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A History of Exclusion: "For Cause" Challenges and Black Jurors

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NOTE

A HISTORY OF EXCLUSION: "FOR CAUSE" CHALLENGES AND BLACK JURORS

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I. INTRODUCTION

In the fall of 2021, many Americans were shocked to learn that the Georgia jury for the trial of three white men accused of murdering Ahmaud Arbery, a young Black man, consisted of eleven white jurors and only one Black juror.[1] Even more shocking was the judge's admission that there appeared to be "intentional discrimination in the panel" after the defense attorneys repeatedly struck Black potential jurors, yet the judge allowed the jury panel to remain since the defense attorneys were able to offer "race-neutral" arguments for excluding the potential jurors.[2] While these events may have seemed disturbing and unusual to many white Americans, they actually reflect the incredibly common racial discrimination that occurs during the jury selection process.

This article examines the history of racial discrimination in jury selection, specifically the exclusion of Black potential jurors, and proposes ways in which the judiciary can take immediate action to increase the diversity of juries. Black Americans in particular have been long excluded from jury service, and that discrimination continues today in the form of peremptory challenges and challenges for cause. While peremptory challenges were the tool utilized by the defense attorneys in the trial of the men who murdered Ahmaud Arbery and have been subject to much criticism, this article focuses on the equally relevant and much more hidden effects of "for cause" challenges. Section II delineates the history of Black exclusion from jury service and racial discrimination in jury selection. Section III traces that history to the rise in discriminatory "for cause" challenges today. Finally, sections IV and V analyze how racial disparities in criminal history and

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1. Joe Hernandez, *How the Jury in the Ahmaud Arbery Case Ended Up Nearly All White — and Why It Matters,* NPR (Nov. 5, 2021, 7:00 AM), https://www.npr.org/2021/11/05/1052435205/ahmaud-arbery-jury.

2. *Id.*

wealth relate to challenges for cause and propose possible solutions to minimize the exclusion of Black potential jurors during jury selection.

II. History of Discrimination in Jury Selection

Although the right to a jury trial has been engrained in American society since its inception, Black Americans have been largely excluded from participating as jurors. Prior to the Civil War, "[t]he Constitution denied Black people the right to serve on juries by classifying enslaved Black people as property," and "[m]ost states also excluded free Black people from jury service."[3] The first Black juror served in 1860 in Massachusetts—just prior to the outbreak of the Civil War.[4] Following the Civil War and the passage of the Thirteenth Amendment and the Civil Rights Act of 1866, Black Americans finally began to serve on juries.[5]

However, the prevalence of Black jurors was inconsistent, and in the South, many jury panels remained all white. For example, in Texas, "there were 500 murder prosecutions of [white defendants] charged with killing [Black individuals] in 1865 and 1866; in the 500 trials, all-white juries acquitted every one of the white defendants."[6] Likewise, Black defendants during this period received "disproportionately harsh" punishments for their alleged crimes "with the advent of the chain gang and convict leasing," and Black citizens lamented the lack of their peers on jury panels.[7] The continued violence against Black Americans and the biased jury panels of that era led Congress to pass the Ku Klux Klan Act of 1871. The Act "denied jury eligibility to persons who had conspired to deny the civil rights of [Black Americans], and provided for penalties for those who perjured themselves during jury selection."[8] Congress also passed the Civil Rights Act of 1875, which outlawed discrimination in jury selection.[9]

During the late nineteenth century, some jurisdictions saw Black juror participation at a rate representative of the community. In the period between 1872 and 1878, in New Orleans, "one-third of the citizens called for grand jury service were black—matching the percentage of [Black individuals] in the region's population."[10] However, "exclusion" of Black Ameri-

3. Equal Just. Initiative, Race and the Jury: Illegal Discrimination in Jury Selection 11 (2021), https://eji.org/wp-content/uploads/2005/11/race-and-the-jury-digital.pdf.

4. Equal Just. Initiative, Illegal Racial Discrimination in Jury Selection: A Continuing Legacy 9 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf.

5. *See* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 49–50 (1990).

6. James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895, 916 (2004).

7. *Id.* at 915–16.

8. *Id.* at 923.

9. Equal Just. Initiative, *supra* note 4.

10. Forman, Jr., *supra* note 6, at 930.

cans "was the more common phenomenon in most counties."[11] In 1879, the Supreme Court finally addressed the issue of laws prohibiting Black Americans from serving as jurors in *Strauder v. West Virginia*, holding that an outright law prohibiting the participation of Black citizens was unconstitutional.[12] However, the Court did not prohibit states from "prescrib[ing] the qualifications of its jurors, and in so doing make discriminations" or limiting jury selection to "males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications."[13]

