

Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

2021

Benevolent Exclusion

Anna Offit

Southern Methodist University, Dedman School of Law

Recommended Citation

Anna Offit, *Benevolent Exclusion*, 96 Wash. L. Rev. 613 (2021)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

BENEVOLENT EXCLUSION

Anna Offit*

Abstract: The American jury system holds the promise of bringing commonsense ideas about justice to the enforcement of the law. But its democratizing effect cannot be realized if a segment of the population faces systematic exclusion based on income or wealth. The problem of unequal access to jury service based on socio-economic disparities is a longstanding yet under-studied problem—and one which the uneven fallout of the COVID-19 pandemic only exacerbated. Like race- and sex-based jury discrimination during the peremptory challenge phase of jury selection, the routine dismissal of citizens who face economic hardship excludes not only people but also the diversity of ideas, experiences, and frames of interpretation that characterize the American population. By failing to make sure that people who are poor can serve, we impoverish our shared understanding of doing justice.

This Article offers a historical and empirical account of how socio-economic exclusion cuts prospective jurors from juries. It argues that the dominant rationale for such exclusion is a perception that poor and otherwise burdened prospective jurors should be excused from jury service for their own benefit. The effect of this superficially benevolent rationale, I argue, has been the concealment and reinforcement of class-based jury discrimination. The Article concludes that addressing this seemingly benign but exclusionary practice is an essential task for legal reformers, recognizing the relationship between race and class-based exclusion. Further, it recommends instituting structural changes that would make it possible for any eligible person to serve, regardless of income or wealth.

INTRODUCTION	614
I. THE LAW OF SOCIO-ECONOMIC JURY EXCLUSION	617
A. Early Property Requirements	617
B. The Key-Man System, The Jury Selection and Service Act of 1968, and the Present.....	621
II. THE PROCESS OF SOCIO-ECONOMIC JURY EXCLUSION.....	625

* Assistant Professor of Law, SMU Dedman School of Law; AB, Princeton University; MPhil, University of Cambridge; JD, Georgetown Law; PhD, Princeton University. This manuscript benefitted from invaluable feedback from the 2020 Chicago-Kent College of Law Faculty Workshop and from the Deason Criminal Justice Reform Center “Systemic Barriers to Social Change and Civic Participation” panel discussion. Thank you, also, to Jenia Turner, Anna Roberts, Nancy Marder, Valerie Hans, Paula Hannaford-Agor, Shari Seidman Diamond, Sanja Kutnjak Ivkovich, Mar Jimeno Bulnes, Nikolai Kovalev, Catherine Grosso, Suja Thomas, Richard Jolly, Tom Munsterman, Stefan Machura, Tom Kimbrough, and participants in the Lay Participation in Law Collaborative Research Network’s “Juries and Lay Participation During the Pandemic” Workshop. I am grateful to Leah Anderson for exceptional research assistance and to the staff of the *Washington Law Review* for sustained and incisive substantive feedback. Finally, I would like to thank Kelly McKowen for inspiration and support throughout this project.

A.	Cause Challenges are an Understudied Mechanism for Juror Exclusion	625
B.	Cause Challenge Dismissals Disparately Exclude Jurors of Color.....	629
III.	AN EMPIRICAL CASE STUDY OF JUDICIAL AND ATTORNEY MANAGEMENT OF HARDSHIP EXCUSES	634
A.	Methods.....	634
B.	Findings.....	637
1.	Inconsistent Judicial Assessments of Hardship Excuses	637
2.	Judicial Authorization of Excusal by Attorney Consent	642
3.	Practical and Strategic Barriers to Attorney Empanelment of Jurors Facing Financial Hardship.....	644
C.	Analysis.....	647
IV.	DIRECTIONS FOR REFORM	649
A.	How Jurors Are—Or Are Not—Compensated.....	649
1.	Hardship Funds.....	651
2.	Juror Compensation Requirements for Employers.....	652
B.	Proposals Toward a Socio-Economically Representative Jury System.....	655
1.	The Expansion of Juror Compensation Schemes	655
2.	The Expansion of Support for Caretakers	658
3.	Addressing the Uneven Economic Impact of the COVID-19 Pandemic	663
	CONCLUSION	666

INTRODUCTION

Lay participation in the legal system is regarded as an inviolable part of a participatory democracy.¹ With the exception of exercising one’s right to vote, serving on a jury is arguably the most direct and powerful way to participate in the democratic process.² In the United States, nearly 40% of American citizens can expect to serve on a jury during their

1. See Jeffrey L. Levin, Note, *The Federal Jury Selection Act of 1968: A Critique*, 2 COLUM. SURV. HUM. RTS. L. 52, 55–56 (1969–1970); Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 829 (2015).

2. *Powers v. Ohio*, 499 U.S. 400, 407 (1991). Justice Kennedy wrote for the majority that jury service is a citizen’s “most significant opportunity to participate in the democratic process.” Justice Kavanaugh quoted this very line early in the 7–2 majority opinion he authored in *Flowers v. Mississippi*, 588 U.S. ___, 139 S. Ct. 2228, 2238 (2019).

lifetimes.³ In doing so, they exercise their right and fulfill their obligation to hear testimony, interpret evidence, and, in criminal cases, adjudicate the guilt of their peers.⁴

And yet, the American jury system is plagued by a cruel irony: While poor people appear disproportionately as defendants in jury trials, they are also disproportionately excluded from jury service.⁵ This exclusion is not officially sanctioned. Rather, it occurs subtly during the period of questioning—referred to as *voir dire*—that precedes a juror’s empanelment.⁶ Though the substance of this questioning varies from one courtroom and case to the next,⁷ lawyers in general use their questions to evaluate the character and credibility of potential jurors. Empirical research, however, reveals that those who lack resources or have unstable living arrangements are often excused from jury service despite being otherwise qualified to participate.⁸ In some cases, prospective jurors fear they will lose their jobs or hourly wages. In others, they worry about how they will afford alternative caregiving arrangements for family members who are young, elderly, ill, or require supervision. Some doubt they can afford to commute to the courthouse or place jury service above other obligations.

Each of these anxieties reflects a pernicious socio-economic inequality that fosters juries that reflect neither the demographic nor the class composition of American society. Building more representative juries no doubt requires undoing these inequalities—of class and race but also gender—more generally. As part of this process, it is essential to identify and reform exclusionary practices within the jury system itself. Though scholarship on jury discrimination has focused on racial bias on the part

3. GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, NAT’L CTR. FOR STATE CTS., THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 8 (2007), https://www.researchgate.net/publication/264870713_The_State-of-the-States_Survey_of_Jury_Improvement_Efforts_A_Compendium_Report (last visited Apr. 30, 2021).

4. LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 128 (1998) (“Like voting, jury service is one of the basic rituals by which Americans affirm their participation in society. Unlike voting, it is a civil obligation; the citizen who does not respond to a summons to serve on a jury faces sanctions ranging from fines to contempt of court.”).

5. See HIROSHI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 64–65 (1993). See generally PETER EDELMAN, NOT A CRIME TO BE POOR: THE CRIMINALIZATION OF POVERTY IN AMERICA 115 (2017) (noting that exclusion from jury service is among the collateral consequences faced by those with criminal records who are also disproportionately poor).

6. See FUKURAI ET AL., *supra* note 5, at 64–65.

7. Janeen Kerper, *The Art and Ethics of Jury Selection*, 24 AM. J. TRIAL ADVOC. 123, 123–24 (2000).

8. Mary R. Rose, Shari Seidman Diamond & Marc A. Musick, *Selected to Serve: An Analysis of Lifetime Jury Participation*, 9 J. EMPIRICAL LEGAL STUD. 33, 50 (2012).

of lawyers,⁹ a significant percentage of prospective jurors are cut from the jury selection process during the cause challenge phase of voir dire, *before* lawyers exercise their peremptory challenges.¹⁰ It is this period of assessing prospective jurors' basic qualifications for jury service—governed largely by trial judges' discretion—that is the focus of this Article.

In what follows, I offer historical, doctrinal, and original empirical analysis of income and wealth-based juror exclusion. My central argument is that the perpetuation of this exclusion is enabled by the widely-shared identification of hardship excusal with *benevolence*. This is a logic that frames jury participation as a financial burden from which the poor can—and should—be spared. But in “sparing” people who are poor, we foreclose the possibility of interrogating the system itself and asking critical questions: Can homogenous juries do justice in a heterogenous society? Is it inevitable that jury service constitutes a financial burden? How might prioritizing inclusion rather than exclusion remake juries, and with them, the American justice system?

This Article illuminates the problem of benevolent exclusion to center these questions and argues for reforms that would renew the promise of the jury trial as a site of greater democratic participation.¹¹ Part I traces the early origins of class-based jury exclusion beginning with the requirement that citizens own property as a condition for service. Turning to contemporary jury selection practice, Part II examines how cause challenges, often exercised by judges, facilitate the removal of jurors with claims of financial hardship. Drawing on novel empirical research, Part III presents a case study to examine the benevolent rationales that often guide judicial and attorney arguments to excuse jurors for cause. Finally, Part IV proposes structural changes aimed at promoting jury service regardless of a person's socio-economic status.

9. See Nancy S. Marder, *Batson Revisited*, 97 IOWA L. REV. 1585, 1608 (2012); see also Catherine M. Grosso & Barbara O'Brien, *Lawyers and Jurors: Interrogating Voir Dire Strategies by Analyzing Conversations*, 16 J. EMPIRICAL LEGAL STUD. 515, 541 (2019) (acknowledging that lawyers' questioning strategies may stem from unconscious as well as conscious assumptions about jurors based on “demeanor, manner of dress, and other factors”).

10. See, e.g., Ronald F. Wright, Kami Chavis & Gregory S. Parks, *The Jury Sunshine Project: Jury Selection Data as a Political Issue*, 2018 U. ILL. L. REV. 1407, 1423 (The researchers estimated that 11% of prospective jurors in North Carolina were removed from felony trials “for cause” in 2011.).

11. It is worth noting that full democratic participation in jury service is still precluded by current laws excluding, for example, those with criminal records.

I. THE LAW OF SOCIO-ECONOMIC JURY EXCLUSION

A. *Early Property Requirements*

An American citizen's right to a trial by jury is notably the only constitutional guarantee that appears both in the U.S. Constitution and the Bill of Rights.¹² The matter of *who* should constitute juries, however, was far narrower at the time of the country's founding. In theory, American jury boxes were exclusively occupied by White,¹³ male property owners.¹⁴ Yet, in practice the property requirement was less than stringent. For example, where the English jury's property requirement meant that a mere quarter of the adult male population could participate, America's less onerous standard meant that at least one half to three quarters of White male adults were eligible to participate as jurors.¹⁵

In the United States, the struggle to eliminate the property requirement for jury service took over a century longer than the parallel effort to

12. U.S. CONST. art. III, § 2; U.S. CONST. amend. VI; see Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870 (1994).

13. The editorial staff of the *Washington Law Review* has asked the authors to make explicit their rationales for capitalizing, or refraining from capitalizing, Black and White. For the purpose of this Article, and other recent work, see Anna Offit, *Race-Conscious Jury Selection*, 82 OHIO ST. L.J. 1 (forthcoming 2021). I choose to capitalize Black and White in recognition that neither racial category is neutral or natural, and that capitalization reflects the cultural and historical contingency of both Blackness and Whiteness in America. See Kwame Anthony Appiah, *The Case for Capitalizing the B in Black*, THE ATL. (June 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-black-and-white/613159/> [https://perma.cc/FT5A-U39F]; see also Nell Irvin Painter, Opinion, *Why 'White' Should Be Capitalized, Too*, WASH. POST (July 22, 2020, 7:57 AM), <https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/> [https://perma.cc/3YR5-BDMD]. I applaud the Editors for inviting authors to interrogate the embedded power dynamics of what may once have been construed as a benign stylistic default. In this context, the pretense of grammatical neutrality and consistency is arguably a stance in and of itself. See ANN THÚY NGUYỄN & MAYA PENDLETON, CTR. FOR THE STUDY OF SOC. POL'Y, RECOGNIZING RACE IN LANGUAGE: WHY WE CAPITALIZE "BLACK" AND "WHITE" (2020), <https://cssp.org/2020/03/recognizing-race-in-language-why-we-capitalize-black-and-white/> [https://perma.cc/949H-YPJP] ("We believe that it is important to call attention to White as a race as a way to understand and give voice to how Whiteness functions in our social and political institutions and our communities. Moreover, the detachment of "White" as a proper noun allows White people to sit out of conversations about race and removes accountability from White people's and White institutions' involvement in racism."). My capitalization choice is consistent with the 2021 Chicago Manual of Style. See THE CHICAGO MANUAL OF STYLE ¶ 8.38 (17th ed. 2017). The Chicago Manual of Style is followed by the American Anthropological Association. See AAA STYLE GUIDE, AM. ANTHROPOLOGICAL ASS'N (2015), <https://www.americananthro.org/StayInformed/Content.aspx?ItemNumber=2044> [https://perma.cc/LQK2-K2UW].

14. Alschuler & Deiss, *supra* note 12, at 870.

15. CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY 1760–1860, at 5–14 (1st ed. 1960). The reason for this distinction, in general, was the relative affordability of American land which permitted a larger number of men to meet voter, and therefore juror, participation requirements.

abolish the property requirement for eligibility to vote.¹⁶ In both cases, advocates of property-based exclusion proffered the idea that the payment of taxes gave citizens a personal stake—and thus a right to participate—in public institutions.¹⁷ In the eighteenth and early nineteenth centuries, conventional wisdom suggested that allowing landless people to vote had two probable outcomes: Their lack of money and influence would prompt them to defer to the preferences of an employer or landlord,¹⁸ or their lack of deference would precipitate anarchy due to their perceived moral and intellectual limitations.¹⁹ Even White men would not be granted suffrage irrespective of wealth or status until Andrew Jackson’s presidency.²⁰ As calls for expanded voting rights gained traction, there was resistance to loosening juror restrictions as new and popular reasoning for exclusion emerged: Jury service for the poor would harm not only society but the poor jurors for whom serving would constitute a threat to their livelihood.²¹ Conveniently, what had long seemed an act of malice became a form of charity.

Still, for voting and jury service, benevolent exclusion did not replace the view that means indexed aptitude. In a 1966 dissenting opinion, for example, Justice John Marshall Harlan II wrote that those in possession of property were more deeply invested in community affairs, and could be considered more responsible, educated, and knowledgeable than non-property owners when it came to casting their vote.²² Though most states permitted all who were qualified to vote to become jurors, some included more nuanced qualifications for jury service, such as taxpaying, specific property requirements, or more indeterminate conditions like intelligence

16. *Id.*

17. *Id.* at 5.

18. *Id.* at 11 (The “true reason of requiring any qualification with regard to property in voters . . . is to exclude such persons as are in so mean a situation as to be esteemed to have no will of their own.” (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *171 (1893))).

19. *Id.* (“The poor of both town and country might combine to attack property rights and pull down the pillars of the established order.”).

20. Naomi Wulf, *The Politics of Past and Progress in Jacksonian Democracy*, 20 AM. TRANSCENDENTAL Q. 647, 647 (2006) (noting that all but three states eliminated their property requirements for White male voters by the mid-1820s); Donald Ratcliffe, *The Right to Vote and the Rise of Democracy, 1787–1828*, 33 J. EARLY REPUBLIC 219 (2013).

21. See, e.g., Gretchen Ritter, *Jury Service and Women’s Citizenship Before and After the Nineteenth Amendment*, 20 LAW & HIST. REV. 479, 483 (2002) (discussing jury duty as a burden and in general discusses it as a separate political right from voting).

22. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 685 (1966) (Harlan, J., dissenting) (“It is also arguable, indeed it was probably accepted as sound political theory by a large percentage of Americans through most of our history, that people with some property have a deeper stake in community affairs, and are consequently more responsible, more educated, more knowledgeable, more worthy of confidence, than those without means, and that the community and Nation would be better managed if the franchise were restricted to such citizens.”).

and good character.²³ Some states, including Georgia, had commensurate qualification requirements for jurors as for voters, while other states, like New York, had separate requirements for each.²⁴ In Georgia, by 1798 White, male, non-property owners who were eligible to vote were also qualified to serve as jurors.²⁵

In New York, by contrast, universal suffrage for White men was established in 1826 through the removal of most property and tax payment requirements for eligible voters.²⁶ It was not until 1967, however, that a property requirement was eliminated for all prospective jurors.²⁷ Interestingly, New York's property provision withstood a constitutional challenge in 1949 when a defendant filed a motion to dismiss a panel on the grounds that jurors faced systematic exclusion based on their racial, economic, or social status.²⁸ In that case, the defendant claimed that the underrepresentation of manual laborers and poor people, among other groups, violated his rights under the Fifth and Sixth Amendments to the U.S. Constitution.²⁹ The judge, however, found these claims frivolous, and stated that “[a]ny attempt to secure such representation would not only result in chaos and confusion but, in my judgment, would inevitably breed the very intolerance which every right-minded person should be vigilant to avoid.”³⁰

Wherever property-based exclusion was allowed, however, it hardly functioned as the kind of absolute prohibition commonly faced by communities of color and women. In fact, property requirements were sometimes treated as a waivable prohibition: When jury venires fell short, non-property-owning, White men could be plucked off the street and ushered into courtrooms.³¹ Whiteness, in this respect, was used as a proxy

23. See, e.g., Act of Feb. 2, 1811, § 4, 4 Del. Laws 444, 447 (1811) (requiring the sheriff to summon “sober, discreet and judicious freeholders, lawful men of fair characters”).

24. Alschuler & Deiss, *supra* note 12, at 879.

25. Act of Feb. 9, 1797, § 27, reprinted in DIGEST OF THE LAWS OF THE STATE OF GEORGIA 271, 278 (Horatio Marbury & William H. Crawford eds., 1802).

26. Act effective Sept. 1, 1967, ch. 49, § 1, 1967 N.Y. Laws 68 (amending the judiciary law relating to the qualifications of jurors). Admittedly, this was a small requirement, at \$250, by the time it was removed. *Id.*

27. *Id.*

28. See generally *United States v. Foster*, 83 F. Supp. 197 (S.D.N.Y. 1949).

29. *Id.* at 208.

