

RE: Constitutional Adequacy of Distanced Trial and Jury Pools during COVID
To: Carl Macpherson
From: Emma McDermott
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- I. **Constitutional adequacy of physically distanced trials:** on what grounds can we challenge the constitutional adequacy of holding trials in an auditorium and/or physically distanced?

Option A: It is impossible to hold jury trials safely during a pandemic.

There seems to be very little to no law on whether trials with everyone twenty feet away from each another are constitutionally adequate. However, there has been a huge number of statewide suspensions of jury trials. At the federal level, at least 88 of the district courts have suspended jury trials.¹ At the state level, 84% or 42 states (other than Oregon) have statewide bans on jury trials.² Some suspensions extend indefinitely, some into June and July. Though 7 state supreme courts have not issued statewide suspension of jury trials, this does not mean they believe holding jury trials is appropriate. Several states lacking state supreme court-ordered statewide bans like Texas and Ohio appear to be leaving it up to trial localities, the majority of which have suspended jury trials of their own accord.³ In Illinois, which lacks a statewide ban, the Illinois Supreme Court issued an order explicitly allowing trial judges to suspend jury trials, which most have done.⁴ The South Dakota Supreme Court and Mississippi Supreme Court gave individual trial judges discretion to suspend jury trials.⁵ The Oregon State Supreme Court Chief Justice has authority to order a statewide suspension of all jury trials pursuant to ORS 1.002.⁶ Despite possessing this authority, the Chief Justice Orders as of April 18 currently allow jury trials for in-custody defendants.⁷

Oregon's decision to continue holding any jury trials starkly contradicts the vast majority of other jurisdictions in the United States. Presumably, if it were feasible or safe to hold jury trials in a socially

¹ <https://www.brennancenter.org/our-work/analysis-opinion/initial-court-responses-covid-19-leave-patchwork-policies>

² [Ballotpedia Summary of State Closures](#); updated from April 16 or Ballotpedia was incorrect: [Rhode Island](#); [New Mexico](#); [Oklahoma](#); [West Virginia](#); [Connecticut](#); [Kansas](#); [Maryland](#); [New York](#); [Colorado](#); [North Dakota](#); [Florida](#); [Kentucky](#); [New Mexico](#); [California](#); [Delaware](#); [Hawaii](#); [Maine](#); [Indiana](#); [Louisiana](#); [Utah](#); [Maine](#)

³ <https://www.irontribune.com/2020/03/20/yost-courts-may-suspend-jury-trials-during-pandemic-state-federal-courts-already-have-delays/>

⁴ https://courts.illinois.gov/Administrative/covid/041520-4Circ_AO.pdf ;
<http://www.illinoiscourts.gov/Administrative/covid-19.asp>

⁵ <https://www.wjtv.com/wp-content/uploads/sites/72/2020/03/20-03-15-Emergency-Admin-Order-2.pdf>;
https://www.aberdeennews.com/courtnews/local-courts-implement-rule-changes-because-of-virus/article_1cfece0e-6a1b-11ea-a5ca-27943b2ef767.html

⁶ ORS 1.002 provides that the Chief Justice of the Oregon Supreme Court is the administrative head of the judicial department of government in this state; shall exercise administrative authority and supervision over the courts of this state consistent with applicable provisions of law and the Oregon Rules of Civil Procedure; and, to facilitate exercise of that administrative authority and supervision, may make rules and issue orders as appropriate or take any other action appropriate to perform the functions of the office of Chief Justice

⁷ https://www.courts.oregon.gov/rules/Documents/CJO-20-006_AmendedOrderImposingLevel3RestrictionsCourtOperations.pdf

distanced manner, the federal bench and other states—all of whom share Oregon’s interest in ensuring the right to a speedy trial and prosecuting lawbreakers—would have done so. The widespread suspension of jury trials implies that either the vast majority of courts in the United States believe no amount of distancing would make in-person jury trials safe during this pandemic or that the amount of distancing it would take to make them safe would make jury trials unworkable and/or unjust.

Ohio’s attorney general Dave Yost said exactly that in a recent formal opinion issued to county prosecutors, stating: “the nature and requirements of jury service means that this threat cannot be mitigated or reduced by implementing the social-distancing measures that health experts have recommended.”⁸ The opinion suggested social distancing and jury service were fundamentally incompatible, asserting that “suspending jury trial activity... is lawful — and responsible...during a pandemic emergency.”⁹

As of April 18th, jury trials are suspended statewide in the follow states until:

April 26	New Jersey
May 1	Alabama, Alaska, Arizona, Hawaii, Michigan, Missouri, Montana, North Carolina, Pennsylvania (no new trials), Tennessee, West Virginia
May 5	Indiana, Louisiana, Massachusetts Minnesota, Washington
May 15	Delaware, New Hampshire, Oklahoma
May 17	Rhode Island
May 22	California
June 1	Arkansas, Florida, Idaho, Kentucky, Maine, New Mexico, Oregon (most but not all), Utah Vermont, Wyoming,
July 1	Colorado, North Dakota
July 13	Iowa
Until further notice	Connecticut, Kansas, Maryland, New York (no new trials), South Carolina, Wisconsin, Virginia (except emergencies)

Option B: The public has a constitutional right to observe trials.

The Oregon public is currently ordered to stay at home by the governor’s executive order.¹⁰ This means they cannot and should not be attending jury trials. Holding jury trials in the midst of a pandemic and the stay-at-home order violates the public’s federal and state constitutional rights to observe trials.