Following *Strauder*, many states sought to restrict Black Americans from participating as jurors by excluding them from jury rolls, creating vague requirements for service, or through the "key man" system in which "prominent citizens" chose prospective jurors.[14] It was not until the mid-twentieth century that the Supreme Court began to address the exclusion of Black Americans from jury panels again. In *Norris v. Alabama*, the Supreme Court held that the total exclusion of Black jurors from service "for a generation or longer" when there were qualified Black citizens in the county was unconstitutional.[15] A decade later, in *Akins v. Texas*, the Supreme Court seemingly walked back its holding in *Norris*, finding a county's policy of only selecting a single Black juror for the jury panel was not unconstitutional since "careful examination of [the] statements [in the record] in connection with all the other evidence" did not convince the Court "that the commissioners deliberately and intentionally limited the number of" Black jurors.[16]

By the 1960s and 1970s, the Supreme Court finally began requiring jury panels to reflect the community with the "fair cross-section requirement":

> 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. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.[17]

11. Forman, Jr., *supra* note 6, at 931.
12. Strauder v. West Virginia, 100 U.S. 303, 312 (1879).
13. *Id.* at 310.
14. EQUAL JUST. INITIATIVE, *supra* note 4, at 10.
15. Norris v. Alabama, 294 U.S. 587, 596 (1935).
16. Akins v. Texas, 325 U.S. 398, 407 (1945).
17. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

"The 'fair cross section' term comes from the right to have the jury pool be drawn from a fair representation of the community, a jury of one's peers" and "address[es] how citizens are called for jury duty."[18]

Despite this improvement, the mid-twentieth century also saw the rise in peremptory challenges used to discriminate against Black potential jurors.[19] Peremptory strikes allow attorneys to remove potential jurors during *voir dire* and "are given by statute to both sides in both criminal and civil cases" with the purpose being to obtain "more impartial and better qualified jurors."[20] "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control."[21] In *Swain v. Alabama*, the prosecutor used peremptory challenges to strike all Black potential jurors from the panel; however, the Supreme Court did not find such action unconstitutional absent evidence of intentional discrimination.[22] The case ultimately "set the bar so high for proving discriminatory intent that no litigant won a *Swain* claim for 20 years" and "[a]s a result, defendants continued to be convicted and executed based on verdicts by all-white juries."[23]

Finally, in *Batson v. Kentucky*, the Court overruled *Swain*, holding that prosecutors cannot peremptorily strike jurors on the basis of their race and providing a new framework for establishing discriminatory strikes.[24] Under a *Batson* challenge:

> [T]he judge must consider whether (1) the defense has made out a prima facie case that jurors were stricken by the government because of their race, (2) the prosecutor has race-neutral reasons for striking certain jurors of color, and (3) whether the dismissal of those jurors was the result of purposeful discrimination.[25]

"*Batson* was later extended to prevent prosecutors from peremptorily striking Black jurors even where the defendant was White" and "*Batson* has also been extended by the Court to prohibit racial discrimination in jury selection by defense counsel as well."[26]

Despite these seeming gains, the representation of Black Americans on juries remains incredibly disparate. For example:

> From 2005 to 2009, in cases where the death penalty has been imposed, prosecutors in Houston County, Alabama, have used

18. Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 402 (2016).

19. EQUAL JUST. INITIATIVE, *supra* note 4, at 12.

20. Swain v. Alabama, 380 U.S. 202, 217–18 (1965).

21. *Id.* at 220.

22. *Id.* at 227.

23. EQUAL JUST. INITIATIVE, *supra* note 4, at 12.

24. Batson v. Kentucky, 476 U.S. 79 (1986).

25. Johnson, *supra* note 18, at 401.

26. Johnson, *supra* note 18, at 401; *see also* Powers v. Ohio, 499 U.S. 400, 415 (1991); Georgia v. McCollum, 505 U.S. 42, 59 (1992).

> peremptory strikes to remove 80% of the African Americans qualified for jury service. As a result, half of these juries were all-white and the remainder had only a single black member, despite the fact that Houston County is 27% African-American.[27]

Likewise, a 2003 study found that due to the exclusion of Black potential jurors in criminal trials in a Louisiana parish "in 80% of criminal trials, there is no effective black representation on the jury because only the votes of white jurors are necessary to convict, even though Jefferson Parish is 23% black."[28] Thus, American juries often lack diversity due to discriminatory practices, specifically those at the stage of jury selection.

III. Why "For Cause" Challenges Equally Contribute to the Exclusion of Black Jurors

While peremptory challenges have historically been scrutinized for potential discrimination, "for cause" challenges also significantly contribute to the lack of diversity on jury panels. Much of the scholarship surrounding the lack of diversity on jury panels has focused on the disproportionate use of peremptory challenges to strike Black potential jurors; however, Professor Thomas Ward Frampton theorizes that "equivalent racial disparities pervade the exercise of challenges for cause" and, based on his analysis of criminal cases in two states, "[t]he racial disparities documented in the prosecutors' exercise of challenges for cause actually exceed the sizeable disparities in their use of peremptory strikes in both datasets."[29] Challenges for cause may actually have more of a disparate impact in reducing jury diversity because, unlike peremptory challenges, there are no limits to the number of "for cause" challenges.[30]

While quantitative evidence regarding the demographics of jurors struck for cause is extremely limited, Frampton's analysis of jury selection in trials in Louisiana and Mississippi provides compelling evidence that "for cause" challenges have a disparate impact on the removal of Black jurors. Looking at 316 jury trials in Louisiana, Frampton found that "prosecutors overwhelmingly used challenges for cause to exclude nonwhite jurors," with 58.9 percent of successful challenges used to remove Black potential jurors and only 34.4 percent used to remove white prospective jurors.[31] This meant that "black jurors were 3.24 times more likely than white jurors to be excluded by the government 'for cause'" and this disparity was greater than that for peremptory strikes in the same trials.[32]

27. Equal Just. Initiative, *supra* note 4, at 14.

28. Equal Just. Initiative, *supra* note 4, at 14.

29. Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 Mich. L. Rev. 785, 788, 790 (2020).

