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### **Pandemic, Protest, and Agency: Jury Service and Equal Protection in a Future Defined by COVID-19**

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# PANDEMIC, PROTEST, AND AGENCY: Jury Service and Equal Protection in a Future Defined by COVID-19

Patrick C. Brayer\*

“And as a right that was exercised for the benefit of the community (like voting and jury service), rather than for the benefit of the individual (like free speech or free exercise), it belonged only to virtuous citizens.”

—Amy Coney Barrett, (then) Circuit Judge, U.S. Court of Appeals<sup>1</sup>

## Abstract

This Essay calls for an expansive view of Fourteenth Amendment equal protection against the discriminatory empanelment of juries grounded upon a culture of systemic racism. For an individual—or potential juror—fundamental elements of survival during a pandemic are access to health care, safe transportation, and connective technology. Yet, structural and systemic racism precludes many potential jurors of color from securing these necessary supports, thus denying them the ability to be recognized on juror source list or accommodated for jury service. Jury service is a direct and impactful act of citizen agency over the justice system, and the systemic exclusion of individuals from jury service based on race and economic status is a denial of that agency and a constitutional violation. Supreme Court rulings like *Duren v. Missouri* are inadequate to provide relief in the face of such violations and only provide outdated and ineffectual remedies to this mass denial of equity.

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\* Patrick C. Brayer retired in 2021 from the St. Louis County Trial Office, where he served as the Deputy District Defender and was a veteran of the trial division. This Essay represents his personal opinions and beliefs and is a private project completed on his own time, utilizing his personal resources. Special thanks and recognition to Tamar Hoffman for her insights and observations and her contribution to this 2020 Advocacy Initiative. Special thanks to social justice advocate Christine Dragonette for her suggestions and information and for all her good work on behalf of the underserved communities of the St. Louis area.

1. *Kanter v. Barr*, 919 F.3d 437, 462–63 (7th Cir. 2019) (Barrett, J., dissenting).

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**Introduction**

In the shadow of the COVID-19 crisis, our legal system is facing a historic challenge; how that challenge is met will forever define how we administer justice and provide due process and equal protection. When faced with crisis, disruption, and change, our system of laws and procedural guarantees should adapt and become more accommodating to the realities of a worldwide pandemic. Unfortunately, as judges and lawyers move to reopen a system of juries and jury trials, courts are likely to ignore how people experiencing poverty (especially Black, Indigenous, and people of color) will participate in new and creative models designed around health and safety. Regrettably, the originalist views of a newly seated Justice Barrett,<sup>2</sup> as stated above, are evidence of a U.S. Supreme Court primed to abandon greater protections for potential jurors who are victims of structural racial exclusion. This potential neglect can only be diminished if our highest courts embrace an expansive view of Fourteenth Amendment equal protection against the discriminatory seating of both criminal and civil juries grounded upon a culture of systemic racism.

A blind spot, opaque to poverty and race, exists in the legal profession that tepidly attempts to assemble juries representative of a fair cross-section of the community.<sup>3</sup> Communities traditionally unrecognized through the lens of systemic racism will continue to be ignored as courts implement pandemic and post-pandemic procedures for trials, jury selection, and jury deliberations. The circumstances of people in poverty, who are disproportionately Black and Brown, must be accounted for in any new COVID-19-influenced jury participation arrangement. Echoing the movement that took to the streets in the wake of the tragic murder of George Floyd, the justice system must include the voices of people of color who have been systemically excluded from legal processes. For

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2. *Id.*

3. Thomas R. Neumeier, *A Burden Too Heavy: Berghuis v. Smith and the Fading Right to a Jury from a Fair Cross-Section of the Community*, 31 B.C. THIRD WORLD L.J. E. SUPP. 69, 83 (2011).

an individual—or potential juror—some fundamental elements of survival during a pandemic are access to health care, safe transportation, and connective technology. Yet, structural and systemic racism precludes many potential jurors of color from securing these necessary supports, thus denying them the ability to be recognized on juror source lists or accommodated for jury service.

A legal mechanism that can be employed to respond to movements for racial justice is a more equitable reading of the Fourteenth Amendment. Systemic racism and discriminatory application of “color-blind” laws violate equal protection and deny agency for Black, Indigenous, and people of color. This pervasive truth tarnishes juries, a cornerstone of the U.S. justice system. Jury service is a direct and impactful act of citizen agency over the justice system. The systematic exclusion of individuals from jury service based on race and economic status is a denial of that agency and a grave violation of constitutional rights. Supreme Court rulings like *Duren v. Missouri*<sup>4</sup> are inadequate to provide relief in the face of such violations and provide outdated and ineffectual remedies to this mass denial of agency and inclusion in the justice system.

I reflect on our nation’s Black, Indigenous, and residents of color and their right to be recognized and accommodated for jury service—especially in this time of pandemic and structural inequality—by realizing equal protections under the Fourteenth Amendment. The voices of the Black Lives Matter movement after the killing of George Floyd, along with particular rulings of the U.S. Supreme Court from the 1940s (another decade of great national challenge) have informed a more expansive legal model of equal protection and agency for the victims of systemic racism. For originalists like Justice Barrett, the 1940s Supreme Court’s expansive interpretation of the Equal Protection Clause is more instructive since those judicial beliefs were formed in the direct aftermath of Fourteenth Amendment ratification. This Essay posits that systemic racism results in the discriminatory application of jury laws, for both criminal and civil trials, in violation of the Equal Protection Clause, which denies agency in our justice system for Black, Indigenous, and people of color and people who live in poverty.

To understand this issue, this Essay explores equal protection and jury service through the lens of real people fighting to overcome the systemic barriers of racism. Understanding the impact of systemic racism is a requirement to meaningfully critique *Duren*, as I do in the last Parts of this Essay.

## **I. The Elements That Create Vulnerable Communities**

In the early days of the pandemic, the U.S. Surgeon General, commenting on the impact of the disease, stated: “[w]e do not think people of color are biologically or genetically predisposed to get COVID-19 . . . but

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4. *Duren v. Missouri*, 439 U.S. 357 (1979).

they are socially predisposed to coronavirus exposure and have a higher incidence of the very diseases that put you at risk for severe complications of coronavirus.”<sup>5</sup> From my experience of advocating for clients of color, I have learned that this social predisposition is more akin to a social imposition, and that systemic factors have created this problem. One commenter responded to the General’s comments by observing “[i]n New York City, the epicenter of the coronavirus, Black and Latino people are dying at twice the rate as white people, likely due to factors such as air pollution and density of cities, jobs that don’t allow teleworking, pre-existing medical conditions that also illustrate racial disparities and denial of tests because of inherent biases.”<sup>6</sup>

The high population density of cities made me reflect on my clients and jurors in poverty who must depend on crowded public transportation systems and multiple bus transfers to arrive at a distant courthouse. Jobs that do not allow teleworking call attention to the unaccommodating nature of all low-wage jobs as people in poverty struggle every day with balancing childcare and the minimal wage that feeds those same children. I understood the problem of preexisting conditions as affordable preventative medical care is geographically removed from many of my clients, just as other government services are similarly scarce in many lower-income communities of color. And the inherent biases experienced in testing are not foreign to Black jurors who are struck from mostly white juries sitting in judgment of Black clients.<sup>7</sup> The elements that support survival in a time of pandemic are some of the same elements that equally protect an individual’s inclusion and recognition for jury service. In the following Subparts, I discuss the systemic barriers to the elements of health care, transportation, and technology, and how these elements are not equally available to all.

