

The Pandemic Juror

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Abstract

While the deadly and highly contagious COVID-19 virus lingers and spreads across the country, courts are resuming criminal jury trials. In moving forward, judges reference case backlogs, speedy trial rights, and other concerns for the rights of the accused. Overlooked in this calculus is the importance of jurors and their safety. The Sixth Amendment guarantees “the right to a speedy and public trial, by an impartial jury.” Without jurors, there is no justice.

Even before the COVID-19 pandemic, the justice system sometimes took advantage of juror vulnerability, treating jurors callously, if not rudely, during voir dire by asking them intensely personal questions. During the pandemic, courts have intensified this harsh treatment of jurors by exposing them to serious health risks—sometimes to decide cases with minor charges. This exploitation of jurors is short-sighted. When courts endanger jurors, they create serious due process concerns for the accused and erode public confidence in an already beleaguered system. If jurors are forced to serve on jury duty without adequate safeguards, verdicts will be suspect, mistrials will dominate, and many citizens who are fearful or susceptible will fail to appear (or worse, contract the virus during jury service), resulting in juries less representative of the community.

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Concerns over the virus are already resulting in some jurors defying their legal obligation to appear for service. Surveys also show that seventy-five percent of jurors are at least somewhat nervous about attending a trial and that people of color, Democrats, and older Americans are very concerned about spreading and contracting COVID-19. When jurors are worried and distracted, they may rush to a verdict—any verdict—or fail to appreciate all of the evidence, resulting in wrongful convictions and erroneous acquittals. And, if even one juror tests positive during the trial, a mistrial may be declared to allow trial participants to quarantine. If we are going to require jurors to serve during this dangerous time, we must protect them to protect the criminal justice system itself.

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I. Introduction

The Sixth Amendment guarantees every person facing a criminal prosecution “the right to a speedy and public trial, by an impartial jury”¹ Despite the jury’s pivotal role in the American criminal justice system, there are no comparable constitutional protections for the jurors who decide criminal cases. Jurors don’t lose all of their legal rights when they enter the courthouse for jury duty, but their freedoms are reduced significantly,² and their usual liberty and privacy safeguards fade.³ For example, outside the courthouse, jurors enjoy a right to be left alone and to keep their thoughts to themselves, but they lose this protection during jury duty.⁴ Even before the COVID-19 pandemic, the justice system sometimes took advantage of juror vulnerability, treating jurors callously, if not rudely, during voir dire.⁵ Voir dire regularly forces jurors to answer highly personal questions, exposing especially private information, including a history of sexual abuse and criminal activity by family members. Jurors have no recourse from this

1. U.S. CONST. amend. VI.

2. For example, a judge may sequester jurors during any part of a trial. *See, e.g., Commonwealth v. McCowen*, 939 N.E.2d 735, 751–52 (Mass. 2010) (upholding a trial judge’s decision to sequester the jury during deliberations to shield them from potentially prejudicial media coverage).

3. *See* Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 155 (1989) (contending that the justice system requires jurors to answer questions that would be “inappropriate and demeaning” in other contexts).

4. Melanie D. Wilson, *Juror Privacy in the Sixth Amendment Balance*, 2012 UTAH L. REV. 2023, 2026, 2036 (2012).

5. *See id.* at 2033–34 (arguing that jurors are often probed too deeply and in embarrassing ways); David Weinstein, *Protecting a Juror’s Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 2–3 (1997) (noting that jurors are subject to intrusive questioning and public scrutiny, which has only increased in fervor with the rise of jury consultants and data analytics).

invasive questioning. They lack legal representation and are left to the mercy of the trial judge's discretion.

During the pandemic, courts have intensified this callous treatment of jurors by exposing them to serious health risks—physical, emotional, and psychological⁶—sometimes to decide cases with minor charges.⁷ This exploitation of jurors is irresponsible and short-sighted. Subjecting jurors to a highly contagious, potentially deadly,⁸ virus with no vaccine threatens the bedrock of our criminal justice system.⁹ By endangering jurors, courts are creating serious due process concerns for the accused and eroding public confidence in an already beleaguered system. Concerns about the virus are resulting in some jurors defying their legal obligation and refusing to appear for service, risking jury pools that are less representative of the community. Recent surveys show that because of COVID-19,

6. Some individuals infected with the COVID-19 virus experience mild symptoms, including “fever, body ache, dry cough, fatigue, chills, headache, sore throat, loss of appetite, and loss of smell”; others experience “neurological symptoms, gastrointestinal (GI) symptoms, or both,” with or without respiratory symptoms. See *If You've Been Exposed to the Coronavirus*, HARV. HEALTH PUBL'G, <https://perma.cc/Y68H-N9XC> (last updated Aug. 25, 2020). Neurological symptoms include: “weakness, tingling or numbness in the hands and feet, dizziness, confusion, delirium, seizures, and stroke.” *Id.* See also Souvik Dubey et al., *Psychosocial Impact of COVID-19*, 14 DIABETES & METABOLIC SYNDROME: CLINICAL RES. & REVIEWS 779, 779 (2020) (noting “acute panic, anxiety, obsessive behaviors . . . depression, and post-traumatic stress disorder” resulting from the virus).

7. See Jamie Satterfield, *COVID-19 Threat Doesn't Scare Away Knox Citizens Summoned for First Masked Jury Trial*, KNOX NEWS (July 21, 2020, 6:04 PM), <https://perma.cc/B4GM-WGMT> [hereinafter Satterfield, *COVID-19 Threat*] (reporting the post-COVID-19 trial of a man charged with a “low-level felony drunken driving charge”).

8. On July 23, 2020, the United States surpassed four million reported COVID-19 cases with about sixty thousand people hospitalized with the virus. Christina Maxouris & Jason Hanna, *U.S. Surpasses 4 Million Reported Coronavirus Cases as Hospitalizations Near Record*, CNN (July 23, 2020, 8:50 PM), <https://perma.cc/R8G5-B6BX>. The Centers for Disease Control and Prevention (CDC) forecast that by September 19, between “196,000 [and] 207,000 total COVID-19 deaths will be reported . . .” See *COVID-19 Forecasts: Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/PMV2-EDSP> (last updated Aug. 27, 2020).

9. See *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968) (explaining the “fundamental” importance of the jury trial to our justice system and noting that “[t]he constitutions adopted by the original States guaranteed jury trial”).

three out of four jurors are nervous about attending a trial¹⁰ and that people of color, Democrats, and older Americans are very concerned about contracting the virus.¹¹ When jurors are worried and distracted, they may rush to a verdict—any verdict—or fail to appreciate all of the evidence, resulting in wrongful convictions and erroneous acquittals. And, if even one juror tests positive during the trial, a mistrial may be declared to allow trial participants to quarantine. If we are going to require jurors to serve during this dangerous time, we must protect them to protect the criminal justice system itself. Otherwise, who will serve?¹²

II. *The Status of Criminal Jury Trials During the Pandemic*

While the deadly and highly contagious COVID-19 virus rages across the country, criminal jury trials are moving forward. As of September 20, 2020, the United States has confirmed 6,768,997 COVID-19 infections and 199,299 deaths.¹³ As early as April 28, 2020, 170 court workers and three New York judges had died from the virus.¹⁴ States and cities have

10. See *What Do 1,500 People Think About Serving as Jurors During the COVID-19 Pandemic*, THE SIMON LAW FIRM, P.C. (June 30, 2020), <https://perma.cc/R3EW-NKS9> (“Jurors are nervous about trials. Roughly 3 out of 4 jurors said they were nervous or somewhat nervous about attending a trial because of concerns about [COVID-19].”).

11. See *infra* Part III.C.3.

12. My thanks go to Corinna Barrett Lain, S.D. Roberts & Sandra Moore Professor of Law, Richmond School of Law, for engaging with me on this very question during the 2020 SEALS conference.

13. Sergio Hernandez et al., *Tracking Covid-19 Cases in the US*, CNN (Sept. 20, 2020, 10:45 AM), <https://perma.cc/DB7U-7MN6>.

14. See Andrew Denney, *3 New York Judges Died From Coronavirus, Almost 170 Court Workers Infected*, N.Y. POST (Apr. 28, 2020, 5:03 PM), <https://perma.cc/2T23-X2KF> (citing infections and deaths, including the deaths of two Brooklyn Supreme Court judges who had handled civil cases). See also Patrick Filbin, *Jon Payne, Chattooga County Probate Judge, Dies of COVID-19*, CHATTANOOGA TIMES FREE PRESS (Aug. 18, 2020), <https://perma.cc/R4GX-VK9W> (reporting that three judges in Chattooga County contracted the virus and one died); R. Robin McDonald, *Juror Zero: How COVID-19 Spread Through the Dougherty County Courthouse*, DAILY REP. (Apr. 7, 2020, 3:11 PM), <https://perma.cc/RHZ2-FCRT> (reporting that a juror summoned for a murder trial in March contracted the virus and served while experiencing symptoms, exposing more than 110 other jurors and court personnel).

closed bars, restaurants, and beaches.¹⁵ But many court clerks across the country continue to summon pools of jurors.