30. *Id.* at 788 ("[A] party may raise challenges for cause against every single potential juror, should they wish.").

31. *Id.* at 794.

32. *Id.* at 795.

Frampton also found similar disparities in Mississippi, with Black jurors constituting "52.9% of the judge-proposed disqualifications" compared to only 44.2 percent for white jurors, despite "white jurors outnumber[ing] black jurors by nearly two to one in the initial venires."[33] Thus, these disparities suggest that "for cause" challenges contribute significantly to the exclusion of Black jurors from jury panels and may be even more discriminatory than peremptory challenges.

The following sections of this article focus on two ways Black jurors are often struck for cause: a history of criminal conviction or arrest and financial hardship. These issues likely have an outsized effect on the exclusion of Black potential jurors because of the legacy of systemic racism in America. When granting challenges for cause, judges can and should take into consideration this history for the following reasons. First, "we know from decades of scholarship that unrepresentative juries 'threaten the public's faith in the . . . legal system and its outcomes.' "[34] Second, studies have shown that all-white juries are more likely to convict Black defendants than white defendants and "an abundance of psychological research . . . [indicates] that deliberative bodies with broad representation have longer and more substantive discussions of evidence due to the confluence of different perspectives."[35]

Thus, it is imperative to justice that judges make efforts to ensure Black potential jurors are not discriminately struck for cause, and judges already possess the power to do so. Unlike peremptory challenges, which attorneys do not need to justify unless contested, "for cause" challenges have a narrower basis and are left to the court's "sound discretion."[36] If "for cause" strikes remove Black jurors more frequently than peremptory strikes, further scrutiny of these challenges will have a greater impact on increasing jury representativeness than increased investigation of peremptory strikes. The following sections detail how racial discrimination in America disproportionately excludes Black jurors through the use of "for cause" challenges, how judges can and should utilize the discretion of *voir dire* to take this history of discrimination into consideration, and proposes solutions to decrease the removal of Black jurors for cause.

33. *Id.* at 796–97.

34. *Id.* at 834–35 (quoting Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1038 (2003)).

35. Anna Offit, *Benevolent Exclusion*, 96 WASH. L. REV. 613, 632 (2021); *see, e.g.*, Johnson, *supra* note 18, at 415 ("In a Duke study of Florida criminal trial records encompassing a decade of information, all-White juries in Florida were 16% more likely to convict Black defendants than White defendants.").

36. Connors v. United States, 158 U.S. 408, 413 (1895).

IV. Black Potential Jurors' Criminal History and "For Cause" Challenges

One of the main ways in which the jury selection system disproportionately excludes Black Americans is through challenges for cause based on a potential juror's history of arrest, criminal conviction, and incarceration. Due to the long legacy of racial discrimination in our policing and criminal justice systems, such challenges likely have a massive effect on removing Black potential jurors from jury panels.

A. Overview of Disparities in Arrests, Criminal Convictions, and Incarceration Rates

Judges must consider the historical context that has led to disparities in arrests, criminal convictions, and incarceration of Black Americans during jury selection. Black Americans' disproportionate arrest rates can be traced back to the passage of the Thirteenth Amendment, which outlawed slavery and spurred Southern states to implement Jim Crow laws that resulted in the arrest of "tens of thousands of African Americans" in the years following.[37] Since then, incarceration rates have increased: in 1980, approximately 500,000 people were incarcerated; by 2015, the number had increased to 2.2 million.[38] Black Americans disproportionately make up the prison population, as "Black Americans are incarcerated in state prisons at nearly 5 times the rate of white Americans."[39] Furthermore, over half the prison population is Black in twelve states.[40] Similarly, in federal prison, Black individuals make up 38.3% of the population as of February 5, 2021.[41]

In terms of arrest rates, a 2016 study found that "black Americans comprised 27% of all individuals arrested in the United States—double their share of the total population" and "Black youth accounted for 15% of all U.S. children yet made up 35% of juvenile arrests in that year."[42] In terms of youth imprisonment, one out of three Black boys "can expect to be sentenced to prison, compared [to] 1 out [of] 6 Latino boys" and one out of

37. Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 31 (rev. ed. 2012).

38. *Criminal Justice Fact Sheet*, NAACP, https://naacp.org/resources/criminal-justice-fact-sheet (last visited Feb. 14, 2021).

39. Ashley Nellis, Sent'g Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons 5 (2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.

40. *Id.*

41. *Statistics: Inmate Race*, Fed. Bureau of Prisons, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last visited Feb. 14, 2021).