30. *Id.*

31. See, e.g., Alschuler & Deiss, *supra* note 12, at 880 (“Just as formal eligibility for jury service did not always mean eligibility in fact, statutory disqualification did not always mean real disqualification. When qualified jurors failed to appear, statutes permitted court clerks or sheriffs to impanel unqualified ‘bystanders.’ In a number of jurisdictions, the nonappearance of qualified jurors and the use of bystanders was common.”).

for property even when legal criteria for ownership could not be met.³² In this manner, the “objective” standard of property ownership could be applied selectively to achieve racial or gendered exclusion without having to identify race or gender as the basis for removing certain groups from the jury pool. Married women, for example, were not allowed to control their own property, and all of their assets were considered their husband’s upon marriage.³³ The 1887 *Harland v. Territory*³⁴ case, for example, held that women could not validly serve on a grand jury due to “householder” requirements. In Washington Territory, in order to be a juror, one had to be both a qualified voter and a householder or property owner.³⁵ While it had previously been thought that a husband and wife’s joint occupancy of a house meant *both* could be considered householders, the Territory’s Chief Justice clarified that only the husband was the householder, or head of house, and that no married woman could qualify as a property owner in this manner.³⁶

For Black people, the hurdle of property ownership was even more restrictive. Laws in all of the colonies prohibited enslaved Africans who entered the United States from owning property.³⁷ And before the Civil War, many states even prohibited freed Black men from owning property³⁸—a restriction that, alongside modern redlining, significantly hindered economic development for Black Americans.³⁹ During Reconstruction, limiting Black access to property was a presidential priority, as President Andrew Johnson stymied General William Tecumseh Sherman’s proposal to give emancipated people the land on

32. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1745 (1993) (“This articulation of rights that were contingent on property ownership was a familiar paradigm, as similar requirements had been imposed on the franchise in the early part of the republic. For the first two hundred years of the country’s existence, the system of racialized privilege in both the public and private spheres carried through this linkage of rights and inequality, and rights and property. Whiteness as property was the critical core of a system that affirmed the hierarchical relations between white and Black.”).

33. Claudia Zaher, *When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459, 462 (2002). Though legislation ended coverture practices at the state level in the mid to late nineteenth century, Justice Ruth Bader Ginsburg pointed out that holdover laws that reinforced the practice were not taken off the books until the women’s rights movement in the 1970s. See Allison Anna Tait, *A Tale of Three Families: Historical Households, Earned Belonging, and Natural Connections*, 63 HASTINGS L.J. 1345, 1355 (2012).

34. 3 Wash. Terr. 131 (1887).

35. *Id.* at 159–61.

36. *Id.*

37. Roy W. Copeland, *In the Beginning: Origins of African American Real Property Ownership in the United States*, 44 J. BLACK STUD. 646, 646 (2013).

38. *Id.* at 647.

39. *Id.*

which they had previously worked without compensation.⁴⁰ During the Jim Crow era, the passage of exclusionary Black codes in the South only created further barriers to the acquisition and retention of property by Black Americans.⁴¹ Among the many consequences of this legalized discrimination was the prevention of Black Americans from participating as lay decision-makers in a legal system already inclined to sanction or ignore their dispossession, discrimination, and death.

B. *The Key-Man System, The Jury Selection and Service Act of 1968, and the Present*

By the 1960s, property requirements for jury service in the United States were moving toward full abolition.⁴² But even as more citizens became statutorily eligible to serve as jurors, the so-called “key-man” system remained an obstacle to their empanelment. The key-man system referred to the process by which sheriffs and county officials personally identified those eligible for jury service through assessments of character and suggestions by third parties.⁴³ This process meant that while some citizens were regularly summoned for jury service, others—particularly women, people of color, and blue-collar workers—were left out.⁴⁴

Though jury commissioners theoretically sought jurors from each “segment” of the population, they exercised discretion to define and identify people who exhibited good moral character, integrity, and common sense.⁴⁵ Resulting juries were disproportionately White, male, and employed in white-collar professions.⁴⁶ In some cases, this

40. *Id.* at 650; see also Nik Heynen, *Toward an Abolition Ecology*, 1 ABOLITION: J. INSURGENT POL. 240, 241–42 (2018) (“Present at this meeting were Sherman, Lincoln’s secretary of war, Edwin M. Stanton, and twenty African American leaders from within the Savannah community, many of whom were ministers. The purpose of the meeting was to discuss enacting emancipation and the political realities that would provide the foundation for *Reconstruction*. When Secretary Stanton asked the group of twenty men, ‘State in what manner you think you can take care of yourselves, and how can you best assist the Government in maintaining your freedom,’ Reverend Garrison Frazier replied, ‘The way we can best take care of ourselves is to have land, and turn it and till it by our labor—that is, by the labor of the women, and children, and old men—and we can maintain ourselves and have something to spare.’” (emphasis in original)).

41. Copeland, *supra* note 37, at 654.

42. Alschuler & Deiss, *supra* note 12, at 870.

43. See, e.g., *id.* at 879–80 (“The members of a group eligible for jury service might never serve, for jurors were not randomly summoned from among those eligible. Instead, public officials called selectmen, supervisors, trustees, or ‘sheriffs of the parish’ exercised what Tocqueville called ‘very extensive and very arbitrary’ powers in summoning jurors.” (quoting 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 359–60 (Alfred A. Knopf ed., 1945))).

44. DENNIS HALE, *THE JURY IN AMERICA: TRIUMPH AND DECLINE* 233 (2016).

45. *Id.*

46. *Id.*

exclusionary outcome was not entirely the fault of the commissioners, who would attempt to find key-men in labor unions only to be told that members did not want to serve.⁴⁷

No case more clearly illustrates the key-man system's exclusionary effects than *Rabinowitz v. United States*,⁴⁸ from the Fifth Circuit, which featured a list of prospective jurors compiled by a jury commissioner in Albany, Georgia. The ostensible basis of the list was the commissioner's identification of those who possessed good character, intelligence, and the ability to understand the cases typically tried in court.⁴⁹ The jury commissioner testified in the case that "[a] lot of the additional names were the result of my own acquaintance, insofar as they were a result of suggestions by my friends whose opinions and integrity I valued," and that his "acquaintance is generally predominantly, of course, with the White race."⁵⁰ Citizens of color and those of lower socio-economic status were disproportionately excluded from the jury pool.⁵¹ The commissioner conceded that he had not actually tried to confer with members of the Black community, including teachers, doctors, church congregants, or members of the local chapter of the National Association for the Advancement of Colored People (NAACP).⁵²

The overt racial and socio-economic exclusion on the part of jury commissioners reflected by *Rabinowitz* precipitated public outrage and calls for reform.⁵³ The result was the Jury Selection and Service Act of 1968 (JSSA).⁵⁴ Senator Joseph Tydings of Maryland, who introduced five different bills on jury reform, was largely credited with the legislation's success.⁵⁵ Tydings's bills proposed more inclusive methods of jury selection and aimed to enlarge jury pools as much as possible.⁵⁶ The legislation declared unambiguously that it sought "to correct the racial and economic imbalances in federal jury composition and to establish uniform

47. *United States v. Foster*, 83 F. Supp. 197, 208 (S.D.N.Y. 1949) ("[A]n official of the American Federation of Labor refused, according to the testimony, to supply any lists of union members as prospective jurors because his men 'wanted to have nothing to do with juries.'").

48. 366 F.2d 34 (5th Cir. 1966).

49. *Id.* at 37.

50. *Id.* at 40.

51. *Id.*

52. *Id.* at 37-42. The opinion, and portions of Mr. Simmons's testimony, were reprinted in the Senate Committee Hearings Report. *Federal Jury Selection: Hearings on S. 383, S. 384, S. 385, S. 386, S. 387, S. 989, and S. 1319 Before the Subcomm. on Improvements in Jud. Mach. of the Comm. on the Judiciary*, 90th Cong. 484 (1967) [hereinafter *Judicial Machinery Hearings*].

53. S. REP. NO. 90-891, at 10-11 (1967); H.R. REP. NO. 90-1076, at 4 (1968).

54. Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-69.

55. S. REP. NO. 90-891, at 12; 113 CONG. REC. 587-89 (1967).

56. S. REP. NO. 90-891, at 15; H.R. REP. NO. 90-1076, at 3.

selection procedures.”⁵⁷

To achieve this objective, the JSSA inaugurated a series of significant and innovative changes to the American jury system, and to federal courts in particular. For instance, it made clear that any requirements for jury service outlined by Congress, including those related to citizenship, age, or residence, would be authoritative.⁵⁸ District courts, by contrast, would be expected to develop “detailed procedures” to “ensure the random selection of a fair cross section of the persons residing in the community.”⁵⁹ Still, district courts would not be left to their own devices. Congress encouraged district courts to compile lists of eligible jurors from multiple sources,⁶⁰ because reliance on telephone lists could exclude those in poorer households.⁶¹ Congressional committee reports also voiced concern that jury commissioners who only utilized voter registration records would disparately summon politically engaged or highly educated citizens.⁶²

In addition to calling for diverse source lists, Congress identified jurors’ paltry compensation as a significant practical barrier to broad

57. Laura Rose Handman, Case Comment, *Underrepresentation of Economic Groups on Federal Juries*, 57 B.U. L. REV. 198, 201 (1977).

58. See 28 U.S.C. § 1865(b) (“In making such determination the chief judge of the district court, or such other district court judge as the plan may provide . . . shall deem any person qualified to serve on grand and petit juries in the district court unless he—(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district; (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form; (3) is unable to speak the English language; (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored.”).

59. *Id.* § 1863(b)(3).

60. *Judicial Machinery Hearings*, *supra* note 52, at 213 (statement of Professor Edwin S. Mills, Professor of Economics, John Hopkins University) (explaining how the key-man system created an economic bias, and solutions to that bias).

61. *Id.* at 131, 374 (statements of Harry Kalven and Hans Zeisel, University of Chicago Law School, and Hon. Donald P. Lay, Judge at United States Court of Appeals, 8th Circuit).

62. *Id.* at 67 (statement of Dale W. Broeder, Esquire, of Dundee, Michigan). In fact, Dale W. Broeder, who was the attorney who had started the University of Chicago Jury Project in 1959, specifically stated in testimony that “use of voting records likewise discriminates against the uneducated and the poor,” adding that those groups of people were substantially underrepresented at the polls, and were, in fact, an overlapping group. *Id.* Particularly striking in his testimony was his statement that

[i]t is to me one of the ironies of all these bills that we commonly say that the jury system allows a criminal defendant to be judged by his peers—and I’m not talking about peers who also happen to be criminals either—while we make substantial though perhaps unintentional efforts to ensure that the socioeconomic groups from which most of our criminal defendants come will typically be judged by people with a lineage more honorable and distinguished.

Id.

participation.⁶³ To remedy the situation, the juror pay rate was raised from \$4 per day to \$20 per day in federal court, which today would be the equivalent of increasing juror pay from \$30 to \$150 per day.⁶⁴ Legislative comments on the bill suggested there was even an iteration of the legislation that sought to compensate jurors for *lost* income, if this figure exceeded the \$20 per day default.⁶⁵ A striking aspect of this part of the reform was its stated intent. For Congress in 1968, the goal of increasing juror compensation was to find a rate commensurate with the wages of a working-class person.⁶⁶ Tellingly, this level of juror compensation has failed to keep pace with the rate of inflation and today is nowhere near average wages, or even a “living wage.”⁶⁷

Another notable feature of the JSSA’s attention to jury reform was its recognition of the interconnectedness of socio-economic and racial exclusion.⁶⁸ Testimony before the committee emphasized that the key-man system’s pronounced economic biases constituted the greatest impediment to Black peoples’ participation on juries.⁶⁹ Undoing economic exclusion was thus viewed as a means of creating juries that were also more reflective of the United States’ racial diversity. Even so, significant racial and gender discrimination in jury selection persisted and has since been the subject of numerous cases, from *Strauder v. West Virginia*⁷⁰ to *Flowers v. Mississippi*.⁷¹ The former held that barring Black citizens from jury service violated the Equal Protection Clause of the Fourteenth Amendment.⁷² The latter held that the doctrine articulated in

63. *Id.* at 216 (statements of Leon Ricassi, Esquire, on behalf of Theodore I. Kaskoff, Esquire, of the American Trial Lawyers Association).

64. Jury Selection and Service Act of 1968, Pub. L. No. 90–274, § 102(a), 82 Stat. 62 (codified at 28 U.S.C. § 1871); *Value of \$20 in 1968*, SAVING.ORG, <https://www.saving.org/inflation/inflation.php?amount=20&year=1968> [https://perma.cc/ZS2D-ENWC].

65. *Judicial Machinery Hearings*, *supra* note 52, at 5 (reproducing draft of S. 384).

66. *Id.* at 216 (statements of Leon Ricassi, Esquire, on behalf of Theodore I. Kaskoff, Esquire, of the American Trial Lawyers Association).

67. *Id.* In 2019, a living wage for a family of four was \$16.54 per hour, or \$132.32 per day for an eight-hour work day. Carey Ann Nadeau, Mass. Inst. of Tech., *A Calculation of the Living Wage*, LIVING WAGE CALCULATOR (Mar. 3, 2020), <https://livingwage.mit.edu/articles/61-new-living-wage-data-for-now-available-on-the-tool> [https://perma.cc/4XLQ-GFV3].

68. S. REP. NO. 90-891, at 15 (1967) (noting that the JSSA arose from reforms suggested during the passage of the Civil Rights Act in 1967).

69. *Judicial Machinery Hearings*, *supra* note 52, at 172–73, 543, 569 (testimony of Kalven and Zeisel) (reprinting of *Labat v. Bennett*, 365 F.2d 698 (1966)).

70. 100 U.S. 303 (1880).

71. 588 U.S. ___, 139 S. Ct. 2228 (2019).

72. *Strauder*, 100 U.S. at 310.

Batson v. Kentucky,⁷³ barring race-based discrimination during voir dire,⁷⁴ was misapplied in a high-profile Mississippi murder prosecution.⁷⁵ Though typically inscribed into the long legal history of racial discrimination and its undoing, the interrelatedness of class and race in the United States requires that both be viewed as central to efforts to combat socio-economic jury exclusion.

The history of socio-economic exclusion in the American jury system is the history of the jury system itself. From property requirements to the key-man system, the affluence and corresponding social status of citizens has long been a hallmark of their eligibility to participate in civic life. Although Congress and the states have made progress in the formal abolition of property requirements, the effects of affluence and income remain determinative of jury participation.⁷⁶ Understanding the continued salience of socio-economic exclusion thus requires a nuanced study of contemporary law and the process of jury empanelment.

II. THE PROCESS OF SOCIO-ECONOMIC JURY EXCLUSION

A. *Cause Challenges Are an Understudied Mechanism for Juror Exclusion*

The process by which ordinary people are empaneled as jurors is one that is stacked, at every turn, against the poor. The first exclusionary juncture lies at the creation of source lists from which jurors are summoned to court.⁷⁷ Though the JSSA attempted to make such rolls more inclusive, many states today use Department of Motor Vehicles (DMV)-generated lists limited to those with a driver's license, registered voters, or those with a voting record.⁷⁸ In an effort to expand these lists, California may soon become the latest state, joining seventeen before it, to include tax records as a way to access a broader sample of eligible

73. 476 U.S. 79 (1986).

74. *Id.* at 96–100.

75. *Flowers*, 139 S. Ct. at 2274.

76. *See, e.g.*, Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT'L BLACK L.J. 238, 273 (1994) (concluding that “socioeconomic barriers preventing full community participation” are among the determinants of “racially demarcated juries”).

77. *Smith v. Texas*, 311 U.S. 128, 129 (1940). The case ultimately determined that the source list, compiled by the key-man system, resulted in underrepresentation of people of color.

78. *See, e.g.*, U.S. DIST. CT. FOR THE DIST. OF VT., PLAN FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS FOR SERVICE WITHIN THE DISTRICT OF VERMONT 1 (2019) (using primarily the voter registration list, supplemented by DMV records).

jurors.⁷⁹ Still, as long as people who are poor are underrepresented in these expanded source lists, the process of assembling juror lists will remain a site of exclusion.

The next point of attrition for prospective jurors who face financial hardship, after source lists are compiled and jurors are summoned, is their arrival to court. On average, 9% of summoned jurors will fail to respond to their summonses—with a rate in some states as high as 50%.⁸⁰ Though some judges have attempted to enforce compliance by issuing warrants for “Failure to Appear” or putting a lien on the property of those who do not show up, this approach is by no means universal.⁸¹ Upon receipt of a summons, prospective jurors can often respond with proof that there is a reason they should not appear in court in advance of their date of service.⁸² Jurors can also seek excusal from jury service by completing written questionnaires which they can submit to the court by mail in advance.⁸³

Jurors may also be dismissed from service *after* reporting to court in person. Though it is possible for an attorney to challenge the composition of a jury panel, or venire,⁸⁴ in practice there are two predominant ways that jurors are relieved of their duty: Through peremptory challenges and

79. Adam Beam, *Bill Would Add Taxpayers to List for Juries in California*, ASSOCIATED PRESS NEWS (July 15, 2020), <https://apnews.com/c13e59b237ac9ad1c67d179f458c8508> [<https://perma.cc/9DQK-AUGB>].

80. Maxine Bernstein, *Judges Cracking Down on People Who Snub Jury Duty*, ASSOCIATED PRESS NEWS (May 21, 2017), <https://apnews.com/62b279c38615469fb9bee505c9c66ff5/Judges-cracking-down-on-people-who-snub-jury-duty> [<https://perma.cc/6R45-BT83>]. In Houston, Texas, for example, only one in four summoned jurors have reportedly appeared for service. Samantha Ketterer, *Battling the Jury Duty Problem, Where Fewer Than 1 in 4 Show Up*, HOUS. CHRON. (Jan. 29, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Battling-the-jury-duty-problem-where-fewer-than-15010187.php> [<https://perma.cc/8SHV-N3GA>]. Fulton County, where the city of Atlanta is located, has also reported a no-show rate of 50%. Johnny Edwards, *In a First, Fulton Holds Jury No-Shows Accountable*, ATLANTA J.-CONST. (Aug. 10, 2012), <https://www.ajc.com/news/local/first-fulton-holds-jury-shows-accountable/NqeoXYrCX55oSMHfdQ9x2L/> [<https://perma.cc/WNP5-2487>].

81. Colleen McMahon & David L. Kornblau, *Chief Judge Judith S. Kaye’s Program of Jury Selection Reform in New York*, 10 J. C.R. & ECON. DEV. 263 (1995).

82. See, e.g., N.J. STAT. ANN. § 2B:20-10 (West 2020) (asking jurors to complete and submit a sworn statement about their financial hardship concerns); MONT. CODE ANN. § 3-15-313 (2019) (allowing for affidavits based on vacations and illness in addition to hardship).

83. Samuel R. Sommers, *Determinants and Consequences of Jury Racial Diversity: Empirical Findings, Implications, and Directions for Future Research*, 2 SOC. ISSUES & POL’Y REV. 65, 81 (2008).