Oregon was one of the first states to reinstate in-person jury trials¹⁶ but provided no clear guidance on how to protect trial participants, resulting in trial judges handling safety issues inconsistently. In one Portland case, defense counsel “argued that potential jurors should be asked to remove their masks while they were questioned, and that witnesses be asked to remove them while on the stand.”¹⁷ The judge agreed.¹⁸ In Ashland, however, a different Oregon trial judge said that jurors and witnesses were “permitted to wear masks.”¹⁹ A juror in yet another case reported that she “arrived at the courthouse to find . . . a thorough approach to social distancing: Lines on the sidewalk showed where to stand outside. Masking-tape arrows indicated safe places to sit inside. Masks and hand sanitizer were available for the asking.”²⁰ But, “[m]ost people in the courtroom took off their masks once they were seated.”²¹

A similar story played out in Mecklenburg County, North Carolina. Jurors were expected to appear for duty on July 6,²²

15. Colman Andrews, *Coronavirus: These States Recently Reopened Bars and Dining Rooms and Are Closing Them Again*, USA TODAY (July 25, 2020, 7:00 AM), <https://perma.cc/6GCL-VD52>.

16. Shaila Dewan, *Jurors, Please Remove Your Masks: Courtrooms Confront the Pandemic*, N.Y. TIMES (June 10, 2020), <https://perma.cc/83EA-CP2N>.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. The Mecklenburg County Jury Service webpage announced:

In the interest of the health and safety of jurors and court personnel, the 26th Judicial District remains committed to balancing access to justice with the public health crisis that COVID-19 presents. All common surfaces in the courthouse are being frequently disinfected. Disinfecting wipes, appropriate signage and social distancing markers are being provided, and we are limiting the number of reporting jurors to facilitate social distancing.

Mecklenburg County Jury Service, N.C. JUDICIAL BRANCH, <https://perma.cc/DV8A-FYQD> [hereinafter *Mecklenburg Jury Service*]. The notice concluded,

as the number of COVID-19 cases in the county rose sharply.²³ Jurors were “encouraged [but not required] to wear protective masks and gloves and to bring a pen for completing the juror questionnaire”²⁴ The same is true on the West Coast. As of July 1, 2020, California confirmed 235,268 COVID-19 cases total²⁵ and experienced more than 8,000 new cases in a single day.²⁶ Nevertheless, California state courts resumed jury trials.²⁷ The Tennessee Supreme Court also restarted jury trials while COVID-19 infections climbed to their highest levels. The court had suspended jury trials in mid-March as the number of COVID-19 cases first began to rise and then extended that ban through July 3.²⁸ By July 3, “Knox County . . . ha[d] recorded record numbers of new [COVID-19] cases in three of the past four days”;²⁹ the county Board of Health had passed a face mask mandate, because of the extensive spread of the virus;³⁰ and the Tennessee Supreme Court cancelled the July bar exam, finding

with emphasis: “*Jurors are encouraged to wear protective masks and gloves and to bring a pen for completing the juror questionnaire.*” *Id.*

23. *Mecklenburg County Reports More Than 700 Coronavirus Cases in One Day*, WBTB (July 3, 2020, 7:20 PM), <https://perma.cc/BHH4-NDRE>.

24. *See* Mecklenburg Jury Service, *supra* note 22.

25. Diya Chacko, *Coronavirus Today: California Rolls Back Reopening*, L.A. TIMES (July 1, 2020, 7:11 PM), <https://perma.cc/6LWV-UBWM>.

26. Matt Kawahara, *California Breaks Record—Again—for Most Coronavirus Cases in a Day, Exceeding 8,000*, S.F. CHRON. (June 30, 2020, 9:07 AM), <https://perma.cc/K846-X3CS>.

27. *See* Blaine Corren, *Jury Service Begins for Trials Delayed by COVID-19 Pandemic*, CAL. CTS.: JUD. BRANCH CALIFORNIA (June 26, 2020), <https://perma.cc/39UD-9AX3> (“Delayed by COVID-19 for nearly three months in most parts of the state, the majority of California’s trial courts are just beginning to hold jury trials again or plan to start in the coming weeks.”).

28. *See Supreme Court Extends Judicial Emergency and Eases Court Restrictions*, TENN. ST. CTS. (May 27, 2020), <https://perma.cc/5VWH-JS9D> [hereinafter *Tennessee Courts Emergency Extension*] (extending the suspension of jury trials first announced on March 13 through July 3, 2020). *See also* Jamie Satterfield, *As Tennessee Trials Set to Resume, Objections Arise Over Masked Jurors, Closed Courtrooms*, KNOX NEWS (July 4, 2020, 2:39 PM), <https://perma.cc/UFC3-8BW6> [hereinafter Satterfield, *Trials Set to Resume*].

29. Jack Lail, *Tracking Coronavirus in Tennessee: Amid Growing Concern, 1,575 New Cases and 11 New Deaths Reported*, WATE.COM (July 3, 2020, 2:51 PM), <https://perma.cc/GS5Q-V5DA>.

30. Hayes Hickman, *Knox County’s New Mask Mandate: What We Know*, KNOX NEWS (July 2, 2020, 8:55 PM), <https://perma.cc/XVJ3-7SVG>.

it too dangerous to administer.³¹ Despite the rising tide of the virus, the Tennessee Supreme Court resumed jury trials.³²

On July 21, Knoxville held its first criminal jury trial in months.³³ Defense counsel had asked the judge to postpone the trial, citing health experts who believed that “a jury trial—now—would be dangerous for the citizens summoned to serve and the trial participants”³⁴ The presiding judge refused to delay, indicating that opinions from health experts “wouldn’t change his mind.”³⁵ Defense counsel filed an emergency appeal to stop the trial, but the appellate court denied the motion, citing the defendant’s right to “appeal should he lose his case at trial.”³⁶ An appeal might provide relief to an aggrieved defendant, but who will protect the jurors should they “lose their case” to COVID-19 infection? Jurors lack similar legal avenues for relief.

Not every state is willing to put jurors (and others) in jeopardy. “[U]ntil further order,” the Supreme Court of Georgia has prohibited jury trials, including banning “the summoning of new trial jurors and grand jurors” because “public health guidance recommends social distancing and other measures that make it impracticable for courts to protect the health of the large groups of people who are normally assembled for jury

31. See *Supreme Court Orders Cancellation of the July 2020 Bar Examination*, TENN. ST. CTS. (July 2, 2020), <https://perma.cc/KV6N-HBWW> (cancelling the July 2020 bar examination “to minimize the risks associated with the spread of the COVID-19 virus”).

32. See Tennessee Courts Emergency Extension, *supra* note 28 (extending the suspension of jury trials in Tennessee through July 3, 2020); *Tennessee Supreme Court Issues Order Requiring Facial Coverings in Courthouses*, TENN. ST. CTS. (July 9, 2020), <https://perma.cc/N7PV-9GS8> (requiring masks be worn in Tennessee courthouses, beginning Monday, July 13, 2020). See also Robert Holder, *Tennessee Supreme Court Cancels July Bar Exam*, WATE.COM (July 3, 2020, 1:05 PM), <https://perma.cc/EL8H-JRVW> (reporting that the Tennessee high court cancelled the July bar exam citing “recent increase in coronavirus cases in the state”).

33. Satterfield, *COVID-19 Threat*, *supra* note 7.

34. Jamie Satterfield, *First Masked Trial Amid COVID-19 Pandemic in Knox History Looms*, KNOX NEWS (July 21, 2020, 5:00 AM), <https://perma.cc/15958-ZJCJ> [hereinafter Satterfield, *First Masked Trial*].