42. Sent'g Project, Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance: Regarding Racial Disparities in the United States Criminal Justice System 2 (2018), https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf.

seventeen white boys.[43] Thus, many Black Americans experience the criminal justice system firsthand before they are old enough to participate as jurors.

Moreover, Black Americans' disparate criminal conviction rates do not necessarily correlate to actual increased criminal activity among that demographic. For example, "5% of illicit drug users are African American, yet African Americans represent 29% of those arrested and 33% of those incarcerated for drug offenses," and even though "African Americans and whites use drugs at similar rates,. . .the imprisonment rate of African Americans for drug charges is almost 6 times that of whites."[44] Additionally, countless factors play into whether an individual is convicted:

> The criminal justice system is made up of a series of discretionary decisions that help determine who ends up with a conviction, and who does not: whether an alleged crime is reported; where, whom, and how to police; whether to arrest; whether and how to charge; whether to dismiss, divert, or pardon; whether to offer something in return for a plea bargain, or for cooperation, and if so what; whether the jurors—or, in some states, most of the jurors—make the subjective decision to convict; whether defense attorneys have the wherewithal to bring a successful defense or appeal.[45]

All of these factors play into the racial disparities in criminal convictions and arrests in the United States, which, in turn, affect the jury selection process.

B. Disparities in Incarceration, Arrest, and Conviction Rates and "For Cause" Challenges

The disparities in incarceration and arrest rates for Black Americans have an invidious connection to "for cause" dismissals of Black potential jurors. First, most jurisdictions exclude felons from jury service. Second, Black jurors are often struck for cause on the basis of previous arrests and convictions for misdemeanors or other crimes. Third, Black jurors may be struck for cause simply because of their connection to those who have been arrested or convicted.

"In forty-seven states and the federal system, disqualification from jury service of those with a felony record is provided for by statute."[46] Only two states, Colorado and Maine, lack statutes explicitly excluding felons

43. NAACP, *supra* note 38.

44. NAACP, *supra* note 38.

45. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 619–20 (2013).

46. *Id.* at 596.

from jury service.[47] States vary in whether disqualification on the basis of a felony conviction is a complete bar to jury service forever.[48] These types of statutes generally prevent citizens from ever even reaching the courthouse; however, some states have express statutes allowing felony convictions to serve as a basis for a "for cause" challenge. For example, Alabama does not explicitly disqualify felons, only those who have "lost the right to vote by conviction for any offense involving moral turpitude."[49] Yet, Alabama also has a statute that allows a juror's indictment for a felony in the last twelve months or conviction for a felony to serve as "good ground" for a challenge.[50]

Considering the disproportionate rate of felony convictions Black Americans face, it seems predetermined that the exclusion of potential jurors with felony convictions would contribute significantly to the lack of diverse jury panels. In 2010, approximately twenty-three percent of Black Americans had a felony conviction and "[t]he number of African-American felons increased more than fivefold between 1980 and 2010, while the number increased threefold for other felons."[51] These disparities have directly affected jury representation, as previous scholarship has found that "exclusion on the basis of felony convictions reduced the representation of African American men on juries by thirty percent."[52] The result of these disqualification statutes means that, as Thomas Ward Frampton aptly notes, "in courtrooms across America today, prosecutors allege (and judges confirm) that black jurors remain less 'qualified' than white jurors to participate in an institution frequently touted as central to American democracy."[53]

Even beyond the disqualification of citizens convicted of felonies, many states allow "for cause" removal of potential jurors with misdemeanor convictions or arrest records—either explicitly through statute or on the basis that such history makes a juror unfit or biased. For example, Texas allows a juror's conviction or indictment for misdemeanor theft as a basis for a "for cause" challenge.[54] Other states allow judges discretion to remove jurors "for cause" if they admit or imply their criminal history will affect their ability to be impartial.

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47. *See* COLO. REV. STAT. § 13-71-105 (However, it should be noted that Colorado does exclude felons from *grand jury* service.); *see also* ME. STAT. tit. 14, § 1211.

48. Roberts, *supra* note 45, at 596 ("While in some jurisdictions, this exclusion applies to all felonies and lasts forever, many qualify the disqualification in some way," such as on the basis of restoration of civil rights, the type of felony, or based on how many years since conviction.).

49. ALA. CODE § 12-16-60 (1978).

50. ALA. CODE § 12-16-150 (1981).

51. Tim Henderson, *Felony Conviction Rates Have Risen Sharply, But Unevenly*, PEW CHARITABLE TRS.: STATELINE (Jan. 2, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/02/felony-conviction-rates-have-risen-sharply-but-unevenly.