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5. Matt Perez, *Surgeon General Tells People of Color to Avoid Alcohol, Drugs to Protect Against Coronavirus; Defends ‘Big Mama’ Comments*, FORBES (Apr. 10, 2020, 7:02 PM), <https://www.forbes.com/sites/mattperez/2020/04/10/surgeon-general-tells-people-of-color-to-avoid-alcohol-drugs-to-protect-against-coronavirus-defends-big-mama-comments/#2b045c7c74f9> [https://perma.cc/779K-Q886]; see also Juana Summers, *U.S. Surgeon General: People of Color ‘Socially Predisposed’ to Coronavirus Exposure*, NPR (Apr. 10, 2020, 3:24 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/10/832026070/u-s-surgeon-general-people-of-color-socially-predisposed-to-coronavirus-exposure> [https://perma.cc/82KJ-MUB8].
  6. Perez, *supra* note 5; see also Linda Villarosa, *‘A Terrible Price’: The Deadly Racial Disparities of Covid-19 in America*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/04/29/magazine/racial-disparities-covid-19.amp.html> [https://perma.cc/LTP6-RTYH].
  7. See generally Patrick C. Brayer, *Foster v. Chatman and the Failings of Batson*, 102 IOWA L. REV. ONLINE 53 (2016).

### A. *The Element of Medical Access and Health Care*

The disparate impact of COVID-19's devastating effects on marginalized, underserved, Black and Brown communities is undeniable.<sup>8</sup> Low-income Black communities have experienced much higher rates of COVID-19 infections than white, affluent communities in the same cities.<sup>9</sup> The racial injustices in infection rates is evident in cities like St. Louis, Chicago, Detroit, and New York.<sup>10</sup>

"African Americans are at greater risk because they are more likely to be low income" and "least likely to have the resources to fight" the virus's impact.<sup>11</sup> Many individuals of color have a dearth of resources because disinvestment and segregation have systemically robbed them of the essentials for survival and advancement.<sup>12</sup> I believe that the systemic bias that decreases the number of Black, Indigenous, and people of color and people in poverty on juries is indistinguishable from the institutional prejudice that fueled the disparate impact of COVID-19. A doctor working in a predominantly Black community commented, "[b]ecause we live in such a highly segregated city, which has scars in it carved by the knife that is structural racism . . . it's not surprising that there is such a dramatic difference in the incidence of the disease and then the death by the disease."<sup>13</sup> Disparate early vaccine rollouts that disadvantaged Black and Brown communities were further evidence of how medical infrastructure benefited predominantly white communities who had greater access to transportation and digital technology.<sup>14</sup>

To conceptualize this national tragedy, I am informed by Black and Brown residents how COVID-19 has impacted their potential to be recognized and to participate as jurors. Because Black, Indigenous, and people of color possess an enhanced risk to the devastation of COVID-19,

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8. See Michal Grinstein-Weiss & Brinda Gupta, *We Don't Need a Map to Tell Us Who COVID-19 Hits the Hardest in St. Louis*, BROOKINGS INST. (Apr. 6, 2020), [https://www.brookings.edu/blog/up-front/2020/04/06/we-dont-need-a-map-to-tell-us-who-covid-19-hits-the-hardest-in-st-louis/?preview\\_id=797968](https://www.brookings.edu/blog/up-front/2020/04/06/we-dont-need-a-map-to-tell-us-who-covid-19-hits-the-hardest-in-st-louis/?preview_id=797968) [<https://perma.cc/2YBK-XRPC>].
  9. Ashley Cole, *'It's About Social Inequities': Data Shows African Americans are More Impacted by COVID-19 in the St. Louis Area*, KSDK (Apr. 9, 2020, 2:10 PM), <https://www.ksdk.com/article/news/health/coronavirus/st-louis-city-racial-data-covid-19-cases/63-f6a56b31-b744-4429-948b-d49cf50c3f57> [<https://perma.cc/L32V-64DX>].
  10. *See id.*
  11. Grinstein-Weiss & Gupta, *supra* note 8.
  12. *See id.*
  13. Emily Woodbury, *Tracking COVID-19 Cases By ZIP Code Highlights Inequity In St. Louis Region*, ST. LOUIS PUB. RADIO (Apr. 14, 2020, 5:05 PM), <https://news.stlpublicradio.org/post/tracking-covid-19-cases-zip-code-highlights-inequity-st-louis-region#stream/0> [<https://perma.cc/688X-TJTK>] (quoting Dr. Laurie Punch).
  14. Hannah Recht & Lauren Weber, *Black Americans Are Getting COVID Vaccines at Lower Rates than White Americans*, SCI. AM. (Jan. 20, 2021), <https://www.scientificamerican.com/article/black-americans-are-getting-covid-vaccines-at-lower-rates-than-white-americans> [<https://perma.cc/P8EA-TBXX>].

their unique and serious circumstances when called to jury service must be acknowledged, accommodated, and respected. Furthermore, their potential to serve must not be overlooked because structural racism (exacerbated by the pandemic) has made it too difficult and dangerous to be included on a juror source list.<sup>15</sup> In the face of COVID-19, keeping vulnerable jurors healthy and included is an essential element that supports agency in the justice system and constitutional equal protection. This element crumbles if courts opt for juror exclusion over juror accommodation or rely on noninclusive juror source list methodology.

### **B. *The Element of Transportation***

The COVID-19 crisis required individuals to become more reflective about the simple interactions they experience throughout their day. Such thinking was and is dominated by how to keep distance from friends, avoid contact with people passed in the store, and reduce surfaces touched throughout the day. When it comes to reimagining a safe yet inclusive jury participation model, the courts must equally reflect on the interactions people in poverty experience as they travel from home to courthouse. Will a low-income or no-income individual be required to take public transportation to satisfy a jury summons? When they do, who will they pass on the street on the way to and from the bus stop? Who will they interact with on a bus and will that bus be crowded? How many crowded trains or buses and transfers will be required on their roundtrip journey? How many face masks or containers of hand sanitizer must be purchased to safely facilitate a trip to jury duty? Comparatively, individuals with adequate income are more likely to travel from home to courthouse roundtrip and in a personal automobile with no masks required for the trip.

Residents of one predominantly Black Midwest community typically earn less than their counterparts in the rest of the region,<sup>16</sup> and “25 percent of MetroBus [regional] ridership originates in [that community]”<sup>17</sup> Because of the many residents living in poverty, “[t]here are many areas where 15 percent to 45 percent of the households do not have access to a vehicle, with a few areas showing a staggering 70 percent of households without a vehicle.”<sup>18</sup> In the early days of the pandemic, these same residents were warned, “[d]ue to fewer workforce resources, it is necessary to reduce the frequency of MetroBus services, and riders are encouraged to plan ahead for delays and allow more time for their

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15. See *infra* note 39 and accompanying text.