35. *Id.*

36. *Id.*

proceedings”³⁷ In Seattle, courts have not conducted a jury trial since early March.³⁸ A federal judge, who spoke on the condition of anonymity, also expressed her reservations about putting jurors at risk for contracting COVID-19. She described the situation as a “terrible burden,” not to be able to guarantee the safety of those the system is asking to “carry out their civic duty.”³⁹ In addition, Chief U.S. District Judge Ricardo Martinez, “who chairs a national committee assigned by the U.S. Judicial Conference to ‘reconstitute’ the federal judicial system in the wake of the coronavirus shutdowns,” acknowledged: “all of a sudden . . . th[e] civic duty has the potential to be deadly, and those very efforts to protect and enforce the rights of some ‘are putting other people’s safety at risk.’”⁴⁰

III. Courts Are Endangering Jurors and Justice by Resuming Jury Trials During the Pandemic

The jury is vital to the American criminal justice system because jurors protect the accused from heavy-handed charging, overzealous prosecutors and police, and incompetent or biased judges.⁴¹ The jury also gives the public confidence in the system

37. See generally SUP. CT. OF GA., FOURTH ORDER EXTENDING DECLARATION OF STATEWIDE JUDICIAL EMERGENCY 2 (2020), <https://perma.cc/B2P8-NC9D> (PDF).

38. See Mike Carter & Sara Jean Green, *Your Right to a Jury Trial Is on Hold, Here’s How Coronavirus Is Changing the Justice System*, SEATTLE TIMES (June 2, 2020, 8:19 PM), <https://perma.cc/MZ3J-RN73> (reporting that “[t]here has not been a jury trial in Western Washington—perhaps in the entire state—since early March”).

39. Alexander Mallin & Luke Barr, *Social Distanced Justice? Courts Restart Trials, Struggle to Adapt to COVID-19 Precautions*, ABC NEWS (June 9, 2020, 4:06 AM), <https://perma.cc/MNF7-VQVQ>. See Melissa Chan, ‘It Will Have Effects for Months and Years.’ *From Jury Duty to Trials, Coronavirus Is Wreaking Havoc on Courts*, TIME (March 16, 2020, 4:44 PM), <https://perma.cc/4JDK-EHAA> (quoting Michigan Supreme Court Chief Justice Bridget McCormack who said it is “not responsible” to “call citizens in for jury duty in big groups”).

40. Carter & Green, *supra* note 38.

41. See Sanjay K. Chhablani, *Re-Framing the ‘Fair Cross-Section’ Requirement*, 13 J. CONST. L. 931, 932 (2011) (citing numerous authorities for the proposition that “[t]he Sixth Amendment was framed in an atmosphere of intense mistrust of a potentially tyrannical government,” and arguing that

by holding the government to its heavy, beyond-a-reasonable-doubt burden of guilt. Therefore, protecting jurors against the significant physical and psychological risks⁴² of COVID-19 is critical not only for the wellbeing of the jurors, but also for protecting the constitutional rights of the accused and building public confidence in our system of justice.⁴³

A. Courts Force Jurors to Serve Despite the Risks to Their Health

Jurors are legally required to take part in criminal cases.⁴⁴ If they ignore the court's summons, jurors risk a fine and even jail for contempt of court.⁴⁵ Jurors do not receive legal

"each procedural right enshrined in the Sixth Amendment was seen as a critical safeguard of individual liberty").

42. See G. Serafini et al., *The Psychological Impact of COVID-19 on the Mental Health in the General Population*, 113 QJM: INT'L J. MED. 529, 529–30 (2020) (noting that because of the COVID-19 outbreak, people have developed "stress, anxiety, depression, frustration, [and] uncertainty" and have, therefore, suffered psychological reactions of "panic behavior or collective hysteria to pervasive feelings of hopelessness and desperation which are associated with negative outcomes including suicidal behavior").

43. See Chan, *supra* note 39 (noting that a Dallas County judge won't suspend jury trials "because the inability to guarantee a speedy trial could result in cases being dismissed"); *id.* (describing Brown University sociology professor Nicole Gonzalez Van Cleve's concern for "people's basic rights and dignity and their ability to go free").

44. See 28 U.S.C. § 1866(b) (2018) ("When the court orders a grand or petit jury to be drawn, the clerk . . . shall issue summonses for the required number of jurors."); *id.* § 1866(g):

Any person summoned for jury service who fails to appear as directed may be ordered by the district court to appear forthwith and show cause for failure to comply with the summons. Any person who fails to show good cause for noncompliance with a summons may be fined not more than \$1,000, imprisoned not more than three days, ordered to perform community service, or any combination thereof.

45. See, e.g., TEX. GOV'T CODE ANN. § 62.0141 (West 2019) ("In addition to any criminal penalty prescribed by law, a person summoned for jury service who does not comply with the summons as required by law . . . is subject to a contempt action punishable by a fine of not less than \$100 nor more than \$1,000."); GA. CODE ANN. § 15-12-10 (2019) ("If any person is duly summoned to appear as a trial . . . juror at court and neglects or refuses to appear, or if

representation during the trial process. Instead, they serve at the mercy of the trial judge and are subjected to whatever conditions—safe or not—the local court has made to protect them from the virus. This obligatory service usually requires prospective jurors to appear at a public, often poorly ventilated and outdated, courthouse where they spend significant time with groups of strangers—first in a jury holding area, then in a courtroom, and finally, in a deliberation room.

Typically, between forty and a hundred (or more) jurors are summoned to the courthouse to await further assignment and instructions.⁴⁶ Then, forty or so are moved from that holding area to a courtroom where they sit together in the presence of a judge, court reporter, the accused, the government's representative, the lawyers, and any public spectators.⁴⁷ This is where jurors undergo questioning by the lawyers. In some jurisdictions, many more potential jurors are called for voir dire.⁴⁸ Due to the small size of most courtrooms, prospective jurors often sit shoulder to shoulder in row after row of pews designed for the public. Because courtrooms are configured much like small churches, jurors in back rows may easily cough, sneeze, and breathe on jurors in front rows. And because they are drawn from a cross-section of the jurisdiction, jurors rarely know one another and have no way of knowing whether any of the other prospective jurors previously engaged in risky

any juror absents himself or herself without leave of the court, such neglect, refusal, or absence may . . . be punished as contempt of court.”).

46. See, e.g., S.C. Code Ann. § 22-2-90(B) (West 2020) (providing that magistrate judges shall draw between “forty but not more than one hundred jurors” for jury trials). See generally Rebecca Davis O'Brien, *Is Anywhere Safe for a Jury Trial During the Covid-19 Pandemic? Try a School Gym.*, WALL ST. J. (May 19, 2020, 9:00 AM), <https://perma.cc/ZX3Q-A66M>.

47. The Sixth Amendment—in addition to guaranteeing the accused a jury—also guarantees the right to a public trial, another challenge courts grapple with during a pandemic. See U.S. CONST., amend VI. See generally Stephen E. Smith, *The Right to a Public Trial in the Time of COVID-19*, 77 WASH. & LEE L. REV. ONLINE 1 (2020).

48. See, e.g., ST. CT. ADMIN. OFF., JURY MANAGEMENT BEST PRACTICES MANUAL 8–10 (2019), <https://perma.cc/2PTD-DXMF> (PDF) (providing guidance to Michigan courts and suggesting they summon a larger number of jurors for shorter stints to provide a less burdensome, but more wholistic, cross-section of jurors). See generally Davis O'Brien, *supra* note 46.

behaviors with regard to COVID-19.⁴⁹ Jurors participate until excused by the court or struck by the prosecutor or defense.

For those not excused during voir dire, jury service continues, and the risk of contracting COVID-19 increases. At trial, jurors captively sit and listen to the evidence from witnesses and oral arguments from lawyers.⁵⁰ The risk of contagion may fluctuate throughout the duration of the trial if the judge does not require everyone in the courtroom to remain masked, if there is no meaningful distancing among those within the courtroom, if the courtroom is small, or if the ventilation is poor. Because prisons have experienced some of the largest incidents of infection,⁵¹ defendants themselves pose a serious risk to jurors—especially if they are not required to wear masks.⁵² Notably, in Knoxville’s first jury trial, the judge first planned for jurors to sit within four feet of each other, contrary to the Centers for Disease Control and Prevention (CDC) guidelines.⁵³ He changed the spacing to six feet only after

49. See Mallin & Barr, *supra* note 39 (quoting “Northern District of Texas district judge Joe Kendall” as stating: “You have no clue where they’ve been or who they’ve been around or what safety precautions they have or have not taken, because we know that safety precautions . . . [are] kind of polarizing”).

50. See Davis O’Brien, *supra* note 46 (“Jury service, by its nature, brings together large groups of people, often into cramped quarters, before sending them back home.”).