52. Roberts, *supra* note 45, at 602.

53. Frampton, *supra* note 29, at 790.

54. TEX. CODE CRIM. PROC. art. 35.16(a)(2)–(a)(3) (2005).

For example, in *United States v. Torres*, the court noted that "the presiding trial judge has the authority and responsibility, either *sua sponte* or upon counsel's motion, to dismiss prospective jurors for cause"[55] and that "[t]he trial judge has this broad discretion [in ruling on "for cause" challenges] because a finding of actual bias 'is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.'"[56] In *Torres*, the court ultimately dismissed a juror who admitted to previous criminal activity similar to that at issue in the case and the court further noted that:

> It is enough for the present to note that cases in which a juror has engaged in activities that closely approximate those of the defendant on trial are particularly apt. The exercise of the trial judge's discretion to grant challenges for cause on the basis of inferred bias is especially appropriate in such situations.[57]

Thus, in many situations, a juror's criminal history may serve as another avenue for removal if the judge determines the juror cannot be impartial.

Arrest history is also another avenue of "for cause" challenges that disproportionately affects Black Americans. While "arrests do not disqualify prospective jurors from serving, questions about arrests are routinely asked in *voir dire* all around the country" and prosecutors regularly use law enforcement databases to investigate jurors.[58] Prosecutors in eleven states and the District of Columbia "have all admitted to participating in this practice."[59] Professor Vida B. Johnson notes that one of the ways jurors are struck for their arrest history may be because "a juror who has been unfairly arrested likely has negative thoughts about police, and those thoughts may be articulated during individual *voir dire*, causing the juror to be subjected to a peremptory strike."[60] While Johnson's scholarship focuses primarily on peremptory strikes, this theory is applicable to "for cause" strikes since "attorneys may challenge prospective jurors for cause, which usually stems from a potential juror's conflicts of interest or inability to be impartial" and the determination of impartiality is left to the discretion of the trial judge.[61] Thus, merely asking jurors whether they have been arrested may result in attorneys raising "for cause" challenges on the assumption that an arrest will lead a juror to be biased against the police or criminal justice system and if the court agrees, they will be excluded.

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55. Unites States v. Torres, 128 F.3d 38, 43 (2d Cir. 1997).

56. *Id.* at 44 (quoting Wainwright v. Witt, 469 U.S. 412, 428 (1985)).

57. *Id.* at 47.

58. Johnson, *supra* note 18, at 389, 399.

59. Johnson, *supra* note 18, at 399–400 (the eleven states are Alaska, California, Colorado, Louisiana, Massachusetts, Michigan, Missouri, New Hampshire, New York, Vermont, and Virginia).

60. Johnson, *supra* note 18, at 406.

61. Flowers v. Mississippi, 139 S. Ct. 2228, 2238 (2019); *see also* Ristaino v. Ross, 424 U.S. 589, 594–95 (1976).

Since Black Americans have higher arrest rates than white Americans, the use of arrest history as a basis for a "for cause" challenge undoubtedly disproportionately affects Black jurors and results in less diverse juries. Black individuals make up thirteen percent of the population yet account for twenty-seven percent of arrests.[62] Even beyond arrest, in terms of police stops, "[a] Black person is five times more likely to be stopped without just cause than a white person."[63] Thus, it is unsurprising that "84% of Black adults say white people are treated better than black people by police" and "87% of Black adults say the U.S. criminal justice system is more unjust towards Black people."[64] Therefore, the probability that a judge would find a juror with previous arrest experience to be biased is high.

Furthermore, questions of arrest and criminal history are posed not just on the basis of a juror's own personal experiences, but also that of the juror's friends and family. Johnson notes that:

> even the question asking prospective jurors about their arrest records and those of friends and family—common questions across jurisdictions—and the implicit approval of using arrest records as a basis for either ad hoc 'for cause' strikes or peremptory strikes compound the racially disparate impact of our criminal justice system.[65]

One example of the exclusion of Black jurors on the basis of their family members' experiences with the criminal justice system occurred during *voir dire* in *Snyder v. Louisiana*, where a prospective juror was dismissed for cause after stating she did not think she could be fair to both sides "knowing that [her] child had been in jail and he died in jail too."[66] Even when Black potential jurors have not had experience with the criminal justice system themselves, considering the disparate rate of arrest and incarceration for Black Americans, it is likely that they have a family member or friend who has. Thus, such questions further contribute to the "for cause" removal of Black jurors.

C. Judicial Action as a Solution to Criminal History "For Cause" Challenges

While broad legislative change and police reform are necessary to reduce the disparities in arrests and criminal convictions that lead to less diverse juries, judges have the ability to mitigate this issue already. Because

62. SUSAN NEMBHARD & LILY ROBIN, URB. INST., RACIAL AND ETHNIC DISPARITIES THROUGHOUT THE CRIMINAL LEGAL SYSTEM: A RESULT OF RACIST POLICIES AND DISCRETIONARY PRACTICES 4 (2021), https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf.

63. NAACP, *supra* note 38.

64. NAACP, *supra* note 38.

65. Johnson, *supra* note 18, at 389.

66. Joint App. vol. 1 at 118, Snyder v. Louisiana, 552 U.S. 472 (2008) (No. 06-10119), 2007 WL 2685158 at *118; *see also* Frampton, *supra* note 29, at 804.

