Juror Smiled; Then They Knew*, N.Y. TIMES, Oct. 4, 1995, at A11; David Margolick, *Not Guilty: The Overview*, N.Y. TIMES, Oct. 4, 1995, at A1.

300. Bill Hutchinson, *Jurors Say Holes in Evidence, Not Race, Were Deciding Factors to Acquit Simpson*, BOSTON HERALD, Oct. 5, 1995, at 1.

301. See *infra* notes 421-26 and accompanying text (discussing classical Greek ideal of womanly virtue, which precluded public discussion of the problems of any individual woman).

302. Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993).

303. *Declaration on the Elimination of Violence Against Women*, G.A. Res. 104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993).

304. *Id.* at 218.

305. Leslye E. Orloff et al., *With No Place to Turn: Improving Legal Advocacy for*

The medical profession, shocked by the severity of the problem shown by its own research, has started to educate its members to diagnose and treat woman abuse, including notification of police or other governmental authorities. A 1976 emergency room study of women non-vehicular trauma victims identified 30% as positive for battering.<sup>306</sup> Of those between eighteen and twenty years of age, 42% were identified as abused.<sup>307</sup> A 1987-88 emergency room study reported that violence was the most common cause of injury to women fifteen to forty-four.<sup>308</sup> A 1993 study of three emergency rooms and two walk-in clinics found that 11.7% of all visits were for acute domestic violence.<sup>309</sup> When vehicular accidents were excluded, the rate rose to 17.9%.<sup>310</sup> The study found that 54.2% of the women patients had suffered from domestic violence at some time in their lives.<sup>311</sup> In 1992 the American Medical Association recommended that doctors routinely screen their female patients because woman abuse and marital rape are so common.<sup>312</sup>

Jury decisions in cases of abused women who kill their abusers depend on what the jurors know of facts and how they are instructed on law. Jurors' knowledge of facts depends on preconceived notions regarding human behavior they bring with them to the trial and the jury room, on the additional knowledge they gain from evidence admitted at trial, and on discussions in the jury room. Jurors' pretrial knowledge may be based on misconceptions and incorrect stereotypes. Education must take place during the trial; including specific evidence about the events at issue, context evidence surrounding the specific events, and expert evidence to explain both specific and context evidence. Education will also take place during the jury deliberations if the jury is representative of the diverse constituencies that make up our society. The defense's objective at the trial of an abused woman who kills her abuser should be to have the jury perceive her acts as reasonable rather than inappropriate

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*Battered Immigrant Women*, 29 FAM. L.Q. 313, 325 (1995).

306. Susan V. McLeer & Rebecca Anwar, *A Study of Battered Women Presenting in an Emergency Department*, 79 AM. J. PUB. HEALTH 65, 66 (1989).

307. *Id.*

308. Jeane A. Grisso et al., *A Population-Based Study of Injuries in Inner-City Women*, 134 AM. J. EPIDEMIOLOGY 59, 65 (1991).

309. Jean Abbott et al., *Domestic Violence Against Women: Incidence and Prevalence in an Emergency Department Population*, 273 JAMA 1763, 1765 (1995).

310. *Id.*

311. *Id.*

312. Council on Scientific Affairs, *Violence Against Women: Relevance for Medical Practitioners*, 267 JAMA 3184, 3189 (1992).

or insane.<sup>313</sup> This includes seeing her fear and actions within a context of long-term abuse and understanding the danger of separation attack.

Expert testimony is supposed to provide jurors, both female and male,<sup>314</sup> with knowledge that they might not have.<sup>315</sup> Early researchers started from presumptions that violence arises from conflict situations, that violence is a method of settling family disputes, and that women and men engage in approximately equal amounts of violence. They presumed deficiencies in abused women who killed their abusers that should lead to verdicts of not guilty by reason of insanity or reductions from murder to manslaughter on the basis of diminished capacity. Another group of researchers argue that battered woman syndrome is not a mental disorder but a term descriptive of the effects of abuse on a woman, effects encompassed under post traumatic stress disorder.<sup>316</sup> Although not labeling abused women who kill as insane, these researchers still view such women as acting abnormally.

Opposed to these early researchers are experts who believe that abused women who kill may be acting reasonably in their assessments of both the severity of the harm they face and its immediacy, which should lead to verdicts of not guilty based on a reasonable need for self-defense. Such experts emphasize context evidence and additional verdict options instead of expert diagnostic testimony.<sup>317</sup>

Studies of actual<sup>318</sup> and experimental<sup>319</sup> jury trials have shown that context evidence and a history of severe abuse influ-

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313. Crocker, *supra* note 257, at 130.

314. Some women are "less sympathetic jurors in victimization cases." Susan Murphy, *Assisting the Jury in Understanding Victimization: Expert Psychological Testimony on Battered Woman Syndrome and Rape Trauma Syndrome*, 25 COLUM. J. L. & SOC. PROBS. 277, 280 (1992).

315. Expert testimony was first introduced in the trial of an abused woman who killed her abuser in *Ibn-Tamas v. United States*, 407 A.2d 626, 631 (D.C. 1979).

316. Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom, A Review of the Literature*, 16 LAW & HUM. BEHAV. 273, 281 (1992).

317. Norman Finkel et al., *The Self-Defense Defense and Community Sentiment*, 15 LAW & HUM. BEHAV. 585, 601 (1991).

318. Schuller & Vidmar, *supra* note 316, at 284 (citing CHARLES P. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION (1987) and LENORE L. WALKER, TERRIFIED LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS (1990)).

319. Experimental studies found that expert testimony and varied jury instructions could lead to verdicts that were more favorable to abused women's claims of self-defense. See Finkel, et al., *supra* note 317, at 586.

ence jurors<sup>320</sup> and result in acquittals or more lenient verdicts for abused women who kill.<sup>321</sup> The most recent report on spousal murders from the Department of Justice shows that both judges and juries already have some understanding of why abused women kill.<sup>322</sup> Women spousal homicide defendants had a lower conviction rate generally, 70%, than husband defendants, 87%.<sup>323</sup> In trials before judges alone, wives were acquitted in 37% of the cases and husbands in 17%.<sup>324</sup> In jury trials, which normally involve cases with more factually complex life situations not clearly resolved by existing laws, juries acquitted 27% of wife defendants and none of the husband defendants.<sup>325</sup> Convicted wives were less likely than convicted husbands to be sentenced to prison, 81% to 94%, and, on average, received shorter sentences than convicted husbands, six years to sixteen and one half years.<sup>326</sup> Forty-four percent of wife defendants, but only 10% of husband defendants, had been threatened with a weapon or physically assaulted at or around the time of the spousal killing.<sup>327</sup> These trial and sentencing results may be explained partially by jury nullification and partially by the application in fact, even if not clearly mandated by law, of expanded notions of self-defense.

The hope of jury nullification, of a jury using its inherent power to acquit the abused woman who kills despite the evidence and the law, is not great in the face of traditional self-defense law.<sup>328</sup> It is not often that we find aware and activist women like Susan Glaspell's Martha Hale on juries. However, women jurors tend to find abused women's testimony more believable, including their inability to leave and their perceptions of severe danger justifying the use of deadly force.<sup>329</sup> In addition to women, those who are younger, who are more educated, and

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320. *Id.* at 596.

321. Schuller & Vidmar, *supra* note 316, at 284 ("Jurors provided with a not guilty by reason of self-defense alternative as opposed to a not guilty by reason of insanity alternative were more likely to render not guilty verdicts.") (citing Diane R. Follingstad et al., 13 LAW & HUM. BEHAV. 253 (1989)).

322. PATRICK A. LANGAN & JOHN M. DAWSON, U.S. DEPT OF JUSTICE, SPOUSE MURDER DEFENDANTS IN LARGE URBAN COUNTIES (1995).

323. *Id.* at iii.

324. *Id.* at 7.

325. *Id.*

326. *Id.* at iii.

327. *Id.* at iv.

328. See generally Maria Marcus, *Conjugal Violence: The Law of Force and the Force of Law*, 69 CAL. L. REV. 1657, 1723-32 (1981).

329. Regina A. Schuller, *The Impact of Battered Woman Syndrome Evidence on Jury Decision Processes*, 16 LAW & HUM. BEHAV. 597, 604 (1992).

who hold more egalitarian sex-role attitudes, have less negative attitudes toward abused women and are more disapproving of the use of force in intimate relationships. The studies make clear that our beliefs about both facts and law must change substantially if all abused women who kill their abusers are to receive fair treatment.

## V. THE CRIMINAL LAW AND JURIES

In the criminal law, as in other fields, the rules were initially developed by English judges to deal with situations they experienced and understood. That tradition of law made by males in their own image continued in this country with both judge-made common law and legislation. Not only our substantive laws but also our legal processes,<sup>330</sup> including the jury, were developed on male models.