Federal rights: In *Waller v. Georgia*, 467 US 39 (1984), the U.S. Supreme Court declared public trials to be “essential” for the people accused because “the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.” The Court suggested that the First, Fourth and Six Amendment rights are all implicated in the protection of public trials.¹¹

⁸ <https://www.supremecourt.ohio.gov/coronavirus/resources/2020-002OHAG.pdf>

⁹ Id.

¹⁰ <https://www.oregonlive.com/business/2020/03/oregon-governor-issues-stay-at-home-order-to-enforce-coronavirus-restrictions.html>

¹¹ *Waller v. Georgia*, 467 US 39 (1984).

State rights: Under Article I section 10 of the Oregon Constitution, the right to observe trials belongs to the people at large and cannot be waived by individual litigants.¹² Section 10 rights are absolute whereas defendant rights under section 11 rights can be circumscribed. There is a small line of Oregon case law on this right, mostly assessing trials being held in jails/live streamed to a room with about ten seats at the courts.¹³ The shelter-in-place law arguably infringes upon the public's Section 10 rights in a much more serious way than any of the livestream jail cases.

Experts like Simone Levine, executive director of Court Watch NOLA in New Orleans, suggest that public access to the courts is particularly important during disasters: "When a community is in an emergency, the community's fear and distrust of public agents and officials increase and in these times it is integral that public officials increase their transparency."¹⁴

II. **Non-representative/hostile jury pools:** on what grounds can we challenge the fact that a sizeable group of the jury pool will opt out of coming to jury duty and those that come will be hostile to the defendant?

Options A: Persuasive authority/pure policy grounds: Wisconsin's Supreme Court's order suspending jury trials noted that many potential jurors would be at higher risk for contracting COVID-19, and would be excused, which could lead to questions about the validity of the resulting panel.¹⁵ Additionally, they cited the fact that as each day goes by, the odds increase that a juror in a trial would become sick from COVID-19, leading to isolation of remaining jurors and other participants in the trial, raising the chances of a mistrial.¹⁶ They also wrote that healthy jurors could hardly be expected to give the same attention to a case as they might if not for the health crisis; their anxiety of being forced to serve might lead to them to rush to a verdict simply to escape the confines of the courtroom and threat of exposure.¹⁷ As a result, the order found that the health risks from the current COVID-19 pandemic constitute "good cause" for the temporary changes, including the suspension of jury trials. "Indeed, failing to temporarily suspend jury trials in the courts of this state would create an unacceptable risk of a miscarriage of justice," the order reads.¹⁸

Option B: Due process claims about the fairness of trial procedures. The Oregon courts do not seem receptive to 6th Amendment/Oregon Constitution Article 1 Section 11 arguments about impartial juries; they hold that law is only about individual juror biases. They say explicitly that the right to a fair trial and an impartial jury are distinct. The correct route for a fair trial, in their view, is through a due process

¹² Oregon Constitution Article I Section 10: "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation.—"

¹³ State v. Lewis, 185 Or. App. 378, 380-81, 59 P.3d 1293, 1294 (2002); State v. Cavan, 185 Or. App. 367, 372-73, 59 P.3d 553, 556-57 (2002) State v. Jackson 178 Ore. App. 235-36.

¹⁴ <https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out>

¹⁵ <https://wicourts.gov/news/docs/jurytrials.pdf>

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

claim which asks if whether the challenged practice is "inherently prejudicial"—i.e., whether it poses a serious threat to the fairness of the fact finding process.¹⁹

Relevant SCOTUS case law

There's not a lot of great case law about the representativeness in juries. To the extent the law intervenes, the main concern is systematic exclusion. The best SCOTUS case on point is likely *Taylor v Louisiana* 419 U.S. 522 (1975). The Supreme Court found that Louisiana's "opt-in" jury selection process that automatically included men on the master jury list but included women only if they registered with local jury officials violated the right to an impartial jury under the 6th Amendment.

Analogously, if and when juries are convened during this pandemic, it seems highly likely distinctive groups will either be systematically excluded or allowed to "opt-in" which leads to disproportionate exclusion of distinct demographics. In *Taylor*, although women were 53% of those eligible for jury service, they were only 10% of the jury wheel.²⁰ The Court held that: "Defendants are not entitled to a jury of any particular composition but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."²¹ They held that a jury must be drawn from "a representative cross-section of the community" to satisfy the Sixth Amendment's guarantee of trial by an impartial jury.²² *Duren v. Missouri*, 439 U.S. 357 (1979), offers a three-prong test to make a prima facie showing that the composition of the jury wheel does not represent a fair cross-section of the community: (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Bottom line: we would need to better understand how jury pools will be compiled to make this argument forcefully. If they're summoning everyone and just letting certain people not show up, this would make the argument more difficult.

Relevant ABA Standards

Though the case law isn't great, ABA model standards give us a bit more to work with. In 2005, the ABA released new model standards for jury service. The issue of diversity and representativeness was such a concern for the ABA that four of the nineteen principles addressed it including: "[Principle 2, Section B: eligibility for jury service should not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation, disability, sexual orientation, or any other factor that discriminates against a cognizable group in the jurisdiction ... [and Principle 5, Section B] courts should collect and analyze information regarding the performance of the jury system on a regular basis in order to ensure: (1) The representativeness and inclusiveness of the jury source list; (2) The responsiveness of individual citizens to jury duty summonses."²³

¹⁹ *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) (citing *Estelle v. Williams*, 425 U.S. 501, 503-04, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976))

²⁰ *Taylor v Louisiana* 419 U.S. 522 (1975)

²¹ *Id.*

²² *Id.*

²³ https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_juryaddendum/