"[v]oir dire 'is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion,'" judges may take into consideration the legacy of systemic racism that has led to high rates of criminal convictions among Black potential jurors and the distrust Black citizens feel toward the criminal justice system.[67]

First, judges can limit questions about arrests only to those that are either immediately relevant to the case (e.g., a case about wrongful arrest) or that resulted in a criminal conviction, and limit questions about non-felony crimes only to those at issue in the case. The Supreme Court in *Ristaino v. Ross* asserted that "[t]he Constitution does not always entitle a defendant to have questions posed during Voir dire specifically directed to matters that conceivably might prejudice veniremen against him" and "[t]hus, the State's obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant."[68] Furthermore, the Supreme Court has also held that "[n]o hard-and-fast formula dictates the necessary depth or breadth of *voir dire*."[69] While some statutes will inevitably require the investigation of a juror's criminal history, at a minimum, judges can regulate the questioning of crimes that fall outside of those statutes. Therefore, questions regarding arrests and criminal convictions should be limited to the precise issues in the present case.

Second, judges should disallow questions regarding the arrest, criminal convictions, and criminal justice experiences of jurors' friends and family members. It is illogical to impute bias against the criminal justice system or the police to a juror simply because they know someone who has committed a crime or been arrested. Rather, judges should inquire broadly to both those with and without experience in the criminal justice system whether they can be impartial. Even if a juror expresses concern or hesitation about their own bias, the judge should inquire further, rather than immediately dismiss the juror for cause. For example, in *Commonwealth v. Williams*, a potential juror was dismissed for cause after stating, "I think the system is rigged against young African American males" when discussing her work with youth convicted of drug crimes.[70] The Massachusetts Supreme Court held that the trial court judge failed to conduct a complete *voir dire* because "the judge did not inquire further to determine whether, given the prospective juror's beliefs based on her life experiences, she nevertheless could fairly evaluate the evidence and follow the law" and that:

> a judge in this situation should focus not on a prospective juror's ability to put aside his or her beliefs formed as a result of life

67. Ristaino v. Ross, 424 U.S. 589, 594 (1976) (quoting Connors v. United States, 158 U.S. 408, 413 (1895)).

68. *Id.* at 594–95.

69. Skilling v. United States, 561 U.S. 358, 386 (2010).

70. Commonwealth v. Williams, 116 N.E.3d 609, 613 (Mass. 2019).

> experiences, but rather on whether that juror, given his or her life experiences and resulting beliefs, is able to listen to the evidence and apply the law as provided by the judge.[71]

Thus, by further inquiring into a prospective juror's ability to fairly evaluate evidence, judges can avoid unnecessarily excluding Black jurors who rightly express distrust and concern regarding the criminal justice system and, thereby, increase the diversity of jury panels.

V. Poverty, Low Wages, and "For Cause" Exclusion of Black Potential Jurors

Poverty and low wages present other factors that regularly lead jurors to be removed for cause. During *voir dire*, judges "frequently exercise cause challenges to remove jurors who indicate that financial impediments would constrain their ability to serve as jurors."[72] Additionally, jurors frequently express concern that participating as a juror would result in losing their job, losing hourly wages, and/or financial hardship due to commuting costs and childcare costs.[73] While these factors affect all low-income citizens, they disproportionately affect racial minorities and can lead to less diverse juries.[74] In order to increase the diversity of jury composition, especially in terms of participation by Black citizens, the judiciary must consider the legacy of systemic racism that has led to higher rates of poverty and low-wage occupations among Black Americans.

A. Racial Disparities in Wealth and Income

Historically, there has been a large gap in wealth between white and Black Americans due to the ongoing legacy of slavery and racism in the United States.[75] Part of the wealth gap between white and Black Americans is due to "lower wages and incomes [which] are, in part, products of labor market discrimination and unequal returns to human capital characteristics such as education. . . .[S]uch discrimination in labor markets accumulates over the life course."[76] Since 1967, this wealth gap has increased to a dizzying degree.[77] In 2020, the median household income for Black Americans

71. *Id.* at 614.

72. Offit, *supra* note 35, at 628.

73. *See* Offit, *supra* note 35, at 615.

74. *See* Offit, *supra* note 35, at 629–30.

75. Cedric Herring & Loren Henderson, *Wealth Inequality in Black and White: Cultural and Structural Sources of the Racial Wealth Gap*, 8 Race & Soc. Probs. 4, 6 (2016).

76. *Id.*

77. Catarina Saraiva, *The Historical Reasons Behind the U.S. Racial Wealth Gap*, Bloomberg (May 23, 2021, 11:01 PM), https://www.bloomberg.com/news/articles/2021-05-24/the-historical-reasons-behind-u-s-racial-wealth-gap-quicktake.

was $45,870, whereas the median for white households was $74,912.[78] Furthermore, the poverty rate for Black Americans was 19.5 percent in 2020, "with 8.5 million individuals in poverty," and was the highest rate among all racial demographics surveyed.[79] Likewise, Black Americans also tend to have higher rates of hourly minimum wage jobs. For example, in 2020, "[a]bout 2 percent of Black workers earned the federal minimum wage or less. . . .[whereas for] White, Asian, and Hispanic workers, the percentage was about 1 percent."[80]