16. JOHN L. WAGNER, FEASIBILITY STUDY FOR THE IMPLEMENTATION OF ON-SITE MEDICAL SERVICES AT METROLINK STATIONS 6 (2017).

17. *Id.* at 3.

18. *Id.* at 7.

commutes”<sup>19</sup> and to “only ride when absolutely necessary.”<sup>20</sup> This reality of life in poverty has always posed an obstacle to litigants dependent on an inclusive and representative jury.<sup>21</sup> Past rulings held that trial courts “did not err in excusing women with small children at home who claimed that jury duty would create a hardship” and appellate judges have cited arguments that no authority from the U.S. Supreme Court finds “exclusion based on poverty provides a basis for finding an Equal Protection violation.”<sup>22</sup>

In the COVID-19 moment and beyond, jurors in poverty face serious health implications as they attempt to comply with a jury summons. One tragic example lies in the initial number of transit workers diagnosed with COVID-19 and the resulting loss of life.<sup>23</sup> “Because of service cuts, fewer vehicles and longer headways” have resulted in “packed conditions on some trains and buses.”<sup>24</sup>

Will our nation’s courts consider this threat to the health of a distinct community and expend resources for safe juror travel, or will other less constitutional means be employed, reminiscent of past decisions? As one court stated, “A rich man can choose to drive a limousine; a poor man may have to walk. The poor man’s lack of choice in his mode of travel may be unfortunate, but it is not unconstitutional.”<sup>25</sup> Will it be easier for courts to unconditionally force attendance or just routinely grant low-income people of color exemptions or ignore nonattendance? Agency through equal protection exists only when courts provide safe and healthy transportation to and from jury service for all residents, both now and when the virus abates.

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19. *MetroBus Riders Encouraged to Plan Ahead for Delays*, ST LOUIS METRO TRANSIT NEXT STOP BLOG, (Mar. 26, 2020), <https://www.metrostlouis.org/nextstop/covid-19-update-metrobus-riders-encouraged-to-plan-ahead-for-delays> [<https://perma.cc/HV8A-JE3K>].
  20. Jasmine Payout, *Metro Transit Bus Driver Dies from COVID-19, Bi-State Says Drivers Are Essential Employees*, KSDK TV ST. LOUIS (Apr. 8, 2020, 5:01 PM), <https://www.wqad.com/article/news/health/coronavirus/metro-transit-bus-driver-dies-covid-19-bi-state-drivers-essential-employees/63-66a197ae-4aaf-40c9-82ec-b21ac1078093> [<https://perma.cc/75UF-LTZX>].
  21. *See* State v. Eighinger, 931 S.W.2d 835, 842 (Mo. Ct. App. 1996).
  22. *Id.* at 843, 842 n.2; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 122–23 (1973) (Marshall, J., dissenting) (footnote omitted) (“Nevertheless, insofar as group wealth discrimination involves wealth over which the disadvantaged individual has no significant control, it represents in fact a more serious basis of discrimination than does personal wealth. For such discrimination is no reflection of the individual’s characteristics or his abilities.”); *id.* at 24 (“[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”).
  23. Laura Bliss, *Hit Hard by Covid-19, Transit Workers Call for Shutdowns*, BLOOMBERG CITY LAB (Apr. 13, 2020, 2:33 PM), <https://www.bloomberg.com/news/articles/2020-04-13/as-transit-workers-get-sick-unions-mull-shutdowns> [<https://perma.cc/R33Z-UN2G>].
  24. *Id.*
  25. *Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir. 1972).



### C. *The Element of Digital Connection*

As judges and court administrators considered digital solutions to the dilemma of safe jury participation in the era of COVID-19, experts reflected if jury selection and deliberations can be conducted remotely and from the safety of a juror's home.<sup>26</sup> "With courts suspending trials because of the virus, some legal experts say a virtual criminal jury trial is a near certainty."<sup>27</sup> On training how to manage juries and jury trials during COVID-19, the National Center for State Courts (NCSC) initially indicated that jurisdictions are not quite ready for cyber juries, but the Center's jury experts also communicated the forewarning: "YET."<sup>28</sup> By May of 2020, Texas had conducted the first jury trial by Zoom and supreme courts in Indiana and Arizona had cleared the way for jurors to appear remotely in some proceedings.<sup>29</sup> Soon after, the NCSC published guidance on how to conduct remote proceedings for any stage of a civil or criminal jury trial.<sup>30</sup>

Many lawyers and judges have taken issue with the logistical and legal complexities present with such a jury participation model.<sup>31</sup> Even more concerning is the digital divide between the have and have-nots of connection.<sup>32</sup> Will courts consider the number of households in poverty (and people of color) lacking computers, smart phones, or internet connection before convening a remote proceeding, or will judges explicitly or implicitly construct barriers to the participation of individuals with limited access to technology? When I contemplate a remote participation model for (more likely civil) jury trials, I fear judges will conveniently ignore communities impacted by poverty.

Communities of color experience significant disparities in access to digital connection. Nationally, "[w]hite residents (82 percent) are more likely to have broadband in their homes than Black (70 percent), Hispanic (74 percent), or American Indian (65 percent) residents," and living in

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26. Matt Reynolds, *Could Zoom Jury Trials Become the Norm During the Coronavirus Pandemic?*, ABA J. WEB FIRST (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/EBJ9-UFHA>].

27. *Id.*

28. NAT'L CTR. FOR STATE CTS., *MANAGING JURIES AND JURY TRIALS DURING COVID-19* 1, 18 (2020).

29. Nate Raymond, *Texas Tries a Pandemic First: A Jury Trial by Zoom*, REUTERS (May 18, 2020, 7:19 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/VH2A-KK2B>].

30. NAT'L CTR. FOR STATE CTS., *TECHNOLOGY OPTIONS FOR JURY TRIALS AND GRAND JURY PROCEEDINGS* 1-17 (2020).

31. Reynolds, *supra* note 26.

32. Douglas Broom, *Coronavirus Has Exposed the Digital Divide Like Never Before*, WORLD ECON. FORUM (Apr. 22, 2020), <https://www.weforum.org/agenda/2020/04/coronavirus-covid-19-pandemic-digital-divide-internet-data-broadband-mobbile> [<https://perma.cc/FVC6-EJZP>].

a rural community can increase this chasm.<sup>33</sup> “A large part of this is likely due to wide socio-economic divides that exist between these groups,” and “[t]hese disparities can exacerbate income, educational, and health gaps that we already see between Americans.”<sup>34</sup>

When it comes to the digital divide, will the courts be willing to spend scarce resources in order to provide technological access for lower income jurors? The NCSC warned that, because of the disproportionate impact of COVID-19 on racial and ethnic minorities, courts should provide remote access options for jurors with limited technological resources.<sup>35</sup> I fear the true cost of a jury representing a fair cross-section of the community will not be a priority in the face of growing trial dockets and dwindling tax revenue. Courts have rationalized when low-income individuals found it financially difficult to serve on a jury: “Not to provide childcare is a rational decision, facially neutral with regard to race and gender. As there is no intention to discriminate, the disproportionate impact on minorities and women is not sufficient to violate the equal protection clause” and “government as a whole, including the judiciary, faces severe constraints on resources.”<sup>36</sup> This judicial tradition of denying equal protection status to residents in poverty is likely to continue post-COVID-19 as judges implement cost-effective, technologically-forward schemes for juror participation.