We all think that we know what murder is. We don't. Not all killings are criminal homicides; for example, some are accidents and some are self-defense. As a young teacher, a section of the Texas Penal Code in effect in 1971 stunned me. It provided: "Homicide is justifiable when committed by the husband upon one taken in the act of adultery with the wife, provided the killing takes place before the parties to the act have separated."<sup>331</sup> Under traditional common law, a husband who caught his wife in the act of adultery had adequate provocation to partially excuse or partially justify him, the reasonable man, for losing his cool. His killing was reduced from murder to manslaughter.<sup>332</sup> Here was an instance of Texas and at least three other American states, Georgia, New Mexico and Utah, going even one better. They found the husband's killing totally justified, resulting in a verdict of not guilty of murder or any other kind of homicide. Of course, this doctrine did not apply to wives killing under such circumstances.<sup>333</sup> The Texas statute taught me that

330. See Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 193-94 n.148 (1991).

331. 1925 TEX. CRIM. STAT. 1220 (repealed 1973).

332. See Marina Angel, *Substantive Due Process and the Criminal Law*, 9 LOY. U. CHI. L.J. 61 (1977) [hereinafter Angel, *Criminal Law*]. "A justification, such as self-defense, looks to acts and circumstances surrounding the event; an excuse, such as insanity, looks to the personal attributes of the actor." *Id.* at 77 n.61. Adultery on the part of the wife can be viewed as a justification or partial justification for homicide since it is a circumstance taking place at or near the time of the killing. *Id.* at 77. However, it can also be viewed as an excuse or partial excuse since it affected the emotions of the killer. *Id.*

333. See *Barr v. State*, 172 S.W.2d 322, 325 (Tex. Crim. App. 1942); *Reed v. State*, 59 S.W.2d 122, 123-24 (Tex. Crim. App. 1933).

words, including murder and manslaughter, mean "what we choose them to mean."<sup>334</sup>

The reasonable man is a man—and, as we shall see, an irrational, jealous and violent one at that. A. P. Herbert joked—but the truth is often told jokingly—"At Common Law a reasonable woman does not exist."<sup>335</sup> The reasonable man is the hypothetical human being who sets the standard of purportedly objective reasonableness, of proper legal and moral behavior, for all of us.<sup>336</sup> The reasonable man has been replaced by the reasonable person, but this individual still seems to have the characteristics—mental, emotional and physical—of a man.

Some have argued for a reasonable woman standard<sup>337</sup> and even a reasonable abused woman standard.<sup>338</sup> Since the reasonable man has always been a hypothetical human being, there is no reason why the reasonable person can not be a totally hypothetical human being embodying both masculine and feminine views of the world—like the Indian God Shiva. This hypothetical being must struggle, as we all will be required to struggle in an increasingly diverse society, to place her/himself in the shoes of a reasonable person with different physical characteristics and life experiences. Only if the reasonable person is defined so as to adopt all of the characteristics, including the moral system, of the individual on trial, would there be no moral standards left in criminal law.

Creating such a hypothetical reasonable person for our modern diverse society requires us to carefully define the moral system under which the reasonable person will operate; to make clear choices as to what we will label right and wrong. The moral system of a diverse society must be developed through the inclusion of the viewpoints of all of our varied groups.

Morally blameworthy conduct is inherent in the definition of crime.<sup>339</sup> Because common law homicide was defined on the par-

334. LEWIS CARROLL, *ALICE IN WONDERLAND* 163 (Donald J. Gray ed., 1992).

335. ALAN PATRICK HERBERT, *MISLEADING CASES IN THE COMMON LAW* 20 (1930).

336. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 51 (1881).

337. See Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 *TEX. J. WOMEN & L.* 95, 129 (1992); Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 *YALE L.J.* 1177, 1215-19 (1990); but see Kathleen A. Kenealy, *Sexual Harassment and the Reasonable Woman Standard*, 8 *LAB. LAW.* 203, 204-10 (1992).

338. See Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 *OR. L. REV.* 393, 415-22 (1988), for a discussion of whether there should be a reasonable battered woman standard.

339. See Angel, *Criminal Law*, *supra* note 332, at 77.

adigm of the reasonable man and not the reasonable woman, abused women who killed were so far outside the paradigm that they often had to rely on the insanity defense. An excuse, such as insanity, finds there is something so wrong with an individual that the individual cannot be held criminally liable.<sup>340</sup> At common law there were reasonable men and insane women. Once we become aware of the widespread existence of woman abuse and the fact that many women who kill do so in response to abuse and in fear of a separation attack, we can no longer view their behavior as irrational and/or insane.

In her early newspaper reporting on the *Hossack* case, Susan Glaspell referred to the possibility of the wife's insanity. After meeting Mrs. Hossack, her view changed. By the time she wrote her story, Glaspell had rejected the notion that an abused woman who kills her abuser is abnormal, irrational or insane.<sup>341</sup> Although the men in the story view Minnie Foster Wright as "queer," the women do not.

The issue of reasonableness comes into play in common law homicide in the doctrines of provocation and self-defense. Both doctrines were built on assumptions that validated the conduct of abusive men. The common law believed that the paragon of virtue, the hypothetical reasonable man, could be so provoked as to lose control and kill in the heat of passion. The circumstances under which this could occur were carefully defined to include only sustaining physical blows or discovering his wife in the act of adultery.<sup>342</sup> Texas, Georgia, New Mexico and Utah acquitted a husband killing in a jealous passion,<sup>343</sup> and the common law in all other states partially excused or partially justified him. The

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340. *Id.* at 77 n.61.

341. See Ann Althouse, *The Lying Woman, the Devious Prostitute and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 916 (1994), for a discussion of how purported facts about women presented in casebooks perpetuate negative stereotypes and laws which disadvantage women.

342. See MODEL PENAL CODE § 210.3 cmt. 5 (1962). Herbert Wechsler, the author of the Model Penal Code, explained the rationale for provocation:

[T]he more strongly [most persons] would be moved to kill by the circumstances of the sort which provoked the actor to the homicidal act, and the more difficulty they would experience in resisting the impulse to which he yielded, the less does his succumbing serve to differentiate his character from theirs.

Herbert Wechsler & Jerome Michael, *A Rationale of the Law of Homicide II*, 37 COLUM. L. REV. 1261, 1281 (1937).

343. See Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 232-36 (1986). See generally Elizabeth Rapaport, *The Death Penalty and the Domestic Discount*, in PUBLIC NATURE OF PRIVATE VIOLENCE, *supra* note 125, at 224, 227-35.

law today should at least partially excuse or partially justify the actions of an abused woman who finally kills her abuser.

The adultery scenario is an emotional self-defense addition to traditional self-defense for physical blows. Lost in this scenario is the fact that the acts of abusive men are not spontaneous. The majority of men who kill their female intimates have documented histories of violent assaults.<sup>344</sup> They often stalk "their" women looking for evidence of sexual misbehavior, which they define to include any attempt to leave them. Thus, the traditional common law reasonable man reacting to the purported provocation of adultery is the prototypical abusive male who exhibits sexual jealousy and possessiveness, anger and a short temper.

Like provocation, common law self-defense could either be a complete justification resulting in a not guilty verdict or it could reduce the degree of the homicide. Again, the hypothetical reasonable man set the purportedly objective standard. If a man reasonably believed there was an imminent danger of death or great bodily harm to himself or others, the homicide was justified and the verdict was not guilty. The common law version of time focused on events immediately before the killing.

Common law doctrines of provocation and self-defense were based on men's emotions, men's realities and men's stories. Provocation was based on the emotion of anger, and a quick anger at that, caused by infidelity or perceived infidelity.<sup>345</sup> Self-defense required a physical attack, evidence of which immediately preceded the killing.

For abused women, the stories are much different. Fear, not anger, is the primary emotion. It is a fear that builds as abused women learn that avenues of escape are blocked. For abused women both provocation and self-defense extend over time.

As a society, we must decide whether we want to continue to validate the anger and offensive violence of the abuser or begin to legitimate the fear and defensive violence of the abused. We must decide whether we find understandable and less blameworthy the acts of the abused woman who kills her abuser in a situation where she acted primarily by reason of fear. We must uncover the facts on which legal doctrines are based in order to understand the value systems underlying those legal doctrines.<sup>346</sup> Women kill their husbands and male intimates for dif-

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344. Coker, *supra* note 267, at 89-94.

345. *Id.* at 102 ("If adultery is the 'paradigm' heat of passion event, anger is the paradigm heat of passion emotion.") (footnote omitted).

346. See Scheppele, *supra* note 175, at 125 ("[T]he law is still sexist, but now in the

ferent reasons and under different circumstances than those for which their husbands and male intimates kill them.<sup>347</sup> Abused women who kill account for approximately one half of all women who kill.<sup>348</sup> However, women who kill their abusers were traditionally viewed as crazy and deviant,<sup>349</sup> rather than as rational beings acting in self-defense. Women's self-defense was often viewed as female aggression.<sup>350</sup> A woman's need for a weapon to meet deadly unarmed male force, a woman's need to act during a lull in the violence when her abuser is asleep or otherwise incapacitated, a woman's knowledge of her abuser's patterns of behavior and signals, including separation attack, were not read as leading to a reasonable fear of death or serious bodily injury. They were read as evidence of premeditated murder.<sup>351</sup>

A key fact that needs to be re-evaluated is time. We must recognize "a version of time very different from, but just as objective and truth-telling as white male standard time."<sup>352</sup> According to the male notion of time, the individual must react quickly to provocation. If the response takes too long, premeditation may be presumed, which would raise the offense to the highest degree of homicide; self-defense will be negated because of presumed alternatives to killing.