In addition to disparities in wages, racial minorities in the United States also disproportionately work in the service industry or gig economy. A Bureau of Labor Statistics report for 2020 found that "[a]bout 18 percent of employed Black and Hispanic men worked in service occupations, compared with 11 percent and 12 percent of employed Asian and White men, respectively" and "[e]mployed Black and Hispanic men also were more likely than White and Asian men to work in production, transportation, and material moving occupations."[81] Similarly, in terms of gig economy work, twenty percent of Black Americans have earned money through online gig work compared with twelve percent of white Americans.[82]

B. Financial Hardship Claims as Basis of "For Cause" Dismissal

Both federal and state courts allow for the excusal of jurors for whom jury service would be an "undue hardship."[83] In *Thiel v. Southern Pacific Co.*, the Supreme Court noted "[i]t is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship."[84] Judges have sole discretion in assessing hardship claims and "empirical research shows that jurors are most likely to face dismissal during voir dire as a result of economic hardship, including the risk of lost income, and the need to care for a child or another dependent."[85] While there is little scholarship on the racial demographics of jurors who are excluded on the basis of hardship, it likely disproportionately

78. EMILY A. SHRIDER, MELISSA KOLLAR, FRANCES CHEN & JESSICA SEMEGA, U.S. DEP'T OF COM., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2020, at 5 fig.2 (2021), https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf.

79. *Id.* at 16.

80. U.S. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., REP. 1091, CHARACTERISTICS OF MINIMUM WAGE WORKERS, 2020, at 2 (2021), https://www.bls.gov/opub/reports/minimum-wage/2020/pdf/home.pdf.

81. U.S. BUREAU OF LAB. STAT., U.S. DEP'T OF LAB., REP. 1095, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2020, at 5 (2021), https://www.bls.gov/opub/reports/race-and-ethnicity/2020/pdf/home.pdf.

82. Risa Gelles-Watnick & Monica Anderson, *Racial and Ethnic Differences Stand Out in the U.S. Gig Workforce*, PEW RSCH. CTR. (Dec. 15, 2021), https://www.pewresearch.org/fact-tank/2021/12/15/racial-and-ethnic-differences-stand-out-in-the-u-s-gig-workforce.

83. *See, e.g.*, 28 U.S.C. § 1866(c)(1); *see also* MINN. GEN. R. PRAC. 810(b)(2) (1991).

84. Thiel v. S. Pac. Co., 328 U.S. 217, 224 (1946).

85. Offit, *supra* note 35, at 647.

affects Black citizens and therefore contributes to less diverse juries overall.[86]

Taking the statistics regarding racial disparities in wealth and income into account, it is clear why Black jurors would be excused for financial hardship at a higher rate than white jurors. Serving as a juror is impossible when you make minimum wage, have limited savings, and work in the gig economy. In a Texas study of juror participation,

> twice as many Hispanic respondents as White respondents found it difficult to spend time away from work during jury duty, and more than 19% of Hispanic persons and 17% of Black Americans earned no wages if they reported to court for jury service, compared to 5% of White citizens surveyed.[87]

Even when loss of income is not directly at issue, jurors have been dismissed for wealth-related reasons, such as access to cars or transportation.[88] In interviews, public defenders have likened "contemporary jury selection practice to voter suppression," and one federal defender "interpreted the disparate presence of White male prospective jurors as evidence that most poor and working-class people . . . were systematically cut from the process."[89] Thus, the wealth disparities Black Americans face have a direct impact on their ability to serve as jurors and further contribute to the lack of diversity on juries.

C. Increasing Juror Compensation as a Solution to Financial Hardship "For Cause" Dismissal

There are numerous ways to decrease the removal of jurors for financial hardship; however, methods like decreasing the racial wealth gap and increasing minimum wage require the seemingly insurmountable task of state and federal legislative action. Instead, state judiciary committees likely already possess the tools and power to decrease hardship excusals and increase jury diversity: increasing the grossly inadequate compensation for jurors.

When the federal government sought to reform the racial and economic disparities in jury selection with the Jury Selection and Service Act of 1968, "Congress identified jurors' paltry compensation as a significant practical barrier to broad participation" and "[t]estimony before the committee emphasized that the [previous] system's pronounced economic biases constituted the greatest impediment to Black peoples' participation on juries."[90] While legislators in the twentieth century recognized the signifi-

86. *See* Offit, *supra* note 35, at 629–30.

87. Offit, *supra* note 35, at 631.

88. *See* Offit, *supra* note 35, at 644 ("For instance, I witnessed prospective jurors without access to cars dismissed for cause at prosecutors' recommendations.").

89. Offit, *supra* note 35, at 645.

90. Offit, *supra* note 35, at 623–24.

cance of juror compensation in connection to racial diversity, today's juror compensation rates have wholly failed to keep up with reality. Today, federal jurors are paid only fifty dollars per day for their participation.[91] Although this rate is codified in federal law, states are free to set their own juror compensation rates for state court proceedings.

