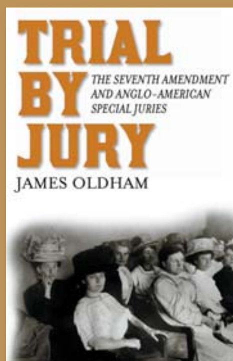
The Jury of Matrons

BY JAMES OLDHAM

However it was, this they all agree in, that my mother pleaded her belly, and being found quick with child, she was respited for about seven months; in which time having brought me into the world, and being about again, she was called down, as they term it, to her former judgment, but obtained the favour of being transported to the plantations.

Moll Flanders *by Daniel Defoe (1722)*

In his new book *Trial By Jury: The Seventh Amendment and Anglo-American Juries*, James Oldham, the St. Thomas More Professor of Law and Legal History at the Law Center, explores the colorful and varied history of trial by jury as established in England, transplanted to America and preserved in the U.S. Constitution. In the chapter excerpted here, Oldham discusses the little-known practice of impaneling all-female juries during the time in England and America when regular juries were all male. *Trial By Jury* was published last June by New York University Press; this essay is published by permission.



It is well known that until the 20th century, regular jury service in both England and America was exclusively a male preserve. Not so well known is that, for at least seven centuries in England, and also in colonial America, women served on exclusively female special-purpose juries. The special purpose was to determine whether a female party to litigation was pregnant — or, to use the quaint language of the jury charge, whether she was "quick with child of a quick child." To provoke the inquiry, the female party to litigation would, again in the language of the day, "plead her belly."

In theory at least, the women chosen to serve on the jury were to be matrons, who were regarded as experts on the subject of pregnancy and childbirth. Ordinarily the jury of matrons was impaneled in one of two contexts. In civil cases, the matrons decided whether a widow was with child by her late husband, a question affecting the inheritance of the husband's estate. On the criminal side, a stay of execution would be granted to a female defendant who had been sentenced to death but was found to be pregnant. Such a stay could lead to a pardon and was therefore of extreme importance to the prisoner. In both civil and criminal situations, the jury of matrons would be required to inspect the woman claiming to be pregnant and to render a verdict stating whether the woman was or was not with quick child.

As is suggested by the above quotation from *Moll Flanders*, there was a widespread popular awareness of this function of matrons, especially by the close of the 17th century and throughout the 18th. This awareness is illustrated in criminal cases tried at the Old Bailey and reported in the criminal trial "newspaper" of the day, the Old Bailey Sessions Papers.

Once, in 1771, the jury of matrons received lively anecdotal treatment in the popular press. That occasion involved the late-18th-century French ambassador (spy?) to England, the Chevalier D'Eon. After accounts began to circulate of appearances by the Chevalier in Europe dressed as a woman, intense speculation developed in England about whether the Chevalier was male or female.

The cover photo from *Trial by Jury* was taken of the first all-woman jury in Los Angeles, which sat on November 2, 1911. Women had just been granted the right to vote the previous month, and all 36 of the women summoned for jury duty appeared, ready to serve.

This speculation was taken up in the London clubs in the form of wagers, eventually involving, allegedly, well over £120,000. Occasionally a party to a wager claimed to have sufficient evidence to prove his case and sued to collect, providing high entertainment to the public and considerable annoyance to the courts. Amid this excitement, *Town & Country* magazine published a wonderful engraving entitled "The Trial of M. D'Eon by a Jury of Matrons," depicting twelve sober matrons seated in a jury box, some equipped with spyglasses, inspecting a diminutive Chevalier who stood on a pedestal, draped in nothing but a sheet and his military cross. [See page 55.] Accompanying the engraving was a fictitious account of the deliberations of the matrons, who were given the thinly disguised names of wives of prominent political figures of the day.