## II. The Three Elements

Three of many elements needed to sustain a healthy community amid a worldwide pandemic are indistinguishable from the three priorities that must be addressed by courts when assembling a jury from a fair cross-section of the community. These three components that must exist in a population if a representative jury is to be summoned in a current and post-COVID-19 environment are access to community resources, safe transportation, and access to technology.

With poverty comes transiency and the unfortunate reality of mobility, as low- or no-income individuals change addresses “to find employment, to join family or friends, to escape high crime rates or their own domestic abuse, and to provide their children with better schools and better housing.”<sup>37</sup> As people experiencing poverty transition in the current and post-COVID-19 world, their fight to remain healthy and recognized by the courts becomes more difficult. Pre-pandemic juror participation studies found “undeliverable, disqualification, excusal and failure-to-appear rates tend to disproportionately decrease minority representation

33. U.S. CONG. JOINT ECON. COMM., AMERICA’S DIGITAL DIVIDE 4 (2017), [https://www.jec.senate.gov/public/\\_cache/files/ff7b3d0b-bc00-4498-9f9d-3e56ef95088f/the-digital-divide-.pdf](https://www.jec.senate.gov/public/_cache/files/ff7b3d0b-bc00-4498-9f9d-3e56ef95088f/the-digital-divide-.pdf) [<https://perma.cc/5594-TMTF>].

34. *Id.*

35. NAT’L CTR. FOR STATE CTS., *supra* note 30.

36. *State v. Whitfield*, 837 S.W.2d 503, 510 (Mo. 1992).

37. Len Biernat, *Limiting Mobility and Improving Student Achievement*, 23 *HAMLINE L. REV.* 1, 4 (1999).

due to socio-economic factors such as mobility rates . . . and financial hardship for lower-income individuals.”<sup>38</sup> The elements that support individual survival in the era of COVID-19 are the same elements that inform judicial recognition. Unfortunately, these elements have become even more fragile and tenuous just as our need for representative juries becomes more essential.

Low-income, predominantly Black and Brown communities face significant challenges in obtaining resources, finding safe transportation to these resources, and accessing technology in homes; but without these tools, residents are less likely to be recognized for jury duty. Many state and federal courts obtain juror names and contact information from driver’s license and state identification (ID) lists and from voter registration rolls.<sup>39</sup> Comparatively, only a few states utilize “income tax rolls, unemployment compensation, and public welfare lists.”<sup>40</sup> If a potential juror is required to relocate because they or a member of their household are one of the millions of Americans who lost their job because of COVID-19,<sup>41</sup> they must register their address change for the summons to be delivered.<sup>42</sup> While facially practical and fair, this requirement can be overwhelming upon viewing this condition to jury service through the lens of poverty, racial inequity, and the pandemic. Being in poverty or being Black increases the probability of mobility and “being more mobile increases the likelihood that an individual will not receive a summons to serve on a jury or that the address the State has on record is no longer current.”<sup>43</sup>

It has been found that “[f]ailure-to-appear rates and excusal rates are likewise highly correlated with socio-economic status” but “have historically been considered forms on nonsystematic exclusion” by courts that cite their inability to make low-income jurors register their new address.<sup>44</sup> Does systemic racism equate to systematic exclusion in a COVID-19 world when the act of updating an official address is more

38. Elizabeth Neely, *Addressing Nonsystematic Factors Contributing to the Underrepresentation of Minorities as Juror*, 47 CT. REV. 96, 98 (2011).

39. See MO. REV. STAT. § 494.410 (2016); *Common Questions*, MO. CTS., <https://www.courts.mo.gov/page.jsp?id=996> [<https://perma.cc/P44T-KPXY>]; *Jury Frequently Asked Questions*, U.S. DIST. CT. FOR E. DIST. MO., <https://www.moed.uscourts.gov/faqs/jury> [<https://perma.cc/ND3J-VQDU>]; Paula Hannaford-Agor, *A New Take on How Jury Service Is Akin to Voting*, NAT’L CTR. FOR STATE CTS. JURY NEWS (Nov. 2017), [http://www.ncsc-jurystudies.org/\\_data/assets/pdf\\_file/0007/6100/jury-news-nov-2017.pdf](http://www.ncsc-jurystudies.org/_data/assets/pdf_file/0007/6100/jury-news-nov-2017.pdf) [<https://perma.cc/W7R6-QJYR>].

40. Hannaford-Agor, *supra* note 39.

41. Jack Kelly, *Nearly 50 Million Americans Have Filed For Unemployment—Here’s What’s Really Happening*, FORBES (July 9, 2020, 12:35 PM), <https://www.forbes.com/sites/jackkelly/2020/07/09/nearly-50-million-americans-have-filed-for-unemployment-heres-whats-really-happening/#70687db027d3> [<https://perma.cc/ZZX9-APJD>].

42. Neumeier, *supra* note 3, at 80.

43. *Id.*

44. NAT’L CTR. FOR STATE CTS., *JURY MANAGERS’ TOOLBOX: A PRIMER ON FAIR CROSS SECTION JURISPRUDENCE 5* (2010).

dangerous for Black and low-income residents? In 2006, researchers found “that ten percent of voting-age citizens who have current photo ID do not have photo ID with both their current address and their current legal name,” and that people in poverty, the elderly, and minority populations are less likely to possess these needed documents.<sup>45</sup> Since 2006, “federal requirements for IDs have grown tougher, contributing to a loop that can help keep people trapped in poverty.”<sup>46</sup>

Advocates for individuals in poverty have confronted many obstacles in attempting to obtain or renew state IDs for residents who lack financial resources.<sup>47</sup> Fees, fees required to obtain necessary supporting documentation, and bureaucratic barriers are all factors in discouraging people in poverty from obtaining state identification<sup>48</sup> and thus from being considered for jury service on a source list. In addition to these traditional barriers in the United States, a survey found that “[t]wenty-five percent of African-American voting-age citizens have no current government-issued photo ID, compared to eight percent of white voting-age citizens.”<sup>49</sup> Ironically, the reason many states added state non-driver IDs to the source list initially was due to the relative ease and low cost of obtaining such an ID, which was intended to increase the participation of nonwhite jurors.<sup>50</sup>

When considering the inclusiveness of a juror source list derived from voters, the “[a]cceptable forms of ID to register” are often associated with an application fee, duplication fee, a possible trip to a government office, or a degree of monetary status like a job or government benefit.<sup>51</sup> Common sense dictates an individual who loses their job or apartment (in the era of COVID-19 and beyond) will not always have a bank statement, utility bill, paycheck, government check, government document, or current state ID with a current address that some states require.<sup>52</sup> “These

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45. BRENNAN CTR. FOR JUST., *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION* 3 (2006).