Juror compensation varies significantly from state to state and even county to county within a state. For example, jurors in Texas are "paid by the county in an amount not less than $6.00 and not more than $50.00 per day or fraction of a day served" and may not be compensated at all if the juror is only present for one day and is not selected for a jury.[92] Some states require employers to compensate jurors for their service—however, this is rare.[93] Surprisingly, Alabama offers some of the highest rates of compensation, requiring employers to pay jurors their regular pay and prohibiting them from requiring jurors to use vacation or sick days during their jury service.[94] However, generally "$50 per day is the most that a state-court juror can hope to earn through mandatory compensation schemes, with many states offering a sum closer to $15 per day."[95] Many states also offer reimbursement for mileage; however, this also varies.[96]

Thus, based on the paltry compensation for jury service, raising the rate of compensation is the quickest way to ensure all jurors are able to participate. While state rules regarding compensation vary, Minnesota provides evidence that the judiciary may have the power to implement such changes independently, rather than merely waiting on the legislature. Under Minnesota law:

> A juror shall be reimbursed for round-trip travel between the juror's residence and the place of holding court and compensated for required attendance at sessions of court and may be reimbursed for additional day care expenses incurred as a result of jury duty at rates determined by the Supreme Court.[97]

In 2007, the Minnesota Supreme Court delegated authority to set jury duty rates to the Judicial Council—which includes the Chief Justice, the Chief Judge of the Court of Appeals, and the Chief Judges of the Judicial Districts

91. 28 U.S.C. § 1871(b)(1).

92. *Jury Service in Texas*, TEX. JUD. BRANCH, https://www.txcourts.gov/about-texas-courts/juror-information/jury-service-in-texas (last visited Feb. 14, 2021).

93. Offit, *supra* note 35, at 652 (Noting that although "some states require employers to compensate jurors for time they devote to jury service, the majority of states do not."); *see also* COLO. REV. STAT. § 13-71-126 (1990) (requiring "regularly employed" jurors to be paid their regular wages, "but not to exceed fifty dollars per day unless by mutual agreement" with their employer).

94. ALA. CODE § 12-16-8 (2005).

95. Offit, *supra* note 35, at 653.

96. *Jury Duty Pay Rates by State,* JURY DUTY 101, https://www.juryduty101.com/juror-pay-by-state (last visited Feb. 14, 2021).

97. MINN. STAT. § 593.48 (2022).

among its members.[98] Currently, Minnesota jurors are compensated at a flat rate of twenty dollars a day and may be reimbursed for mileage at a rate of fifty-four cents per mile.[99]

At the current compensation rate, jurors making minimum wage would only be able to serve for about two hours before losing a significant amount of income.[100] Furthermore, a mileage reimbursement does little for citizens who lack the means or funds for reliable transportation to and from the courthouse. The Minnesota judiciary can and should raise the rate of juror compensation to at least match the state minimum wage or reflect a living wage. Not only would this allow Minnesota's poorest citizens to participate in the judicial process, but it likely would help increase the racial diversity of Minnesota's juries. A 2018 survey "estimated that more than a fifth of the state's people of color earned incomes below the poverty level" and the "[p]overty levels for American Indians and Black or African Americans at 33.8% and 27.2% respectively, were the highest across all groups."[101] Thus, increasing juror compensation would significantly increase the ability of Black Minnesotans to participate as jurors and likely would reduce the prevalence of hardship excusals. Furthermore, this strategy of increasing juror compensation could be implemented in other states that have similarly structured laws and judiciaries.

VI. CONCLUSION

Although jury diversity has come a long way since 1860, the discriminatory rate at which Black potential jurors are struck both for cause and by peremptories remains a glaring miscarriage of justice. The history of racial discrimination in America that has resulted in disparate rates of arrest, criminal conviction, incarceration, poverty, and low-wage employment for Black Americans directly translates to increased removal of Black potential jurors for cause, thus contributing to the lack of diverse juries. Rather than wait for Congress or the Supreme Court to address these underlying disparities or the discriminatory use of peremptory strikes, the judiciary can take immediate action to increase the representativeness of jury panels and decrease the removal of Black jurors.

98. *See* MINN. SUP. CT. ORD. C8-95-25 (2007); *see also Minnesota Judicial Council*, MINN. JUD. BRANCH, https://www.mncourts.gov/MinnesotaJudicialCouncil (last visited Feb. 14, 2021).

99. MINN. JUD. COUNCIL, MINN. JUD. BRANCH, POL'Y NO. 509, JURY MANAGEMENT (2016), https://www.mncourts.gov/mncourtsgov/media/Judicial_Council_Library/Policies/500/509-Jury-Management.pdf.

100. The current minimum wage rate in Minnesota for small employers is $8.42 an hour and $10.33 per hour for large employers. *See Minimum Wage Increases Jan. 1, 2022*, MINN. DEP'T OF LAB. & INDUS. (Aug. 19, 2021), https://www.dli.mn.gov/news/minimum-wage-increases-jan-1-2022.

101. MINN. DEP'T OF EMP. & ECON. DEV., MINNESOTA DISPARITIES BY RACE REPORT (2020), https://mn.gov/deed/assets/061020_MN_disparities_final_tcm1045-435939.pdf.