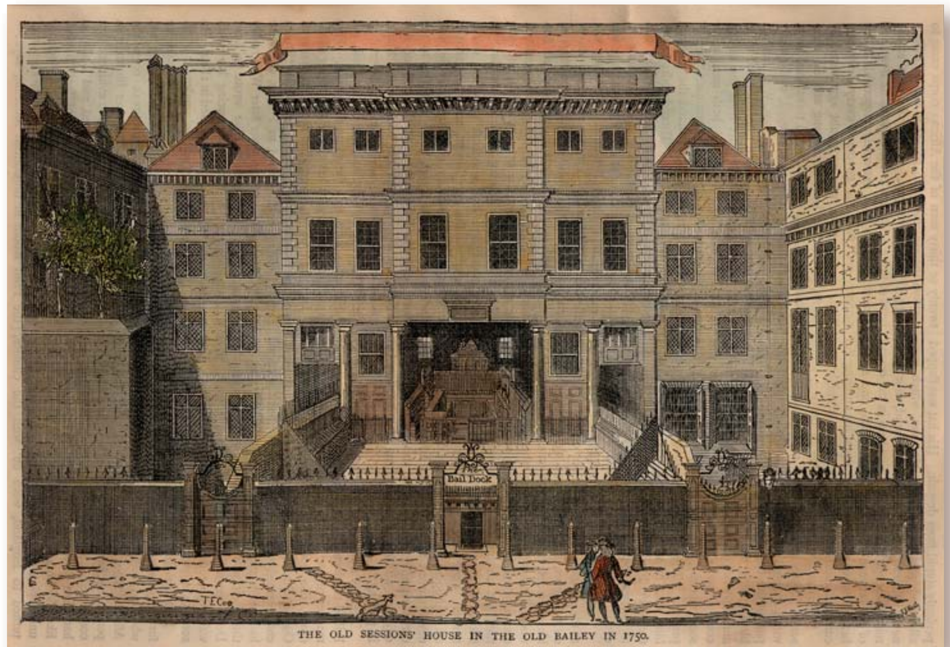
It is unlikely that any uniform definition of "matron" existed, or, even if it did, that it was adhered to in the process of impaneling juries. *The Oxford English Dictionary* provides a retrospective definition of "matron" — "a married woman considered as having expert knowledge in matters of childbirth, pregnancy, etc.; now only in jury of matrons." In the mid-18th century, Dr. Johnson's *Dictionary of the English Language* defined "matron" as "an elderly lady" or "an old woman." But in 1708, John Kersey in his *Dictionarium Anglo-Britanicum* defined "matron" as "a prudent and virtuous, motherly woman, also one of the grave women that have the over-sight of children in an Hospital." It is fair to assume that the term "matron" was meant to exclude young

single women and perhaps women who had never been married.

There is no evidence of any repository of names from which matrons would be summoned and virtually no evidence of the use of customary forms associated with the summoning of jurymen. The most logical explanation for this is that the matrons were obtained "de circumstantibus" — that is, from among the audience in the courtroom or bystanders in the courthouse. The only delay was that required to round up the twelve "matrons." It is improbable that, in such a slap-dash impaneling process, particular care was taken to ensure that the women chosen had genuine experience with pregnancy or childbirth.

Assuming that juries of matrons were usually "de circumstantibus," it is interesting to reflect on the nature of the surroundings. Before the mid-18th century, matrons at the Old Bailey could not have been "captured" as in the 19th-century cases by closing the doors to the courtroom, because there were no doors to close. Historians frequently lose sight of the fact that the Old Bailey was once an open-air edifice, almost an architectural cutaway, designed to protect the court against infectious disease that might be carried by prisoners or witnesses. Engravings of the court as it then appeared suggest that onlookers at trials stood in the open area, a courtyard called "Sessions House Yard," reached through an alley. As Gerald Howson observed in *Thief-Taker General, The Rise and Fall of Jonathan Wild* (New York: St. Martins, 1970, 315), "seen from Sessions House Yard, a trial at the Old Bailey must have resembled nothing so much as a giant Punch and Judy show." The outdoor setting may have been unappealing to genteel members of society, and in winter months or inclement weather it must have diminished the natural supply of onlookers. If so, this could give weight to accusations of jury-packing.

What were the matrons charged to do, and did they in fact carry out their charge? An Old Bailey Sessions Paper

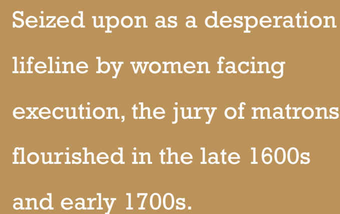


This engraving of London's Old Bailey shows that it was once an open-air edifice.

from December 1688 states simply that the three female prisoners who pleaded their bellies were "by a jury of Women found Pregnant," but officially the jurors' job was more subtle. The jurors' task was to determine whether the prisoner was "quick with child." The notion of quickening was conceptually central to the role of the jury of matrons because until the late 18th century, the belief was widespread that human life had not begun before this event. Such a belief was to be scotched by medical advances, but it was firmly in place throughout most of

the centuries of existence of the jury of matrons. As stated by Blackstone (*Commentaries on the Laws of England*, Oxford, 1765-69, 4:388), execution was stayed only "if they bring in their verdict quick with child (for barely, with child, unless it be alive in the womb, is not sufficient)."