51. See Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal and State Prisons*, 324 [J]AMA 603, 603–04 (2020) (finding that the COVID-19 infection rate is 5.5 times higher for adults in custody than for the U.S. population, and that the death rate is three times greater than would be expected if adjusted for age and sex distributions of the U.S. population); see also Samantha Max, *Metro Prison COVID-19 Outbreak Goes Unnoticed Due to Reporting Loophole*, NASHVILLE PUB. RADIO (Aug. 27, 2020), <https://perma.cc/HR7W-863K> (reporting that “[m]ore than one third of the 460 men and women at [a] private prison in Nashville . . . tested positive for the coronavirus” but none of the cases were reported to the Tennessee Department of Corrections or to the public).

52. A good defense attorney may convince the court that a mask unconstitutionally inhibits the accused from communicating with his lawyer during his trial. See *Illinois v. Allen*, 397 U.S. 337, 344 (1970) (describing “one of the defendant’s primary advantages of being present at the trial” as being able “to communicate with his counsel”).

53. See Satterfield, *First Masked Trial*, *supra* note 34 (“[A] review of the juror safety plan . . . showed it did not follow [CDC] social distancing

the local newspaper reported his plan.⁵⁴ The judge also said during a pretrial hearing that the county health department had “been consulted and ‘approved the [trial] layout,’” but a spokeswoman for that department said that “the agency had not given its approval to any plans involving jury safety—nor would it.”⁵⁵

Even if jurors avoid contracting the virus from the participants in the trial itself, the risk of infection intensifies once the evidence closes and the jurors begin to deliberate. The U.S. Supreme Court ruled earlier this year, in *Ramos v. Louisiana*,⁵⁶ that criminal jury verdicts must be unanimous.⁵⁷ Thus, jurors must spend enough time deliberating to reach unanimous agreement as to the defendant’s guilt. Jury deliberations often take place in very small, windowless rooms, where there is one table and just enough chairs for every juror. The configuration is specifically designed to facilitate discussion and to allow jurors to sit near one another and review and touch each piece of evidence. Typically, all twelve members of the jury sit at one table and talk, debate, persuade, sometimes yell, and often compromise to resolve the case. Jurors will often handle the evidence and pass it to other jurors to read or inspect. Conversation to reach a unanimous verdict is a must, and jurors often get loud, even in heated debates, when deliberating, all behaviors that now put fellow jurors at increased risk of contracting the virus. Deliberation is also the time when it will be toughest to enforce mask and hygiene directives. Jury deliberation happens in secret. Only jurors are present. If one juror removes his mask or refuses to use wipes to sanitize his area, who will enforce the direction? Another juror?

guidelines of 6 feet between jurors and instead allowed only 4 feet of space between them.”).

54. *Id.*

55. *Id.*

56. 140 S. Ct. 1390 (2020).

57. *See id.* at 1397 (“There can be no question . . . that the Sixth Amendment’s unanimity requirement applies to state and federal criminal trials equally.”).

B. Jurors Are Reluctant to Serve, and Some Are Defying Their Legal Duty

Many jurors are worried about exposure to the virus, and a number of potential jurors are refusing to serve despite their legal obligation to do so. In Portland, as early as May, only 121 of 500 potential jurors (24%) complied with their jury summons.⁵⁸ That percentage reportedly represented about “half the usual number.”⁵⁹ In Miami, “[o]nly half of the roughly 600 potential jurors surveyed . . . said they would report for duty in July, citing safety concerns . . .”⁶⁰ “Based on jury response rates and approved excused dismissal rates for ‘COVID-19 era,’” in Champaign County, Ohio, the court has increased the number of jurors it plans to summon from 50 to 135.⁶¹ A judge in Washington State, noted: “[P]eople facing health issues or financial hardships during the crisis will be less likely to serve, shrinking the already small pool of prospective jurors who respond to summonses.”⁶² One juror called for duty in March reported that all of the “180 prospective jurors in the Manhattan waiting room were trying to avoid one another, choosing seats as far apart as possible” and that “just about everyone, including the court clerk, was discussing the coronavirus.”⁶³ That juror thought: “After all of these other things are canceled . . . there’s still jury duty.”⁶⁴

Every reasonable juror who participates in an in-person trial will remain concerned for her health and the contingent health of her family. A June 2020 poll, conducted by the Pew

58. Dewan, *supra* note 16.

59. *Id.*

60. Matthew Bultman & Maeve Allsup, *Judges Weigh Bigger Rooms, Cleaner Mics as Jury Trials Restart*, BLOOMBERG LAW (May 26, 2020, 6:01 AM), <https://perma.cc/9WMK-VG65> (noting the results of a Miami-Dade County Eleventh Circuit poll).

61. HON. NICK A. SELVAGGIO, CHAMPAIGN COUNTY CT. COMMON PLEAS, CHAMPAIGN COUNTY COMMON PLEAS COURT COVID-19 JURY TRIAL PROTOCOL 1 (2020), <https://perma.cc/6DXH-UEMS> (PDF).

62. Carter & Green, *supra* note 38 (citing Judge Jim Rogers of the King County Superior Court).

63. Chan, *supra* note 39.

64. *Id.*

Research Center, revealed that 62 percent of Americans are very or somewhat concerned that they may unknowingly spread the coronavirus, and 51 percent are concerned that they will contract the coronavirus and require hospitalization (with 24 percent very concerned).⁶⁵ Undoubtedly, concern about the virus will increase when people are forced to gather for jury duty.

C. Courts Are Endangering Justice in Addition to Jurors

By requiring reluctant and distracted jurors to perform their key functions during a pandemic, many states are unwittingly undermining the justice system by risking mistrials and faulty verdicts.

In addition to “its high infectivity and fatality rates,” COVID-19 has “caus[ed] mass hysteria, economic burden and financial losses,” as well as “acute panic, anxiety, obsessive behaviors, hoarding, paranoia . . . depression, and post-traumatic stress disorder (PTSD).”⁶⁶ Defense attorneys across the country intuitively recognize the risks that fearful and distracted jurors pose for their clients. Defense counsel are filing motions like the one in Knoxville, Tennessee, arguing: “[A]ny jury trial held amid this pandemic is both dangerous and legally doomed, guaranteed to deprive the accused of a constitutionally sound trial.”⁶⁷ The Knoxville lawyers emphasized that “[o]ne of the great dangers of this disease is asymptomatic transmission, which means that a person can carry and spread the disease without personally exhibiting any symptoms . . .”⁶⁸ The defense contended that fear of asymptomatic transmission would make it more likely for the jury to convict, asserting: “This court cannot ignore the possibility that jurors will be more likely to convict (a defendant)

65. PEW RES. CTR., REPUBLICANS, DEMOCRATS MOVE EVEN FURTHER APART IN CORONAVIRUS CONCERNS 5 (2020), <https://perma.cc/9JQW-YKTR> (PDF) [hereinafter PEW, REPUBLICANS, DEMOCRATS].

66. See Dubey, *supra* note 6, at 779 (noting, too, that as a result of the virus, “racism, stigmatization, and xenophobia against particular communities are also being widely reported”).

67. See Satterfield, *Trials Set to Resume*, *supra* note 28 (quoting defense attorney Joshua Hedrick).

68. *Id.*

when their faces are covered with face masks . . . stuck in close proximity with a group of strangers. It will 'feel' unsafe."⁶⁹ Certainly, jurors who are compelled to serve may show up angry, scared, distracted, or all three. It is doubtful that these jurors will be able to focus on the evidence if they are worrying about contracting the virus from the juror sitting closest or the lawyer who keeps moving too near the jury box during argument.

1. The Risk of Faulty Verdicts

Although the Tennessee lawyers argued that worried jurors are likely to convict an accused, there is an equally persuasive argument that a jury is more likely to acquit during a pandemic, regardless of the strength of the evidence. In the COVID-19 world, a short jail sentence may become a death sentence. Unless the accused is on trial for a violent crime, and the evidence is very convincing, juries may be disinclined to condemn the defendant to prison, where she is more likely to contract COVID-19 and potentially die.⁷⁰ Furthermore, the-beyond-a-reasonable-doubt standard is an exacting one. Jurors distracted with concerns for their health are unlikely to hear all of the evidence or process all of the arguments. Holes in the evidence should benefit defendants in our system because an acquittal is required whenever any reasonable doubt remains about the defendant's guilt. But fear and distraction from COVID-19 should not be the source of any perceived reasonable doubt. And, whether resulting in more acquittals or more convictions, if fear and distraction from COVID-19 influence the verdicts in criminal trials, then justice is in jeopardy.

