

## **CAN THEY STILL DECIDE AT 75? INCREASING THE JURY DUTY “OPT-OUT” AGE FROM 70 TO 75**

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*The elderly population in the United States is growing. Currently, in most federal and state courts, any citizen of the United States can avoid jury duty if the individual is age seventy or older. This is problematic as the United States' older population grows. It must allow the older population to stay involved in their communities and the judicial processes. Keeping the older population engaged is beneficial as they are a hard-working population and many will have retired which eliminates the concerns about absences from work. The history of the jury values diverse viewpoints. A proper community representation is a desirable trait in a jury. With an increasing elderly population, more elderly Americans should be a part of the jury selection process.*

*States have their own rules regarding the jury-selection opt-out age and procedures. Some state programs allow individuals to opt-out at the age of sixty-five. If the federal government increases the opt-out age, states may mirror their jury selection standards. This change would encourage more elderly jurors to be a part of jury selection.*

*This Note surveys the history on jury service and the advantages of including the aging population as jury members. It also provides an analysis on international and domestic requirements and rationale for why increasing the jury opt-out age would be beneficial to society. The author recommends that the federal jury opt-out age should be increased from seventy to seventy-five. This change is needed to accommodate the growth of the aging population and preserve the integrity of the jury system.*

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## I. Introduction

When a jury duty summons arrives in the mail, United States citizens often have mixed reactions about completing this civic duty, no matter the age. Still, one group of people can easily avoid this obligation, and other age groups cannot avoid the obligation as easily. In the United States today, federal jury duty remains an “optional” civic duty after one reaches the age of seventy.<sup>1</sup> If a potential juror chooses not to participate in the jury selection process, an excusal is available for any juror over age seventy in most federal district courts.<sup>2</sup> Most state courts follow the same framework for age-based jury duty opt-outs and excusal processes, easily dismissing large numbers of citizens or allowing them to opt-out after reaching the age of seventy.<sup>3</sup> The availability of this excuse is premature. The current opt-out age of seventy warrants an additional five-year delay in order for the jury standards to remain up-to-date with today’s society.

The ability to “opt-out” is not always a permanent exemption from all future jury service, but is an excusal from all future jury service related to that particular summons date.<sup>4</sup> Thus, the age-based opt-

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1. See 28 U.S.C. § 1861 (2018) (“It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a *fair cross section of the community* in the district or division wherein the court convenes. It is further the policy of the United States that *all citizens shall have the opportunity to be considered for service* on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.”) (emphasis added); 28 U.S.C. § 1863 (5)(A)-(B) (2018) (“(5)(A) except as provided in subparagraph (B), specify those groups of persons or occupational classes whose members shall, on individual request therefor, be excused from jury service. Such groups or classes shall be excused only if the district court finds, and the plan states, that jury service by such class or group would entail undue hardship or extreme inconvenience to the members thereof, and excuse of members thereof would not be inconsistent with sections 1861 and 1862 of this title.”); JUROR QUALIFICATIONS, UNITED STATES COURTS, <http://www.uscourts.gov/services-forms/jury-service/juror-qualifications> (last visited Nov. 6, 2017) [hereinafter JUROR QUALIFICATIONS].

2. Jody George et al., *Handbook on Jury Use in the Federal District Courts*, FED. JUDICIAL CTR. 27–28 (1989), [http://www.fjc.gov/public/pdf.nsf/lookup/juryuse.pdf/\\$file/juryuse.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/juryuse.pdf/$file/juryuse.pdf) [hereinafter George et al.].

3. HON. GREGORY MIZE ET AL., *The State of the States Survey of Jury Improvement Efforts: A Compendium Report*, NAT’L CTR. FOR STATE COURTS 15 (April 2007), <http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/SOS/SOSCompendiumFinal.ashx> (last visited Nov. 6, 2017) [hereinafter HON. MIZE ET AL.].