How faithful the juries were to their charge cannot be known exactly. Certainly the question is meaningless if the jury was packed in the prisoner's favor, as was surely true on occasion. But the jury determinations were almost always expressed in terms of "quickening." Sometimes the jury return was written that a prisoner was, or was not, "quick with child," but most were returned "with quick child" or "not with quick child." Clearly the honest juries of matrons had the notion of "quickening" in mind; the child's movement — movement that they could feel — was the best possible evidence to support their decision. And frequently the juries returned verdicts that prisoners were not with quick child. Of the prisoners who pleaded their bellies as shown in the Old Bailey Sessions Papers from 1677-1800, 138 out of a total of 296 women, or 47 percent, were found not with quick child. Percentages for individual years varied, and some patterns of abuse are evident, but the overall figures indicate that many juries went about their task conscientiously. In one instance (April 1714), a jury expressly found that a prisoner "was with Child, but not Quick."



Seized upon as a desperation lifeline by women facing execution, the jury of matrons flourished in the late 1600s and early 1700s.

One question was of ultimate importance to the prisoners: Did pleading their bellies improve their chances for survival? Undoubtedly many prisoners, if genuinely pregnant, would have pleaded their bellies to allow their unborn children to live even if the device offered no chance to redeem their own lives. Further, most prisoners would naturally attempt to delay their trip to the gallows as long as possible. Even if the chance for a pardon was unclear or apparently nonexistent, there was nothing to lose by the attempt — the prisoners were already under ultimate sanction.

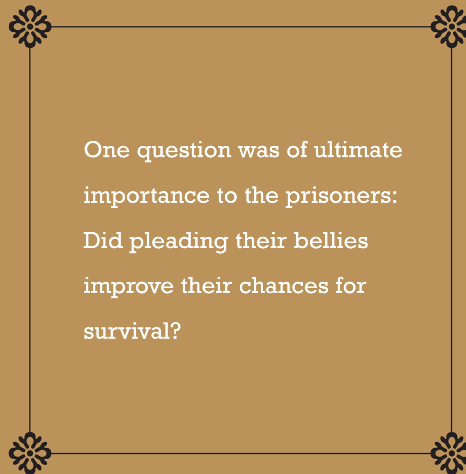
The fact is, however, that gaining time was of considerable value. Fervid efforts were often made to gain reprieves for prisoners, and these sometimes worked, sometimes unexpectedly. A reprieve provided time to evaluate whether a prisoner should be pardoned, either totally, or conditional upon transportation to America. What is of particular interest is whether a reprieve for pregnancy gave the prisoner a better than ordinary chance of escaping the gallows. The evidence I have examined in the Gaol Delivery Books, the Old Bailey Sessions Papers and the Newgate Calendars does not permit a conclusion that a successful pregnancy plea was tantamount to a pardon, since some prisoners after delivering their babies were "called down to their former judgment." But many did survive by means of pardons conditional upon transportation to the colonies.

Another question is the extent to which fraudulent appeals to juries of matrons became a tactical ploy to gain time. In addition to jury-packing, abuse of the jury of matrons could take several forms, such as skillful fakery by the prisoner to demonstrate pregnancy, and contriving to become pregnant while in prison awaiting trial. Alexander Smith gives lively examples in his *History of the Lives of the Most Noted Highwaymen, Foot-pads, House-breakers, Shop-lifts and Cheats, of Both Sexes* (London, 1714, 2:46, 184-85). Describing the fate of Mary Carleton (known as "The German Princess"), Smith

stated that, after having been found guilty, "She now had but one Shift more, and that was an Old Newgate-Trick, to plead her Belly; whereupon a jury of Women was found out, and sworn." Smith also wrote that Nan Harris, after being sentenced to death for a theft of calico, "pleaded her belly, and used the old Stratagem of drinking new Ale very plentifully, to make her swell, cramming a Pillow in her Petticoat to make her look big; and having Matrons of her own Profession ready at hand, who, right or wrong, bring their wicked Companions quick with Child, to the great Impediment of justice."