Jurors must feel safe in order to focus on their responsibilities. If significant numbers of jurors do not participate or become distracted, the system will seem unfair and unworkable to everyone who observes it, including the accused, her family, and the public. Relatedly, if jurors become

69. *Id.*

70. *See generally* Saloner, *supra* note 51. *See also A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT, <https://perma.cc/336Q-PKK7> (Aug. 28, 2020, 3:15 PM) (reporting over 900 prisoner deaths from COVID-19 as of August 28, 2020).

infected by the virus while completing jury obligations, that news will travel fast, and fewer and fewer jurors will appear when summoned. All who do appear will become even more distracted. And, jurors who fear prolonged exposure to others in the courtroom may rush to reach a verdict—any verdict—simply to finish the case and return home to safety. It is, thus, shortsighted and reckless to take a callous approach to the wellbeing of jurors. But that is the attitude of some prosecutors and judges. One Knoxville prosecutor reportedly wrote in a pleading: “[C]itizens just need to get accustomed to this newfound way of dispensing justice because the court system must continue to operate, pandemic or not.”⁷¹ She concluded: “We cannot shut down the court system and wait for the situation to be perfect before we start back trying cases.”⁷²

2. *The Risk of Mistrials*

If one juror tests positive for the virus during a trial, the trial would probably end in a mistrial. As one Ohio judge predicted: “Obviously if we just found out that a juror had tested positive, then because of the fact that the other jurors had been in proximity we would probably declare a mistrial and not be able to go forward with the trial”⁷³ A mistrial would be necessary because “[a]ll persons that have come in contact with the juror would have to be tested”⁷⁴ Because of their resource intensiveness, too many mistrials will likely erode confidence in the system. Yet, given the exponential spread of COVID-19, more mistrials than usual are expected during this pandemic. A mistrial requires a repeat of the whole trial, unless a plea is reached or the prosecution agrees to a dismissal. A new trial means empaneling a new jury and imposing the COVID-19 risks to new jurors all over again.

71. Satterfield, *Trials Set to Resume*, *supra* note 28 (quoting Knox County Assistant District Attorney General TaKisha Fitzgerald).

72. *Id.*

73. Mallin & Barr, *supra* note 39 (quoting Stephen McIntosh, Franklin County Court Judge, Columbus, Ohio).

74. *Id.* See McDonald, *supra* note 14 (reporting that an “infected juror potentially exposed the entire jury pool, the prosecutor, the defendant and his lawyer, court bailiffs, the judge and her court reporter and other court personnel” after contracting COVID-19 while serving on a criminal jury).

The non-economic costs of a mistrial are less obvious but, arguably, equally serious. At least from the government's perspective, a mistrial is never a positive development, particularly in cases involving human victims. After a mistrial, victims must come to court again and face testifying anew, including another cross-examination. Every time a witness or victim testifies under oath, she creates the possibility of an inconsistent statement that can be used to impeach her believability. Any delay in the trial of the case also creates a risk that a witness will die or a memory will fade. Usually a mistrial delays the possibility of a conviction and, thus, favors the accused. But, in the era of COVID-19, delay may disadvantage both sides. An accused is never guaranteed a continuance, and the pandemic has made trials more cumbersome. Defendants who want a continuance of a case are in a stronger position to convince a judge to postpone. As a result, defendants insisting on a trial may feel confident about an acquittal or a conviction on a lesser charge. When you are expecting an acquittal, and your case ends in a mistrial, that's a big loss.

Mistrials also create concern and uncertainty for the community. A mistrial suggests that there was something wrong with the process, and the human mind does not like incomplete tasks.⁷⁵ Mistrials are the equivalent of the power going out just before the movie ends. There is no verdict and no resolution. The community wants a guilty person convicted and believes that an innocent person will be acquitted. When a trial ends prematurely, it gives the impression of incompetence: the prosecutor overstepped and the judge granted a mistrial; one of the lawyers engaged in illegal, immoral, or other inappropriate conduct, causing the judge to stop the trial; or, in the case of COVID-19, the system, and in particular, the judge, didn't keep the participants safe.

75. See, e.g., *The Zeigarnik Effect Explained*, PSYCHOLOGIST WORLD, <https://perma.cc/R4ZZ-NA3F> (explaining that people desire to finish tasks leading to better recall of "details of interrupted tasks around 90% better" than those they are able to complete).

3. *The Risk of Juries That Are Not Representative of the Community*

If news spreads of juries infected with COVID-19, those most at risk of suffering serious consequences from the virus and those most concerned about contracting COVID-19 may be deterred in greater numbers from jury service. Given that the virus is harming people of color in disproportionate numbers,⁷⁶ and that White people, Republicans, and young people are least concerned about spreading and contracting the virus,⁷⁷ resuming jury trials during the pandemic may exacerbate racial disparities in jury pools and create trial juries that do not otherwise represent the community.

While defendants are disproportionately people of color,⁷⁸ Black and Brown people are underrepresented on juries.⁷⁹ Because of the very real health risks now associated with jury duty, minority jurors may become especially discouraged from appearing for service. The majority of Black (63 percent) and Hispanic (73 percent) citizens surveyed in June said that they were “very or somewhat” concerned about contracting the virus and requiring hospitalization.⁸⁰ Their concern is warranted. The

76. Maria Godoy & Daniel Wood, *What Do Coronavirus Racial Disparities Look Like State by State?*, NPR (May 30, 2020, 6:00 AM), <https://perma.cc/2H3W-GVCT> (reporting that data reveals that “[c]ommunities of color are being hit disproportionately hard by COVID-19.”).

77. See *supra* note 65 and accompanying text.

78. See REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE, SENTENCING PROJECT 1 (2018), <https://perma.cc/NP8E-45QB> (PDF) (concluding that “African Americans are more likely than white Americans to be arrested . . . more likely to be convicted . . . and they are more likely to experience lengthy prison sentences”).

79. See, e.g., *Study Finds Mississippi Prosecutors Disproportionately Exclude Black Jurors*, EQUAL JUST. INITIATIVE (June 15, 2018), <https://perma.cc/VVP4-UZF5> (“At every step in the jury selection process, the [study] revealed stark racial disparities.”). See generally Ronald Randall, James A. Woods, & Robert G. Martin, *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 JUST. SYS. J. 71 (2008) (analyzing the source of the underrepresentation of racial and ethnic minorities on juries in Ohio).

80. PEW, REPUBLICANS, DEMOCRATS, *supra* note 65, at 17.

death and hospitalization rates are significantly higher for non-Hispanic Black persons, Hispanics and Latinos, American Indians, and Alaska Natives than for White persons.⁸¹ Greater racial disparities on juries will further undermine the public's confidence in the fairness of our system of justice.

Attracting jury pools dominated by Republicans and young people is also problematic, but these are the groups who may be most willing to serve because they generally feel less concerned about COVID-19 and more comfortable gathering in groups. According to surveys conducted between June 16 and 22, 2020, 61% of "Republicans and Republican-leaning independents" said that "the worst [of the virus] is behind us," while "just 23% of Democrats and Democratic leaners said that the worst is behind us . . ."⁸² Republicans are also "nearly 40 percentage points more likely than Democrats to say they would be comfortable eating out in a restaurant (65% of Republicans vs. 28% of Democrats)."⁸³ While fewer Americans of any political affiliation "feel comfortable attending a crowded party, nearly four times as many Republicans (31%) as Democrats (8%) say they would feel comfortable . . ."⁸⁴ Younger people, similar to Republicans, also remain less concerned about contracting the virus. Fifty-four percent of adults age sixty-five or older are "very or somewhat concerned about requiring hospitalization due to COVID-19," compared to thirty-nine percent of those eighteen to twenty-nine years of age.⁸⁵ Given the disparate levels of concern about the virus and comfort with group events, Republicans and younger people are probably more willing than Democrats and older individuals to take part in jury service.