The male notion of time has been applied to abused women's self-defense cases.<sup>353</sup> Under the common law, there had to be both physical and temporal proximity. However, from a woman's point of view, "the space around her need not be filled with flailing limbs and weapons in order to be threatening. The space need only be filled—by the man's definition of it, by his demonstrated ability to control it, by his need to fill it."<sup>354</sup> For abused women time is elongated: Provocation continues,<sup>355</sup> as does the need for self-defense.<sup>356</sup>

name of fact rather than doctrine.").

347. Crocker, *supra* note 257, at 121.

348. Phyllis Chesler, *Women in the Criminal Justice System: A Woman's Right to Self-Defense: The Case of Aileen Carol Wuornos*, 66 ST. JOHN'S L. REV. 933, 936 (1993).

349. *Id.* But see Kinports, *supra* note 338, at 463-64 (noting that few juries have acquitted battered women by reason of insanity).

350. Chesler, *supra* note 348, at 938.

351. See Gloria Killian, *Equal Justice for Some*, 2 S. CAL. REV. L. & WOMEN'S STUD. 5, 5-6 (1992).

352. Anne C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 106 (1990).

353. *Id.* at 112.

354. *Id.*

355. See Susan S.M. Edwards, *A Socio-Legal Evaluation of Gender Ideologies in Domestic Violence Assault and Spousal Homicides*, 10 VICTIMOLOGY 186, 201 (1985).

356. See Crocker, *supra* note 257, at 127.

It has been suggested that most abused women kill in "psychological self-defense" and that self-defense law be expanded to justify such killings.<sup>357</sup> The argument that abused women who kill do so to avoid "life without feeling alive,' 'partial death,' or simply utter hopelessness"<sup>358</sup> recalls Martha Hale's fear that she had let Minnie Foster Wright "die for lack of life." The common law recognized psychological self-defense for men in the doctrine that a wife's adultery excused or justified a killing. Abusive men have long used psychological self-defense to justify their violence with "the bitch deserved it" defense.<sup>359</sup>

We do not need to create an additional doctrine of psychological self-defense for abused women,<sup>360</sup> since most abused women are usually both physically and psychologically mistreated, and many are sexually assaulted.<sup>361</sup> To address the non-confrontation cases which go against traditional doctrines of temporal proximity and immediacy, we must understand separation attack and recognize the lack of resources for abused women, including inadequate police responses and shelters.

Let us consider what should be a not so startling suggestion: that we redefine our homicide laws from the perspective of the abused woman and not from the perspective of the abusive man; that women's stories become the reality that informs our criminal law. If adultery provided provocation to reduce murder to manslaughter, or in the case of Texas to justify a killing completely, why shouldn't a history of physical abuse and fear of future abuse justify an acquittal or provide provocation to reduce murder to manslaughter?

In a more radical vein, we could change the law to legitimize the anger of the victim for past events. Normally, a killing committed where there is no fear of future attack would be the highest degree of homicide, a premeditated murder. It was never admirable for the reasonable man to lose control and kill in anger in response to the purported provocation of adultery, but it justified a reduction from murder to manslaughter. A killing in the heat of passion caused by the anger of a female victim of long-term abuse should be understandable to both women and

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357. Charles P. Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 *LAW & HUM. BEHAV.* 579, 586-87 (1990).

358. *Id.* at 587 (footnotes omitted).

359. See Coker, *supra* note 267, at 104.

360. For an argument advocating the creation of a psychological self-defense standard for abused women, see Ewing, *supra* note 357, at 579.

361. *Id.* at 581.

men and should also at least justify a reduction from murder to manslaughter.

On the issue of self-defense, minor changes in the doctrine of time and the admissibility of expert testimony can help judges and juries recognize the realities of abused women's lives. The action of the abused woman who kills while her abuser is asleep or otherwise incapacitated can be justified if she acted in reasonable fear of a future attack which she realistically would be unable to avoid.

Ultimately, we should move to a perspective that recognizes the facts of the lives of each of us and that calls for a sensitive response to those facts. Such a caring society would work at stopping abuse before it started or stopping it as soon as it started by providing the woman, her abuser, and those they love with support systems.

We must sensitize not only officials who participate in our system of justice—police, prosecutors, judges, legislators, and governors—but also members of the public who are equally crucial players. Sensitization must take place in the community in which battering occurs, including abused women and abusive men, including the Martha Hales of the world who should have intervened but did not. It is the community that must recognize and condemn abuse and provide resources to intervene and stop it. It is the community that will supply the individuals who will make up the juries that ultimately decide the cases. The triers of fact, whether judges or juries, have been predominantly male or people for whom the male reality is dominant. We must integrate the world of women into our facts, our substantive legal doctrines, our formal and informal procedures, and our law-making processes. Unfortunately, we have still not even fully integrated women into our juries.

If Minnie Foster Wright had gone to trial for murder in 1916, she would have been judged by a male jury, instructed by a male judge on criminal law defined by men for men. By 1944, a majority of state courts ruled that the Nineteenth Amendment granting women the right to vote in 1920 also made women eligible to serve as jurors where voting was the primary qualification for jury service.<sup>362</sup> By 1961, women could serve as jurors in forty-seven states. In eighteen of those states and the District of Columbia, service was voluntary because women had an abso-

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362. See M.L. Cross, Annotation, *Eligibility of Women as Jurors*, 157 A.L.R. 461 (1944). Twenty-eight states allowed women to serve as jurors, but, in fifteen, service was voluntary. *Id.*

lute exemption based solely on their gender.<sup>363</sup> Women could avoid the often onerous burden of jury duty by simply declining to serve. Most did.

Attitudes towards women's jury service continue to be shaped by divergent views of reality, by divergent theories of sameness and differences, and by divergent political visions of the jury and its relationship to parties, excluded jurors, and the community at large. Women are still disproportionately excluded from juries because the realities of our lives make us primary care-givers and therefore eligible for hardship exclusions. We are still disproportionately excluded through the use of peremptory challenges, challenges that allow the parties to a case to eliminate potential jurors without explanation. Although such challenges cannot be used solely on the basis of gender, they can be used to exclude women because of any other factor, including viewpoint and occupation.

In the first modern Supreme Court case regarding women's jury service, *Ballard v. United States*<sup>364</sup> decided in 1946, Justice Douglas dealt with both sameness and differences. Opponents to women's jury service argued that an all-male panel drawn from diverse groups within a community could represent women, because men and women were influenced by the same factors—personality, background, and economic status.<sup>365</sup> Gender was not important. Justice Douglas responded: "Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel?"<sup>366</sup>

Justice Douglas embraced differences in a way that echoed Susan Glaspell's references to half-finished, and therefore incomplete, tasks. "[T]he 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."<sup>367</sup> He understood that gender ex-

363. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961). It was not until 1966 that all states allowed women to serve on juries. Shirley S. Abrahamson, *Justice and Juror*, 20 GA. L. REV. 257, 269 (1986).

364. 329 U.S. 187 (1946).

365. *Id.* at 193.

366. *Id.* at 193-94.

367. *Id.* (footnote omitted). Justice Douglas wrote:

To insulate the courtroom from either [sex] 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.

clusion, like racial exclusion, destroys the broad base juries must have in our democratic society. Injury extends to the defendant, "to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."<sup>368</sup> The *Ballard* decision integrated our federal juries, but it did not affect our state juries.

In 1975, the Supreme Court finally declared voluntary exclusion of women from all juries unconstitutional,<sup>369</sup> 100 years after it found exclusion of African American men unconstitutional. The Louisiana statute in *Taylor v. Louisiana*<sup>370</sup> provided that a woman could serve only if she filed a written declaration of a desire to do so.<sup>371</sup> In *Taylor*, 53% of those eligible for jury service in the relevant area were women; less than 10% of the jury list were women;<sup>372</sup> there were no women in the group from which the trial jury was drawn. Consequently, there were no women on the trial jury.<sup>373</sup>

The *Taylor* Court emphasized the political nature of the jury and focused on the constitutional requirement that a jury represent a fair cross section of the community as essential to promote group deliberation.<sup>374</sup> Diversity of experience, viewpoint, and interest are inherent in these concepts.<sup>375</sup> The Court believed bias would exist if the jury was composed of "only special segments of the populace or if large, distinctive groups [were] excluded."<sup>376</sup> Community participation was consistent with democracy and critical to public confidence in the justice system.<sup>377</sup> Because women were sufficiently numerous and distinct from men, their systematic exclusion violated the Constitution.<sup>378</sup> Legislatures could grant exemptions based on hardship, including child care, but the offer of voluntary exclusion to all women on

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*Id.* at 194.

368. *Id.* at 195.

369. *Taylor v. Louisiana*, 419 U.S. 522, 535-37 (1975).