It is hard to imagine the use of a pillow to any advantage with an honest jury, but the device could give courtroom verisimilitude to a corrupt verdict above accusations of abuse. From 1698 through 1727, 62 percent of all women sentenced to death at the Old Bailey pleaded pregnancy, and of these, 61 percent were successful before juries of matrons. For one five-year period, 1714-1719, during which Daniel Defoe was writing *Moll Flanders*, 92 of the 112 females sentenced to death — an astonishing 82 percent — pleaded their bellies. The peak year was 1716, in which all 24 — 100 percent — of the women sentenced to death pleaded pregnancy, 18 of them successfully.

Thus, long before the jury of matrons was replaced by the doctors, a chapter of corruption in its history was written at the Old Bailey. Seized upon as a desperation lifeline by women facing execution, the jury of matrons flourished in the late 1600s and early 1700s. Assertions that often the juries were packed, and that often the pregnancies were contrived while in jail, were likely true. But during the 1720s, recourse to the jury of matrons decreased sharply, and by the 1760s the appearance of the jury was quite sporadic. According to the Old Bailey Sessions Papers, no more than one prisoner pleaded her belly at any sessions after 1762, regardless of the number of females who were sentenced to death.



This change is striking, and the reasons for it are unclear. Official efforts to curb the abuse of 1715-20 might have occurred, although I have discovered no such evidence. Perhaps more care was taken by the sheriffs and judges in the impaneling process; this might have been true especially after mid-century, when the Old Bailey courtroom became fully enclosed and thus more hospitable to curiosity-seeking matrons among the middling gentry. No doubt also the increasing use of the expedient of transportation and a generalized leniency in the treatment of female prisoners played a part.

To the extent that the early 18th-century abuses were due to packed juries of matrons, they were a corruption of legal process. But it is not likely that all 12 matrons on a given jury were cronies of the prisoner, and another interpretation is possible. Eighteenth- and nineteenth-century trial juries often mitigated the rigors of the penal laws by what has been termed "jury nullification" or "pious perjury," most commonly by finding that the value of stolen goods was just under 40 shillings, the amount making the theft a felony, even though the goods were manifestly worth more. Perhaps the behavior of juries of matrons was a variation on this theme. If the prisoner's claim of being with quick child had any plausibility, what was the harm in allowing a respite? There was no risk to the jurors of being attainted or even penalized for a false verdict. The prisoner would eventually be hung or transported, and there was some chance of saving the life

of an innocent unborn child. Such, at least, could have been the reasoning of those members of the jury who did not have their minds made up in advance.

Ultimately, the jury of matrons became obsolete. Medical expertise in the second half of the 19th century could no longer be ignored. From the mid-1700s into the 1900s, the jury of matrons continued to function, but with decreasing regularity. The last known use of a jury of matrons was reported by *The Times* on July 19, 1917. On the previous day, a young woman named Stevens was convicted of infanticide and was sentenced to death, but she claimed pregnancy. Justice Lawrence ordered that a jury of matrons be impaneled, "and after hearing medical evidence they returned a verdict that the prisoner was pregnant." Accordingly, the death sentence was respited.

Unlike most juries of matrons, which were impaneled to discover whether a woman was "quick with child," this one was asked to determine whether the Chevalier D'Eon, a late 18th-century French ambassador to England, was male or female.

As a part of the customary law of England that had been called into play rarely since the mid-18th century, and hardly at all since the early 19th century, it did not become necessary formally to abolish the jury of matrons, or to replace it with a more modern procedure. Such a procedure was, nevertheless, proposed. The Criminal Code introduced in the House of Commons in 1879 (and again in 1880) contained a provision abolishing the jury of matrons, substituting in its place a requirement that the court "direct one or more registered medical practitioners to be sworn to examine the woman in some private place, either together or successively, and to inquire whether she is with child of a quick child or not" (House of Commons Sessional Papers, London, 1878-79, vol. 2, title 7, part 43, s. 531). By comparison, the State of New York in its 1881 Code of Criminal Procedure provided that, "If there is reasonable ground to believe that a female defendant, sentenced to the punishment of death, is pregnant, the sheriff of the county where the conviction took place must impanel a jury of six physicians to inquire into her pregnancy."

In England, the jury of matrons died a natural death of obsolescence. The jury of matrons' surprising history is an example of a legal principle founded on humanitarian values that was abused, perhaps sometimes in order to palliate the harshness of the penal laws, and that ultimately perished not by continued abuse, but by the growth of science.