4. See UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS PLAN FOR RANDOM SECTION OF JURORS 1, 6–10, [http://www.ilnd.uscourts.gov/\\_assets/\\_documents/\\_forms/\\_press/ILNDJuryPlan.pdf](http://www.ilnd.uscourts.gov/_assets/_documents/_forms/_press/ILNDJuryPlan.pdf) (last visited Nov. 6, 2017) [hereinafter JURY PLAN].

out excusal works only as an excuse for the date listed on the current summons.<sup>5</sup> Potentially, the same person that opts out could receive a summons in the future if they remain a registered voter or have a valid driver's license, two common ways potential jurors are located.<sup>6</sup> Each state has their own rules for their preferred opt-out procedures,<sup>7</sup>

but if all the federal standards increase to age seventy-five, states will also benefit from the opportunity to prevent confusion and mirror the federal standard.

With the current federal jury duty opt-out age typically set at seventy, this leniency regarding older Americans and their civic duties remains problematic.<sup>8</sup> The current age-based exemption should change and adapt to a modern society: a society constantly changing and rapidly aging.<sup>9</sup> In 2012, the United States had the largest number of people in the oldest age category among developed countries, with 5.9 million people aged eighty-five and older.<sup>10</sup> This number of people is expected to grow as the Baby Boomers continue to age, but also as they live well into the twenty-first century.<sup>11</sup> With an estimated 154,000

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5. See generally *id.*

6. JEE-YEON K. LEHMANN & JEREMY BLAIR SMITH, A MULTIDIMENSIONAL EXAMINATION OF JURY COMPOSITION, TRIAL OUTCOMES, AND ATTORNEY PREFERENCES 6 (June 27, 2013), [http://www.uh.edu/~jlehman2/papers/lehmann\\_smith\\_jurycomposition.pdf](http://www.uh.edu/~jlehman2/papers/lehmann_smith_jurycomposition.pdf) [hereinafter LEHMANN & SMITH].

7. John B. Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 CREIGHTON L. REV. 1137, 1143 (1978) ("To reduce these difficulties, the United States Congress passed the Jury Selection and Service Act of 1968. This was the first modern attempt to guarantee a trial by a fair and impartial jury through legislative action. But the law was as important for what it did not do, as for what it did. The most crucial decision was to leave state jury selection methods as they were.") [hereinafter Ashby].

8. Compare THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, JURY FREQUENTLY ASKED QUESTIONS, <http://www.cand.uscourts.gov/juryfaq> (last visited Nov. 6, 2017) (The United States District Court for the Northern District of California is one of the few federal courts that has an excusal age set at seventy-five. The majority of federal courts excusal age is 70.), with U.S. DIST. CT. FOR THE EASTERN DIST. OF CALIF., JUROR MANAGEMENT PLAN, 14 <http://www.caed.uscourts.gov/caednew/assets/File/GO%20553.pdf> (last visited Nov. 6, 2017) (Another federal district court jurisdiction, the United States District Court for the Eastern District of California, has the more typical age excusal limit of 70.).

9. See JUROR QUALIFICATIONS, *supra* note 1.

10. Jennifer M. Ortman et al., AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES, U.S. CENSUS BUREAU 1, 6 (May 2014), <https://www.census.gov/prod/2014pubs/p25-1140.pdf>.

11. Sandra L. Colby & Jennifer M. Ortman, *The Baby Boom Cohort in the United States*, U.S. CENSUS BUREAU 1, 1 (May 2014), <https://www.census.gov/prod/2014pubs/p25-1141.pdf> [hereinafter Colby & Ortman].

jury trials in the United States each year, citizens should be encouraged to participate and opportunities to do so should be plain.<sup>12</sup>

To meet these population changes and preserve the integrity of the jury system in the United States, the current jury standards need modification. It is essential to bridge the gap and revise the standards to accommodate to the growth of this older population. The solution to this problem is updating the current jury duty age standards.<sup>13</sup> If the age for opting out increased to seventy-five, more people ages seventy to seventy-five would receive summons and be qualified as potential jurors. This change to the current jury model would create a better cross-section of jurors.<sup>14</sup> The opt-out age adjustment encourages the United States' elderly population, a particularly sensitive age group, to feel like empowered members of society once again.<sup>15</sup>