370. *Id.*

371. *See id.* at 523 n.2 (citing LA. CODE CRIM. PROC. ANN. art. 402). Although this provision of the Louisiana statute was repealed effective January 1, 1975, the repeal had "no effect on the conviction obtained in this case." *Id.*

372. *Id.* at 524.

373. *Id.* at 525.

374. *Id.* at 528.

375. *Id.*

376. *Id.* at 530.

377. *Id.* ("Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.")

378. *Id.* at 531.

the assumption that it would be a special hardship for every woman to perform jury service was untenable.

The Supreme Court in 1994 dealt with the use of peremptory challenges in *J.E.B. v. Alabama ex rel T.B.*,<sup>379</sup> a paternity case where both sides played the gender elimination game which resulted in an all-female jury. The state used its peremptory challenges to remove all male jurors and the putative father used all but one of his strikes to remove female jurors.<sup>380</sup>

Under our peremptory challenge system, each side seeks to eliminate from the jury all those whom it believes, on the basis of stereotypes,<sup>381</sup> may have a different and, from its perspective, unfavorable view of the world. Belief in differences clearly underlies the peremptory challenge system. But rather than embracing differences, the traditional peremptory challenge system aims to eliminate or reduce to the lowest possible number all those of a perceived unfriendly group. Peremptory challenges are used to eliminate the other, rather than to adjust to true diversity in views of the world, value systems and reasoning processes.<sup>382</sup>

Adjusting to diversity means inhabiting all of our institutions with all those who live in our society. Tokenism does not work. Tokenism heightens visibility of tokens, polarizes and isolates tokens, and assimilates tokens.<sup>383</sup> Token women are usu-

379. 511 U.S. 127 (1994).

380. *Id.* at 129.

381. See generally David H. Gans, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875, 1887, 1897 (1995) (arguing that the Supreme Court's equal protection analysis has prohibited stereotyping where there are similarities between men and women, but has not dealt adequately with stereotyping where there are sex differences between men and women).

382. See Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 104 (1994).

The value of meaningful juror deliberation is at the heart of the representative model. The creative opportunity lies in the ability of social and political equals with divergent views to construct truth through the give and take of the deliberative process. Theoretically, the process of deliberation is a 'process through which biases of individual jurors are exposed and isolated or controlled.'

A representative model favors the greatest amount of diversity to meet the goals of this process. The argument is that notwithstanding the identity of the litigants, society—and other jurors—can be deprived of the influence of jurors who reflect a particular perspective or world-view and who are absent from deliberation. A litigant who does have a similar social identity is deprived of the influence and knowledge of that missing segment which can most empathize with and understand her during the deliberative process.

*Id.* (footnote omitted).

383. See Rosabeth Kanter, *Some Effects of Proportions on Group Life: Skewed Sex*

ally prevented from exerting influence and often do so only at the cost of becoming "one of the boys."<sup>384</sup>

Democratic development can be detoured but it cannot be reversed or stopped. Like the Supreme Court's election decision mandating "one-person one-vote,"<sup>385</sup> so too has curtailment of peremptory challenges become a powerful political idea whose time has come. The ideal of allowing political participation by all adult citizens on our juries was always present in the notion of trial by a jury of one's peers.<sup>386</sup> Now that ideal must be applied to a complex democratic society facing second-generation diversity problems.

Black men received the right to serve on juries after the Fifteenth Amendment in 1868 gave them the right to vote—long before any women, Black or white. The Court in *J.E.B.*<sup>387</sup> equated all women with African American men in needing a specific constitutional amendment, the Nineteenth Amendment in 1920, to give them the vote, the most basic right of citizenship in a democracy.

The categories of race and gender overlap; the exclusion of women from juries can mask the exclusion of minority women.<sup>388</sup> The majority of lower court decisions before *J.E.B.* involved the use of peremptory challenges to remove minority women.<sup>389</sup> African American and other minority women bear the burden of a unique synergistic discrimination that intertwines race and gender and that goes beyond the discrimination experienced by either minority men or majority women. The Supreme Court for the first time recognized that African American no longer meant only African American men but also included African American women, and that female no longer meant only white women but also women of color.

The Court embraced an equal protection of sameness and difference. Even if there was some validity in gender stereotypes,<sup>390</sup> stereotypes had been used to justify the exclusion of women from juries.<sup>391</sup> Not all members of a gender fit the stereotypes.<sup>392</sup> Men and women could be the same. But the Court ac-

*Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 971-72 (1977).

384. *Id.* at 979.

385. *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964).

386. See Amar, *supra* note 114, at 1187-89.

387. *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127 (1994).

388. *Id.* at 145.

389. *Id.* at 145 n.18.

390. *Id.* at 139 n.11.

391. *Id.* at 137.

392. *Id.* at 138-39 & 138 n.9.

cepted the value of differences, understanding that half-done things are incomplete. Differences must be acknowledged while exclusionary actions based on gender or race must be eliminated. Differences should not lead to exclusion from a jury but are the reason for inclusion on a jury. Differences must be welcomed and integrated. Both sameness and difference must coexist in all of the political processes of our diverse democratic society; not just at the ballot box but on our juries.<sup>393</sup>

Failure to integrate those who are different results in multiple harms: to the litigants who are not judged by their peers;<sup>394</sup> to those excluded from our juries who are denied participation in a political process;<sup>395</sup> and to the community, which suffers when the state perpetuates stereotypes,<sup>396</sup> which loses confidence in a judicial system that allows such discrimination, and which is deprived of the viewpoints of all its members. The Constitution requires equal opportunity for all our citizens to participate in the administration of justice.<sup>397</sup> Exclusion on the basis of race and/or gender jeopardizes "the integrity of our judicial system."<sup>398</sup> It creates the impression that the "deck has been stacked."<sup>399</sup> The insight that "[t]he verdict will not be accepted or understood [as fair] if the jury is chosen by unlawful means"<sup>400</sup> underlies Susan Glaspell's *A Jury of Her Peers*, and has been brought home in our time by the reactions to the initial Rodney King verdict.

Justice Sandra Day O'Connor was the only Justice, in *J.E.B.*, to raise the issue of the abused woman: She asked whether the abused woman would be precluded "from using her peremptory challenges to ensure that the jury of her peers contains as many women members as possible?"<sup>401</sup> Justice O'Connor does not understand that half-finished tasks are incomplete; that serving on a jury is part of a learning process that will not be successful if we educate only women about abuse and not the men who abuse, not the men who continue to be disproportionately the power holders and deciders in our society. Only by communication and education will we end woman abuse and other gender discrimination.

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393. *Id.* at 146.

394. *Id.* at 140.

395. *Id.* at 141.

396. *Id.* at 140.

397. *Id.* at 145-46.

398. *Id.* at 146.

399. *Id.* at 140 (citation omitted).

400. *Id.* (quoting *Powers v. Ohio*, 499 U.S. 400, 413 (1991)).

401. *Id.* at 151 (O'Connor, J., concurring).

## VI. THE GREEK CONNECTION

All art is derivative in the sense that everything in this world builds on what came before. Genius is knowing what to choose and how to weave it together in a context that speaks to your own age and place and yet is universal.

Because of my Greek heritage, I was struck by Susan Glaspell's debt to classical Greece in *Trifles* and *A Jury of Her Peers*. The only similarity previously noted was that the role of the men was comparable to that of a "Greek Chorus, 'the voice of the community's conscience,' entering at various points to reiterate their major themes—Minnie's guilt and the triviality of the women's occupations, avocations, and preoccupations."<sup>402</sup> There are many more.

Susan Glaspell may have come upon her knowledge of classical Greek drama and literature through her husband, George Cram Cook, Jig, a self-proclaimed Philhellene.<sup>403</sup> In her biography of her husband, *The Road to the Temple*,<sup>404</sup> Susan Glaspell describes how his Iowa upbringing included Plato and Greek urns.<sup>405</sup> While at Harvard he studied classical Greek and wrote of the spiritual treasures he planned to bring back to "the Homeric West" from a trip to Greece.<sup>406</sup>

In New York City he saw productions of Euripides' *The Trojan Women* in 1911<sup>407</sup> and Aristophanes' *Lysistrata* in 1914.<sup>408</sup> Both antiwar plays were written during Athens' disastrous thirty-year war with Sparta<sup>409</sup> and both were relevant to the First World War.<sup>410</sup> Jig wrote to Susan Glaspell about *Lysistrata*;

402. Leonard Mustazza, *Generic Translation and Thematic Shift in Susan Glaspell's 'Trifles' and 'A Jury of Her Peers,'* in 26 *STUD. IN SHORT FICTION* 490 (1989) (quoting Beverley A. Smith, *Women's Work—Trifles? The Skill and Insight of Playwright Susan Glaspell,* in 5 *INT'L J. WOMEN'S STUD.* 175 (1982)).

There are often multiple choruses in Greek drama. For example, in *Lysistrata*, a chorus of radical old women who take over the treasury of Athens to end the war clashes with a chorus of old men who pronounce conservative pro-war political views. See *infra* notes 461-62 and accompanying text (discussing choruses in *Lysistrata*).