46. Patrick Marion Bradley, *The Invisibles: The Cruel Catch-22 of Being Poor with No ID*, WASH. POST (June 15, 2016), [https://www.washingtonpost.com/lifestyle/magazine/what-happens-to-people-who-cant-prove-who-they-are/2017/06/14/fc0aaca2-4215-11e7-adba-394ee67a7582\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/what-happens-to-people-who-cant-prove-who-they-are/2017/06/14/fc0aaca2-4215-11e7-adba-394ee67a7582_story.html) [https://perma.cc/YM6W-6YML].

47. Email from Christine Dragonette, Dir. of Soc. Ministry St. Francis Xavier Coll. Church, to author (May 22, 2020) (on file with author) (“Through my experience in our program over the past nearly seven years, I have seen firsthand the barriers people in poverty face to obtaining Missouri State ID cards. Clients of our program often lack the required documents to receive a State ID.”).

48. *Id.*

49. BRENNAN CTR. FOR JUST., *supra* note 45, at 3.

50. *See* Neely, *supra* note 38, at 98.

51. *Voter Registration Information*, ST. LOUIS CNTY. MO., <https://stlouiscountymo.gov/st-louis-county-government/board-of-elections/elections/voter-services/voter-registration-information> [https://perma.cc/WCM6-YPNT].

52. *See id.*

voters are disproportionately low-income, racial and ethnic minorities, the elderly, and people with disabilities.”<sup>53</sup>

Before the economic downturn of 2008, it was estimated that thirteen million American citizens did not have access to passports, naturalization papers, or birth certificates, and that low-income individuals were two times as likely not to have these documents available.<sup>54</sup> In addition to increased food prices and record unemployment in the era of COVID-19,<sup>55</sup> the expenses of obtaining documentation for voting purposes “are significant—especially for minority group and low-income voters—typically ranging from about \$75 to \$175” in some states.<sup>56</sup> The Federal Jury Selection and Service Act has emphasized in order to promote fair cross-section requirements and nondiscrimination provisions in the Act, federal courts may need to use other or additional sources not connected to voting “where necessary.”<sup>57</sup> Unfortunately, many district courts still rely solely on registration lists or active voter lists as the source of their juror list.<sup>58</sup>

Critics of this Essay will point out, and I will acknowledge, it is not impossible for a Black, Indigenous, person of color to be recognized for jury service, but courts must consider that it is comparatively much easier for a white person of means to access the elements of recognition and participation. Equity and agency will be denied for people of color if the Supreme Court adopts a more originalist view.<sup>59</sup> Unfortunately, I detect in Justice Barrett’s writings a judicial belief system that will equate not registering to vote or not obtaining a government ID with the status of being a non-“virtuous citizen.”<sup>60</sup> A more palatable label will likely be used as some Justices deny a mere “civic” right, but the impact will remain: the denial of the “individual,” fundamental right of serving on a jury for people of color.<sup>61</sup>

### III. COVID-19 and the Need for Equal Protection

Sixth Amendment fair cross-section and Fifth and Fourteenth Amendment due process claims will become a common practice for criminal defense attorneys as some jurisdictions push to commence jury trials in the face of the disparate impact of COVID-19.<sup>62</sup> The challenge

53. ACLU, FACT SHEET ON VOTER ID LAWS (2017), <https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet> [<https://perma.cc/D2UA-3BNB>].

54. BRENNAN CTR. FOR JUST., *supra* note 45, at 3.

55. Ben Popken, *Food Prices Rose in June for the Sixth-Straight Month*, NBC NEWS (July 14, 2020, 12:14 PM), <https://www.nbcnews.com/business/consumer/food-prices-rose-june-sixth-straight-month-n1233747> [<https://perma.cc/4MCJ-2RQE>].

56. RICHARD SOBEL, HARV. L. SCH. INST. FOR RACE & JUST., THE HIGH COST OF ‘FREE’ PHOTO VOTER IDENTIFICATION CARDS 2 (2014).

57. 28 U.S.C. § 1863; *see also* Hannaford-Agor, *supra* note 39.

58. Hannaford-Agor, *supra* note 39.

59. *See* Kanter v. Barr, 919 F.3d 437, 454, 464 (7th Cir. 2019) (Barrett, J., dissenting).

60. *See id.*

61. *See id.*

62. *See* NAT’L CTR. FOR STATE CTS., *supra* note 28.

with such claims will be confronting the antiquated yet entrenched judicial philosophy in *Duren* requiring that “underrepresentation is due to systematic exclusion of the group in the jury-selection process” and further, that the underrepresentation be of “a distinctive group in the community.”<sup>63</sup> These outdated standards fail to capture the reality of how environmental, economic, and systemic bias and structural racism against people of color have resulted in the underresourcing of communities, and thus, the underrecognition of minorities and individuals in poverty when juries are assembled.

The COVID-19 experience has informed us (and our courts) how Black, Indigenous, and people of color who live in poverty are “distinct” and “cognizable,”<sup>64</sup> and that their imposed vulnerability is a result of hundreds of years of brutal enslavement, followed by a century of legally sanctioned explicit racial prejudice, and confirmed by additional years of systemic disinvestment and rationalized bias. *Duren* fails to acknowledge how systematic exclusion in the jury selection process is indistinguishable from when a group of people (people of color experiencing poverty) are systemically excluded from the resources necessary to be recognized and to safely participate in jury service.<sup>65</sup> The seemingly progressive, decades-old ruling in *Duren* will give trial courts continued cover to ignore jury pools that are obviously “not fair and reasonable in relation to the number of such persons in the community”<sup>66</sup> by requiring litigants to identify the “systematic exclusion” within the selection process proper.<sup>67</sup> “This heightened burden is especially problematic for criminal defendants when socioeconomic factors are inextricably linked to issues of proof,” yet the Supreme Court failed to recognize this link as it devolved on Sixth Amendment *Duren* protections in 2010 with its ruling in *Berghuis v. Smith* (*Berghuis II*).<sup>68</sup>

Before the impact of COVID-19, “[m]ost instances of minority underrepresentation [were] due to intransigent socioeconomic factors that traditionally have been exempted from enforcement under the fair cross section requirement for the simple reason that courts cannot preemptively solve the underlying socioeconomic conditions themselves.”<sup>69</sup> In a COVID-19 environment, it has become comparatively more dangerous and difficult for people of color and people experiencing poverty to be recognized for and to participate in jury service. A narrow reading of *Duren* will allow courts to ignore this grave problem of underrepresentation as

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63. *Duren v. Missouri*, 439 U.S. 357, 357 (1979).

64. *See id.*; *see also* NAT’L CTR. FOR STATE CTS., *supra* note 44, at 2.

65. *See generally Duren*, 439 U.S. at 357.

66. *Id.* at 364.

67. *Id.*

68. *Berghuis v. Smith (Berghuis II)*, 559 U.S. 314, 332 (2010); Neumeier, *supra* note 3, at 82.

69. Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded*, 59 *DRAKE L. REV.* 761, 797 (2011).

administrators fail to evaluate the efficacy of pre-COVID-19 source list procedures, provide healthy modes of transportation to the courthouse, and provide needed technology to jurors in poverty. I fear the courts will default to the practice of excusing jurors when their participation becomes inconvenient and costly.<sup>70</sup>

A few judges and justices in both state and federal courts have provided leadership on our nation's path toward truly representative jury pools. "Some courts in recent years have expanded the scope of systematic exclusion to include factors that may fall outside of the court's ability to prevent, but for which reasonably effective and cost-efficient remedies exist."<sup>71</sup> State courts have struck down source list schemes that rely solely on voter registration lists and federal district courts have proposed oversampling of nonwhite ZIP codes as a remedy for high failure-to-appear rates in predominantly minority communities.<sup>72</sup> As early as 1984, the California Supreme Court made it clear that it would not allow inaction to evolve into discrimination when administrators compile jury lists.<sup>73</sup>

The U.S. Supreme Court's currently favored Sixth Amendment analysis of forbidding only systematic exclusion is potentially a paper barrier, serving as a mere rationalization for resulting, majority-white juries of means.<sup>74</sup> Will the Supreme Court cling to the reasoning that courts cannot force lower-income people to register to vote or obtain a state ID? Under this standard, exclusion will continue to germinate from state inaction in poor communities of color where juror source lists favor the white, the employed, and the healthy, and state disinvestment serves as a catalyst to poverty and disease. Judicial standards like "systematic exclusion" of a "cognizable group"<sup>75</sup> are barriers to future litigants of the pandemic who seek to protect jurors of color and jurors in poverty. As insightful courts, and a few astute legislatures,<sup>76</sup> work toward greater due process rights for defendants, the core intellectual argument for more inclusive juries can be salvaged from historical voices calling for an expansive view of equal protection guarantees.

The Equal Protection Clause of the Fourteenth Amendment has historically evolved into a systematic analysis of the intentionality of "official" discrimination,<sup>77</sup> the protection of a fundamental right, the implementation of judicial scrutiny, and the identification of a protected

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70. See *State v. Whitfield*, 837 S.W.2d 503, 510 (Mo. 1992) (en banc).

71. NAT'L CTR. FOR STATE CTS., *supra* note 44, at 5.

72. *Id.* at 6.

73. *Id.*

74. See *Berghuis v. Smith (Berghuis II)*, 559 U.S. 314, at 333 (2010); see also Neumeier, *supra* note 3, at 69, 83.

75. NAT'L CTR. FOR STATE CTS., *supra* note 44, at 2.

76. Hannaford-Agor, *supra* note 39, at 1–2 ("Several states use state income tax rolls, unemployment compensation, and public welfare lists. Two states use unique statewide lists—the permanent fund in Alaska, and an annual statewide census in Massachusetts—both of which are extremely inclusive and representative . . .").

77. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).



group (or suspect class).<sup>78</sup> In reality, the Equal Protection Clause is a more broad, wide-ranging, and inconsistently utilized tool of the Court,<sup>79</sup> brought forth when inequities call for a strong declaration of condemnation<sup>80</sup> or national conflict wants of a unified remedy.<sup>81</sup> From the 1880 ruling in *Strauder v. West Virginia*,<sup>82</sup> which confronted expressed state racial discrimination on juries while authorizing gender discrimination, to *Bush v. Gore* in 2000,<sup>83</sup> equal protection analysis has historically bent to the will of each Justices' moral belief system at the time.<sup>84</sup>

In 1977, the Court noted "proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause" while conceding "some contrary indications may be drawn from some of our cases."<sup>85</sup> By 2000, the Court, ruling in *Bush*, embraced an equal protection argument with no mention of discriminatory intent, a protected group, or race, but imposed a remedy that arguably disenfranchised numerous Black voters in Florida.<sup>86</sup> When Justices took an equal protection stand against discrimination on grand juries, they broadly cited the discriminatory actions of private citizens in the community.<sup>87</sup> Conversely, when they declined to confront racism in the same era and in the same state, the Court cited the mere oath-taking of jury commissioners as evidence of nondiscrimination.<sup>88</sup> Fourteenth Amendment protection historically presents when the Court, originalist justices included, takes a stand against a perceived injustice regardless of governmental intent.<sup>89</sup>

I disagree with scholars and judges who narrowly affirm, "An Equal Protection challenge [only] concerns the *process* of selecting jurors, or the allegation that selection decisions were made with discriminatory intent," and a well-intentioned official cannot be the source of such a violation when community representation is unintentionally yet disproportionately impacted.<sup>90</sup> The lasting, yet often forgotten, bond between juries being "truly representative of the community" with equal protection was cemented by the Court's 1940 ruling in *Smith v. Texas*.<sup>91</sup> Years

78. DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES, 1277–1283 (2000).

79. *Id.* at 84–85, 305, 1278.

80. See *Hernandez v. Texas*, 347 U.S. 475, 479 (1954).

81. See *Bush v. Gore*, 531 U.S. 98 (2000).

82. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

83. *Bush*, 531 U.S. 98.

84. See O'BRIEN, *supra* note 78, at 84–85, 305, 1278.

85. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

86. David Margolick et al., *Special Report: The Path to Florida*, VANITY FAIR (Oct. 2004); see also *Bush v. Gore*, 531 U.S. 98, 143 (Ginsberg J., dissenting).

87. *Hernandez v. Texas*, 347 U.S. 475, 479 (1954).

88. *Akins v. Texas*, 325 U.S. 398, 407 (1945).

89. See O'BRIEN, *supra* note 78, at 84–85, 305, 1278; see *Bush*, 531 U.S. at 105.

90. Nina W. Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 IOWA L. REV. 1719 (2016) (quoting *United States v. Green*, 389 F. Supp. 2d 29, 51 (D. Mass. 2005)).

91. *Smith v. Texas*, 311 U.S. 128 (1940).



later, *Taylor v. Louisiana* merely expanded these protections under a broader Sixth Amendment umbrella; unfortunately, while embracing *Smith*, the Court in *Taylor* (arguably unintentionally) veered the focus away from *Smith*'s core equal protection principle.<sup>92</sup> This continued diversion away from the Fourteenth Amendment likely resulted because strong dissents in both *Taylor* and *Duren* attempted to use equal protection analysis as an analytical pretext for allowing the continued disparate exclusion of women on juries.<sup>93</sup>

In *Smith*,<sup>94</sup> the majority was determined to embrace equal protection as a remedy against prejudicial state actions that were proven less intentional yet equally impactful.<sup>95</sup> For Justice Black, the expressed intent of the law had little meaning if the result of state action or inaction was a nonrepresentative grand jury.<sup>96</sup> Notably, the Court found the Texas statutory scheme at issue “is not, in itself, unfair; it is capable of being carried out with no racial discrimination.”<sup>97</sup> Justice Black acknowledged testimony from jury commissioners in which they denied people of color were “intentionally, arbitrarily or systematically discriminated against,”<sup>98</sup> but he took issue with the commissioners’ authority to select people they knew when the commissioners were (in their words) “not personally acquainted” with any Black individuals.<sup>99</sup>

I find the old Texas scheme similar to how many individuals are ignored for jury service today. On an abstract level, judges and court administrators understand some potential qualified jurors of color are without access to an automobile, or are without a computer connection, or choose not to have an ID or register to vote because of bureaucratic and financial barriers, or have little access to the type of medical care that decreases the likelihood of contracting COVID-19. Conversely, a majority of legal professionals are not “personally acquainted”<sup>100</sup> with that level of struggle to survive, as our judicial system disregards individuals who fail to make it on the source lists or fail to receive a summons at a temporary address.<sup>101</sup>

The promise for Black and Brown residents to be recognized for, and to safely participate in, jury service comes from cases like *Smith* and other powerful equal protection cases of the same period that forbid discriminatory state actions against “basic civil and political rights . . . based

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92. *Taylor v. Louisiana*, 419 U.S. 522, 527–528 (1975).