84. 47 AM. JUR. 2D *Jury* § 209 (2021) (noting that such a challenge relates to a “prejudicial defect or irregularity” in the selection of jurors summoned to court (citing *Coca Cola Bottling Co. v. Jones*, 250 P.2d 586 (Ariz. 1952) (holding that the summoning of jurors had not been carried out at adequate intervals)); *State v. Jackson*, 125 S.E.2d 474, 476 (S.C. 1962) (challenging a court clerk’s constitution of a venire constrained by the jury box’s size).

through cause challenges.⁸⁵ Both routes of juror excusal take place during an extended period of juror questioning, known as *voir dire*, during which attorneys and judges question jurors about their ability to serve.⁸⁶

Cause challenges, which can be exercised by judges without restriction, are the first and most significant means by which racial disparities are introduced to empaneled juries.⁸⁷ One function of the cause challenge is to excuse citizens the judge believes harbor biases that might prevent them from fairly and impartially assessing evidence.⁸⁸ Recognizing that one's right to an impartial jury is an integral part of the American legal system,⁸⁹ cause challenges are perceived to be an essential strategic resource for litigants;⁹⁰ they promote the removal of jurors who appear as though they cannot follow legal instructions or assess evidence fairly.⁹¹

In practice, judges dismiss jurors for cause for a variety of reasons. In the federal context, for example, Rule 24 of the Federal Rules of Criminal Procedure, which governs jury selection, has widely been interpreted as affording judges broad discretion to determine the parameters and types of questions asked of prospective jurors.⁹² In civil cases, judges exercise similar discretion to identify prospective jurors who might have a

85. FED. R. CRIM. P. 24.

86. Wright et al., *supra* note 10, at 1411.

87. *See id.*; *see also* Will Craft, *How Did Curtis Flowers End Up with a Nearly All-White Jury*, APM REPS. (June 5, 2018), <https://features.apmreports.org/in-the-dark/Curtis-flowers-trial-six-jury-selection/> [<https://perma.cc/5J32-F8W3>] (describing the demographic impact of jurors' removal, for cause, during Curtis Flowers's prosecution).

88. *See, e.g.*, 47 AM. JUR. 2D *Jury* § 193 (2021) (citing *United States v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000)) (describing challenges to jurors for cause). Challenges for cause are the means by which partial or biased jurors should be eliminated. *Id.*; *Gonzalez*, 214 F.3d at 1111; *see, e.g.*, ALA. CODE § 12-16-152 (2020) (disqualifying for cause those who would refuse to impose the death penalty in a capital punishment case or those who are biased against penitentiary punishment); TEX. GOV'T CODE ANN. § 62.105 (West 2020) (disqualifying for cause those who for various reasons may be biased in a particular case).

89. U.S. CONST. amends. VI, XIV; *Paenitz v. Commonwealth*, 820 S.W.2d 480, 482 (Ky. 1991) (noting that “[there are] some constitutional rights . . . so basic to a fair trial that their infraction can never be treated as harmless error” (quoting *Gray v. Mississippi*, 481 U.S. 648 (1987))).

90. *Sorter v. Austen*, 129 So. 51, 52 (Ala. 1930) (noting that “the right to challenge for cause is inherent in the right of trial by an impartial jury”); 47 AM. JUR. 2D *Jury* § 193 (2021) (“A prosecutor, and indeed any party, is entitled to challenge prospective jurors for cause.” (citing *People v. Sánchez*, 375 P.3d 812, 837 (Cal. 2016))).

91. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (noting that “[w]ithout an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled”).

92. FED. R. CRIM. P. 24; *see, e.g.*, *Hamling v. United States*, 418 U.S. 87, 140 (1974) (“[T]he trial judge made a general inquiry into the jurors' general views concerning obscenity. Failure to ask specific questions as to the possible effect of educational, political, and religious biases did ‘not reach the level of a constitutional violation,’ nor was it error requiring the exercise of our supervisory authority over the administration of justice in the federal courts.” (citation omitted)).

prejudicial personal relationship with an attorney or party in a case.⁹³ To the extent that a prospective juror has adverse interests that involve a party in the case, or a suit pending in the same court involving similar questions of fact, the removal of such jurors for cause is also common.⁹⁴

In addition to addressing potential sources of bias, cause challenges are used to excuse jurors who fail to meet legal qualifications to participate.⁹⁵ Though restrictions on eligibility vary by jurisdiction, they generally require American citizenship and residency in the county from which one is summoned, a minimum and maximum age, English language proficiency, and the absence of a prior felony conviction.⁹⁶ Of particular significance, judges also frequently exercise cause challenges to remove jurors who indicate that financial impediments would constrain their ability to serve as jurors.⁹⁷ Jurisdictional hardship guidance, however, does not provide a precise or consistent definition of financial hardship. In the federal context, jurors seeking direction from the U.S. Courts Administrative Office in Washington, D.C., which maintains a website, can expect to find little helpful information. The site notes that under the Jury Act, courts can excuse jurors on the basis of “undue hardship or extreme inconvenience,” which can be requested in writing.⁹⁸ The criteria for seeking such an excuse, however, are not specified.

Assessments of hardship excuses, among other rationales for a cause dismissal, lie at the sole discretion of the judge.⁹⁹ Cause challenge determinations are also rarely appealed, as the standard of review is abuse of discretion.¹⁰⁰ The next Part of this Article will demonstrate that judges’

93. THOMSON REUTERS, 50 STATE STATUTORY SURVEYS: SELECTION OF JURORS (database updated April 2020) (available on Westlaw).

94. *Id.*

95. 47 AM. JUR. 2D *Jury* § 193 (2021) (“[C]hallenge for cause is the appropriate method for objection to a prospective juror on the ground that he or she does not have the qualifications required by the statute governing jury service.” (citing *People v. Thomas*, 533 N.Y.S.2d 192, 193 (Sup. Ct. 1988))); AM. BAR ASS’N, PRINCIPLES FOR JURIES AND JURY TRIALS 13–14 (2005) [hereinafter ABA PRINCIPLES FOR JURIES], https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles.authcheckdam.pdf [https://perma.cc/QK6R-3PTG] (stating that “[a]t a minimum, a challenge for cause to a juror should be sustained if the juror has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by law to serve on a jury, has a familial relation to a participant in the trial, or may be unable or unwilling to hear the subject case fairly and impartially”).

96. See ABA PRINCIPLES FOR JURIES, *supra* note 95, at 13 (providing a model for such principles).

97. See, e.g., ARK. CODE ANN. § 16-31-103 (West 2021) (excusing for cause those who assert that the state of their health requires absence from jury service); CONN. GEN. STAT. § 51-217(a) (2019) (excusing jurors for cause upon a finding of extreme hardship).

98. *Juror Qualifications*, U.S. CTS., <http://www.uscourts.gov/services-forms/jury-service/juror-qualifications> [https://perma.cc/A2P6-MYDA].

99. *Snyder v. Louisiana*, 552 U.S. 472, 483 (2008).

100. *Id.*

cause challenge determinations are highly variable, with some showing deference to jurors' concerns, and others insisting that financial hardship should not warrant excusal.¹⁰¹ Lawyers who wish to preserve an error for argument on appeal are thus sometimes required to use peremptory challenges to excuse jurors they feel should have been removed for cause.¹⁰²

Unlike peremptory challenges, which are limited in number and subject to anti-discrimination law,¹⁰³ cause challenges are theoretically limitless.¹⁰⁴ And the dismissal of prospective jurors for reasons of financial hardship, though seemingly benevolent, can effectively purge the venire of jurors who defense attorneys view as advantageous to their clients.¹⁰⁵ In one case, for example, a defendant argued—unsuccessfully—that hardship challenges were used to selectively remove Black prospective jurors with childcare commitments, even as White prospective jurors raised the same concern.¹⁰⁶ This practice recalls the selective application of property requirements to fill venires with non-propertied White prospective jurors and serves as an important reminder that any discussion of undoing socio-economic exclusion is in the United States also a discussion of undoing race-based exclusion.

B. Cause Challenge Dismissals Disparately Exclude Jurors of Color

Judges' uses of cause challenges to excuse prospective jurors who raise hardship concerns results in juries that are socio-economically and racially homogenous. Past studies have focused on the extent to which inquiries into juror bias can lead to the disparate dismissal of jurors of color—sometimes based on past criminal convictions¹⁰⁷ or even arrest records.¹⁰⁸ It is particularly notable, in light of the American jury system's

101. David Ferrara, *'We've Heard Every Excuse' for Ducking Jury Service, Nevada Judges Say*, LAS VEGAS REV.-J. (Sept. 27, 2016), <https://www.reviewjournal.com/local/local-las-vegas/weve-heard-every-excuse-for-ducking-jury-service-nevada-judges-say/> [https://perma.cc/W8YJ-UHQ5].

102. William G. Childs, *The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error*, 27 AM. J. CRIM. L. 49, 55 (1999).

103. See *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding that the state's "privilege to strike individual jurors through peremptory challenges, is subject to the commands of the Equal Protection Clause").

104. *People v. Mickey*, 818 P.2d 84, 108 (Cal. 1991) ("[A] total of 325 prospective jurors and 235 hardship excusals.").

105. *People v. Gray*, 118 P.3d 496, 508 (Cal. 2005).

106. *Id.* at 511.

107. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 602 (2013).

108. Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 YALE L. & POL'Y REV. 387, 389 (2016).

fraught racial history, that the racialized experience of poverty has been absent from scholarship on jury demographics while featuring so prominently in hearings on the Jury Selection and Service Act of 1968.¹⁰⁹

According to the Pew Research Center, White families in the United States have a net worth that is on average thirteen times greater than that of families of color.¹¹⁰ The poverty rate among Black and Hispanic Americans in 2019 was 18.8% and 15.7%, respectively, as compared to the 7.3% poverty rate among non-Hispanic White Americans.¹¹¹ White citizens are also more likely than citizens of color to own their own cars¹¹² and homes.¹¹³ The consequences of this disparity for jury representativeness cannot be overlooked. One variable that may account for disparate juror summons response rates, for example, is the fact that renters tend to live at an address for shorter periods of time and may fail to update the address on their driver's license each time they move—both of which lead to less inclusive juror lists.¹¹⁴

Research suggests that disparities in the number of individuals who report for jury service, based on race, often correspond to concern about the financial consequences of participating.¹¹⁵ In Dallas, Texas, in the early 2000s, for example, *The Dallas Morning News* and *SMU Law Review* conducted a comprehensive study of jury participation in the county.¹¹⁶ According to that study, four out of five people summoned for

109. *Judicial Machinery Hearings*, *supra* note 52, at 67 (statement of Dale W. Broeder, Esquire, of Dundee, Michigan).

110. In 2013, for example, White families had an average net worth of \$144,200, and Black families had an average net worth of \$11,200. PEW RSCH. CTR., SOCIAL & DEMOGRAPHIC TRENDS: DEMOGRAPHIC TRENDS AND ECONOMIC WELL-BEING (2016), <https://www.pewsocialtrends.org/2016/06/27/1-demographic-trends-and-economic-well-being/> [<https://perma.cc/459T-JM53>].

111. JESSICA SEMEGA, MELISSA KOLLAR, EMILY A. SHRIDER & JOHN F. CREAMER, U.S. CENSUS BUREAU, P60-270, INCOME AND POVERTY IN THE UNITED STATES: 2019, at 15 (2020), <https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-270.pdf> [<https://perma.cc/3ZM5-KT9R>].

112. See ALAN BERUBE, ELIZABETH DEAKIN & STEVEN RAPHAEL, SOCIOECONOMIC DIFFERENCES IN HOUSEHOLD AUTOMOBILE OWNERSHIP RATES: IMPLICATIONS FOR EVACUATION POLICY (2006), <https://gspp.berkeley.edu/assets/uploads/research/pdf/berubedeakenraphael.pdf> [<https://perma.cc/7QNG-WK9G>]; see also Steven Raphael & Michael Stoll, *Can Boosting Minority Car-Ownership Rates Narrow Inter-Racial Employment Gaps?* 101 (U.C. Berkeley, Berkeley Program on Hous. & Urb. Pol'y, Working Paper No. W00-002, 2001), <https://escholarship.org/uc/item/4k4519pw#main> [<https://perma.cc/X2MG-KQ4Y>].

113. Svenja Gudell, *Why the Black and White Homeownership Gap Hasn't Changed Much in 100 Years*, CNN BUS. (June 15, 2020), <https://www.cnn.com/2020/06/15/perspectives/housing-discrimination/index.html> [<https://perma.cc/GD7F-UQN5>] (“Nearly 75% of white households own their homes, compared with just 44% of black households.”).

114. Sommers, *supra* note 83, at 69–70.

115. Rose et al., *supra* note 8, at 37.

116. Robert C. Walters, Michael D. Marin & Mark Curriden, *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 320 (2005).

jury service did not show up, and Hispanic residents in particular were under-represented.¹¹⁷ In a county in which more than one in four citizens was Hispanic during the period in question, only one in *fourteen* jury service participants was Hispanic.¹¹⁸ And while 40% of the population lived in households earning \$35,000 or less, only 13% of this population participated in jury service.¹¹⁹

Beyond this data, which suggest that jury no-shows may stem, in part, from citizens' concerns about the financial consequences of participation,¹²⁰ research participants completed surveys that revealed striking disparities. In particular, twice as many Hispanic respondents as White respondents found it difficult to spend time away from work during jury duty, and more than 19% of Hispanic persons and 17% of Black Americans earned *no* wages if they reported to court for jury service, compared to 5% of White citizens surveyed.¹²¹

There is evidence that the economic impact of the COVID-19 pandemic has exacerbated the racial and socio-economic disparities that continue to plague juries. A June 2020 informal survey of potential jurors in Dallas and Houston, for example, indicated that more Black and Hispanic potential jurors reported economic hardships if summoned for jury duty, and were also more likely to work in hospitals or other areas of increased viral exposure.¹²² When a Zoom-based virtual jury was later summoned for a criminal trial in Travis County, Texas, which encompasses the city of Austin, 73% of empaneled jurors self-reported their race as White and 83% self-reported having a post-graduate or college degree.¹²³ U.S. Census data indicates, in contrast, that fewer than 50% of Travis County residents are either White or possess advanced degrees.¹²⁴

This research demonstrates that legal scholars committed to eliminating racism from the American legal system must confront socio-economic disparities and their attendant forms of exclusion in our juries. In practice, people of color are removed from jury venires long before

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 330–31.

121. *Id.*

122. *Tillotson Law Survey: COVID-19 Dramatically Impacts Dallas, Houston Jury Pools*, TILLOTSON L. (June 25, 2020), <https://www.tillotsonlaw.com/news/tillotson-law-survey-covid-19-dramatically-impacts-dallas-houston-jury-pools/> [<https://perma.cc/2X3X-HKWH>].

123. Jennifer Lapinski, Robert Hirschhorn & Lisa Blue, *Zoom Jury Trials: The Idea Vastly Exceeds the Technology*, NEWS.LAW (Aug. 25, 2020), <https://news.law/zoom-jury-trials-the-idea-vastly-exceeds-the-technology/> [<https://perma.cc/QK7V-3LFU>].

124. *Id.*

peremptory challenges are exercised; even in the absence of explicit racial animus or bias, financial hardship stands as a persistent obstacle to representative jury participation.

The consequences of this are significant. In addition to violating a person's constitutional right to serve as a juror,¹²⁵ the functional exclusion of people of color undermines public confidence in the jury trial,¹²⁶ as well as in the accuracy of verdicts.¹²⁷ In fact, empirical research suggests that jury deliberations are less satisfying for poor and historically underrepresented jurors, including those who are Black and Hispanic, than for White jurors regardless of class.¹²⁸ In *Taylor v. Louisiana*,¹²⁹ the Supreme Court specifically noted that public confidence in the trial system depended on the perceived fairness of jury selection procedures that ensured the broadest levels of participation possible.¹³⁰

While public confidence is a worthy goal in and of itself, the stakes of jury exclusion may be greatest for criminal defendants. There is an abundance of psychological research, for example, indicating that deliberative bodies with broad representation have longer and more substantive discussions of evidence due to the confluence of different perspectives.¹³¹ Another study found that jury demographics affected participation during deliberation: All-White (mock) juries tend to be dominated by White males while White females are less talkative and perceived as less persuasive.¹³² When jurors of color were introduced to the mock panel, this dynamic changed; women became more active participants and their contributions were more impactful.¹³³

With respect to guilty verdicts, a study has shown that White jurors are more likely to convict than Black jurors in cases involving Black

125. See *Batson v. Kentucky*, 476 U.S. 79, 91 (1986).

126. Sommers, *supra* note 83, at 79–82.

127. Jordan Abshire & Brian H. Bornstein, *Juror Sensitivity to the Cross-Race Effect*, 27 LAW & HUM. BEHAV. 471, 471 (2003).

128. Alix S. Winter & Matthew Clair, *Jurors' Subjective Experiences of Deliberations in Criminal Cases*, 43 LAW & SOC. INQUIRY 1458, 1463, 1480 (2017) (“[I]n the context of jury deliberations, being black with a lower level of education is qualitatively different from being white with a lower level of education. This differing effect of class by race has previously been found with respect to incarceration as well as with respect to residential neighborhoods but we find that it is also the case in the context of interpersonal interaction.” (citations omitted)).

129. 419 U.S. 522 (1975).

130. *Id.* at 530–31.

131. See Sommers, *supra* note 83, at 86.

132. Negin R. Toosi, Samuel R. Sommers & Nalini Ambady, *Getting a Word in Group-Wise: Effects of Racial Diversity on Gender Dynamics*, 48 J. EXPERIMENTAL SOC. PSYCH. 1150, 1154 (2012).

133. *Id.*

defendants on trial for violent crimes.¹³⁴ This may result, in part, from Black jurors' greater awareness (and experience) with the inequities of the criminal justice system.¹³⁵ It may also result from the prejudicial tendencies of predominantly White juries.

Studies have also highlighted the varying effect of jury demographics on the outcomes of different types of criminal cases.¹³⁶ One such study, based on North Carolina data, determined that juries with more than one Black male member were more likely to acquit defendants.¹³⁷ White juries, in contrast, were found to more often convict Black defendants in cases with White victims.¹³⁸ Scholars have also highlighted instances in which reliance on racial stereotypes about jurors' likely sympathies when empaneling jurors of color have been unfounded and prejudicial in and of themselves.¹³⁹ Ensuring that jurors from diverse backgrounds are empaneled thus not only improves the public perception of the legal system, but influences the deliberative process by effectuating a more fulsome and measured review of evidence.