403. SUSAN GLASPELL, *THE ROAD TO THE TEMPLE* 320 (1926) [hereinafter GLASPELL, *TEMPLE*].

404. *Id.*

405. *Id.* at 13.

406. *Id.* at 46.

407. RABKIN, *supra* note 6, at ix.

408. See GLASPELL, *TEMPLE*, *supra* note 403, at 191.

409. The Peloponnesian War lasted from 431 to 404 B.C. LOIS SPATZ, ARISTOPHANES 16 (1978). Thucydides was, and remains, its leading commentator. See *THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR* (Robert B. Strassler ed., The Free Press 1996.)

410. The First World War lasted from 1914 to 1918. 29 *THE NEW ENCYCLOPAEDIA*

about "its revelation of man and woman as they were two thousand years ago—and are . . ." As a playwright he concluded, "We can write about taboos. If we do it just right, it will go. But that is not swinging free, like Aristophanes, with all the elements of life."<sup>411</sup> The impact of *Lysistrata* lasted throughout his life. When living with Susan Glaspell in Delphi, Greece from 1922 until his death there in 1924, he wrote a "Letter to the Greek Nation," which was printed in an Athenian newspaper:

If the Greeks of 420 B.C. had been compelled by their women, not in a poet's dream, but in reality, to stop their war between brothers—my world, the world of my bad Babylon, would have inherited the pure intense Greek beauty of Aristophanes, of Aeschylus, of Euripides, of Homer and Hesiod and Sappho.<sup>412</sup>

Susan Glaspell and George Cram Cook were a close couple, both personally and professionally. They founded and nurtured the Provincetown Players and worked together writing, acting, and producing.<sup>413</sup> It is impossible to believe that Jig and Susan didn't read and discuss *Lysistrata*, *The Trojan Women*, and Homer, as well as other Greek classics. But Susan Glaspell had her own, her woman's, readings of the Greek classics. These readings influenced *Trifles* and *A Jury of Her Peers*.

Both Euripides' *The Trojan Women*,<sup>414</sup> a tragedy, and Aristophanes' *Lysistrata*,<sup>415</sup> a comedy with serious moral and political overtones,<sup>416</sup> are anti-war plays that focus on the devastating consequences of male aggression for women and their children. Susan Glaspell wrote *Trifles* and *A Jury of Her Peers* in 1916, a time of war and of strong anti-war sentiments which coincided with the peak of the first wave of the women's movement. *Trifles* was a political play of the kind of suffrage plays which were

BRITANNICA *The World Wars* 961 (15th ed. 1997).

411. GLASPELL, TEMPLE, *supra* note 403, at 191-92.

412. *Id.* at 320-21. Because of George Cram Cook's influence on the revitalization of classical drama, the Greek government allowed a marble from the Acropolis of Athens to be erected at Delphi in his honor. *Id.* at 343.

413. *Id.* at 191-93. See also Rabkin, *supra* note 6, at vii, x.

414. EURIPIDES, *supra* note 141.

415. ARISTOPHANES, *supra* note 11, at 809.

416. See WILLIAM MEREDITH HUGILL, PANHELLENISM IN ARISTOPHANES, at ii-iii, 25 (1936). I first came to know these plays as a teenager from volumes edited by Eugene O'Neill, Jr., the son of Susan Glaspell's fellow playwright. The *Lysistrata* in these volumes was first published in 1912 by an unknown English translator and may have been the version that so affected Jig in 1914. COMPLETE GREEK DRAMA, *supra* note 11. The translation is identical to the 1912 translation by the Athenian Society of London, found in ARISTOPHANES: THE ELEVEN COMEDIES, *supra* note 11.

prominent until the vote was won in 1919.<sup>417</sup> The first wave of feminism saw both the vote and the right to serve on juries as essential political rights in a democracy.

The conflict between men and women, between the public as symbolized by the ΠΟΛΙΣ, the city-state,<sup>418</sup> and the private, the ΟΙΚΟΣ, the home,<sup>419</sup> is particularly strong in *Lysistrata*, *Antigone* and *The Trojan Women*. In Greek society, men were characterized as aggressive and violent, their violence most often taking the form of war, and women were characterized as cooperative, their principal concerns being the harmonious running of the home and the raising of children.<sup>420</sup>

Thucydides<sup>421</sup> and Xenophon<sup>422</sup> are often cited for the sharp division between ΠΟΛΙΣ and ΟΙΚΟΣ. Thucydides reports that Pericles in his funeral oration for the Athenian men who died in the first year of the Peloponnesian War told the war widows, the greatest glory "will be hers who is least talked of among the men whether for good or for bad."<sup>423</sup> Similarly, Xenophon states, "It is a finer thing for the woman to stay indoors than to spend time in the open . . ."<sup>424</sup> This is reminiscent of the Victorian notion that a lady only had her name in the press twice in her life: at her marriage and at her death. Athenian women were limited to the home, just as Martha Hale and Mrs. Peters were limited to the kitchen while the men could roam the house and grounds and travel back and forth to town.<sup>425</sup> Thucydides reinforced the idea that a woman should not go outside the home with her problems, or any problem of the home because this would bring shame on her husband and her home.<sup>426</sup>

417. HELENE KEYSSAR, *FEMINIST THEATRE: AN INTRODUCTION TO PLAYS OF CONTEMPORARY BRITISH AND AMERICAN WOMEN* 25 (1984).

418. SPATZ, *supra* note 409, at 93-94; LAUREN K. TAAFFE, *ARISTOPHANES AND WOMEN* 48 (1993); Michael Shaw, *The Female Intruder: Women in Fifth Century Drama*, 70 *CLASSICAL PHILOLOGY* 255, 256-57 (1975).

419. SPATZ, *supra* note 409, at 93-94, 307; Helene P. Foley, *The 'Female Intruder' Reconsidered: Women in Aristophanes' Lysistrata and 'Eccleziastusae'*, 77 *CLASSICAL PHILOLOGY* 1 (1982) (arguing that the division between the ΠΟΛΙΣ and the ΟΙΚΟΣ was not as sharp as portrayed by most writers); Shaw, *supra* note 418, at 256-57.

420. Shaw, *supra* note 418, at 256.

421. SPATZ, *supra* note 409, at 93.

422. XENOPHON, *THE OECONOMICUS reprinted in Xenophon's Socratic Discourse: An Interpretation of the Oeconomicus* 3 (Carnes Lord trans., Cornell University Press 1970), cited in Shaw, *supra* note 418, at 256; Foley, *supra* note 419, at 3.

423. *THE LANDMARK THUCYDIDES*, *supra* note 409, Book 2:45, at 117.

424. XENOPHON, *supra* note 422, Book 7:30, at 33.

425. See *supra* notes 144, 238-41 and accompanying text.

426. Shaw, *supra* note 418, at 256 n.9. See also *supra* notes 24-26, 123-30, 301-02 and accompanying text.

But the division between public and private spheres may not have been as clear in ancient Athens as most writers believe.<sup>427</sup> Athena, in her guise as Athena Polias, the goddess-protectress of the city of Athens, was a woman served by priestesses.<sup>428</sup> The chief priestess of Athena Polias was in charge of the weaving of a new garment to cover the statue of the goddess in the Parthenon on the Acropolis every four years as part of the Panathenaic Festival.<sup>429</sup> Since the Treasury of the city of Athens was housed on the Acropolis, the chief priestess also had a formal role in signing off on any state expenditures.<sup>430</sup>

Even if ΠΟΛΙΣ and ΟΙΚΟΣ were separate spheres, the Greeks understood that what happened in one could impact on the other.<sup>431</sup> An example of the ΠΟΛΙΣ impacting on the ΟΙΚΟΣ is when war kills males thereby causing pain and injury to their mothers and wives and an entire generation of young women who would not find marriage partners.<sup>432</sup> The impact of war on women was the theme for Euripides in *The Trojan Women*, Aristophanes in *Lysistrata*, and Sophocles in *Antigone*. *Antigone* most clearly articulates that ΝΟΜΟΣ, the positive law of the ΠΟΛΙΣ, the law of men, does not deal fairly with the concerns of the ΟΙΚΟΣ, the concerns of the women for the home and family, and that ΔΙΚΗ, just law, and ΝΟΜΙΜΑ, ancient religious law, must temper ΝΟΜΟΣ, or discord will result.

*The Trojan Women* was produced in 415 B.C.E., shortly after Athens had defeated the island of Melos, killed all the men, and sold all the women and children into slavery.<sup>433</sup> Thucydides, in

427. Shaw, *supra* note 418, at 256.

428. KENNETH J. RECKFORD, ARISTOPHANES' OLD-AND-NEW COMEDY: VOLUME 1, SIX ESSAYS IN PERSPECTIVE 309 (1987); TAAFFE, *supra* note 418, at 62; Foley, *supra* note 419, at 8; Richard P. Martin, *Fire on the Mountain: Lysistrata and the Lemnian Women*, 6 CLASSICAL ANTIQUITY 77, 87 (1987).