On a federal level, each of the ninety-five federal district courts maintains their own jury procedures and policies regarding jury service excuses.<sup>16</sup> These procedures and policies are found in each district court's "jury plan."<sup>17</sup> Each federal district court's plan provides selection guidelines for potential petit jurors and grand jurors.<sup>18</sup> Overall, federal district courts maintain similar standards regarding exemptions and excusals.<sup>19</sup> Some state courts allow for younger excusal ages than other states and the federal system. For example, in South Carolina state courts, a potential juror can receive an excusal after they

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12. DENNIS J. DEVINE, *JURY DECISION MAKING: THE STATE OF THE SCIENCE* 6 (Brian Bornstein & Monica Miller eds., 2012) [hereinafter DEVINE].

13. Colby and Ortman, *supra* note 11, at 1–2.

14. See generally *Duren v. Missouri*, 439 U.S. 357 (1979); Ted C. Newman, *Fair Cross-sections and Good Intentions: Representation in Federal Juries*, 18 THE JUST. SYS. J., 211, 213 (1996) ("The *Duren* dispute involved the underrepresentation of women in Missouri state court jury venires.") [hereinafter Newman].

15. See David Barnard & Tara Trask, *Citizen Juror: Justice Sotomayor and Steve Susman Discuss Why Jury Duty Matters*, THE JURY EXPERT 12 (May 20, 2016), <http://www.thejuryexpert.com/2016/05/citizen-juror-justice-sotomayor-and-steve-susman-discuss-why-jury-duty-matters/> (quoting Supreme Court Justice Sonia Sotomayor: "[b]ut this is the one activity where you're asked to serve and to actually come to a decision on the behalf of the society that we represent, and I think that is a very, very important thing to remind people of.") [hereinafter Barnard & Trask].

16. George et al., *supra* note 2, at 27–28 [hereinafter George et al.]; COURT ROLE AND STRUCTURE, UNITED STATES COURTS, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure> (last visited Nov. 6, 2017) ("The nation's 94 district or trial courts are called U.S. District Courts.").

17. See generally George et al., *supra* note 2.

18. See Newman, *supra* note 14, at 211.

19. See George et al., *supra* note 2, at 7.

reach age sixty-five.<sup>20</sup> Other state courts require older age standards, like New Jersey state courts, where the excusal age is seventy-five for state court jury service.<sup>21</sup> These state and federal court inconsistencies often lead to misunderstandings.<sup>22</sup> For federal and state jury systems, accustomed to significant amounts of scrutiny, the jury systems across the United States make it difficult for the average citizen to understand their responsibilities and options for excusal once they receive a summons.

Some state courts take a simple approach when dealing with jurors that are eligible to opt-out because of their older age.<sup>23</sup> Illinois is no stranger to this excusal process; in fact, they have a *designated program* to streamline the excusal process in some of their state courts.<sup>24</sup> In the Circuit Court of Cook County, there is a distinctive “Opt-Out Program” available for citizens.<sup>25</sup> After the prospective juror in Cook County reaches age seventy, that person can simply call a telephone number and ask to be opted out; this action allows for the juror to easily receive an excusal.<sup>26</sup> If a citizen is over seventy and does not want to be on a jury, it is a simple process for a jury duty excuse.<sup>27</sup> By unassumingly typing in a birthdate in an online juror system, or in some jurisdictions, making a quick phone call, any septuagenarian and older will receive an excusal, no questions asked.<sup>28</sup> Jury duty remains an

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20. SOUTH CAROLINA JUDICIAL DEPARTMENT, JUROR INFORMATION (2017) <http://www.sccourts.org/jurorInfo/jurorInfo.cfm> (last visited Nov. 6, 2017).

21. NEW JERSEY COURTS, FREQUENTLY ASKED QUESTIONS ABOUT JURY SERVICE IN NEW JERSEY 5, <https://www.judiciary.state.nj.us/jurors/assets/juryfqa.pdf> (last visited Nov. 6, 2017).