93. *See id.* at 539 (Rehnquist, J., dissenting); *Duren v. Missouri*, 439 U.S. 357, 371 (1979) (Rehnquist, J., dissenting).

94. *Smith*, 311 U.S. 128.

95. *Id.* at 132.

96. *Id.* at 130.

97. *Id.* at 130–31.

98. *Id.* at 131.

99. *Id.* at 132.

100. *Id.*

101. *See* Hannaford-Agor, *supra* note 39, at 2–3; *see also* NAT’L CTR. FOR STATE CTS., *supra* note 44, at 5.

on considerations of race or color.”<sup>102</sup> In *Shelley v. Kraemer*, the Court, sitting in (and informed by) past periods of economic devastation (the Great Depression) and tragic death (World War II), diminished the need to prove actual discrimination in *Smith*<sup>103</sup> while expanding the concept of state action under equal protection analysis.<sup>104</sup> The relevance of these rulings, combined with the dire nature of our current circumstances of litigation in a pandemic, presents advocates with an obligation to revisit meaningful equal protection analysis when vulnerable populations are excluded, ignored, or are not accommodated for jury service.

Since people of color and people in poverty are a distinct “group”<sup>105</sup> impacted by this virus, it is discrimination under the Equal Protection Clause when trials are conducted absent their voices. What has made people of color and people in poverty a legally impacted “group” are the years of segregation and structural disinvestment that serves as a constant frame to “political power, cultural influence, health, wealth, education, and employment.”<sup>106</sup> In the words of past Justices, “in evil or reckless hands,” the power to exclude, ignore, or refuse to accommodate diverse voices “can cause races or types which are inimical to the dominant group to wither and disappear.”<sup>107</sup>

The devastating impact of this virus on communities of color has revealed the flaw in how courts currently analyze fair cross-section claims under the Sixth Amendment and Equal Protection challenges under the Fourteenth Amendment. The Supreme Court continues to be blind to how continued racial persecution comes in the form of an unrecognized prejudice that is real yet undetectable by a narrow interpretation of discrimination.<sup>108</sup> One example of this myopic view is in the evolution of how “[a]n Equal Protection challenge concerns the process of selecting jurors, or the allegation that selection decisions were made with discriminatory intent.”<sup>109</sup> The perpetuation of this standard in contemporary

102. *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948). The Court expanded the concept of state action, under Equal Protection, to include judicial enforcement of racially restrictive housing covenants.

103. *Smith*, 311 U.S. at 132.

104. *Shelley*, 334 U.S. 1. Historians believe that St. Louis’s midcentury, court-enforced racial covenants are just one of many state actions of racial prejudice that have contributed to segregation and disinvestment. See Jeannette Cooperman, *The Story of Segregation in St. Louis*, STL MAG. (Oct. 17, 2014, 9:47 AM), <https://www.stlmag.com/news/the-color-line-race-in-st-louis> [<https://perma.cc/7CAJ-T3LY>].

105. See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (acknowledging a protected group).

106. Cooperman, *supra* note 104.

107. *Skinner*, 316 U.S. at 542.

108. See *United States v. Green*, 389 F. Supp. 2d 29, 51 (D. Mass. 2005) (“An Equal Protection challenge concerns . . . discriminatory intent. The Sixth Amendment, on the other hand, is concerned with *impact*, or the systematic exclusion of a cognizable group regardless of how benevolent the reasons.”); Chernoff, *supra* note 90.

109. *Green*, 389 F. Supp. 2d at 51.

court rulings<sup>110</sup> is evidence of how the judiciary ignores the devastating impact of structural, environmental, and systemic racism on our communities and on our juries while failing to recognize how rationalized bias in the minds of litigators continues to marginalize jurors of color.<sup>111</sup>

Fundamental principles of liberty and equal treatment inseparably intertwine Fifth Amendment due process, Sixth Amendment trial rights, and Fourteenth Amendment equal protection and due process guarantees into one unified shield against disparate impacts caused by both federal and state actors.<sup>112</sup> Equal access and equal recognition is equal protection in a society that values the promise of inclusion and participation for “any person.”<sup>113</sup> “The fact that the written words of a state’s laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given, not merely promised.”<sup>114</sup> And it is this promise of inclusion and participation that will ultimately be sacrificed by the COVID-19 pandemic as a record number of Americans join the distinct and cognizable group of people in poverty.

#### IV. Protest, Pandemic, and Agency

In May and June of 2020, tragic events pressed many Americans to comprehend the ugly reality of prejudice and bias. One man’s painful and prolonged killing resulted in a worldwide protest of focused anger and determination for permanent change. In observing the death of George Floyd, Americans observed on a visceral level the “historical disenfranchisement, persistent experience of segregation and discrimination, and higher exposure to environmental risk factors”<sup>115</sup> for people of color. Residents of St. Louis joined in the worldwide protest, six years after they had led the world from the streets of Ferguson, Missouri, following the killing of Michael Brown.<sup>116</sup> Despite many community efforts in Ferguson and throughout the nation,<sup>117</sup> it seemed like little had changed since 2014.

Arguably, because America’s highest courts had not internalized the voices on the streets of Ferguson, little changed for Black residents. Calls for change may start from the street, but to succeed, such demands must be given value by American courts, which are tasked with protecting

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110. *See id.*

111. *See* Brayer, *supra* note 7, at 54–55.

112. *Lawrence v. Texas*, 539 U.S. 558, 575 (2003).

113. *Smith v. Texas*, 311 U.S. 128, 130 (1940).

114. *Id.*

115. Annika Merrilees, *Sick Alone, Mourning Alone: COVID-19 Hits the Elderly and African Americans the Hardest in Missouri*, ST. LOUIS POST DISPATCH (June 8, 2020), [https://www.stltoday.com/business/local/sick-alone-mourning-alone-covid-19-hits-the-elderly-and-african-americans-the-hardest-in/article\\_bab7f387-0667-51d6-b29f-4c0660b3e017.html](https://www.stltoday.com/business/local/sick-alone-mourning-alone-covid-19-hits-the-elderly-and-african-americans-the-hardest-in/article_bab7f387-0667-51d6-b29f-4c0660b3e017.html) [<https://perma.cc/LJ2Q-8TAX>].