429. Foley, *supra* note 419, at 9.

430. Jeffrey Henderson, *Older Women in Attic Old Comedy*, 117 TRANSACTIONS OF THE AMERICAN PHILOLOGICAL ASSOCIATION 97, 124 (1987).

431. Professor Michael Shaw outlined the pattern of male actions negatively impacting on women, which was "widely prevalent in fifth-century Athenian literature." Shaw, *supra* note 418, at 265.

(1) a man, acting as a pure male, does something which threatens the pure female; (2) the pure female comes out of the *oikos* and opposes the male; (3) there is an impasse; (4) the female, taking some male attributes, acts; (5) a previously invisible feminine aspect of the male (e.g., his love for his children) is destroyed; (6) there is a new formation, with male and female no longer pure.

*Id.* at 265-66.

432. Foley, *supra* note 419, at 6-7.

433. Whitney J. Oats & Eugene O'Neill Jr., *Introduction to EURIPIDES, THE TROJAN WOMEN* 957 (415 B.C.) in COMPLETE GREEK DRAMA, *supra* note 11.

his history, described the Athenian actions.<sup>434</sup> Euripides condemned them in *The Trojan Women*, using a slightly masked form based on Homer's *Iliad*.

The play, which takes place just after the fall of Troy, focuses on the women, primarily on Andromache, the wife of Hector; Hecuba, former queen of Troy and Hector's mother; and Helen, the wife of the Greek king Menelaus and the purported cause of the war. Like a modern docudrama, the fate and laments of the women, who have lost their homes, husbands, sons and grandsons, and who have been set aside as prizes of war for the Greek leaders, bring to life the horrors of war. Especially poignant is the scene where Hecuba mourns the death of the son of Hector and Andromache, her grandson Astyanax, who has been killed off stage.<sup>435</sup>

Like the Trojan women who are held captive by and for the Greek men, Minnie Foster Wright was held captive, first within a loveless and brutal marriage and then in jail. Her married life was one of captivity no less severe than her actual imprisonment and both were dictated by a legal system over which women had no control.

Susan Glaspell observed the classical Greek unities of time, place, and action.<sup>436</sup> She presented no violence on stage, but centered all of her story on the unseen violence of John Wright and his violent death. However, she went beyond the classical Greek tradition in making the unseen woman,<sup>437</sup> Minnie Foster Wright, the main character in her story. She went beyond the classical Greek tradition in making unstated facts and ideals central to an understanding of her story. The facts were those of male violence against women and the ideals were those of the first wave of feminism.

Aristophanes produced *Lysistrata* in 411 B.C.E., during the same long and draining war between Athens and Sparta. Greek tragedies were based on old stories with well known plots and characters, but comic playwrights created their own stories and characters.<sup>438</sup> The Greeks' great interest in words, their uses and connections,<sup>439</sup> extended to names.<sup>440</sup> Aristophanes took particu-

434. THE LANDMARK THUCYDIDES, *supra* note 409, Book 5:116, at 357.

435. EURIPIDES, *supra* note 141, at 1002-03.

436. See THE OXFORD COMPANION TO ENGLISH LITERATURE 1016 (5th ed. 1985) (discussing the unities).

437. Marcia A. Noe, *Reconfiguring the Subject/Recuperating Realism: Susan Glaspell's Unseen Woman*, 4 AM. DRAMA 36 (Spring 1995).

438. Olson, *supra* note 156, at 305-06.

439. JOHN PERADOTTO, MAN IN THE MIDDLE VOICE: NAME AND NARRATION IN THE *Odyssey* (1990); Jeffrey Henderson, *Introduction & Commentary to ARISTOPHANES' LYSISTRATA*

lar care in creating names, and their uses "offer significant insights into the playwright's larger purposes and tendencies."<sup>441</sup> Susan Glaspell similarly invented and used names; for example, Mrs. Wright became Minnie Wright and then Minnie Foster Wright.<sup>442</sup>

Plays like *Lysistrata* and *Trifles* are meant to be seen and heard, not read silently. Aristophanes purposely calculated the impact of the name *Lysistrata* (ΛΥΣΙΣΤΡΑΤΗ)<sup>443</sup> on his audience,<sup>444</sup> just as Susan Glaspell did with Minnie Foster Wright. The name *Lysistrata* is emphasized by its use in the sixth line and its repetition throughout the opening dialogues.<sup>445</sup>

*Lysi* (ΛΥΣΙ) means unravel or solve, as in unravel or solve a problem. *Strata* (ΣΤΡΑΤΗ) means armies. It has become a convention of English and American classicists to translate her name idiomatically, as "Disbander of the Armies,"<sup>446</sup> rather than literally, as "Unraveler of Armies." It is the literal meaning which would have struck Athenian audiences of the time since her main, and concededly serious speech,<sup>447</sup> likens unraveling the armies and finding a solution to the issues that caused the war to unraveling wool and then weaving together disparate elements to form a strong and peaceful state.

167 (Jeffrey Henderson ed., 1987).

440. See generally Calvin S. Brown, *Odysseus and Polyphemus: The Name and the Curse*, xviii *COMPARATIVE LITERATURE* 193 (1966) (discussing an example of the power of names in Greek literature).

441. Olson, *supra* note 156, at 306.

442. See *supra* notes 152-60 and accompanying text (describing Susan Glaspell's invention of names). Minnie may also be a reference to Minerva, the Roman name for Athena, the goddess of wisdom, justice and war. Athena in Aeschylus' *Eumenides*, the last part of the trilogy *Oresteia: Agamemnon, The Choepori and the Eumenides*, forgives Orestes for killing his mother, Clytemnestra, but Clytemnestra is condemned by all for killing her husband, Agamemnon, even though he had killed their daughter, Iphigenia. Aeschylus, *Oresteia* (458 B.C.E.) in *COMPLETE GREEK DRAMA: VOL. I*, *supra* note 11 at 163. In Susan Glaspell's modern interpretation Minnie, the modern Minerva, is found to be justified in killing her husband and is forgiven and protected by her fellow women. See also *infra* note 486 (discussing wives who killed their husbands in two Greek myths).

443. HOWATSON, *supra* note 151, at 338.

444. Olson, *supra* note 156, at 306-07.

445. *Id.* at 313. The hero is the first character to appear on stage and speak, but, on average in Aristophanes' plays, the hero's name is not used for the first 383 lines. In only two of Aristophanes' eleven extant comedies is the name of the hero used in the opening lines. *Id.* at 306-07.

446. Henderson, *supra* note 439, at xxv.

447. HUGILL, *supra* note 416, at 39-102; DOUGLAS M. MACDOWELL, *ARISTOPHANES AND ATHENS: AN INTRODUCTION TO THE PLAYS* 235-36 (1995); RECKFORD, *supra* note 428, at 307; Henderson, *supra* note 439, at xxix.

Aristophanes may have partly based the character of Lysistrata on Lysimache, who in 411 B.C.E. was the priestess of Athena Polias, the goddess protectress of the city of Athens whose main temple was on the Acropolis.<sup>448</sup> Lysimache (ΛΥΣΙΜΑΧΗ) means "Unraveler of Battles" and the priestess was a well known figure and probable peace advocate who held office for sixty-four years.<sup>449</sup> It would have been improper to blatantly base the heroine of a comic sex strike on the chief priestess of Athena, although Aristophanes specifically refers to Lysimache's antiwar sentiments twice.<sup>450</sup> Even more importantly, the impact of the meaning of her name would have been diluted by frequent usage. To an Athenian audience of 411 B.C.E., the word Lysimache would have identified a specific individual, the priestess of Athena Polias, and would not have called to mind the literal meaning of the word. Lysistrata was not a common name.<sup>451</sup> Its early and frequent use by Aristophanes would have struck an Athenian audience with its literal meaning and prepared them for the weaving metaphor in her main political speeches.

Lysistrata, the Unraveler of Armies, conceives a two part scheme whereby the women of warring Athens and Sparta and their allied city-states will bring an end to the catastrophic war.<sup>452</sup> First, the younger women will withhold sex until the men agree to stop fighting.<sup>453</sup> When asked what they are to do if their husbands use force, Lysistrata replies,

Then yield to their wishes, but with a bad grace; there is no pleasure in it for them, when they do it by force. Besides, there are a thousand ways of tormenting them. Never fear, they'll soon tire of the game; there's no satisfaction for a man, unless the woman shares it.<sup>454</sup>

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448. Foley, *supra* note 419, at 8; Henderson, *supra* note 439, at xxxv.

449. Henderson, *supra* note 439, at xxxv, xxxviii-xxxix; Olson, *supra* note 156, at 313.

450. Henderson, *supra* note 439, at xxxix.

451. *Id.* at xl.

452. SPATZ, *supra* note 409, at 92; A. O. Hulton, *The Women on the Acropolis: A Note on the Structure of the 'Lysistrata,'* XIX GREECE & ROME 32 (1972).

453. ARISTOPHANES, *supra* note 11, at 816:

We need only sit indoors with painted cheeks, and meet our mates lightly clad in transparent gowns of Amorgos silk, and perfectly depilated; they will get their tools up and be wild to lie with us. That will be the time to refuse, and they will hasten to make peace, I am convinced of that!