The foregoing shows that despite a record of demonstrable progress, the American jury system remains vulnerable to socio-economic exclusion. Keeping people who are poor out of venires deepens the marginalization of already underrepresented groups, resulting in juries that are neither socio-economically nor racially representative of American society. This is an affront to the Constitution which, under *Batson*, protects a person's right to serve as a juror.¹⁴⁰ It also prevents empaneled jurors from feeling that they can speak and be heard. But a review of the ideal-typical process¹⁴¹ of assessing and challenging jurors

134. Abshire & Bornstein, *supra* note 127, at 477.

135. *Id.* at 473.

136. Randall A. Gordon, Thomas A. Bindrim, Michael L. McNicholas & Teresa L. Walden, *Perceptions of Blue-Collar and White-Collar Crime: The Effect of Defendant Race on Simulated Juror Decisions*, 128 J. SOC. PSYCH. 191, 195 (1988) (observing that White jurors often view white collar crimes, such as embezzlement, as more serious than blue collar crimes, such as burglary).

137. See Wright et al., *supra* note 10, at 1430.

138. See Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1082 (2011).

139. See Sommers, *supra* note 83, at 74–75 (This article discusses a case in which a defense attorney's empanement of a Black juror relied on the unfounded assumption, based on race, that the juror was likely to be sympathetic to the Black defendant. The juror at issue made racially biased statements, offering grounds for the defendant's appeal.).

140. See *Batson v. Kentucky*, 476 U.S. 79, 88–89 (1986).

141. An "ideal type," as famously conceived by sociologist Max Weber, refers to a social phenomenon stripped of its local or empirical specificity for purposes of analysis. See generally Max Weber, "Objectivity" in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 49, 90 (Edward A. Shils & Henry A. Finch eds. & trans., 1949).

does not offer a full picture of how things unfold in practice.

In Part III, I draw on my own extended empirical studies of jury selection to offer an innovative look at socio-economic exclusion in real time. In particular, I identify the central role that benevolence plays as a common rationale for exclusion. In the nineteenth and early twentieth centuries the link between property, ability, and moral aptitude served to make socio-economic exclusion not only thinkable to its advocates but right and good.

Today, I argue, the view of jury service as an impossible burden for those who are poor, and excusal from it as an act of benevolence, once more makes exclusion of certain people not only thinkable but right and good. Further, as I will discuss in the final section of this Article, the view of jury service as a burden for people who are poor and excusal as an act of benevolence reifies the jury system as something unchangeable, rather than a living system in which the financial consequences of service might be reduced, eliminated, or turned positive, by compensating jurors at a level that befits the importance of the service they render.

III. AN EMPIRICAL CASE STUDY OF JUDICIAL AND ATTORNEY MANAGEMENT OF HARDSHIP EXCUSES

The last section examined the legal mechanisms through which otherwise eligible jurors are excused from jury service due to economic hardship. Missing from this account, however, is discussion or analysis of the real-time *process* by which lawyers and judges use and rationalize cause challenges to excuse jurors who explicitly or implicitly identify themselves as financially burdened by jury service. What will become clear is that while judges manage cause challenges quite differently, it is possible to discern patterns in their practices of juror questioning and dismissal based on their twin desires to be benevolent and yet also vigilant in their empanelment of juries. Uncovering this, however, requires a shift to a qualitative empirical perspective from traditional legal analysis. Thus, the section that follows continues the foregoing discussion of socio-economic exclusion by synthesizing findings from court observations and semi-structured interviews over a seven-year period.

A. *Methods*

This section presents findings from an empirical study carried out between 2013 and 2020 with the support of the National Science Foundation. This field research, which took place in state and federal courtrooms and prosecutors' offices, contributed to a long-term study

focused on the role of jurors in prosecutors' decision-making.¹⁴² The study consisted of participation in thirty jury selection proceedings in state and federal court¹⁴³ and semi-structured interviews with thirty Assistant District Attorneys, thirty Assistant U.S. Attorneys, thirty federal public defenders, and thirty state public defenders about their experiences with and approaches to voir dire.

Though the case names associated with the jury selection proceedings analyzed in this section have been de-identified to preserve the anonymity of the attorneys and judges involved, they include a range of civil and criminal cases—from car accidents and healthcare fraud to prosecutions of alleged public corruption, rape, child abuse, and drug trafficking. I selected the state and federal districts of such jury selection proceedings and interviews for their variable population density, racial diversity, and comparatively high level of socio-economic inequality.

As the study focuses on two anonymized judicial districts in distinct regions of the United States, it is fair to question the applicability of its findings to other jurisdictions. My response is first, that this study is aimed at shedding light on a broader phenomenon by building on other empirical legal and doctrinal scholarship. Through its complementarity with other research, this study creates a more fulsome understanding of the impacts of cause challenges and effects of socio-economic exclusion. Second, the central focus of this study is the identification and explication of particular mechanisms and processes of jury selection. To this end, I aim to offer insight into the ways dismissals of prospective jurors due to economic hardship enlarge the scope of judicial and attorney discretion to prevent otherwise eligible jurors from serving. These findings present an avenue for future research in other settings which might confirm or contest their validity. My confidence in their generalizability stems from the broad similarity of jurors' eligibility criteria across the United States and the robustness of the study itself. With over 100 interviews over a seven-year research period, my study offers ample evidence that judges and lawyers utilize a shared discursive and practical toolkit to assess and grant excuses or exemptions to jurors who present hardship excuses in court.

With few exceptions, empirical studies of the exclusionary character of jury selection practices typically focus on the demographics of empaneled

142. See generally Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. 1071 (2019) (This study examines the role that hypothetical jurors play in federal prosecutors' case preparation.).

143. To the extent that quotations appear in this Article, they have been modified. Their purpose is to tease out formulations that emerged as generalizable and representative of prosecutors who grappled with similar strategic and ethical concerns in preparing for jury selection.

(or excused) jurors.¹⁴⁴ My research, by contrast, builds on a different, processual approach, drawing on interviews with former jurors¹⁴⁵ and lawyers¹⁴⁶ to connect off-transcript deliberations about voir dire¹⁴⁷ to the *production* of unrepresentative jury pools and panels. This scholarship uses qualitative data to illuminate the norms, beliefs, routines, and other features of professional behavior among legal actors that account for how a diverse public is actively sorted into less diverse juries in state and federal court.¹⁴⁸ What distinguishes my approach is both its attention to multiple perspectives and its long duration: Through extensive participant observation¹⁴⁹ and interviews with 120 actors across four groups, it offers an unparalleled look at the production of socio-economic exclusion in the contemporary United States.

144. Cf. Catherine M. Grosso & Barbara O'Brien, *Lawyers and Jurors: Interrogating Voir Dire Strategies by Analyzing Conversations*, 16 J. EMPIRICAL LEGAL STUD. 515, 524 (2019) (Drawing on transcript analysis, the authors note that their study "systematically codes the conversations leading up to a decision to peremptorily strike or pass a potential juror. In so doing, it maps out the actual conversation documented in written transcripts between each targeted juror and the judge, prosecutor, and defense counsel trying the case."); Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163 (2005); Anna Offit, *Peer Review: Navigating Uncertainty in the United States Jury System*, 6 U.C. IRVINE L. REV. 169 (2016).

145. See generally ROBIN CONLEY RINER, *CONFRONTING THE DEATH PENALTY: HOW LANGUAGE INFLUENCES JURORS IN CAPITAL CASES* (2016) (Riner's ethnographic research drew on interviews with twenty-one former capital jurors.).

146. See Zalman & Tsoudis, *supra* note 144.

147. This includes data gathered from interviews with attorneys as well as informal discussions among lawyers—including those taking place during breaks in trial proceedings or out of court.

148. ANN SOUTHWORTH & CATHERINE L. FISK, *THE LEGAL PROFESSION: ETHICS IN CONTEMPORARY PRACTICE* 356–57 (2014) (discussing how plea bargains undermine the transparency of criminal procedure and trials); Candace McCoy, *Prosecution*, in *THE OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE* 663, 682 (Michael Tonry ed., 2011) (engaging in a similar discussion).

149. Participant observation is an ethnographic research method that entails an inductive and immersive field study aimed at attaining an understanding of the meaning research subjects impute to their decisions, actions, and multitude of social practices by their own accounts. See Signe Howell, *Ethnography*, *CAMBRIDGE ENCYCLOPEDIA OF ANTHROPOLOGY* (Feb. 18, 2018), <https://www.anthroencyclopedia.com/entry/ethnography> [https://perma.cc/Y9J5-886V].

B. Findings

Figure 1:
Illustrative Questionnaire Excerpt From Voir Dire in a Federal Criminal Case¹⁵⁰

JUROR NUMBER: _____

Preliminary Questions

1. The attorneys in this case and I are going to see that it is tried as quickly and as efficiently as we can. It will likely take approximately 6 weeks to try. Is there any extraordinary personal or business situation that makes it impossible for you to sit on this jury?
 Yes No

If YES, please explain.

1. *Inconsistent Judicial Assessments of Hardship Excuses*

The first conclusion drawn from the empirical data is that judges do not take a uniform approach to exercising cause challenges. Interviews with state and federal prosecutors, as well as defense attorneys, all point toward this conclusion.¹⁵¹ Some judges were perceived as taking a “flexible,”¹⁵² “reasonable,”¹⁵³ “respectful,”¹⁵⁴ “deferential,”¹⁵⁵ “sympathetic,”¹⁵⁶

150. This graphic came from the Author’s anonymized research.

151. *See, e.g.*, Interview with 6V, State Pub. Def., in U.S. (2020) (“I think in terms of hardship . . . it depends on the judge’s agenda . . . I don’t believe there is a rhyme or reason.”); Interview with 6S, State Pub. Def., in U.S. (2020) (“Depending on which floor of the courthouse, every question is going to be different.”); Interview with 6Q, Fed. Pub. Def., in U.S. (2020) (“With regard to hardships and how courts respond, I think it depends on the judge.”); Interview with 5S, Assistant Dist. Att’y, in U.S. (2020) (“I think it comes down to individual judges.”).

152. *See, e.g.*, Interview with 6X, State Pub. Def., in U.S. (2020) (“Most of the times in most trials, courts are pretty flexible if they think they’re going to have enough jurors.”).

153. *See, e.g.*, Interview with 6Q, Fed. Pub. Def., in U.S. (2020) (“Painting with a broad brush, most judges are reasonable.”).

154. *See, e.g.*, Interview with 5X, State Pub. Def., in U.S. (2020) (“It has been only on rare occasions I’ve seen a judge force someone to remain in the jury pool who said they didn’t want to be there . . . everyone’s usually pretty respectful.”).

155. *See, e.g.*, Interview with 6H, Assistant Dist. Att’y, in U.S. (2020) (“The judge whose court I’m in now I’ve found to be very deferential.”).

156. *See, e.g.*, Interview with 6C, Assistant Dist. Att’y, in U.S. (2020) (explaining that judges’ approaches to hardship excuses “var[y] so widely [and] depend entirely on the judge . . . generally speaking judges are rather sympathetic”).

“fair,”¹⁵⁷ or even “lenient”¹⁵⁸ approach to excusing prospective jurors who presented hardship concerns. The exchange below between a judge and prospective juror during state court jury selection proceedings illustrates how “flexibility” or “sympathy” figures in the process of identifying financial hardship. In response to a middle-aged White male construction worker’s concern about lost wages, the judge asked:

Judge: Is it an hourly wage?

Prospective Juror: Yes, it is.

Judge: And this would cause a hardship?

Prospective Juror: It might.

Judge: Ok. I don’t want to put anyone in a bind . . . but when you say it might

Prospective Juror: I mean lost wages.

Judge: Are you the only provider in your household?

Prospective Juror: Yes, sir.

Judge: Ok, I’ll excuse you.¹⁵⁹

In this context, the prospective juror appeared visibly uncomfortable—pausing before offering responses and averting eye contact—as though self-conscious about the judge’s effort to frame his requested dismissal as a legally permissible hardship excuse. In an exchange with a different juror, the same judge reframed a prospective juror’s concerns about burdens posed by the anticipated trial schedule in a manner that enhanced the excuse’s legitimacy. In this case a prospective juror raised her hand and explained:

Prospective Juror: My problem is I have a lot of bills to pay—including

157. *See, e.g.*, Interview with 6R, Fed. Pub. Def., in U.S. (2020) (“Our judges are typically pretty fair about those things in my experience.”).

158. *See, e.g.*, Interview with 5U, Assistant Dist. Att’y, in U.S. (2020) (describing the judges who presided over the prosecutor’s last three jury trials as taking a “lenient” approach to excusing prospective jurors with hardship concerns).

159. E-1 Participation in Jury Selection Proceedings, in U.S. (2013–2017).

paying my own rent

Judge: I see. [pause] And are you self-employed?

Prospective Juror: Yes . . . I work for myself.

Judge: So, while you're a juror, you have no other source of income?

Prospective Juror: No, sir.¹⁶⁰

In this exchange, the judge guided the juror toward identifying herself as “self-employed” before granting a cause challenge—signaling the legitimacy of this excuse for other prospective jurors who were seated in open court.

Several of the prosecutors and defense attorneys I interviewed emphasized judges' willingness to excuse prospective jurors who expressly mentioned childcare obligations, or the needs of other dependent family members.¹⁶¹ Some lawyers felt this tendency reflected judges' intuitions that jurors who raised childcare concerns were more likely to be sincere in their requests for excusal.¹⁶²

Still, lawyers agreed that not all judges evinced a willingness to dismiss low-income people or prospective jurors with dependents. In fact, some felt that judges were more likely to honor hardship excusal requests that pointed to an inconvenience, rather than a genuine financial burden. Examples included concerns about vacation plans¹⁶³ and business trips.¹⁶⁴ One federal defender even averred that often socio-economic

160. *Id.*

161. *See, e.g.*, Interview with 5O, Assistant Dist. Att'y, in U.S. (2020) (characterizing judges' willingness to excuse jurors with childcare concerns as rendering them more like “exemptions,” since most judges are “sympathetic” to this concern); *see also* Interview with 6W, State Pub. Def., in U.S. (2020) (“Judges tended to be more understanding and willing to let people go when [they had] concerns about caring for children and especially special needs children or other family members.”); Interview with 6N, Fed. Pub. Def., in U.S. (2020) (noting that juror excusals due to childcare obligations were more prevalent than those due to financial, medical, or other sources of hardship).

162. *See, e.g.*, Interview with 6M, Fed. Pub. Def., in U.S. (2020) (noting that although jurors sometimes present “phony” excuses related to taking care of small children they are unlikely to be “made up”); *cf.* Interview with 6J, State Pub. Def., in U.S. (2020) (noting that where defense attorney described judges' skepticism about prospective jurors' childcare excuses due to a perception that caretaking help was readily available in the jurisdiction).

163. *See* Interview with 6L, Fed. Pub. Def., in U.S. (2020); Interview with 5G, Assistant Dist. Att'y, in U.S. (2020); Interview with 6J, Assistant Dist. Att'y, in U.S. (2020).

164. *See* Interview with 5Q, Assistant Dist. Att'y, in U.S. (2020); Interview with 6J, Assistant Dist. Att'y, in U.S. (2020); Interview with 6C, Assistant Dist. Att'y, in U.S. (2020) (noting the perception that judges were particularly sympathetic to small business owners who raised hardship excuses).

considerations cut the other way, saying that “hardship excuses are classist in the sense that vacations are considered a hardship excuse, but losing my job is not.”¹⁶⁵ In some cases, judges’ skepticism about the actual possibility of job loss prompted judges to insist that they would personally contact jurors’ employers to verify such claims.¹⁶⁶

What to make of this “harsh”¹⁶⁷ or more unforgiving attitude toward jurors’ concerns about financial burdens?¹⁶⁸ What at first glance seems indicative of a bias toward making low-income people serve is in fact evidence of the contradictory motives that legal actors must confront when building juries. Judges, my interlocutors agreed, wished to be benevolent toward people for whom jury service might constitute a burden. At the same time, they did not want to risk losing too many jurors from the venire—or “busting the panel.”¹⁶⁹ In a country where many people work paycheck to paycheck, deferring too freely to material concerns would mean that “two-thirds of the panel [would] raise their hands” with similar excuses.¹⁷⁰ For this reason, it was not unusual to see judges “really grill jurors” or exercise caution before “letting someone go.”¹⁷¹

Lawyers agreed that judges’ two modes—benevolence and vigilance—made it difficult to propose and contest cause challenges.¹⁷² In one wire fraud case, for example, a trial team of federal prosecutors bemoaned their

165. Interview with 6L, Fed. Pub. Def., in U.S. (2020).

166. *See, e.g.*, Interview with 5E, Assistant Dist. Att’y, in U.S. (2020) (“I have heard judges say if your employer gives you a problem I’ll contact them directly.”); *see also* Interview with 5O, Assistant Dist. Att’y, in U.S. (2020) (recalling a judge who asked prospective juror who was concerned about getting fired to identify that juror’s employer).

167. *See, e.g.*, Interview with 6U, State Pub. Def., in U.S. (2020) (describing a judge who was “notoriously harsh on letting jurors or potential jurors have any exceptions and she would even threaten people for contempt if they lied or tried to get out”).

168. *See, e.g.*, Interview with 6F, Assistant Dist. Att’y, in U.S. (2020) (“[M]ost of the time, the financial excuse is an absolute no.”); *see also* Interview with 5Y, Assistant Dist. Att’y, in U.S. (2020) (describing judges’ responses to jurors’ hardship concerns in “most trials” as “welp, ok, too bad”).

169. *See* Interview with 6X, State Pub. Def., in U.S. (2020); Interview with 6T, State Pub. Def., in U.S. (2020); Interview with 6O, Fed. Pub. Def., in U.S. (2020).

170. *See* Interview with 5J, Assistant Dist. Att’y, in U.S. (2020).

171. Interview with 6B, Assistant Dist. Att’y, in U.S. (2020); *see also* 6J, Assistant Dist. Att’y, in U.S. (2020) (suggesting that judges became *increasingly strict* in their hardship excuse criteria as more jurors were excused and fewer remained in court for potential empanelment).