If more Republicans and more young people comprise jury pools, then trial juries are destined to be very different than in non-COVID times. Although there is no way to accurately predict which way any individual juror will lean, arguably, increasing the number of Republicans will favor the prosecution, and increasing the number of young jurors will

81. See Godoy & Wood, *supra* note 76.

82. PEW, REPUBLICANS, DEMOCRATS, *supra* note 65, at 4.

83. *Id.*

84. *Id.*

85. *Id.*

benefit the accused. Research shows that Republicans approve of the death penalty in significantly greater numbers than Democrats. As of 2018, 77 percent of Republicans favored the death penalty, compared to only 35 percent of Democrats.⁸⁶ Republicans also generally identify with a “law and order” mentality.⁸⁷ For these reasons, prosecutors generally want more Republicans on their trial jury, while the defense wants more young jurors. In a study of seven hundred felony trials in Florida, researchers learned that prosecutors are more likely to use their peremptory challenges to exclude younger jurors, while defense lawyers are more likely to exclude older ones.⁸⁸ Researchers also found that older jurors are more likely to render a verdict of guilty.⁸⁹ As discussed above, a fundamental shift in the makeup of juries because of COVID-19 is problematic for a fair system of justice. A systematic shift to more Republican jurors would arguably jeopardize the accused’s right to Due Process. A system shift to younger jurors could lead to too many acquittals, leaving victims without justice. Either way, justice is endangered. The Sixth and Fourteenth Amendments guarantee every criminal defendant the right to a jury drawn from a “representative cross-section” of the

86. J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RES. CTR. (June 11, 2018), <https://perma.cc/DF3Y-QHE5>.

87. In June of 2020, President Donald Trump appealed to conservatives by announcing: “I am your president of law and order.” See Li Zhou, *What We Know About How Trump’s “Law and Order” Message is Going*, VOX (June 8, 2020, 7:50 AM), <https://perma.cc/A2EP-9Z3V>. This is a message the President had used before successfully. See *id.* (recounting Trump’s utilization of the same message at the Republican National Convention in 2016, where then Republican nominee stated: “In this race for the White House, I am the law and order candidate”).

88. See generally Shamena Anwar, Patrick Bayer, & Randi Hjalmarsson, *The Role of Age in Jury Selection and Trial Outcomes*, 57 J.L. & ECON. 1001 (2014).

89. *Id.* at 1012–22. This tendency is not surprising given the above research on Republicans’ views of the death penalty and the fact that far more Millennials (those born from 1981 to 1996) lean Democratic. See PEW RES. CTR., WIDE GENDER GAP, GROWING EDUCATIONAL DIVIDE IN VOTERS’ PARTY IDENTIFICATION 13 (2018), <https://perma.cc/39NV-XQCM> (PDF) (“Democrats enjoy a 27-percentage-point advantage among Millennial voters (59% are Democrats or lean Democratic, 32% are Republican or lean Republican).”).

community in which she lives.⁹⁰ How can a petit jury be drawn from a representative cross-section of the defendant's community when the COVID-19 virus disproportionately discourages people of color or others from serving?

IV. Proposals To Protect Jurors and the Justice System as Trials Resume

Describing the resumption of jury trials during the pandemic as “reckless and irresponsible[,]” the National Association of Criminal Defense Lawyers (NACDL) concluded that criminal jury trials should be postponed.⁹¹ Although extreme, pausing all criminal jury trials is a reasonable approach. The risks from COVID-19 are significant and unique, particularly for jurors. While the judge, court personnel, and lawyers maintain some control over their environment and interactions with others in the courtroom, jurors are forced to participate and remain at the mercy of the court and other participants. Worse, the nature of their duties requires them to interact in groups, putting them at increased risk for contracting the virus. Nevertheless, with the COVID-19 virus unrelenting, at least some criminal trials may need to resume prior to development of a vaccine.⁹²

Before trials begin again, courts need to take specific, well-designed steps to ensure a safe and fair process, not only for the judge, court personnel, lawyers, witnesses and the accused, but also for every member of the jury. In addition to

90. See U.S. CONST., amend. VI; *id.* amend. XIV; *Glasser v. United States*, 315 U.S. 60, 86 (1942) (“[O]fficials charged with choosing federal jurors . . . must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community.”).

91. NAT’L ASS’N CRIM. DEF. LAW., CRIMINAL COURT REOPENING AND PUBLIC HEALTH IN THE COVID-19 ERA 8 (2020), <https://perma.cc/Q4JF-2M7X> (PDF) [hereinafter NACDL Report].

92. See Ann E. Marimow and Justin Jouvenal, *Courts Dramatically Rethink the Jury Trial in the Era of the Coronavirus*, WASH. POST (July 31, 2020, 8:54 AM), <https://perma.cc/M38N-R3N2> (“[J]udges . . . face the tricky balancing act of protecting the health of jurors who are compelled by the law to serve, while also providing the constitutionally mandated right to a speedy and public trial to tens of thousands of defendants, some of whom have languished in jail for months . . .”).

the fact that outcomes in cases will be influenced by worried and distracted jurors, jurors simply deserve the court's protection. In fact, jurors arguably merit this security more than any of the other trial participants. Jurors are the only participants in the trial who are connected to the case merely by virtue of their citizenship in the community. If anyone should be kept safe from the virus, it's the people involuntarily required to take part, on whom the entire system hinges.⁹³

A. Jurors Need Medical-Grade Masks

To maximize juror safety from the Coronavirus when criminal jury trials resume, courts should take several steps, as outlined below. The most important one is to treat jurors like the essential criminal justice system workers they are and provide each one with a medical-grade mask. Experts believe that face masks significantly reduce the chance of spreading COVID-19.⁹⁴ “[W]earing masks is recommended as a way of strengthening social distancing”⁹⁵ According to CDC experts, masks “contain respiratory secretions right at the source.”⁹⁶ But, “[t]he concept is risk reduction rather than absolute prevention.”⁹⁷ Except for medical-grade masks, masks

93. Jurors are paid a nominal amount. In federal court, jurors are paid \$50 per day. *Juror Pay*, U.S. CTS., <https://perma.cc/H8MR-A4M9>. In Knox County, jurors serve for two weeks and are paid \$11.00 per day. MIKE HAMMOND, CLERK CRIM. CT., KNOX COUNTY, TENN., JUROR INFORMATION 1, <https://perma.cc/8Y87-PZ4R> (PDF). Witnesses may also be only tangentially connected to the case, but they hold information relevant to the defendant's guilt or innocence.

94. See, e.g., Nina Bai, *Still Confused About Masks? Here's the Science Behind How Face Masks Prevent Coronavirus*, U. CAL., S.F. (June 26, 2020), <https://perma.cc/H4LH-FKPM> (reporting evidence that masks help prevent the spread of COVID-19 and that the more people wearing masks, the better); Caitlin McCabe, *Face Masks Really Do Matter. The Scientific Evidence Is Growing*, WALL ST. J. (Aug. 13, 2020, 4:57 PM), <https://perma.cc/2S89-4R5T> (same). See generally Robert Gatter & Seema Mohapatra, *COVID-19 and the Conundrum of Mask Requirements*, 77 WASH. & LEE L. REV. ONLINE 17 (2020).

95. *Partly False Claim: Wear a Face Mask; COVID-19 Risk Reduced by Up to 98.5%*, REUTERS (Apr. 23, 2020, 4:00 PM), <https://perma.cc/9W3G-YB3R>.

96. *Id.*

97. Bai, *supra* note 94 (quoting infectious disease specialist Peter Chin-Hong, M.D.).

protect others.⁹⁸ Even medical masks are no guarantee against SARS-CoV-2.⁹⁹ Although not a silver bullet, medical-grade masks protect the wearer as well as others. N95 masks “filter out both large and small particles when the wearer inhales. As the name indicates, the mask is designed to block 95% of very small particles.”¹⁰⁰ Despite their protective qualities, the CDC recommends reserving these “critical supplies” for “health care workers and other medical first responders”¹⁰¹

Because jurors are an essential piece of every criminal jury trial, courts must protect them to protect the system itself. Safeguarding jurors is as important to the justice system as protecting essential healthcare workers is to healthcare. Juries make life and death decisions, just like nurses and doctors. Juries regularly decide whether the accused keeps her liberty or spends time confined and suffers all of the ancillary restrictions of incarceration. Therefore, as criminal trials restart before a vaccine is found, courts should provide jurors with N95 masks at no expense. Without providing these masks, every juror is at serious risk for the deadly virus, and older jurors and jurors of color are at even higher risk. If our criminal justice system will ever be fair, it will require a competent, informed, diverse jury pool. We must treat jurors with respect to attract such a pool. Jurors should not be expected to complete their involuntary civic responsibilities at the expense of their lives, the lives of their families, or physical or economic hardship from illness.

98. Mahesh Jayaweera et al., *Transmission of COVID-19 Virus by Droplets and Aerosols: A Critical Review*, ENVTL. RES., June 13, 2020, at 1, 6, <https://perma.cc/7LEN-WFGC> (PDF) (describing medical “filtering facepiece” (FFP) masks that vary in filtration from 80 percent aerosol filtration for FFP1 masks to FFP3 masks that filter 99 percent of such particles); McCabe, *supra* note 94 (noting that researchers are “now examining the possibility that [homemade] masks might offer some personal protection from the virus, despite initial thinking that they mostly protected others”).