*Id.*

454. *Id.*

This was the original "make love, not war." The sex strike part of the rebellion is a passive one.

The second part of her scheme involves active rebellion. Lysistrata and the older women of Athens seize the Acropolis, which contains the treasury of the city.<sup>455</sup> Proboulos,<sup>456</sup> a public official or magistrate, functions as the symbol of traditional law and power, like the sheriff and the county attorney in Susan Glaspell's story. The main scene in Aristophanes' play is between Lysistrata and Proboulos when he tries to enter the Acropolis to draw money from the city treasury to pay for the war. Lysistrata and the older women stop him.

MAGISTRATE

What do you propose to do then, pray?

LYSISTRATA

You ask me that! Why, we propose to administer the treasury ourselves.

MAGISTRATE

You do?

LYSISTRATA

What is there in that to surprise you? Do we not administer the budget of household expenses?

MAGISTRATE

But that is not the same thing.

LYSISTRATA

How so—not the same thing?

MAGISTRATE

It is the treasury supplies the expenses of the war.

LYSISTRATA

That's our first principle—no war!

MAGISTRATE

What! and the safety of the city?

LYSISTRATA

We will provide for that.

MAGISTRATE

You?

LYSISTRATA

Yes, *we*!

MAGISTRATE

What a sorry business!

LYSISTRATA

455. SPATZ, *supra* note 409, at 92.

456. Due to the disastrous course of the war, there was a change in the government of Athens whereby ten Probouli were selected to assume the direction of the war. HUGILL, *supra* note 416, at 2 (citing Thucydides at Book 8:1); MACDOWELL, *supra* note 447, at 234. Professor Spatz called them a Board of Ten Commissioners of Public Safety. SPATZ, *supra* note 409, at 92-93. Aristophanes was opposed to their policy of "stubborn, blind resistance." HUGILL, *supra* note 416, at 3 (footnote omitted).

Yes, we're going to save you, whether you like it or not.<sup>457</sup>

Aristophanes' women,<sup>458</sup> like Susan Glaspell's contemporary suffragettes,<sup>459</sup> justified their ability to direct public funds on the ground that they traditionally ran the household. Both ancient and modern women equated the well run home, ΟΙΚΟΣ, with the well run state, ΠΟΛΙΣ. When they seized the Treasury, the Greek women went beyond passive resistance and into active rebellion, just as Susan Glaspell's women did when they hide and destroyed evidence and lied about it.<sup>460</sup> Aristophanes' Lysistrata outmaneuvered the Athenian men just as Susan Glaspell's jury of women outmaneuvered the men of their time.

There are two choruses in *Lysistrata*, a chorus of old women who, together with Lysistrata, take strong feminist positions, and a chorus of old men, who, together with Proboulos, pronounce traditional male views. Lysistrata and the women's chorus are forced to engage in a debate regarding their right to participate in the political life of the state, the same debate which occupied the Suffragettes in 1916. When the Magistrate challenges Lysistrata as to what burden of war the women face, she replies, "What! wretched man! Why, it's a far heavier burden to us than to you. In the first place, we bear sons who go off to fight far away from Athens."<sup>461</sup> The Leader of the women's chorus responds in the same vein, "I pay my share of tolls and taxes, by giving men to the State."<sup>462</sup>

By 411 B.C.E. one-third of the male population of Athens had been killed in the disastrous war.<sup>463</sup> Although Athenian women theoretically had no say in the public life of the ΠΟΛΙΣ, the discontentment of the women in the ΟΙΚΟΣ over the deaths of fathers, husbands, sons, and eligible males must have spilled over and influenced male public opinion.<sup>464</sup> The actions of the men of the ΠΟΛΙΣ had impacted heavily and negatively on the women of the ΟΙΚΟΣ. The women responded through Aristophanes' *Lysistrata* with the same arguments made by Twentieth Century American feminists to justify the grant of political power: we too work for the good of the state by running our

457. ARISTOPHANES, *supra* note 11, at 828-29.

458. Foley, *supra* note 419, at 7; Henderson, *supra* note 439, at 129-30.

459. Crystal Eastman Benedict, *Political Recognition of Women the Next Step in the Development of Democracy*, 19 CASE & COM. 327, 327-28 (1912-13).

460. *Trifles*, *supra* note 1, at 277.

461. ARISTOPHANES, *supra* note 11, at 833.

462. *Id.* at 835.

463. See TAAFFE, *supra* note 418, at 72.

464. *Id.*; Henderson, *supra* note 439, at 128.

homes and providing for future generations and we too pay taxes.

There is even a connection to jury service in *Lysistrata*. The old men who form the male chorus are retirees whose income derives from paid jury service.<sup>465</sup> That jury pay came from the Treasury on the Acropolis, so their attempt to retake the Acropolis is patriotism fueled by self-interest.<sup>466</sup> Aristophanes was critical of paying old men unfit for other occupations to perform important public service on juries.<sup>467</sup>

Lysistrata uses weaving, a traditional Greek women's domestic pursuit,<sup>468</sup> as a metaphor. From wool gathering to final garment, she explains how to end the war.<sup>469</sup> First, emissaries must be sent to enemies and allies to uncover information about the causes of discontent and possible solutions. "When we are winding thread, and it is tangled, we pass the spool across and through the skein, now this way, now that way; even so, to finish off the war, we shall send embassies hither and thither and everywhere, to disentangle matters."<sup>470</sup>

Next, Lysistrata makes a powerful political statement on diversity, on judging and using people according to their value, even if they are traditionally classified in different categories.<sup>471</sup> Inclusion despite diversity was a major theme of the suffragettes and was echoed by Susan Glaspell.<sup>472</sup> Lysistrata states,

First we wash the yarn to separate the grease and filth; do the same with all bad citizens, sort them out and drive them forth with rods—they're the refuse of the city. Then for all such as come crowding up in search of employments and offices, we must card them thoroughly; then, to bring them all to the same standard, pitch them pell-mell into the same basket, resident aliens or no, allies, debtors to the State, all mixed up together. Then as for our Colonies, you must think of them as so many isolated hanks; find the ends of the separate threads, draw them to a centre here, wind them into one, make one great hank of the lot, out of which the public can weave itself a good, stout tunic.<sup>473</sup>

Lysistrata would blur the sharpe distinctions Athens tradition-

465. Henderson, *supra* note 439, at xxxvii, 99.

466. *Id.* at 152-53.

467. *Id.*

468. See Foley, *supra* note 419, at 7.

469. See HUGILL, *supra* note 416, at 39-102; RECKFORD, *supra* note 428, at 307.

470. ARISTOPHANES, *supra* note 11, at 832.

471. See MACDOWELL, *supra* note 447, at 237-38; Henderson, *supra* note 439, at 144.

472. See *supra* notes 131-32, 161-64 and accompanying text.

473. ARISTOPHANES, *supra* note 11, at 833.

ally drew among citizens, resident aliens and foreign allies.<sup>474</sup> As to citizens, she would eliminate the bad ones, the ones who sought to benefit themselves at the expense of the ΠΟΛΙΣ, and include the good ones, those unfairly thrown into debt.<sup>475</sup> She would also include all those living in Athens and contributing to the welfare of the ΠΟΛΙΣ, even resident aliens and foreign allies.<sup>476</sup> All those of value to the ΠΟΛΙΣ would be woven together to provide a cloak for the city, a symbol of prosperity and safety.<sup>477</sup> In the same way, Susan Glaspell's finished American quilt would provide protection for the inhabitants of the home and symbolically for the state.

There is also a parallel to Susan Glaspell's Ladies Aid Society, a church sponsored women's group that sewed and quilted for the benefit of the community. In Athens, the priestess of Athena Polias oversaw the annual weaving of a new peplos or gown for the goddess.<sup>478</sup> Athena herself combined male and female, public and domestic.<sup>479</sup> In both *Lysistrata* and *Antigone*, the heroines advocated and represented traditional religious values.

From Homer on, Greek literature presented spinning and weaving for women and fighting for men as proper gender roles.<sup>480</sup> Aristophanes alludes to this Homeric tradition when *Lysistrata* reports she was told by a man: "Just weave your web, please . . . . War is men's business!"<sup>481</sup> A major instance of men not understanding women's work occurs in Homer's *Odyssey*.<sup>482</sup> Ulysses was away at war in Troy for ten years and then adventured for ten more years before returning home to Ithaca. Penelope, his faithful wife, was besieged in her home by numerous suitors who, believing Ulysses dead, wanted her to choose one of them as her new husband. Penelope delayed this choice by setting "up a web" on her loom and promising to decide on a new husband when she finished weaving a shroud.

So by day I'd weave at my great and growing web—by night, by the light of torches set beside me, I would unravel all I'd done. Three whole years I deceived them blind, seduced them with this scheme. Then, when the

474. See MACDOWELL, *supra* note 447, at 236-38.

475. *Id.*; HUGILL, *supra* note 416, at 41-42.