172. A narrow exception to this trend could be seen in cases tried during the COVID-19 pandemic, in which judges modified their general procedure to afford counsel time in advance of trial to review prospective jurors’ detailed responses to written questionnaires. *See, e.g.*, Interview with 6Y, State Pub. Def., in U.S. (2020) (describing a judge’s decision to send counsel detailed juror questionnaire responses one week before the commencement of a criminal prosecution during the COVID-19 pandemic).

lack of information about the judge's approach to managing voir dire.¹⁷³ When a prospective juror expressed concern that his employment would be compromised if he served, a prosecutor shared that she had "no sense" of how the judge presiding over their case would interpret and respond to a juror's preexisting work commitment.¹⁷⁴ This prompted a colleague to respond that in his experience, judges requested clarity about the actual risk of job termination that missing a work trip could pose—and whether the judge herself could authenticate the prospective juror's excuse with the employer.¹⁷⁵ Some federal prosecutors shared that even in the face of judicial inconsistency, they themselves tried to be consistent.¹⁷⁶ For instance, they often felt obligated to dismiss jurors who explicitly used the language of financial hardship.¹⁷⁷

In both state and federal court, the cause challenge phase of jury selection revealed significant differences between individual judges. In addition to approaching the evaluation of hardship excuses differently, judges also managed the process of considering cause challenges differently.¹⁷⁸ Some judges invited the sustained participation of lawyers, while others directed lines of questioning, and follow-up questioning, themselves.¹⁷⁹

Highlighting the variability of judicial approaches is critical to disabusing the reader of any notion that judges lack discretion and function as automatons when it comes to socio-economic exclusion. In fact, judges, like other legal actors, make decisions under particular legal and normative constraints while trying to balance competing imperatives. The desires to be benevolent and vigilant manifest themselves in different practices and outcomes. Critically, however, judges often navigated difficulties by enlisting lawyers in the process of evaluating claims.

173. Participation in Jury Selection Proceedings with FB, DB & FA, in U.S. (2013–2017).

174. *Id.*

175. *Id.*; see also Interview with 5J, Assistant Dist. Att'y, in U.S. (2020). During the interview, a state prosecutor commented on judges' willingness to test a prospective juror's veracity with respect to anticipated work conflicts. *Id.*

176. I-44 Participation in Jury Selection Proceedings with FB, DB & FA, in U.S. (2013–2017).

177. *Id.*

178. See, e.g., Gregory E. Mize & Paula Hannaford-Agor, *Building a Better Voir Dire Process*, 47 JUDGES' J. 4, 8 (2008) (presenting the results of a four-year long fifty-state survey in 2007 revealing that in state court, 25.9% of jury selection proceedings were exclusively managed by judges, and 19.4% involved the equal participation of judges and lawyers; in federal court, jury selection proceedings were exclusively managed by judges in 69.6% of trials, and by judges and lawyers equally in 13.6% of trials).

179. *Id.*

2. *Judicial Authorization of Excusal by Attorney Consent*

Cause challenges lie within the sole discretion of the court. Still, participant observation and interviews confirmed that judges routinely deferred to counsel on such questions, at which point attorneys could agree to excuse prospective jurors without placing reasons for such decisions on the record.¹⁸⁰ “The common practice,” one federal defender explained, was for a judge to say “attorneys, see who you agree on and when you’re done, approach the bench.”¹⁸¹ While some lawyers took this practice for granted,¹⁸² others viewed it as “passing the buck”—or inappropriately evading responsibility.¹⁸³

In practice, this deference of judicial power meant that prosecutors and defense attorneys regularly found themselves in the position of assessing prospective jurors’ hardship excuses themselves. This required that lawyers, not judges, determine whether jurors’ self-reported professional or family commitments made jury service financially burdensome. Reaching a conclusion was made difficult by the fact that across jurisdictions, legal thresholds for personal hardship are ill-defined and inconsistently deployed. Making matters only more complex, jurors did not always identify themselves as requiring excusal on one of the specified grounds, as doing so might be humiliating.¹⁸⁴ Prosecutors and defense attorneys were therefore often left to identify, evaluate, or contest indices of suitability based on scant or ambiguous information.

In the course of observing jury selection strategy meetings, for example, I noted that federal prosecutors often gave interpretations of juror hardship that went beyond the actual excuses provided in court. In these cases, prosecutors tried to imagine what jurors actually meant by “enormous financial hardship” and concluded that many people with such excuses likely felt that they could not “complain” to the judge.¹⁸⁵

And this was likely true. Even in cases in which the venire was told

180. See, e.g., Interview with 5K, Assistant Dist. Att’y, in U.S. (2020) (“Judges will put the decision about cause challenges on attorneys.”); see also Interview with 6S, State Pub. Def., in U.S. (2020).

181. See Interview with 6Q, Fed. Pub. Def., in U.S. (2020).

182. Interview with 5L, Assistant Dist. Att’y, in U.S. (2020) (“It’s something we do deal with in every single one of our jury selections. For the most part, judges will leave it up to the lawyers.”).

183. See Interview with 6C, Assistant Dist. Att’y, in U.S. (2020).

184. See Offit, *supra* note 144, at 190; see also Interview with BJ, Assistant U.S. Att’y, in U.S. (2013).

185. I-43 Participation in Jury Selection Proceedings with AY & BQ, in U.S. (2013–2017). During the proceedings, jurors stated they “could not afford to lose income for that long,” and stated, after having been empaneled, that their employers would not compensate them for the duration of their jury service. *Id.*

that a trial would last for months, prospective jurors rarely shared explicit concern about missing work. If federal prosecutors had the benefit of using written questionnaires, they typically speculated about a juror's ability to serve based on stated occupations. Among the prospective jurors who emerged as causes for concern, for example, was a T.J. Maxx retail associate, an auto repairman, a department manager at Walmart, a Sheet Metal Journeyman, a food service worker, a warehouse shipping clerk, a crossing guard, Uber drivers, substitute or assistant teachers, a produce clerk, a substation mechanic, and a delivery driver—among others.¹⁸⁶ They also expressed concern about the impact of jury service on those who were unemployed but actively searching for new positions.¹⁸⁷ This included a juror who had scheduled an interview that conflicted with the jury selection proceedings and explained that she was desperate for the job.¹⁸⁸ Significantly, this meant that the jurors who prosecutors and defense attorneys believed would make appealing jurors were often those who they believed could afford to serve.¹⁸⁹

Their motives were mixed. Some prosecutors expressed a desire to benevolently spare those who might otherwise suffer undue economic hardship.¹⁹⁰ At the same time, it was commonly understood that financial hardship could prove to be an impediment to the legal process, as the discovery of a juror's scheduling conflicts or financial precarity might disrupt the trial later on.¹⁹¹

Removing jurors, however, was not always straightforward.

186. *Id.*

187. I-32 Participation in Jury Selection Proceedings with AI & AV, in U.S. (2013–2017); I-43 Participation in Jury Selection Proceedings with AY & BQ, in U.S. (2013–2017); Participation in Jury Selection Proceedings with FB, DB & FA, in U.S. (2013–2017); Participation in Jury Selection Proceedings with BT & AA, in U.S. (2013–2017) (describing an instance in which a prosecutor commented that he could not understand how a prospective juror who was “between jobs” could be empaneled).

188. I-32 Participation in Jury Selection Proceedings with AI & AV, in U.S. (2013–2017).

189. *See, e.g.*, Interview with AZ, Assistant U.S. Att’y, in U.S. (2013) (describing jurors that prosecutors ultimately empaneled as “usually kind of middleclass people who find their jobs boring or don’t mind being away from their office for a couple of weeks and find it like a vacation”); Interview with AL, Assistant U.S. Att’y, in U.S. (2013) (characterizing the district’s typical jury pool as “middle class—not blue collar”); Interview with BC, Assistant U.S. Att’y, in U.S. (2013) (commenting that desired jurors have “steady employment” and are “solidly middle class”); Interview with BZ, Assistant U.S. Att’y, in U.S. (2013) (noting that the jurors he is “looking for” are “middle class”).

190. Participation in Jury Selection Proceedings with BT & AA, in U.S. (2013–2017). During this interview, a prosecutor commented that a Williams Sonoma employee was likely to be discouraged from serving as a juror because she probably worked on commission; a different prosecutor noted that although a summer camp director had not raised a hardship excuse, the trial’s summer schedule would undoubtedly pose a problem. *Id.*

191. *Id.*

Prosecutors sought to make cases for excusal more persuasive by highlighting evidence of a juror's unsuitability due to financial or logistical barriers that might have been addressed through material support. For instance, I witnessed prospective jurors without access to cars dismissed for cause at prosecutors' recommendations.¹⁹² Depending on prosecutors' and defense attorneys' impressions of a prospective juror, sources of hardship could be strategically emphasized or downplayed.¹⁹³ If multiple prospective jurors described travel conflicts during voir dire in the same trial, for example, prosecutors might respond differently depending on their impressions jurors' answers to other questions.¹⁹⁴

Overall, the difficulty faced by judges in navigating hardship excuses fostered a situation in which lawyers were regularly asked to weigh in on strike decisions. In a sense, this augmented lawyers' ability to make peremptory challenges. One public defender praised this practice, declaring that it allowed attorneys to excuse jurors for cause who they otherwise found problematic "without wasting our peremptories."¹⁹⁵ The hardship excusal process thus created an opening, understated in extant scholarly literature, for socio-economic inequity to take root in the jury system.

3. *Practical and Strategic Barriers to Attorney Empanelment of Jurors Facing Financial Hardship*

Though some jurors came forward with hardship excuses related to work constraints, childcare obligations, and concerns about paying bills due to lost income, many jurors remained silent. Eliciting such personal information from jurors, I saw as a participant observer, often necessitated patient, empathetic, and persistent work—often at sidebar. This was also true of prospective jurors who responded to voir dire questions in writing. Even when accounts of hardships were explicitly requested through written questionnaires, prospective jurors could be reluctant to characterize their personal circumstances as "extraordinary," perhaps recognizing the commonality of their experience.¹⁹⁶

192. Participation in Jury Selection Proceedings with FB, DB & FA, in U.S. (2013–2017); I-43 Participation in Jury Selection Proceedings with AY & BQ, in U.S. (2013–2017).

193. I-43 Participation in jury selection proceedings with AY & BQ, in U.S. (2013–2017).

194. *Id.*

195. Interview with 6T, State Pub. Def., in U.S. (2020) (describing a judge who told counsel they could dismiss jurors they agreed upon and not "worry about using your [peremptory] challenges for this purpose").

196. *See* Interview with 6T, State Pub. Def., in U.S. (2020) (noting that jurors' presentations of hardship excuses can be a source of "embarrassment" and that benevolent judges could spare them such embarrassment by excusing them).

To the extent that prospective jurors did express concern about their empanelment in a case, prosecutors and defense attorneys were often unified in the belief that citizens who did not want to serve as jurors should not be forced to do so.¹⁹⁷ Prosecutors and defense attorneys were particularly concerned that those with financial concerns might be preoccupied and therefore inattentive during trial.¹⁹⁸ And prosecutors were particularly worried that a juror whose hardship excuse was denied might harbor resentment toward the government for charging and prosecuting a case.¹⁹⁹ Likewise, there were defense attorneys who worried that a juror who raised a hardship excuse after hearing others present similar concerns might be a “follower looking to get out the door,” unlikely to stand up to fellow jurors during contentious deliberations in a criminal case.²⁰⁰ In some cases, prosecutors and defense attorneys felt so strongly that jurors should be excused for cause that they were willing to use peremptory challenges to remove them.²⁰¹

Notwithstanding lawyers’ interest in excusing prospective jurors facing financial hardship, prosecutors and defense attorneys shared concern that the representativeness of empaneled juries would suffer. One federal defender expressed concern that cause challenges likely “skewed” the jury pool in longer trials, since poorly compensated jurors would be unlikely to participate.²⁰² Likening contemporary jury selection practice to voter suppression, another federal defender interpreted the disparate presence of White male prospective jurors as evidence that most poor and working-class people, including undocumented workers who were not summoned for jury duty to begin with, were systematically cut from the process.²⁰³

Some prosecutors shared this concern, noting that citizens excused

197. *See, e.g.*, Interviews with AK, Assistant U.S. Att’y, in U.S. (2013) (“[I]f a person says they don’t want to serve, I don’t want them to.”); Interview with AM, Assistant U.S. Att’y, in U.S. (2015) (“I don’t like jurors that show any indication during voir dire that they do not want to be there.”); *see also* Interview with 6O, Fed. Pub. Def., in U.S. (2020) (“From a personal perspective, I’ve never seen a person who’s wanted to get off a jury who I’ve wanted to keep. I don’t want someone who doesn’t want to be there.”).

198. *See, e.g.*, Interview with 5J, Assistant Dist. Att’y, in U.S. (2020) (noting that a juror distracted “based on a home life situation is not going to be able to pay attention to the evidence that’s presented”); *see also* Interview with 6M, Fed. Pub. Def., in U.S. (2020) (“If they have those types of economic problems, they’re not going to be focusing on the trial.”).

199. *See* Interview with 6J, Assistant Dist. Att’y, in U.S. (2020).

200. *See* Interview with 6Q, Fed. Pub. Def., in U.S. (2020).

201. *See* Interviews with 6T & 6S, State Pub. Defs., in U.S. (2020); Interviews with 5E & 5U, Assistant Dist. Att’ys, in U.S. (2020).

202. Interview with 6N, Fed. Pub. Def., in U.S. (2020).

203. *See* Interview with 6Q, Fed. Pub. Def., in U.S. (2020). *See generally* Amy R. Motomura, Note, *The American Jury: Can Noncitizens Still Be Excluded?*, 64 STAN. L. REV. 1503 (2012).

from venires in their jurisdictions were often Hispanic,²⁰⁴ Black,²⁰⁵ or likely to live in neighborhoods that faced disparate or discriminatory policing by law enforcement.²⁰⁶ Beyond the introduction of racial disparities, prosecutors noted the broader problem of losing jurors with different “life situations” including those who faced adversity.²⁰⁷

Concern about jury representativeness led some defense attorneys to argue adamantly that indigent jurors, who shared financial hardship in common with their clients, should never be excused by consent. “I would not let them off the hook,” one public defender explained, “and I think most defense attorneys would not, because we have to do our job and that supersedes everything else.”²⁰⁸ The attorney went on to explain that choosing to “agree to an exemption” could mean forfeiting an error that could otherwise be preserved for appeal.²⁰⁹

Many defense attorneys, however, felt they had no choice but to accede to cause challenges about which they had strong reservations. “The ritual I see,” one federal defender explained,

is when someone says there’s a hardship and the judge finds it persuasive they’ll say, “does anyone have an objection to that?”

Once the judge signals an intent to grant a hardship excuse, I haven’t ever seen, or rarely have seen, an attorney from either side object to that.²¹⁰

The issue, by this and other defense attorneys’ accounts, was that judges’ interpretations of cause challenge decisions often pressured the parties to agree to such challenges. Defense attorneys were particularly anxious about the possibility that resisting a cause challenge would lead jurors to turn against them.²¹¹ Prosecutors shared this sentiment, and expressed discomfort when judges put them in the position of having to dispute the legitimacy of jurors’ financial concerns in their presence.²¹²

What the foregoing shows is that for different reasons, the desires and

204. See Interview with 5G, Assistant Dist. Att’y, in U.S. (2020).

205. See Interview with 5J, Assistant Dist. Att’y, in U.S. (2020).

206. *Id.* (noting that lawyers “don’t want to strike everyone who makes under \$30,000 per year” since those with low wages are likely “less trusting of the criminal justice system,” raising particular concern on the part of defense counsel).

207. Interview with 5S, Assistant Dist. Att’y, in U.S. (2020).

208. See Interview with 6V, State Pub. Def., in U.S. (2020).

209. *Id.*

210. See Interview with 6L, Fed. Pub. Def., in U.S. (2020) (emphasis in original).

211. See, e.g., Interview with 6P, Fed. Pub. Def., in U.S. (2020) (“I don’t want [the juror] to know that I’m forcing her to come here and not provide for [her] family.” (emphasis in original)).

212. See, e.g., Interview with 5N, Assistant Dist. Att’y, in U.S. (2020) (noting judges will generally “put it to attorneys, which we hate . . . we’re not going to make an argument that will poison us out of that juror”).

objectives of prosecutors and defense attorneys could align to make low-income or financially strained prospective jurors undesirable—even when they bemoaned the homogeneity of the juries that resulted. Afforded greater discretion by judges who were caught between the imperatives to be benevolent and to be vigilant, these legal actors exercised power over the production of juries that went beyond their allotted peremptory challenges. But as with the judges, lawyers' motives for striking indigent jurors should not be viewed as inherently or deliberately nefarious. Jurors who were poor were often viewed as potential impediments to an efficient trial, disadvantageous to a case or client, or unduly burdened by a legal system that could not fairly compensate them for their time. In many cases, giving prospective jurors what they wanted—a way out of poorly compensated service—allowed judges, prosecutors, and defense attorneys to believe they were best serving everyone's interests.

C. *Analysis*

Beyond the problem of juror attrition during the “summoning” and “summons response” phases of jury selection based on financial hardship,²¹³ empirical research shows that jurors are most likely to face dismissal during voir dire as a result of economic hardship, including the risk of lost income, and the need to care for a child or another dependent.²¹⁴ These studies demonstrate that a juror's financial hardship plays a significant role in that person's willingness, if not ability, to report to court and ultimately serve on a jury. As a result of the COVID-19 pandemic, anecdotal evidence suggests that citizens of color raise a disparate number of financial hardship concerns,²¹⁵ though this has not necessarily led to the disproportionately White and male juries that some

213. As Professors Mary R. Rose, Shari Seidman Diamond, and Marc A. Musick outline in their study of lifetime jury participation in Texas, jurors must be summoned for jury service, recognize and respond to this summons, and complete a period of in-court questioning in order to be assigned to sit as jurors in particular cases. See Mary R. Rose, Shari Seidman Diamond & Marc A. Musick, *Selected to Serve: An Analysis of Lifetime Jury Participation*, 9 J. EMPIRICAL LEGAL STUD. 33, 35 (2012).

214. See HIROSHI FUKURAI, EDGAR W. BUTLER & RICHARD KROOTH, RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 64 (1993) (noting, in the context of a California-based research study, that factors that are most likely to lead to prospective jurors' excusal include: “(1) economic hardship; (2) lack of child care; (3) age; (4) the distance traveled and transportation; and (5) illness”); ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS 117–20 (1998); JANICE T. MUNSTERMAN, G. THOMAS MUNSTERMAN, BRIAN LYNCH & STEVEN D. PENROD, NAT'L CTR. FOR STATE CTS., THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE 40 (1991), <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/juries/id/105> [<https://perma.cc/WY9P-FM9P>].

215. See *Tillotson Law Survey*, *supra* note 122.

researchers predicted.²¹⁶ As the previous sections have shown, the question of how prospective jurors facing economic or caretaking burdens lose representation on juries requires sustained qualitative study.