99. See Jayaweera, *supra* note 98, at 8. (“None of these masks is guaranteed to cut off SARS-CoV-2 fully; hence, social distancing is vital to be adopted, especially in the indoor environment. . . . [As of] early May 2020, there have been no promising [personal protective equipment] developed to curtail such transmission.”).

100. *COVID-19: How Much Protection Do Face Masks Offer?*, MAYO CLINIC (Aug. 20, 2020), <https://perma.cc/TC8J-MDCZ>.

101. *N95 Respirators, Surgical Masks, and Face Masks*, U.S. FOOD & DRUG ADMIN., <https://perma.cc/AUM7-LW9Z> (last updated Aug. 20, 2020).

B. All Court Participants Should Be Masked

In conjunction with providing medical-grade masks for jurors, courts must take additional safety precautions to protect them. Courts should mandate cloth masks for all court participants, including members of the public and the accused. Should the accused believe that she is disadvantaged by wearing a cloth mask, she could be provided, upon request, with a mask incorporating a transparent panel over most of the surface area.¹⁰² A clear mask would allow everyone to see the accused's face. The same could be provided for witnesses, at the request of the accused or the jury.

C. Court Proceedings Should Be Spaced Properly

The courts must also ensure proper distancing between trial participants. "One of the biggest differences in holding jury trials during the health crisis is the amount of space required: two-to-three times more than normal . . ." ¹⁰³ Jurors should only meet in large rooms, and courts should limit the number of people in any one room.¹⁰⁴ Because the accused has a constitutional right to a "public trial" this will require courts to find additional space for observers.¹⁰⁵ Although some states may

102. Such masks are commercially available. *See, e.g.*, CLEARMASK, <https://perma.cc/G635-2RSN>.

103. Bultman & Allsup, *supra* note 60 (citing Renee Rothauge, a member of an American Board of Trial Advocates task force, studying jury trials during COVID-19).

104. *See Max Minute: 'Increasing Evidence That Six Foot Social Distance Rule May Not Be Enough Indoors'*, CBS N.Y. (June 1, 2020, 6:45 AM), <https://perma.cc/8NAW-VVBF> (noting growing evidence that the "six foot" rule is inadequate to keep people safe indoors because during normal conversation, people "expel microscopic droplets . . . that can stay suspended in air").

105. U.S. CONST. amend. VI; *Presley v. Georgia*, 558 U.S. 209, 215 (2010) (holding that excluding the accused's uncle from the courtroom during voir dire violated the Constitution and that "[t]rial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials"). This right to a public trial is not without limit. *See id.* ("There are no doubt circumstances where a judge could conclude that threats of improper communications with jurors or safety concerns are concrete enough to warrant closing voir dire."). *See generally* Smith, *supra* note 47.

be tempted to exclude the public during the pandemic,¹⁰⁶ shutting the public out may require retrial of every defendant convicted in seclusion.¹⁰⁷ In addition, excluding the public is problematic because when the public cannot observe the criminal justice process, it arouses suspicion that the system is not working fairly or normally. A possible solution to this issue during the pandemic is providing real-time audio and video of the proceeding, either to a separate, nearby room in which the public is invited, or through an online website.

Some judges are already making plans to move jury trials to “spacious ceremonial courtroom[s]” and planning to let jurors deliberate “in a separate courtroom, rather than in one of the designated jury rooms, which are often small and windowless.”¹⁰⁸ In northwestern Montana, a court is using a high school gymnasium for jury selection.¹⁰⁹ “The gym . . . is perhaps the only place in Lincoln County[, Montana] where 100 prospective jurors can gather with social distancing and other safety measures to be selected for a domestic assault trial set to begin June 9”¹¹⁰ The scientific evidence to date overwhelmingly suggests that enclosed spaces with limited ventilation facilitate spread of the COVID-19 virus.¹¹¹ “Probably about 10% of cases lead to 80% of the [virus] spread.”¹¹² And,

106. See *Tennessee Supreme Court Issues Order Keeping Courts Open, Limiting In-Person Court Proceedings Until March 31*, TENN. ST. CTS. (Mar. 13, 2020), <https://perma.cc/2DYH-9QHJ> (limiting “permitted in-court proceedings” to “attorneys, parties, witnesses, security officers, and other necessary persons”).

107. See *supra* note 103 and accompanying text.

108. Bultman & Allsup, *supra* note 60.

109. See Davis O’Brien, *supra* note 46 (“In the remote Kootenai Valley of northwestern Montana, the Libby Middle High School gymnasium . . . will become a courtroom.”).

110. *Id.*

111. See Jayaweera, *supra* note 98, at 8–15 (discussing the significant contagion risks of airplane travel, car travel, and healthcare centers). See also Kai Kupferschmidt, *Why Do Some COVID-19 Patients Infect Many Others, Whereas Most Don’t Spread the Virus at All?*, SCI. MAG. (May 19, 2020, 5:25 PM), <https://perma.cc/EB45-JR7E> (“SARS-CoV-2 . . . seems especially prone to attacking groups of tightly connected people while sparing others.”)

112. See *id.* (quoting Adam Kucharski of the London School of Hygiene and Tropical Medicine).

“there is a much higher risk in enclosed spaces than outside.”¹¹³ One study in Japan found “the risk of infection indoors . . . almost 19 times higher than outdoors.”¹¹⁴ Perhaps because of these risks, the NACDL has urged that in-person court proceedings be conducted only after independent medical experts certify that the conditions adopted in the courthouse pose “minimal risk of COVID-19 transmission.”¹¹⁵

Another complication of using even a large courtroom is that distancing participants may require jurors to sit behind the defendant, rather in a normal position—to the side in the jury box. This configuration can disadvantage the accused, who may need to whisper to his counsel or pass a note. Jurors who sit behind a defendant can more easily see the defendant at all times, even as they listen to, and observe, witnesses. Typically, the jurors must choose: turn your head one way and observe the judge and witness or turn the other to look at the accused. But from behind, the defendant is always in view. In addition, when jurors sit behind, the accused cannot watch for cues from jurors as witnesses testify. Does the jury believe the witness? Does the jury like the witness? What indications are the jurors conveying with their expressions? Neither the defendant nor her counsel will have any chance to catch an eye roll or a raised eyebrow.

D. Courts Should Take All Other Reasonable Precautions

In addition to providing high-quality, protective masks and ensuring plenty of space for every juror, courts must take all of the other, usual precautions that employers, hospitals, and other responsible establishments are taking, plus a few more.

1. Health Checks

Temperature and health checks are a must. Some courts, like many hospitals, universities, and employers, have implemented health checks before anyone can enter the

113. *Id.* (citing Christian Althaus, University of Bern).

114. *Id.*

115. See NACDL Report, *supra* note 91, at 3.

courthouse.¹¹⁶ Most of these health checks require a temperature self-check and ask about various COVID-19 symptoms, such as fever and chills, shortness of breath or difficulty breathing, fatigue, muscle and body aches, and loss of taste or smell, among others.¹¹⁷ At least some courts have hired a nurse to conduct the health evaluations.¹¹⁸ In either instance, these health checks are no guarantee because many people with the virus are asymptomatic, yet contagious.¹¹⁹ In addition, these health checks depend on prospective jurors, court personnel, and lawyers responding with complete candor.

To reduce the time it takes to conduct voir dire, thereby reducing the time jurors spend indoors exposed to others, and to determine jurors' level of concern about the virus, courts should insist on pre-trial, written questionnaires to jurors.¹²⁰ The federal COVID-19 Judicial Task Force recommends such questionnaires and that jurors be required to attest to their answers under penalty of a perjury prosecution.¹²¹ In Champaign County, Ohio, jurors are mailed a questionnaire explaining the usual reasons to be excused from duty, as well as

116. See, e.g., SELVAGGIO, *supra* note 61, at 2 (identifying the following symptoms for self-monitoring upon entry: “[f]ever greater than 100.4 degrees”; “[p]ersistent, dry cough”; “[s]hortness of breath or difficulty breathing”; “[c]hills, [m]uscle pain or [s]ore [t]hroat”; “[n]ew loss of taste or smell”; “[n]ausea, vomiting or diarrhea”).

117. *Symptoms of Coronavirus*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/FB2W-WJYD> (last updated May 13, 2020).

118. See Alanna Durkin Richer, *Courts Get Creative to Restart Jury Trials Amid Pandemic*, AP NEWS (July 15, 2020), <https://perma.cc/24P4-Z8D4> (noting that a federal court in Charlotte, North Carolina, hired a nurse to take people's temperatures and assess health, maintaining the power “to turn anyone away”).