476. See *id.*, at 61-64; MACDOWELL, *supra* note 447, at 237-38.

477. See HUGILL, *supra* note 416, at 96-99; RECKFORD, *supra* note 428, at 307.

478. See Henderson, *supra* note 439, at 155-56.

479. RECKFORD, *supra* note 428, at 309.

480. See Henderson, *supra* note 439, at 134.

481. ARISTOPHANES, *supra* note 11, at 830.

482. HOMER, *THE ODYSSEY* (Robert Fagles trans., Viking 1996).

wheeling seasons brought the fourth year on and the months waned and the long days came round once more, then, thanks to my maids—the shameless, reckless creatures—the suitors caught me in the act, denounced me harshly. So I finished it off. Against my will. They forced me.<sup>483</sup>

This may be the first instance in literature of men not having a clue about women's work; of not understanding that for three years Penelope was weaving and unraveling the same cloth. The men never figured it out on their own but only when Penelope was betrayed by other women.

Susan Glaspell drew on Greek literature but placed her characters in an American context. Instead of weaving, she used the unique American women's domestic pursuit of quilting. Instead of unraveling threads to solve a problem or a mystery and weaving different threads together to form a solution, her female characters quilted trifles together to discover what happened and then replaced bad sewing with good to reach a just solution.<sup>484</sup> Instead of the female betrayal of the *Odyssey*, Susan Glaspell, like Aristophanes, presented female solidarity to protect Minnie Foster and make a murder trial impossible. Instead of protesting against the male violence of war that indirectly impacted on women, Susan Glaspell exposed the direct violence of woman abuse and the injustice of male law that did not protect women against such abuse and that would punish a woman for self-defense. Instead of Aristophanes' women who used their sex to force men to exercise their power to govern in a just fashion,<sup>485</sup> Susan Glaspell's women take power to do justice themselves.<sup>486</sup> *Lysistrata* is a play about women's values by a man;

483. *Id.* at 395.

484. *Trifles*, *supra* note 1, at 270.

485. "The play is not so much a plea for women's rights as an indictment of men's incompetence." Matthew Dillon, *The Lysistrata as a Post-Deceleian Peace Play*, 117 *TRANSACTIONS AM. PHILOLOGICAL ASS'N* 97, 101 (1987); see also CEDRIC H. WHITMAN, *ARISTOPHANES AND THE COMIC HERO* 202 (1964).

486. Susan Glaspell's story is the first instance in Western literature where a woman's killing of her husband is found to be justified. Wives killed husbands in two Greek myths: Aeschylus' trilogy, *Oresteia: Agamemnon, The Choephoroi* and *The Eumenides*, turned on the killing of Agamemnon by his wife Clytemnestra, Howatson, *supra* note 151, at 398-99, and Aeschylus' trilogy, *The Suppliants, The Aigyptioi*, and *Amynone*, involved the killing by all but one of the fifty Danaides of their husbands, Howatson, *supra* note 151, at 168. For a more complete discussion of *The Suppliants* trilogy, see JOHN HERINGTON, *AESCHYLUS* 94-111 (1986).

In the first myth, Agamemnon, the leader of the Greek expedition against Troy, killed his daughter, Iphigenia, as a sacrifice to the gods so the wind could rise for the Greek fleet to sail to Troy. For his act of infanticide, Agamemnon earned the hatred of his wife Clytemnestra. Upon his return from Troy, Clytemnestra and her lover Aegis-

*Trifles* is a play about women's equality by a woman.

*The Trojan Women* and *Lysistrata* concern the different values of men and women and the depiction of their different values by the use of different words; words symbolizing male and female, ΠΟΛΙΣ and ΟΙΚΟΣ, war and peace, aggression and cooperation. There is no direct evidence that Susan Glaspell knew Sophocles' *Antigone*,<sup>487</sup> but it is the clearest example in Greek literature of men and women using different words to underline a clash of different values; Creon's ΝΟΜΟΣ against Antigone's ΔΙΚΗ and ΝΟΜΙΜΑ.

Women writers of both the first and second waves of American feminism understood the importance of language. Aristophanes had *Lysistrata* make serious and ringing political statements reflecting what he believed to be women's perspective. Susan Glaspell went further and contrasted the authoritative statements of the men with the hesitant speech and non-speech of the women. The distinguished theatre critic, Ludwig Lewisohn,<sup>488</sup> writing in 1920 in New York, did not understand Susan Glaspell's non-use of language. He knew the theme of *Trifles* was "magnificent," "But the actual speech of the play is neither sufficient nor sufficiently direct. Somewhere in every drama words must ring out . . . Suppose in *Trifles*' you do not, on the stage, catch the precise significance of the glances which the neighbor women exchange."<sup>489</sup> He failed to understand the power of non-speech when he complained, "But one aches for words to release the dumbness, complete the crisis, and drive

thus killed Agamemnon and Cassandra, a princess of Troy whom Agamemnon had taken as a prize of war. For her act, Clytemnestra was condemned by all. When her son Orestes killed her, his act of matricide was forgiven by Athena.

In *The Suppliants*, Danaus and his fifty daughters, the Danaids, fled Egypt to avoid marriage with the fifty sons of their uncle Aegyptus. Whitney J. Oats & Eugene O'Neill Jr., *Introduction to AESCHYLUS, THE SUPPLIANTS* 6 (c.463 B.C.E.) in *COMPLETE GREEK DRAMA*, *supra* note 11. Although only the first play of Aeschylus' trilogy has survived, in the myth all but one of the Danaids killed their husbands on their wedding night. The theme of *The Suppliants* can be interpreted to be the right of women to refuse forced and loveless marriages. ROBERT DUFF MURRAY, JR., *THE MOTIF OF IO IN AESCHYLUS' SUPPLIANTS* 3, 7 (1958). According to one post-Aeschylean legend, the women were punished by forever trying to fill leaky jars in the Underworld. *Id.* at 13.

In contrast to the ancient condemnation of these women who killed, Susan Glaspell's women found Minnie Foster Wright justified in killing John Wright for subjecting her to a loveless and abusive marriage.

487. SOPHOCLES, *supra* note 5.

488. Alexander Woollcott, *The Play: Concerning 'Rose Bernd'* N.Y.TIMES, Oct. 1, 1922, at VII:1:1.

489. Ludwig Lewisohn, *Review of Plays by Susan Glaspell*, THE NATION, Nov. 3 1920, at 509, 510.

the tragic situation home."<sup>490</sup> It is the lack of formal power and speech that magnifies the tragedy and drives it home to the audience.<sup>491</sup> Until named, woman abuse, marital rape, stalking, and separation attack existed in the private world of women but not in the political world of men. Susan Glaspell very effectively played with language in her use and non-use of words, in her reliance on looks and gestures, in her choice and use of names, and in her use of the words "trifles," "queer," and "knot."

### CONCLUSION

Susan Glaspell told the story of how she came to write *Trifles* in *The Road to the Temple*, her biography of her husband. Jig announced a play by her for the Provincetown Players. She protested that she didn't know how to write a play. He insisted.

So I went out on the wharf, sat alone on one of our wooden benches without a back, and looked a long time at that bare little stage. After a time the stage became a kitchen,—a kitchen there all by itself. I saw just where the stove was, the table, and the steps going upstairs. Then the door at the back opened, and people all bundled up came in—two or three men, I wasn't sure which, but sure enough about the two women, who hung back, reluctant to enter that kitchen. When I was a newspaper reporter out in Iowa, I was sent down-state to do a murder trial, and I never forgot going into the kitchen of a woman locked up in town. I had meant to do it as a short story, but the stage took it for its own, so I hurried in from the wharf to write down what I had seen. Whenever I got stuck, I would run across the street to the old wharf, sit in that leaning little theatre under which the sea sounded, until the play was ready to continue. Sometimes things written in my room would not form on the stage, and I must go home and cross them out.<sup>492</sup>

We can imagine what forces and experiences led to *Trifles* and *A Jury of Her Peers*. We, like Martha Hale and Mrs. Peters, can quilt together the pieces of Susan Glaspell's life. Her coverage of the trial of Mrs. Hossack when she was a young reporter and her visit to the Hossack farmhouse provided factual knowledge of abuse and society's responses and non-responses. The kitchen of the farmhouse gave her the set for *Trifles*. Her exposure to feminist theory associated with the first wave of femi-

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490. *Id.* at 510.

491. Susan Glaspell rediscovered that the narrative voice can convey the subjective feel of experiences in a way that triggers understanding of others and an emphatic response to their plight, thereby changing our moral beliefs and our moral assessment of law. See Ben Zvi, *Women Playwrights*, *supra* note 6.

492. GLASPELL, TEMPLE, *supra* note 403, at 196-97.

nism in New York City, Provincetown and Chicago gave her a clear theoretical basis for her feminist views. Her exposure to the Greek classics through her husband gave her examples of how the voices of men and women clashed on issues of state and home, public and private, violence and peace, competition and cooperation; it gave her the example of unraveling and weaving as political statements. It was her genius, however, that took these diverse influences and, like an American quilt, brought them together.