What the findings above show is that economic hardship remains an elusive and unelaborated basis for a juror's dismissal. This is because jurors' concerns about losing income, jeopardizing their jobs, and caring for young, elderly, or disabled family members, prompt the highly subjective and variable scrutiny of judges. In addition to judges' unilateral dismissals of prospective jurors for reasons of hardship, judges often defer hardship decisions to attorneys who either agree to dismiss a prospective juror or exercise a peremptory challenge. In such cases, lawyers find themselves in the position of assessing peoples' abilities to maintain livelihoods despite jury participation, while weighing such decisions against the possibility that others will invoke similar rationales such that an inadequate number of venirepersons would be available to fill the box.

One consequence of the largely unregulated and unreviewable nature of cause challenges is the difficulty of investigating how they contribute to the race or sex disparities among empaneled jurors. Another is a more fundamental distortion of the purpose of such challenges. Rather than identify sources of bias or ineligibility, cause challenges often lead to the dismissal of capable jurors who identify themselves as precariously employed, poor, or otherwise responsible for uncompensated domestic labor, including childcare. In the absence of reform efforts aimed at providing material support to citizens for the duration of jury service, juries will fail to meaningfully represent the socio-economically stratified communities from which they are drawn. At a time of growing social inequality²¹⁷ and attention to systemic racism in the criminal justice system,²¹⁸ the stakes of neglecting sources of jury discrimination are high, and point to the need for reforms described in the Part that follows.

216. See Interview with 6O, Fed. Pub. Def., in U.S. (2020) (describing a jury trial that took place during the pandemic in which the empaneled jury reflected greater racial diversity than was typical in his experience, in the district).

217. See generally James E. Wright II & Cullen C. Merritt, *Social Equity and COVID-19: The Case of African Americans*, 80 PUB. ADMIN. REV. 820 (2020) (discussing the pandemic's disparate impact on American citizens of color).

218. See generally NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 34–36 (2016) (describing the racialized landscape of the criminal legal system based on the observation of court proceedings). See also John Eligon & Audra D. S. Burch, *After a Summer of Racial Reckoning, Race Is on the Ballot*, N.Y. TIMES (Oct. 30, 2020), <https://www.nytimes.com/2020/10/30/us/racial-justice-elections.html> [<https://perma.cc/5VVE-W3BA>].

IV. DIRECTIONS FOR REFORM

The history, law, and practice of jury selection in the United States suggest that socio-economic status plays a considerable role in determining who will ultimately serve on juries. This reality has led researchers, and others involved in jury reform initiatives, to try to remove practical and material obstacles to jury participation. In *Thiel v. Southern Pacific Co.*,²¹⁹ for instance, the United States Supreme Court addressed the systematic excusal of day laborers and low-income workers.²²⁰ Still, it afforded judges the discretion to excuse such individuals on a case-by-case basis. Tellingly, a considerable portion of the Thiel Court's opinion explained how the wholesale exclusion of day laborers would create an imbalanced jury system, since citizens of every class and occupation were fit to serve, and jury qualification was an individual, rather than a group, matter.²²¹ The clerk who had dismissed prospective jurors who were day laborers nonetheless framed the decision as one of benevolence; he sought to excuse a group of jurors who, for legitimate reasons of hardship, needed their wages to live, and could not afford to take time off to serve on a jury.²²² Herein lies the problem that the American jury system has yet to resolve: Representative juries must be created, and supported, through a concerted effort. And meaningful reform of the jury system's composition requires more than a normative commitment to inclusion. If jurors are not adequately compensated and otherwise supported for the duration of their service, their dismissal from the venire for reasons of financial hardship will virtually assure their continued exclusion.

A. *How Jurors Are—Or Are Not—Compensated*

Jurisdictions have taken a variety of approaches to implementing jury compensation schemes. Some states pay jurors a nominal sum for each

219. 328 U.S. 217 (1946).

220. *Id.* at 224 (“It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship.”).

221. *Id.* at 220 (“Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.”).

222. *Id.* at 222 (“If I see in the directory the name of John Jones and it says he is a longshoreman, I do not put his name in, because I have found by experience that that man will not serve as a juror, and I will not get people who will qualify. The minute that a juror is called into court on a venire and says he is working for \$10 a day and cannot afford to work for four, the Judge has never made one of those men serve, and so in order to avoid putting names of people in who I know won't become jurors in the court, won't qualify as jurors in this court, I do leave them out Where I thought the designation indicated that they were day laborers, I mean they were people who were compensated solely when they were working by the day, I leave them out.”).

full day of service.²²³ Other states have laws that strongly encourage, if not require, employers to compensate employees during the days they report for jury service.²²⁴ And still other states offer types of assistance that can help with caretaking commitments.²²⁵

The range of juror pay also varies widely from one jurisdiction to the next. Jurors in federal court receive fifty dollars per day of service, and sixty dollars per day after serving for ten days.²²⁶ Prospective and empaneled jurors who are federal employees, however, are paid their regular salaries.²²⁷ Taking into account that the average federal salary for civilians, according to data from the U.S. Bureau of Economic Analysis, is \$94,463, an average federal juror working for the federal government could be looking at payment of more than \$300 per day.²²⁸ While this is just one example of juror pay inequality depending on one's occupation, and there is certainly dramatic variation in federal workers' income,²²⁹ it illustrates the different economic incentives that can motivate otherwise eligible jurors and introduce class disparities to juries.

In *Frazier v. United States*,²³⁰ the defendant, Frazier, argued that

223. See MIZE ET AL., *supra* note 3, at 11 (offering an overview of different states' approaches to compensating jurors beyond universal "reimbursement for out-of-pocket expenses as well as token monetary recognition" of jury service's value).

224. See, e.g., COLO. REV. STAT. ANN. § 13-71-126 (West 2021) ("All regularly employed trial or grand jurors shall be paid regular wages, but not to exceed fifty dollars per day unless by mutual agreement between the employee and employer, by their employers for the first three days of juror service or any part thereof. Regular employment shall include part-time, temporary, and casual employment if the employment hours may be determined by a schedule, custom, or practice established during the three-month period preceding the juror's term of service."); ALA. CODE § 12-16-8(c) (2021) ("Notwithstanding the excused absence provided in subsection (a), any full-time employee shall be entitled to his or her usual compensation received from such employment.").

225. CAL. CT. R. 10.24 ("Each court should endeavor to provide a children's waiting room located in the courthouse for the use of minors under the age of 16 who are present on court premises as participants or who accompany persons who are participants in court proceedings. The waiting room should be supervised and open during normal court hours. If a court does not have sufficient space in the courthouse for a children's waiting room, the court should create the necessary space when court facilities are reorganized or remodeled or when new facilities are constructed.").

226. See, e.g., *Juror Pay*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/juror-pay> [<https://perma.cc/QG7Q-7APT>].

227. *Id.*

228. *National Income and Product Accounts: Table 6.6D*, U.S. BUREAU OF ECON. ANALYSIS, <https://apps.bea.gov/iTable/iTable.cfm?reqid=19&step=2#reqid=19&step=2&isuri=1&1921=survey> [<https://perma.cc/523A-GF3X>].

229. As an illustration of this range, a Human Resources Manager for the Veterans Benefits Administration can earn \$712,205 per year and a federally employed laundry worker can earn \$19,305 per year. Compare *Top 100 Highest-Paid Government Employees of 2018*, FEDERALPAY.ORG, <https://www.federalpay.org/employees/top-100> [<https://perma.cc/7CX9-A8DM>], with *Lowest Paid 100 Federal Occupations in 2018*, FEDERALPAY.ORG, <https://www.federalpay.org/employees/occupations/lowest-100/2018> [<https://perma.cc/V5KM-YEU8>].

230. 335 U.S. 497 (1948).

because of the federal worker wage replacement policy which was in place at the time, his jury was entirely composed of federal employees who, in his view, were biased against him.²³¹ Though Frazier lost, Justice Jackson's dissenting opinion noted the predicament that such compensation schemes caused; federal workers protected against any financial loss could fill jury panels, while non-federal workers could decline service to avoid lost income.²³² Among the issues highlighted in the dissent, Justice Jackson noted the discussion of the inadequacy of juror pay that ultimately animated the Jury Selection and Service Act of 1968 discussed earlier.²³³ Indeed, one of the concerns that informed the legislation was the possibility that unequal pay among citizens would result in juries with disproportionate numbers of government workers.²³⁴

1. *Hardship Funds*

The gap between jurors' financial needs and their compensation during jury service will only widen as pay rates remain stagnant in state and federal court. The American Legislative Exchange Council's (ALEC) introduction of the Jury Patriotism Act has been the most sweeping reform initiative aimed at supporting eligible jurors who would otherwise be unable to participate for financial reasons.²³⁵ Arizona was the first state to enact this law in 2003.²³⁶ Perhaps the biggest change the act brought about was the Lengthy Trial Fund (LTF), which provides supplemental pay for jurors who spend more than five days on a jury.²³⁷ Under this scheme, a juror can receive between \$40 and \$300 per day, depending upon the

231. *Id.* at 498–502. The case involved a jury panel with both government and non-government employees, and the defendant was the one to strike the non-government employees, and then felt his jury was biased. *Id.* The Court held that government employees could in fact serve as jurors due to the lack of inherent bias in their positions. *Id.* at 513. The Court held further that the defendant was neither deprived of an impartial jury nor able to show actual bias. *Id.*

232. *Id.* at 516–17 (Jackson, J., dissenting) (“The non-government juror receives \$4 per day, which under present conditions is inadequate to be compensatory to nearly every gainfully employed juror. But the government employee is not paid specially; instead, he is given leave from his government work with full pay while serving on the jury. The latter class are thus induced to jury service by protection against any financial loss, while the former are subjected to considerable disadvantage.”).

233. *See supra* section I.B.

234. *Judicial Machinery Hearings*, *supra* note 52, at 180–93 (statement of Mr. Monroe H. Freedman, Professor, George Washington University Law School, on the subject of unequal juror pay leading to potentially biased juries).

235. Cary Silverman, *ALEC's Jury Patriotism Act: Reducing Hardship for Thousands of Jurors and Ensuring Representative Juries on Complex Cases*, INSIDE ALEC, March 2012, at 5, 5–6. The proposal was first finalized in 2003.

236. *Id.* at 6.

237. *Id.*

amount of lost income.²³⁸ Jurors who are unemployed or cannot otherwise prove that income is lost receive \$40 per day after their sixth day of jury service rather than a rate of pay that might better align with their actual needs.²³⁹ And all jurors in Arizona, regardless of employment status, receive \$12 per day for the first five days of service.²⁴⁰ Oklahoma, another state that adopted an LTF, pays jurors \$20 per day, which increases to \$50 between the fourth and tenth day and up to \$200 from the eleventh day onward.²⁴¹

Though the funding schemes that states like Arizona and Oklahoma adopted are progressive in the financial support they offer to jurors, they nonetheless limit their beneficiaries in significant ways. First, as their title reflects, LTFs are limited to jurors who participate in the minority²⁴² of state and federal trials that exceed a few days.²⁴³ Second, these funds are limited to jurors who are employed and can demonstrate financial loss. As a result, such funds fail to capture the significant, and growing, number of Americans who face unemployment and underemployment, as well as burdens associated with caretaking obligations or the onerous process of seeking work. The recipients of the funds' most generous payouts are thus those who already enjoy stable—if not salaried—jobs that provide a living wage.

2. *Juror Compensation Requirements for Employers*

Though some states require employers to compensate jurors for time they devote to jury service, the majority of states do not.²⁴⁴ And even states with such a requirement do not necessarily call for jurors to be

238. ARIZ. REV. STAT. ANN. § 21-222(d) (2021) (“The amount a juror receives from the fund is limited to the difference between the jury fee prescribed in § 21-221 and the actual amount of earnings a juror earns, not less than forty dollars, up to the maximum level payable under subsection C of this section, minus any amount the juror actually received from the juror’s employer during the same time period.”).

239. *Id.* § 21-222(e) (“Jurors who are unemployed and are not eligible for payment pursuant to subsections C and D of this section are eligible to be paid forty dollars per day . . .”).

240. *Jury Service—What to Expect*, ARIZ. JUD. BRANCH, <https://www.azcourts.gov/juryduty/Jury-Service-What-to-Expect> [https://perma.cc/GS5A-DXFW].

241. OKLA. STAT. ANN. tit. 28, § 86 (West 2021).

242. See DALE ANNE SIPES, MARY ELSNER ORAM, MARLENE A. THORNTON, DANIEL J. VALLUZZI & RICHARD VAN DUIZEND, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 9 (1988); *Frequently Asked Questions*, U.S. DIST. CT. FOR THE DIST. OF MASS., <https://www.mad.uscourts.gov/jurors/pdf/jmsquessp.pdf> [https://perma.cc/9YUT-BXQS] (noting that the “average jury trial in the Federal Court spans between two to four days”).

243. *Arizona Lengthy Trial Fund—Rules for Eligibility*, JUD. BRANCH OF ARIZ.: MARICOPA CNTY., <https://superiorcourt.maricopa.gov/Jury/Arizona-Lengthy-Trial-Fund> [https://perma.cc/E9RC-REXV].

244. See MIZE ET AL., *supra* note 3, at 11.

compensated at their regular rate. Colorado, for example, requires employers to pay employees \$50 for their first day of service.²⁴⁵ Of the remaining six states that require employer compensation, Alabama offers the most expansive protections: It requires employers to pay employees their regular wage while they serve on a jury and prohibits employers from requiring employees to take sick leave or other paid time off to do so.²⁴⁶ More states follow Colorado's employer requirement than Alabama's. Connecticut, for example, requires juror payment of \$50 per day.²⁴⁷ Other statutes reduce wage protection by permitting employers to only pay what the state might have paid if the juror was self-employed.²⁴⁸ To put the numbers in perspective, aside from New Mexico, where jurors are paid a minimum wage for jury work,²⁴⁹ \$50 per day is the most that a state-court juror can hope to earn through mandatory compensation schemes, with many states offering a sum closer to \$15 per day.²⁵⁰

In addition to state juror compensation programs, employers may offer separate jury selection compensation to employees by private agreement.

245. COLO. REV. STAT. ANN. § 13-71-126 (West 2021) (“All regularly employed trial or grand jurors shall be paid regular wages, but not to exceed fifty dollars per day unless by mutual agreement between the employee and employer, by their employers for the first three days of juror service or any part thereof. Regular employment shall include part-time, temporary, and casual employment if the employment hours may be determined by a schedule, custom, or practice established during the three-month period preceding the juror’s term of service.”).

246. ALA. CODE § 12-16-8(b)–(d) (2021) (“An employee may not be required or requested to use annual, vacation, unpaid leave, or sick leave for time spent responding to a summons for jury duty, time spent participating in the jury selection process, or for time spent actually serving on a jury. Nothing in this subsection shall be construed to require an employer to provide annual, vacation, or sick leave to employees who otherwise are not entitled to the benefits under policies of the employer. . . . Notwithstanding the excused absence provided in subsection (a), any full-time employee shall be entitled to his or her usual compensation received from such employment. . . . It shall be the duty of all persons paying jurors their fee or compensation for services to issue to each juror a statement showing the daily fee or compensation and the total fee or compensation received by the juror.”).

247. CONN. GEN. STAT. § 51-247 (2020) (“A reimbursement award under this subsection for each day of service shall not be less than twenty dollars or more than fifty dollars.”).

248. TENN. CODE ANN. § 22-4-106 (2021) (allowing employers to reduce what the court would pay).

249. N.M. STAT. ANN. § 38-5-15 (2021) (“Persons summoned for jury service and jurors shall be reimbursed for travel in excess of forty miles round trip from their place of actual residence to the courthouse when their attendance is ordered at the rate allowed public officers and employees per mile of necessary travel. Persons summoned for jury service and jurors shall be compensated for their time in attendance and service at the highest prevailing state minimum wage rate.”).

250. CAL. CIV. PROC. CODE § 215 (West 2021) (“(a) Except as provided in subdivision (b), on and after July 1, 2000, the fee for jurors in the superior court, in civil and criminal cases, is fifteen dollars (\$15) a day for each day’s attendance as a juror after the first day. (b) A juror who is employed by a federal, state, or local government entity, or by any other public entity as defined in Section 481.200, and who receives regular compensation and benefits while performing jury service, may not be paid the fee described in subdivision (a).”).

In practice, however, employer policies that compensate workers during jury service are unlikely to enhance the socio-economic diversity of juries. The types of employers that utilize them are likely to pay employees at a rate such that an uncompensated week would not prove financially devastating.²⁵¹

In 2017, the year for which the most recent data is available, the U.S. Bureau of Labor Statistics' Employee Benefits Survey reported that 57% of workers received paid juror leave.²⁵² However, such protection from employers is not evenly distributed. White collar sectors including management and finance provide paid juror leave to 79% of workers, as compared to 33% of service sector employees.²⁵³ Within all sectors, those with the highest 10% of wages comprised 83% of those who received pay during jury service.²⁵⁴ Among those in the bottom 10% of all wage-earners across industries, in contrast, only 24% received compensation during jury service as a job benefit.²⁵⁵ This suggests that employees in better compensated professions not only receive the most generous pay for juror leave, but are also less likely to view jury participation as posing a financial hardship as compared with workers in other sectors.

Interestingly, finance and insurance employers are the most likely to offer paid jury leave to their employees, with 92% of workers in that industry benefiting from such coverage.²⁵⁶ Only 24% of those employed in the leisure and hospitality industry, in contrast, were compensated during jury service.²⁵⁷ The odds of receiving wages during jury service also increase if one works for a company with fewer than fifty employees.²⁵⁸ The overwhelming trend in this data is that the most financially vulnerable members of the American workforce are also the least likely to receive any type of private compensation for fulfilling their obligation to participate in the jury system. In its current form, employer-supported juror pay is thus not an effective solution to the problem of socio-economic jury exclusion.

251. *Employee Benefits Survey*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/ncs/ebs/benefits/2017/ownership/private/table32a.htm> [<https://perma.cc/5JW9-PA2T>].