116. *Id.*

117. *Id.*

equal participation on American juries. The U.S. Supreme Court fails to recognize in its rulings how people of color are still being struck from juries because they are Black or Brown and excluded by bias that resides deep in the minds of legal professionals.<sup>118</sup> In cases in which *Batson v. Kentucky*<sup>119</sup>—and *Batson*'s more recent affirmation, *Foster*<sup>120</sup>—are applied, the Court continues to rely on antiquated, feel-good standards, requiring opposing counsel to satisfy the heavy burden of proving purposeful discrimination when trial attorneys and prosecutors make racially-motivated peremptory strikes.<sup>121</sup> The existence of unprovable implicit bias is increasingly more devastating to the cause of justice, as the phenomena of all-white juries continues to be a reality.<sup>122</sup> “The practice of systematically excluding black jurors has not been halted by *Batson*; the only thing that has changed is that prosecutors must come up with a race-neutral excuse for the [peremptory] strikes—an exceedingly easy task.”<sup>123</sup>

Agency in our system of justice is denied to people of color and people in poverty when the U.S. Supreme Court fails to equate the pervasiveness of structural racism with the “systematic exclusion” of minority populations in the jury-selection process.<sup>124</sup> The “systematic exclusion” roadblock of *Duren*<sup>125</sup> and *Berghuis II*<sup>126</sup> is similar to the “purposeful discrimination” obstacle of *Batson*<sup>127</sup> and *Foster*.<sup>128</sup> In fair cross-section claims, the Court must abandon its outdated analysis under the Sixth Amendment of ineffectual protections and adopt an expanded view of equal protection for potential jurors of color and for those in poverty. These distinctive individuals are much more than a protected class—they are actual citizens not being recognized or accommodated for jury service. Their agency in the justice system is denied by the Court’s implicit collaboration with prejudice.

This historical moment of protest and pandemic has reminded us that millions of Americans of color have been excluded from full participation in our democratic experiment. When considering a direct impact on broader reform for the justice system, researchers confirm how diverse juries are “more thorough and competent” than all-white juries and more likely to consider issues of “system fairness” when deliberating and returning a verdict.<sup>129</sup> A reformation toward racial justice and equity can

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118. Brayer, *supra* note 7, at 53–54.

119. *Batson v. Kentucky*, 476 U.S. 79, 80–81 (1986).

120. *See generally Foster v. Chatman*, 136 S.Ct. 1737 (2016).

121. Brayer, *supra* note 7, at 54–55.

122. *See id.*; *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 121 (2012).

123. ALEXANDER, *supra* note 122, at 121.

124. *See Neumeier, supra* note 3, at 80.

125. *Duren v. Missouri*, 439 U.S. 357, 363 (1979).

126. *Berghuis v. Smith (Berghuis II)*, 559 U.S. 314, 332 (2010).

127. *Foster v. Chatman*, 136 S.Ct. 1737, 1750–51 (2016).

128. Brayer, *supra* note 7, at 54–55.

129. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberation*, 90 J.

emerge from thousands of jury rooms across the nation if the “distinctive knowledge and perspective” of excluded communities is heard.<sup>130</sup> While the direct impact on individuals seeking access to justice is evident, a more global impact occurs when millions of previously unrecognized voices are empowered through thousands of jury deliberations and verdicts each week.

“No other institution of government rivals the jury in placing power so directly in the hands of citizens.”<sup>131</sup> In this American democracy, we vote, we march in the streets, and we voice our opinions on social media, but only on a jury do unelected and unappointed citizens possess the direct responsibility for government.<sup>132</sup> When large groups of individuals are racially excluded from their democratic agency over those who possess power, the consent of all people to be policed and judged withers into nonexistence. James Baldwin best articulated the genesis of this denial of agency in America as “the white man’s profound desire not to be judged by those who are not white.”<sup>133</sup>

This reality may reveal why courts implicitly (and in some cases explicitly) embrace juries that are less thorough and competent and ignore system fairness in deliberations.<sup>134</sup> The summer protest of 2020 and the pandemic clarified how the consent to being policed and judged is derived from an individual’s right to be equally selected as a controlling agent over the justice system by way of jury service. Further, the right to serve is not a tepid right reserved by originalist judges for “citizens” historically labeled as “virtuous”; rather, jury service is an assertion of (in Baldwin’s words) a fundamental individual “right to be here”<sup>135</sup> guaranteed to Black, Indigenous, and people of color and individuals in poverty.

### Conclusion

How and why does society underserve people in poverty—particularly people of color—who are confronted by the economic, systemic, environmental, and structural racism that fuels such poverty? It is important to reflect on why the factors that have increased the impact of

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PERSONALITY & SOC. PSYCHOL. 597, 608–609 (2006).

130. JEFFERY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY*, 10 (2000) (“Precisely because we all inevitably view the evidence at trial from perspectives shaped by the lives we live in America, diversity is important to the accuracy of jury verdicts. Representative juries are better able to ‘mix it up’ during deliberation, the preconceptions of some calling into doubt the predisposition of others . . . . On a representative jury, persuasive people are those who make arguments capable of convincing across the traditional demographic divides.”).
131. *Id.*
132. *Id.*
133. JAMES BALDWIN, *THE FIRE NEXT TIME* 95 (1962).
134. See ALEXANDER, *supra* note 122, at 121; see also Sommers, *supra* note 129, at 608–09.
135. *I AM NOT YOUR NEGRO* AT 43:00 (Magnolia Pictures 2017) (drawing from archival footage and unfinished writing of James Baldwin).

COVID-19 in underresourced populations have also contributed to the low number of people of color and people in poverty on juries.

The lessons of pandemic and protest must not be lost on the courts of this country, especially the U.S. Supreme Court and on jurists like Justice Barrett who fail to see jury service as an individual right.<sup>136</sup> The pandemic has forced many of us to better understand the importance of quality preventative health care, safe transportation, and digital connection. The protest movement awakened many to how these essential elements of modern life are not equally accessible to people of color and people in poverty and how this tragedy is often exacerbated by intentional and cruel racism. Low- or no-income people of color have been denied the chance to serve on American juries because their imposed poverty and the disinvestment in their community has made it comparatively more difficult to get a state ID or register to vote, thus preventing them from being considered on a source list to receive a jury summons. If a summons is received, the condition of imposed poverty has made it more difficult (if not impossible with COVID-19) for marginalized residents to participate in jury proceedings.

Agency-for-all in our system of justice has been demanded and must be provided by way of an expansive view of the Equal Protection Clause. Antiquated requirements of proving “systematic exclusion” to a “distinctive group” is a false Sixth Amendment protection that has little meaning in an age in which the structural remnants of discrimination, segregation, and disenfranchisement still remain firmly in place. Administrators, legislators, and courts must immediately remedy the lack of minority representation on juries by expanding source list recognition beyond current records that inherently reduce the participation of people of color and people in poverty. As the country emerges from the COVID-19 era, administrators and courts must provide a safe and healthy environment for juror participation, healthy modes of transportation to jury service, and equal opportunities for remote participation for all individuals in marginalized communities. To do any less, as we emerge from this collective tragedy, is to deny the lessons learned from the sacrifice of those truly virtuous citizens who have suffered the most from disease and prejudice.

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136. *Kanter v. Barr*, 919 F.3d 437, 454, 464 (7th Cir. 2019) (Barrett, J., dissenting).