119. Nancy Schimelpfening, *Even Asymptomatic People Can Spread COVID-19 Within a Room*, HEALTHLINE (July 8, 2020), <https://perma.cc/P7GD-YUAG>. “[U]p to half of people who contract the virus may be asymptomatic carriers of the disease.” *Id.* (quoting Brian Labus, PhD, MPH, professor at the University of Nevada, Las Vegas).

120. Because of the extra time it takes to wipe witness areas, microphones, and other areas with bleach products, trials will take longer, putting the participants at even greater risk for aerosol exposure.

121. See COVID-19 JUD. TASK FORCE, JURY SUBGROUP, CONDUCTING JURY TRIALS AND CONVENING GRAND JURIES DURING THE PANDEMIC 3 (2020), <https://perma.cc/U8GG-WW5S> (PDF) (“Courts should consider an attestation clause for jury questionnaires making them subject to the penalties of perjury.”).

an “opportunity to express a ‘COVID-19’ reason for being excused from jury service.”¹²² Unlike many other jurisdictions, in Champaign jurors are expressly informed that if “they are either in a high-risk category for contracting the virus or feel[] scared about contracting the virus during their jury service,” they will be excused.¹²³

Normally, jurors are not directly threatened with a perjury prosecution during voir dire, so the request for special attestation suggested by the federal task force seems especially heavy handed, particularly given the risks to jurors during the pandemic. But, providing jurors with written questions in advance is prudent, given the need to limit the time during which jurors and other trial participants are exposed to one another. Certainly in a time when questions about COVID-19 could significantly lengthen voir dire, asking pre-trial questions about COVID sensitivities and related health questions is advisable. Not only will this written questioning save time, but it also protects sensitive health information from being discussed in open court. The pretrial, private questioning may also yield more accurate and complete answers from each juror.

2. Clear Guidance

Whether or not questions are asked before the public voir dire or only in the courtroom once the jury pool is gathered, every court should adopt and post—on its webpage, on all doors to the courthouse, and include in email and mail communications to prospective jurors—clear written guidance. The guidance should specify all of the precautions the trial court is taking, including what protective materials the court will supply. Notice should detail where jurors must enter the courthouse and how the entire process will proceed. As part of this guidance, if there are COVID-19 or other grounds on which jurors will be excused from duty, those should be specified. Jurors believing that they meet the criteria should be urged to call or email a court employee, rather than appear in person on

122. SELVAGGIO, *supra* note 61, at 1.

123. *Id.*

the date designated. The court in Champaign, Ohio, created the type of guidance that other courts should adopt.¹²⁴

3. Liberal Policies of Excusing Jurors

Because of the increased risk of hospitalization and death, trial courts should adopt a liberal policy of excusing prospective jurors. Some judges are asking jurors if they would experience “hardship” from serving “because they’ll have risk factors that make them appropriate not to be coming into the court”¹²⁵ The NACDL recommends that all jurors and court personnel who face high risk of infection be excused from participating in “in-person court proceedings.”¹²⁶ This is the only reasonable position a court can take. The CDC provides that older individuals¹²⁷ and those of any age with certain pre-existing conditions¹²⁸ are at higher risk to contract and die from the virus. Moreover, many people of color are suffering worse outcomes from the virus. Black, Hispanic, and Latino Americans are experiencing higher rates of hospitalization and death from COVID-19 than White persons.¹²⁹ Given the risks

124. *Id.*

125. See Bultman & Allsup, *supra* note 60 (quoting U.S. District Judge Beth Labson Freeman).

126. See NACDL Report, *supra* note 91, at 4

Persons deemed high risk for severe illness from COVID-19 should not be required to participate in in-person court proceedings. . . . This group . . . includes persons who live with or have primary caretaker duties to at-risk individuals. No person excluded from participation for the foregoing reasons shall suffer any penalty or loss of rights.

127. “[T]he risk for severe illness from COVID-19 increases with age, with older adults at highest risk.” See *Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/V5XN-75CS> (last updated Aug. 16, 2020).

128. At-risk individuals include those with cancer, chronic kidney disease, serious heart conditions, obesity, and sickle cell disease. See *People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/K5KT-6YLY> (last updated Aug. 14, 2020).

129. See generally Godoy & Wood, *supra* note 76. See also Judith Graham, *Why Coronavirus Is Hitting Black Seniors Especially Hard*, TAMPA BAY TIMES (Sept. 3, 2020), <https://perma.cc/ULT7-47L3> (last updated Sept. 3, 2020) (reporting that an analysis of data from the CDC shows that Black Americans ages 65–74 died of COVID-19 five times as often as Whites).

and these citizens' concerns, it is unconscionable that our justice system would mandate that any juror, especially jurors at high risk, expose themselves to the likelihood of contracting the virus, except in the most exceptional circumstances.

A liberal policy of excusing at-risk jurors is not without drawbacks, nevertheless. Excluding significant numbers of older jurors and others at higher risk of hospitalization may impede the defendant's Sixth Amendment right to a jury pool from a fair cross-section of the community.¹³⁰ In *Taylor v. Louisiana*,¹³¹ the Court made clear that "selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."¹³² A court that systematically excludes jurors over a specified age or excludes more people of color probably violates the cross-section mandate.¹³³ To avoid this concern, courts should let individual jurors decide whether to apply for an exemption from service. Even then, if few older individuals and disproportionately fewer people of color decide to serve, the Constitution may be violated, resulting in reversals on appeal years after the fact. Provided trial courts take juror health and safety seriously, implement all of the recommended precautions, and communicate these actions to potential jurors, courts may well quell (or at least reduce) juror fears and, correspondingly, encourage greater participation, yielding a more representative jury pool.

4. Trials Reserved for Serious Offenses

Because jury trials are now risky for all involved, until there is a vaccine for COVID-19, criminal jury trials should be reserved for those charged with the most serious offenses who

130. See *Duren v. Missouri*, 439 U.S. 357, 360, 364 (1979) (determining that where less than fifteen percent of juries are women on average, there is a violation of the constitutional requirement of a fair cross-section on a jury); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) ("We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation.")

131. 419 U.S. 522 (1975).

132. *Id.* at 528.

133. See *supra* note 130 and accompanying text.

are detained pending trial. Courts should also take every reasonable step to encourage resolution of cases without a trial,¹³⁴ to include using non-binding “Zoom trials”¹³⁵ to help the parties negotiate plea deals and dismissals.

As an initial matter, only serious charges should be tried during the pandemic. If we are going to put the health of citizens at risk for the sake of operating the criminal justice system, we should only do so if the accused presents a serious and imminent risk of danger to the public.¹³⁶ In all other cases, non-binding “Zoom trials” could be used to determine whether a verdict of guilty is likely and to gauge what the public thinks about the strengths and weaknesses of the government’s case. In the weakest cases, prosecutors could then consider a dismissal of the charges. In the strongest cases, defendants would be prompted to negotiate a plea. Cases falling outside of these two categories could be postponed in non-serious cases and heard in the event of a potentially dangerous or incarcerated accused.

V. Conclusion

The right to a jury trial in a criminal case is “fundamental to our system of justice . . .”¹³⁷ “Those who wrote our constitutions knew from history and experience that [the jury] was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.”¹³⁸ If criminal convictions are going to retain credibility, then jurors must be protected from COVID-19 during the pandemic. Without such protections, verdicts will be suspect, mistrials will prevail, and citizens most vulnerable to the virus may refuse to participate or worse—contract the virus during jury service. For these

134. See Satterfield, *First Masked Trial*, *supra* note 34 (reporting the trial judge’s desire to resume trials because of all of the cases delayed by the COVID-19 shutdown).

135. See, e.g., Justin Jouvenal, *Justice by Zoom: Frozen Video, a Cat—and Finally a Verdict*, WASH. POST (Aug. 12, 2020, 11:03 AM), <https://perma.cc/PKS9-SFSS> (providing an example of a Zoom trial in Texas).

136. See, e.g., Satterfield, *COVID-19 Threat*, *supra* note 7 (proceeding with a “low-level felony drunken driving charge” of a man out on bond).

137. *Duncan v. Louisiana*, 391 U.S. 145, 153 (1968).

138. *Id.* at 156.

reasons, only the most serious felony cases involving dangerous defendants who are detained pretrial and refuse to waive speedy trial deadlines should be tried during this pandemic. All trial participants should remain masked. Jurors, who are essential justice workers, should be provided with high-quality, medical-grade masks at no expense. Whenever possible, trials should be held in large facilities, and courts should implement policies allowing jurors significant control over whether they serve and when. Jurors deserve this protection. There is no justice without jurors.

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