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

B. *Proposals Toward a Socio-Economically Representative Jury System*

1. *The Expansion of Juror Compensation Schemes*

Compared to state initiatives to compensate citizens for the duration of their jury service, federal juror compensation schemes more closely approximate the federal minimum wage (as of 2021) of \$7.25 per hour.²⁵⁹ In 2019, federal jurors received \$50 each day for jury service lasting under one week, followed by \$60 for each day of a trial that exceeded ten days.²⁶⁰ Compensation for empanelment on state juries varied more dramatically. According to data maintained by the National Center for State Courts (NCSC), some jurisdictions refrained from compensating jurors for their first day of service,²⁶¹ while others denied such pay for the first several days of service.²⁶² Still other states offered token payment as jurors began their service.²⁶³ Compensation for professional judges, by contrast, has consistently increased to reflect cost-of-living adjustments.²⁶⁴ If one were to take seriously the commensurate judicial responsibility that jurors assume in judging the facts of cases, even the most modestly compensated judges of general jurisdiction receive over \$60 per hour.²⁶⁵

Compensating prospective and empaneled jurors at a minimum wage rate would represent a step in the right direction. Currently, New Mexico is the only state to pay jurors minimum wage in addition to travel expenses for commutes that exceed forty miles from home to courthouse.²⁶⁶ In New

259. Alison Doyle, *2021 Federal and State Minimum Wage Rates*, THE BALANCE CAREERS (Mar. 11, 2021), <https://www.thebalancecareers.com/2018-19-federal-state-minimum-wage-rates-2061043> [<https://perma.cc/57RV-R7TT>].

260. *Juror Pay*, *supra* note 223.

261. This includes Arizona, California, Washington, D.C., and Delaware. *Jury Management*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/services-and-experts/areas-of-expertise/jury-management> [<https://perma.cc/62QU-AYZJ>].

262. This includes Colorado, Connecticut, Florida, Massachusetts, and Nevada. *Id.*

263. This includes Lake County, Illinois, which compensates jurors \$5 for the first two days of service, and New Jersey, which offers \$5 compensation for each of the first three days of service. Jurors in Pennsylvania receive \$9 of compensation for the first three days of service. *Id.*

264. *Judicial Compensation*, U.S. CTS., <https://www.uscourts.gov/judges-judgeships/judicial-compensation> [<https://perma.cc/G97L-8BWM>].

265. This estimate is based on National Center for State Courts 2019 data indicating judges of general jurisdiction in Kansas receive an annual salary of \$125,499, the lowest of their judicial peers, and assumes approximately 40-hours of work per week including paid vacation.

266. N.M. STAT. ANN. § 38-5-15 (2021) (“Persons summoned for jury service and jurors shall be reimbursed for travel in excess of forty miles round trip from their place of actual residence to the courthouse when their attendance is ordered at the rate allowed public officers and employees per

Mexico, this amounts to \$9 per hour, or \$72 per day.²⁶⁷ There are currently sixteen states that compensate jurors at federal minimum wage levels, \$7.25 per hour, totaling \$58 per eight hour work day.²⁶⁸ In Washington, D.C., which has the nation's highest minimum wage, at \$15 per hour, juror compensation would be \$120 per day—rather than the \$50 per day that federal jurors are currently paid.²⁶⁹ This reform would address the needs of prospective jurors, including those surveyed in D.C., who cite their inability to forego wages and economic hardship as primarily responsible for their inability to report for service.²⁷⁰

In April 2020, the Washington State Supreme Court decided that its jurors did not qualify for minimum wage compensation, explaining that their duties lay outside the scope of those of an “employee,” despite the fact that for the duration of a trial jurors effectively report to court each day to “work.”²⁷¹ The current default for Washington State jurors is a \$10 per day wage—eleven times less than what they would receive if the state's \$13.69 per hour minimum wage was honored during jury service.²⁷² Though minimum wage, in all but one state, would not cover a juror's cost of living for even a single person household, it would increase current rates of pay significantly in some states, and represent an overall improvement over current law.²⁷³ And if every state was to adjust minimum wage to a level that would support single person households,

mile of necessary travel. Persons summoned for jury service and jurors shall be compensated for their time in attendance and service at the highest prevailing state minimum wage rate.”)

267. *Consolidated Minimum Wage Table*, WAGE & HOUR DIV., U.S. DEP'T OF LAB. (Jan. 1, 2021), <https://www.dol.gov/agencies/whd/mw-consolidated> [https://perma.cc/CP68-XCAN].

268. *Id.*

269. *Office of Wage-Hour Compliance*, DC.GOV: DEP'T OF EMP. SERVS., <https://does.dc.gov/service/office-wage-hour-compliance-0> [https://perma.cc/F7PZ-TQKF].

270. *See, e.g.*, Richard Seltzer, *The Vanishing Juror: Why Are There Not Enough Available Jurors?*, 20 JUST. SYS. J., 203, 214 (1999) (observing in a juror exit survey that 10% of jurors said they could not afford to lose pay and 14% cited economic hardship as grounds for failing to participate as jurors).

271. *Rocha v. King Cnty.*, 195 Wash. 2d 412, 424, 460 P.3d 624, 631 (2020); Patrick Dorrian, *Washington State Jurors Not “Employees” Under Minimum Wage Law*, BLOOMBERG L.: DAILY LAB. REP. (Apr. 10, 2020, 11:04 AM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X35HB97000000?bna_news_filter=daily-labor-report#jcite (last visited Apr. 12, 2021).

272. Dorrian, *supra* note 270; U.S. DEP'T OF LAB., *supra* note 267.

273. *How Much of the Cost of Living Is Covered by Minimum Wage?*, DIVVY (Mar. 4, 2020), <https://getdivvy.com/blog/minimum-wage-vs-living-wage/> [https://perma.cc/BB6B-X7QE].

Research suggests that even a more modest pay increase for jurors could encourage participation. The city of El Paso, for example, saw an increase in juror participation from 22% to 46% by increasing the level of juror pay from \$6 to \$40 per day over a two-year period. *See* Robert Walters & Mark Curriden, *A Jury of One's Peers? Investigating Underrepresentation in Jury Venues*, 43 JUDGES' J. 17, 19–20 (2004) (noting that New York City saw a dramatic increase in juror participation rates, from 12% to 39%, after requiring that large businesses compensate employees for taking time off of work for jury service).

jury service would impose a more manageable burden on the many eligible Americans who cannot currently participate. Indeed, an added benefit of this reform would be the incremental increase in juror wages which would account for inflation and the increased cost of living across the country.

This, of course, leaves open the question of how states—and the federal judiciary—might fund such reforms. At the federal level, juror pay is set by statute and funded by Congress.²⁷⁴ At the state level, funding sources vary. In Texas, for example, funding for jury service is provided at the county or city level.²⁷⁵ Beyond the reallocation of such budgets, states that currently utilize generous hardship funding may offer a model for reform. In Arizona, which enacted the Lengthy Trial Fund (discussed previously) as part of a wider effort to diversify its jury pool, funding is drawn from a \$15 filing fee for every civil case.²⁷⁶ The fund carries a surplus²⁷⁷ and a majority of civil cases settle before trial, obviating the need for juries.²⁷⁸ Indeed, if the vast majority of civil cases settle, with some resolving in bench trials,²⁷⁹ filing fee savings may at the very least help subsidize the allocation of minimum wage funds for those summoned for jury service—not only in lengthy trials, but from the start of all trials. Beyond implementing an increase in jurors' wages, some jurisdictions have found creative ways to augment support for eligible jurors of limited means. Certain counties, for example, have sought to offset jurors' commuting burdens by compensating them for the cost of public transportation or parking.²⁸⁰

274. See 28 U.S.C. § 1871.

275. See TEX. JUD. BRANCH, FISCAL YEAR 2016 ANNUAL STATISTICAL REPORT, at vii <https://www.txcourts.gov/media/1437891/about-texas-courts-2016.pdf> [<https://perma.cc/MZ4L-CCY3>] (“Counties pay the operating costs of district courts, as well as the base salary of judges, full salaries of other staff, and operating costs for constitutional county courts, county courts at law, and justice courts. Cities finance all costs related to the operation of municipal courts, including judges’ salaries.”); *Jury Service in Texas*, TEX. JUD. BRANCH, <https://www.txcourts.gov/about-texas-courts/juror-information/jury-service-in-texas/> [<https://perma.cc/Z8HU-U4YH>].

276. Silverman, *supra* note 235, at 5–6.

277. *Id.*

278. Jonathan D. Glater, *Study Finds Settling Is Better than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), <https://www.nytimes.com/2008/08/08/business/08law.html> [<https://perma.cc/3KN9-UBY6>].

279. Anna Offit, *Prosecuting in the Shadow of the Jury*, 113 NW. U. L. REV. 1071, 1074–75 (2019). Out of 274,362 total reported federal civil cases that were terminated in fiscal year 2015 (with the exception of land condemnation cases), 2,091 were tried by juries. *Id.* (citing ADMIN. OFF. OF THE U.S. CTS., JUDICIAL FACTS AND FIGURES 2015, at tbl.4.10 (2015), http://www.uscourts.gov/sites/default/files/table4.10_0.pdf [<https://perma.cc/CP2U-MJAH>]).

280. See Jack Craver, *Travis County Offers Free Bus Rides to Jurors*, AUSTIN MONITOR (May 28, 2019), <https://www.austinmonitor.com/stories/2019/05/travis-county-offers-free-bus-rides-to-jurors/> [<https://perma.cc/2HKQ-ZDXM>]; *Jury Duty Service*, EL PASO CNTY., <https://www.epcounty.com/>

The failure to support the material needs of citizens for the duration of jury service, more than anything, reflects a failure to value or prioritize the vital function that jurors play in the legal system. Moreover, it reflects a doctrinal blindness and practical indifference to the impact that disparate juror compensation has on judges' and litigants' ability to empanel representative juries. Bringing state juror compensation rates in line with the standards of the federal judiciary would represent a promising first step toward more broadly and uniformly recognizing the value of jurors' labor. It would also represent recognition of the inextricable connection between people's material well-being and capacity to contribute to a civic institution that demands significant temporal and intellectual investment.

2. *The Expansion of Support for Caretakers*

Loss of pay is not the only potential burden faced by a prospective juror. People have family members for whom they provide care that is not readily delegated. Historically, caregiving was viewed as a woman's responsibility; women tended to both children and ailing parents while their husbands appeared in the jury box.²⁸¹ In many parts of the country, women fought vigorously to participate as jurors, and were flatly rebuffed for nearly sixty years, even after gaining the right to vote.²⁸²

As late as 1961, the United States Supreme Court declined to require that states empanel women and men on juries in equal number, since women were "still regarded as the center of home and family life."²⁸³ Though in later decisions the Court would hold that women should not be required to "opt-in" or "out" of jury service on the basis of sex due to the reinforcement of stereotypical gender roles, these decisions gave rise to a purportedly gender neutral "caregiver" exemption from service.²⁸⁴

courts/juryservice.htm [https://perma.cc/B7Q7-T3SU]; *Free Bus Transportation for Jury Duty*, JURY DUTY: METRO. NASHVILLE & DAVIDSON CNTY., https://juryduty.nashville.gov/resources/free-bus-transportation-for-jury-duty/?doing_wp_cron=1596508248.5603349208831787109375 [https://perma.cc/4SRK-MHJ2].

281. Ritter, *supra* note 21, at 485.

282. *Id.* at 503.

283. Hoyt v. Florida, 368 U.S. 57, 62 (1961) ("We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service unless she herself determines that such service is consistent with her own special responsibilities."); *see also* LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 157 (1998) (noting that when Gwendolyn Hoyt moved to dismiss her venire on the ground that she was denied a constitutional right to a fair trial, the trial judge dramatically understated the percentage of eligible female jurors who had been summoned to court).

284. Duren v. Missouri, 439 U.S. 357, 369 (1979) ("[E]xempting all women because of the preclusive domestic responsibilities of some women is insufficient justification for their disproportionate exclusion on jury venires.").

Today, many states offer an explicit exemption for those caring for children or the elderly.²⁸⁵ There is little uniformity, however, in the way that states approach this exemption. A minority of states explicitly limit the exemption to childcare obligations.²⁸⁶ Others have a designated exemption for breastfeeding mothers,²⁸⁷ and still others offer an exemption so broad that it could theoretically excuse all mothers from jury service.²⁸⁸ The inherent inconsistency that arises from judges' exercising discretion in evaluating—and ultimately granting—caretaking excuses can lead some parents to avoid reporting to court altogether, out of concern they will not have recourse if their excusal is denied.²⁸⁹

Even at present day, families that do not have the means to pay for in-home or external caregivers often rely on women to assume these duties. Due, in part, to the pandemic's closure of daycare centers and schools across the country,²⁹⁰ women left the American workforce in record

285. See TEX. GOV'T CODE ANN. § 62.106 (West 2020).

286. CAL. CT. R. 2.1008 (d)(7); FLA. STAT. § 40.013 (4) (2021); 705 ILL. COMP. STAT. ANN. 305/10.2 (West 2021); S.C. CODE ANN. § 14-7-860 (2021); TEX. GOV'T CODE ANN. § 62.106(a)(2); WYO. STAT ANN. § 1-11-104(a) (West 2020); GA. CODE ANN. § 15-12-1.1(a)(3) (2021); N.J. REV. STAT. § 2b:20-10(3) (2020); OR. REV. STAT. § 10.050(4)–(5) (2020); VA. CODE ANN. § 8.01-341.1(8) (2021).

287. DEL. CODE ANN. tit. 10, § 4511(b) (2021); HAW. REV. STAT. § 612-6(9) (2020); IDAHO CODE § 2-212(3) (2021); KY. REV. STAT. ANN. § 29A.100 (West 2021); MONT. CODE ANN. § 3-15-313(1) (2020); OKLA. STAT. tit. 38, § 28(E)(2) (2021); S.D. CODIFIED LAWS § 16-13-10.4 (2021); COLO. REV. STAT. § 13-71-119.5(2.5) (2021); NEB. REV. STAT. § 25-1601(1) (2021); UTAH CODE ANN. § 78B-1-109(1)(a) (West 2021).

288. ALA. CODE § 12-16-63(b)(2)(a) (2021); ALASKA STAT. § 09.20.030 (2021); ARIZ. REV. STAT. § 21-202(B)(4)(c)(i) (LexisNexis 2021); CONN. GEN. STAT. § 51-217(b) (2020); IOWA CODE § 607A.6 (2021); ME. REV. STAT. ANN. tit. 14, § 1213(2) (2021); MASS. GEN. LAWS ch. 234a, § 39 (2021); MO. REV. STAT. § 494.430(1)(4) (2020); NEV. REV. STAT. § 6.030(1)(c) (2020); N.H. REV. STAT. ANN. § 500-A:11 (2021); N.M. STAT. ANN. § 38-5-2(C)(1) (2021); N.Y. JUD. LAW § 517(2)(c) (Consol. 2021); N.C. GEN. STAT. § 9-6(a) (2020); N.D. CENT. CODE § 27-09.1-11(2) (2021); OHIO REV. CODE ANN. § 2313.14(5) (West 2020); 42 PA. CONS. STAT. § 4503(3) (2021); 9 R.I. GEN. LAWS § 9-10-9 (2021); VT. STAT. ANN. tit. 4, § 962(5)(b) (2020); W. VA. CODE § 52-1-11(b) (2021); WIS. STAT. ANN. § 756.03(1)–(2) (West 2021); ARK. CODE ANN. § 16-31-103 (2021); KAN. STAT. ANN. § 43-159 (2021); LA. STAT. ANN. § 13:3042(F) (2021); MD. CODE ANN., CTS. & JUD. PROC. § 8-402(c)(1)–(2) (West 2021); MISS. CODE ANN. § 13-5-23 (3)(a) (2021); TENN. CODE ANN. § 22-1-103(b)(4) (2021); WASH. REV. CODE § 2.36.100 (2021); IND. CODE § 33-28-5-18(c)(4)(A)–(C) (2021).

289. Mackenzie Mays, *Mom on Jury Duty Didn't Have Child Care. Judge Asked What if She 'Got Hit by a Mack Truck.'* FRESNO BEE (Dec. 6, 2018, 4:51 PM), <https://www.fresnobee.com/news/local/article222568350.html> (last visited Apr. 12, 2021).

290. Eleni X. Karageorge, *COVID-19 Recession Is Tougher on Women*, U.S. BUREAU OF LAB. STAT.: MONTHLY LAB. REV. (Sept. 2020), <https://www.bls.gov/opub/mlr/2020/beyond-bls/covid-19-recession-is-tougher-on-women.htm> [<https://perma.cc/NYW3-7793>]; Alicia Sasser Modestino, Jamie Ladage & Alisa Lincoln, *The Importance of Childcare in Reopening the Economy*, ECONOFAC (July 29, 2020), <https://econofact.org/the-importance-of-childcare-in-reopening-the-economy> [<https://perma.cc/TH9F-LCB8>] (summarizing a National Panel Survey of over 2,500 employed

number in 2020.²⁹¹ An estimated 2.1 million women found themselves out of work during the first year of the pandemic, resulting in 5.4 million lost jobs since February of 2020.

This, of course, is not a new phenomenon. Between 2015 and 2019, women have on average spent twice as much time caring for children as men have.²⁹² And in 2012, approximately 28% of American children were being cared for by mothers who stayed primarily in the home, meaning a significant portion of the jury pool at any given moment would be precluded from serving as jurors due to childcare obligations.²⁹³ Even in pre-pandemic conditions, women who did not exclusively work from home but were employed in positions that allowed for a flexible workday could find themselves unable to serve on a jury due to childcare commitments.²⁹⁴

For these reasons, blanket exemptions from jury service for caregivers can result in the disproportionate removal of women from venues.²⁹⁵ In Eugene, Oregon, for example, the cost of childcare for toddlers can be nearly twice as much as a year of public university tuition, and for every individual slot available at a preschool, there are eight children who need

parents conducted between May and June of 2020 by Northeastern University); *see also* Marguerite Ward, *The Pandemic Is Set to Shutter 40% of US Childcare Centers—and It Could Prove Catastrophic for the Careers of American Women*, INSIDER (July 30, 2020, 2:54 PM), <https://www.businessinsider.com/pandemic-child-care-closures-could-be-terrible-for-womens-careers-2020-5> [<https://perma.cc/SPS6-T5UU>].

291. Since February of 2020, women have reportedly lost over 5.4 million jobs. Claire Ewing-Nelson, *All of the Jobs Lost in December Were Women's Jobs*, NAT'L WOMEN'S L. CTR. (Jan. 2021), <https://nwlc.org/wp-content/uploads/2021/01/December-Jobs-Day.pdf> [<https://perma.cc/8PZS-X79C>].

292. News Release, Bureau of Lab. Stat., U.S. Dep't of Lab., American Time Use Survey—2019 Results (June 25, 2020), <https://www.bls.gov/news.release/pdf/atus.pdf> [<https://perma.cc/GF95-N7A9>] (noting that women on average dedicated 1.78 hours per day to childcare while men averaged 0.90 hours per day).

293. Jacob Galley, *Stay-at-Home Mothers Through the Years*, U.S. BUREAU OF LAB. STAT.: MONTHLY LAB. REV. (Sept. 2014), <https://www.bls.gov/opub/mlr/2014/beyond-bls/stay-at-home-mothers-through-the-years.htm> [<https://perma.cc/SVF6-R48U>].

294. Even beyond childcare responsibilities, women constitute a larger percentage of the working poor and part-time workforce than men—realities which may further detract from their ability to participate as jurors. *See* U.S. BUREAU OF LAB. STAT., REPORT NO. 1077, WOMEN IN THE LABOR FORCE: A DATABOOK (2018), <https://www.bls.gov/opub/reports/womens-databook/2018/home.htm#technical-notes> [<https://perma.cc/N57Q-PF79>]. Women of color, in particular, disparately earn lower wages. *See generally* Hadas Mandel & Moshe Semyonov, *Going Back in Time? Gender Differences in Trends and Sources of the Racial Pay Gap, 1970 to 2010*, 81 AM. SOCIO. REV. 1039, 1041 (2016).

295. *See generally* Kim Parker, *Women More Than Men Adjust Their Careers for Family Life*, PEW RSCH. CTR. (Oct. 1, 2015), <http://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life/> [<https://perma.cc/K4TU-HZXU>].

care.²⁹⁶ Recognizing the prohibitive cost of daycare, and the fact that early childhood education resources are unlikely to be available on short notice and for short periods of time, California provides a supervised children's waiting room to prospective jurors in need of such assistance.²⁹⁷ There are currently sixty-seven California courthouses that utilize and provide juror access to children's waiting rooms of some kind.²⁹⁸

Although not as expansive as California, other states have employed similar alternatives to blanket exemptions for caretakers. Colorado, for example, implemented the Family Friendly Courts Act, which recommends the use of children's centers to address the problem that jury service poses for caregivers.²⁹⁹ There are currently two courthouses in Colorado that offer free, licensed daycare services to people involved in court proceedings, including jurors. In El Paso County, which has one such facility, most who rely on the service are of low income, and three-quarters are single mothers.³⁰⁰ The daycare is staffed by a childcare nonprofit organization that operates on grants and community donations.³⁰¹ In Washington, D.C., the Superior Court of the District of Columbia Child Care Center is available to the children of jurors, witnesses, and others between the ages of two and twelve who require supervision.³⁰² The Center was founded by a volunteer group in 1974 before the D.C. Courts administration assumed control of the program in the 1980s.³⁰³ In Orange County, Florida, the Orlando Day Nursery runs a center that offers drop-in childcare for those, including jurors, who have

296. Tatiana Parafiniuk-Talesnick, *Child Care Options for Toddlers and Infants Scarce, Pricey in Lane County*, REGISTER-GUARD (Oct. 4, 2019), <https://www.registerguard.com/news/20191003/child-care-options-for-toddlers-and-infants-scarce-pricey-in-lane-county> [https://perma.cc/QTJ8-LWKC].

297. CAL. GOV'T CODE § 70640(a) (West 2021) ("It is the policy of the state that each court shall endeavor to provide a children's waiting room in each courthouse for children whose parents or guardians are attending a court hearing as a litigant, witness, or for other court purposes as determined by the court.").

298. NAT'L CTR. FOR STATE CTS., CHILDREN'S WAITING ROOMS: SIXTY-SEVEN CALIFORNIA COURTHOUSES HAVE CHILDREN'S WAITING ROOMS (2020).

299. COLO. REV. STAT. ANN. § 13-3-113 (West 2021) ("[W]hich report was submitted by the Colorado supreme court family friendly facilities task force and which report recommended the establishment of children's centers in courthouses.").

300. Lance Benzel, *Free, Licensed Day Care Offered at El Paso County Courthouse*, GAZETTE (July 27, 2018), https://gazette.com/news/free-licensed-day-care-offered-at-el-paso-county-courthouse/article_2908c5a4-bd38-5a26-876e-40aef857899b.html [https://perma.cc/73WD-RW9N].

301. *Id.*

302. SUPERIOR CT. OF D.C.: DC COURTS' CHILD CARE CENTER: PARENT HANDBOOK 3 (2020), <https://www.dccourts.gov/sites/default/files/matters-docs/Child-Care-Center-Handbook-Final.pdf> [https://perma.cc/42CQ-RTCH].

303. *Id.*

business with the court.³⁰⁴ While there are a few other courthouse daycare centers scattered throughout the country, the vast majority of parents and caregivers have few or no alternatives when they are summoned for jury service.³⁰⁵

This must change. The socio-economic, gender, and racial diversity of American juries can be enhanced by facilities and services that offer caregiving support to dependents. Adjustments in trial schedules, for instance, could accommodate school pick-up and drop-off times.³⁰⁶ And access to a designated childcare fund could aid those in a position to employ a backup caretaker for the duration of jury selection or a trial. A functional model for such an accommodation can be found in Minnesota.³⁰⁷ There, jurors who are stay-at-home caretakers receive reimbursement of up to \$50 per day to offset the cost of a licensed daycare, or \$40 per day to reduce the expense of hiring a babysitter.³⁰⁸

This and the other cases highlighted above gesture toward a new paradigm of juror support that not only acknowledges but embraces prospective jurors as whole individuals—individuals with obligations and constraints whose personal and professional responsibilities do not disqualify them from fulfilling an essential civic duty. Once more, given the gendered and racialized dimensions of employment and care, universal reforms that tackle sources of hardship will have the added benefit of building juries whose diversity reflects that of the country. Further, lawyers are right to think that jurors will be distracted from trials by concerns about their jobs or the well-being of their dependents. Removing these concerns will translate to more focused juries.

304. *A Place for Children*, NINTH JUD. CIR. CT. OF FLA., <https://www.ninthcircuit.org/services/a-place-for-children> [<https://perma.cc/9TAZ-6TBW>].

305. NAT'L CTR. FOR STATE CTS., *supra* note 298.

306. *See, e.g., Reduced Public Business Hours*, U.S. DIST. CT. FOR THE W. DIST. OF ARK. (Mar. 18, 2020), <https://www.arwd.uscourts.gov/news/reduced-public-business-hours> [<https://perma.cc/HV3S-YD8P>] (“Until further notice, the Western District of Arkansas’s public business hours for all divisions will be from 9:00 AM – 3:30 PM.”); Public Administrative Order Regarding Court Hours of Operation, No. 20-AO-0003-P (N.D. Iowa Mar. 20, 2020), https://content.govdelivery.com/attachments/USFEDCOURTS/2020/03/20/file_attachments/1407347/Administrative%20Order%2020-AO-0003-P.pdf [<https://perma.cc/CJU6-YCV4>] (“Effective immediately the public hours for Court operations on regular business days at the Sioux City courthouse and the Cedar Rapids courthouse will be 9:00 a.m. to 4:00 p.m.”); General Order Regarding Court Operations Related to COVID-19, No. 20-06 (E.D. Ky. Mar. 31, 2020), http://www.kyed.uscourts.gov/kyed_GOs/gen20-06.pdf [<https://perma.cc/WJ3B-FH8R>] (“Effective immediately, the Lexington Courthouse is open to the public from 10:00 a.m. to 2:00 p.m., Eastern Time, Monday through Friday (excluding holidays) . . .”).

307. MINN. JUD. BRANCH, JUROR REQUEST FOR DAY CARE REIMBURSEMENT FORM (2019), http://www.mncourts.gov/mncourtsgov/media/scao_library/Jury/Daycare-Reimbursement-Form-per-Policy-509-revision-10-4-2019.pdf [<https://perma.cc/SF89-AMS8>].

308. *Id.*

3. *Addressing the Uneven Economic Impact of the COVID-19 Pandemic*

The socio-economic challenges associated with the American jury system were immense before 2020. The arrival of the COVID-19 pandemic exacerbated old issues and introduced new ones. As legislators and government officials worked to limit the spread of COVID-19 through social-distancing and shelter-in-place provisions (after the loosening of such protocols led to corresponding and distinct peaks in cases),³⁰⁹ the delay of criminal court proceedings was inevitable.³¹⁰ Businesses and corporations tried to curb their losses by adapting to the social and work environment changes COVID-19 created for Americans by utilizing video technology software, such as Zoom.³¹¹ This prompted some criminal judges and attorneys to consider resuming their own court business remotely, as a means of managing the growing backlog of criminal cases that accumulated during the pandemic.³¹² It should be clear, however, that these adaptive measures carried significant implications for a defendant's right to a jury that represents a fair cross-section of the community.

The most obvious impediment was limited access to functional broadband internet, which was the precondition for "remote" juries.³¹³ Seven percent of Americans do not use the internet,³¹⁴ and, in large

309. John Harrington & Hristina Byrnes, *COVID-19 Reopening: Every State's Social Distancing Measures, Restrictions on Movement*, USA TODAY (June 18, 2020, 9:39 AM), <https://www.usatoday.com/story/money/2020/06/18/every-states-rules-for-reopening-and-social-distancing/111909588/> [<https://perma.cc/RV52-X6KD>].

310. Jacob Gershman & Byron Tau, *Coronavirus Disrupts U.S. Court System*, WALL ST. J. (Mar. 17, 2020, 7:40 AM), <https://www.wsj.com/articles/coronavirus-disrupts-u-s-court-system-11584445222> [<https://perma.cc/9FWG-EKN7>] (providing an overview of issues for the U.S. court systems since the onset of the COVID-19 pandemic); see also Michelle Casady, *Texas Courts Re-Closing Amid COVID-19 Spike*, LAW 360 (June 29, 2020, 11:53 AM), <https://www.law360.com/articles/1287555> [<https://perma.cc/BD45-W2YK>].

311. William Antonelli, *What Is Zoom? A Comprehensive Guide to the Wildly Popular Video-Chatting Service for Computers and Smartphones*, INSIDER (Nov. 18, 2020, 7:52 PM), <https://www.businessinsider.com/what-is-zoom-guide> [<https://perma.cc/7GLT-78NW>] (detailing what Zoom is and how to use the program); Dain Evans, *How Zoom Became So Popular During Social Distancing*, CNBC (Apr. 4, 2020, 12:26 PM), <https://www.cnbc.com/2020/04/03/how-zoom-rose-to-the-top-during-the-coronavirus-pandemic.html> [<https://perma.cc/PAV4-2BZ6>] (detailing reasons for Zoom's growth in popularity during the COVID-19 pandemic).

312. Matt Reynolds, *Could Zoom Jury Trials Become the Norm During the Coronavirus Pandemic?*, A.B.A. J. (May 11, 2020, 8:00 AM), <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic> [<https://perma.cc/7YYM-9BS4>].

313. Paula Hinton & Tom Melsheimer, *The Remote Jury Trial Is a Bad Idea*, LAW 360 (June 9, 2020), <https://www.law360.com/articles/1279805/> [<https://perma.cc/8TBA-MFRY>].

314. *Id.*; see also Andrew Perrin & Sara Atske, *7% of Americans Don't Use the Internet. Who Are*

metropolitan areas, such as Dallas County, one in three families lack home internet access.³¹⁵ Judge Emily Miskel, who conducted the first remote voir dire in a civil case,³¹⁶ suggested offering socially-distanced, public areas, such as spaces within libraries or courthouses, where those without internet access could participate in jury selection proceedings and jury duty.³¹⁷ Even for those with internet access, courts likely discovered that technical literacy is unevenly distributed in society, showing at the very least a generational bias.

Some, however, have argued that technological solutions may facilitate more equitable jury trial proceedings in the long run.³¹⁸ More widespread use of electronic communications and remote hearings, for example, could reduce court costs while facilitating the empanelment of jurors who possess the means to participate remotely.³¹⁹ As juries returned to entirely in-person proceedings, some scholars feared that reporting and participation rates may have fallen to lower numbers than existed pre-pandemic, due to concerns about new viral variants and other impediments to vaccine uptake that might further inhibit broad participation.³²⁰

Though the pandemic's impact on the jury system and civic participation more broadly is far from certain, a recent national poll conducted by the NCSC revealed concern about the viability of representative jury participation during the pandemic.³²¹ Out of the 1,000

They?, PEW RSCH. CTR. (Apr. 2, 2021), <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/> [<https://perma.cc/HYH6-37XG>].

315. Corbett Smith, *A Third of Dallas Families Are Without Home Internet, Making Online Learning All the More Difficult*, DALL. MORNING NEWS (May 8, 2020, 7:45 PM), <https://www.dallasnews.com/news/public-health/2020/05/08/a-third-of-dallas-families-are-without-home-internet-making-online-learning-all-the-more-difficult/> [<https://perma.cc/52HW-KDZF>].

316. Nate Raymond, *Texas Tries a Pandemic First: A Jury Trial by Zoom*, REUTERS (May 18, 2020, 4:19 AM), <https://www.reuters.com/article/us-health-coronavirus-courts-texas/texas-tries-a-pandemic-first-a-jury-trial-by-zoom-idUSKBN22U1FE> [<https://perma.cc/C8NW-TQ9H>].

317. Nat'l Ctr. for State Cts., *How State Courts Are Using Innovative Technologies and Responsible Health and Safety Practices to Resume Jury Trials*, VIMEO, at 52:16 (May 22, 2020), <https://vimeo.com/422780495> (last visited Apr. 13, 2021) (remarks of Judge Emily Miskel, Collin Cnty. Tex. J.).

318. Lucy Lang, *Virtual Criminal Justice May Make the System More Equitable*, WIRED (July 1, 2020, 9:00 AM), <https://www.wired.com/story/opinion-virtual-criminal-justice-may-make-the-system-more-equitable/> [<https://perma.cc/J7YN-VQH6>].

319. *See id.*

320. *Id.*; see also James Paton & Bloomberg, *Public Health Officials Warn About Slow Vaccine Rollout as Coronavirus Variants Multiply*, FORTUNE (Jan. 18, 2021, 12:19 AM), <https://fortune.com/2021/01/18/health-warning-slow-vaccine-rollout-coronavirus-variants-multiply/> [<https://perma.cc/7JC6-XE55>].

321. Memorandum from GBAO Strategies to Nat'l Ctr. for State Cts. (June 22, 2020),

registered voters polled, at least 55% of respondents reported that they would not be able to participate in jury service because they either served as a primary caregiver to an elderly family member, could not secure childcare, or shared a household with someone with an underlying health condition which placed them at higher risk of a COVID-19 complication.³²²

Beyond the possibility of remote proceedings, the pandemic also exacerbated obstacles to jury service faced by women who serve as caregivers,³²³ even as in-person jury trials resumed. Over the course of the pandemic, women spent fifteen more hours per week on domestic labor than men.³²⁴ Furthermore, and drawing on the impact of past pandemics such as the 2014–2016 Ebola outbreak in West Africa, women are more likely than men to make career sacrifices or pursue flexible jobs that accommodate childcare and housework.³²⁵

All of this suggests that however the COVID-19 pandemic refigures trials, its effect on juries is unlikely to foster greater access to groups historically excluded on socio-economic grounds. Once more, it is likely that their excusal—due to caregiving responsibilities, poor internet connections, or lack of technical literacy—will be accepted in everyday proceedings as “for their own good” or “what’s best for the trial.” Accepting these new hardships or the deepening of old ones only furthers the sclerosis of an American legal system that for too long has asked what jurors can do for it and not what it can do for jurors. Alongside the increase

https://www.ncsc.org/_data/assets/pdf_file/0006/41001/NCSC-Juries-Post-Pandemic-World-Survey-Analysis.pdf [https://perma.cc/5UY4-TDBC].

322. *Id.*

323. See *America’s Mothers Are in Crisis*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/interactive/2021/02/04/parenting/working-moms-coronavirus.html> [https://perma.cc/NV4S-R5UT].

324. Matt Krentz, Emily Kos, Anna Green & Jennifer Garcia-Alonso, *Easing the COVID-19 Burden on Working Parents*, BOS. CONSULTING GRP. (May 21, 2020), <https://www.bcg.com/publications/2020/helping-working-parents-ease-the-burden-of-covid-19> [https://perma.cc/Q25F-J54M].

325. Helen Lewis, *The Coronavirus Is a Disaster for Feminism*, THE ATL. (Mar. 19, 2020), <https://www.theatlantic.com/international/archive/2020/03/feminism-womens-rights-coronavirus-covid19/608302/> [https://perma.cc/K2D7-PJAM]; see also Mark Miller, *Female Workers Could Take Another Pandemic Hit: To Their Retirements*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/11/business/women-retirement-covid-social-security.html> [https://perma.cc/FLJ4-5NU3]; VICTORIA M. DEFRANCESCO SOTO, Y.W.C.A. USA, AMERICA’S RECOVERY FROM THE 2020 “SHECESSION”: BUILDING A FEMALE FUTURE OF CHILDCARE AND WORK 6 (2020), https://www.ywca.org/wp-content/uploads/COVID_WOMEN-CHILDCARE_R4.pdf [https://perma.cc/X9YF-9UH8] (“The rates of unemployment have been especially steep among women of color. Compared to 13 percent unemployment for white women, Latina unemployment is nearing 20 percent, followed by 16 percent unemployment among Black and Asian American women. Over 60 percent of women of color have lost their hours, faced a pay cut, or been laid off or furloughed.” (citations omitted)).

in compensation and expansion of caregiving, state and federal courts must seriously consider that preserving the constitutional right to a trial by jury necessitates the roll-out of public broadband and publicly-funded resources for building technical literacy. If the trial is to go digital, then we have a moral imperative to cultivate a diverse digital citizenry.

CONCLUSION

Though property requirements have been consigned to the dustbin of American legal history, socio-economic exclusion remains a pernicious feature of the jury trial. One need not seek an explanation for its persistence in simple stories about discriminatory prosecutors and “recalcitrant[.]” citizens eager to avoid jury service.³²⁶ The empirical evidence marshalled in this Article suggests that contradictory judicial motives to be benevolent and vigilant, deference to advantage-seeking attorneys, and the well-founded anxieties of low-income people mix to produce an everyday process whereby otherwise capable prospective jurors do not make the cut—for “their own good.” The implications are not only homogenous juries but juries in which members of particular groups do not feel that they can participate fully in the deliberative process. The jury is a critical resource for the American legal system, and we are not investing in it.

But we could. This Article has described numerous experiments, large and small, where courts are making socio-economic inclusion a priority. Their example suggests that true benevolence is not the refusal to impose a heavy financial load on jurors but the acknowledgement that the load must be lightened—for all. The COVID-19 pandemic may at first have seemed like one more enormous problem for the jury trial. But it can instead present an opportunity if at last we see that there is a human infrastructure to the American legal system, and it must be the target of sustained and generous public investment. The result would be a break with centuries of socio-economic exclusion and a turn toward juries that look, talk, think, and act in all the ways characteristic of our diverse society. We must empower more poor and working people, who are disproportionately the objects of the justice system, to participate actively in the process of doing justice.

326. See RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 126 (2003).