22. U.S. DIST. CT. FOR THE DIST. OF S. CAR., JURY DUTY FREQUENTLY ASKED QUESTIONS, <http://www.scd.uscourts.gov/Jury/FAQ.asp#Q11> (“I don’t have to serve in State Court when I am 65 years old. Why am I not excused in Federal Court? The statutory age for excuse from federal jury service is 70.”) (last visited Nov. 6, 2017).

23. See STATE OF ILLINOIS: CIRCUIT COURT OF COOK COUNTY, FREQUENTLY ASKED QUESTIONS, <http://www.cookcountycourt.org/FORJURORS/FrequentlyAskedQuestions.aspx> (last visited Nov. 6, 2017) [hereinafter FAQs COOK COUNTY].

24. See *id.* (emphasis added).

25. *Id.* (“The Opt-Out Program allows potential jurors 70 years of age or older to either transfer to another court location or choose not to participate in jury service. In order to opt-out, you must call (312) 603-JURY before your service date.”).

26. *Id.*

27. *Id.*

28. *Id.*

important civic duty for citizens, but the procedure to avoid the duty is remarkably stress-free.<sup>29</sup>

Jury service, often viewed as an annoyance, generates enormous impacts and benefits for the judicial system and its fundamental ideologies when juries include older members of society.<sup>30</sup> The cross-section of a jury is an integral part of any jury.<sup>31</sup> A prevailing principle, a proper cross-section, means that every party in a judicial proceeding deserves the right to an impartial jury that fairly represents the corresponding jurisdiction's population.<sup>32</sup> The judicial system can benefit from someone over the age of seventy as a member on the jury.<sup>33</sup> Juries need and should reflect the current society's wide range of goals and ideals. Older citizens have their own unique thoughts and impacts on society. An additional benefit is a jury with an increased opt-out age would provide a better representation of a community—a true jury of one's peers.<sup>34</sup> Today, the Baby Boomer population, a significant portion of the country's population,<sup>35</sup> is living longer than ever and well into

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29. David M. Sums et al., *Avoiding Jury Duty: Psychological and Legal Perspectives*, THE JURY EXPERT (Jan. 31, 2013), <https://www.thejuryexpert.com/2013/01/avoiding-jury-duty-psychological-ad-legal-perspectives/> [hereinafter Sums et al.] (“Even the more descriptive [undue hardship] statutes allow courts wide discretion as to the meaning of undue hardship and provide avoidance-seeking citizens a wide canvas upon which to paint their woeful tales.”).

30. See generally Max B. Rothman et al., *Jury Selection in Aging America: The New Discrimination?*, 2 MARQ. ELDER'S ADVISOR 69 (2000) [hereinafter Rothman et al.].

31. See also *Duren v. Missouri*, 439 U.S. 357, 357 (1979).

32. See *Fair-Cross-Section Requirement*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“The principle that a person's right to an impartial jury, guaranteed by the Sixth Amendment, includes a requirement that the pool of potential jurors fairly represent the composition of the jurisdiction's population. Although the pool of potential jurors need not precisely match the composition of the jurisdiction, the representation of each group must be fair—no group being systematically excluded or underrepresented.”).

33. Sums et al., *supra* note 29, at 26 (explaining that the major life events of different generations may lead to unique perspectives for juries based on the generational composition of a given jury).

34. 28 U.S.C. § 1861 (2018) (“It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.”).

35. Kevin Pollard & Paola Scommegna, *Just How Many Baby Boomers Are There?*, POPULATION REFERENCE BUREAU,

the twenty-first century.<sup>36</sup> As the Baby Boomers vastly approach age seventy and above, they serve as the driving force behind why the current jury standards need to be updated. The United States, as a leading and powerful nation, needs to ensure that the judicial system adjusts its standards for its changing society.

When the jury rules were first enacted, a citizen over the age of seventy was likely a very different type seventy-year-old than the ones alive today. Advancing medicine, older citizens' varying outlooks and attitudes, and generally a larger population of people over age seventy all contributes to this change.<sup>37</sup> An individual summoned for jury duty classified as "elderly" has various understandings to offer a jury: life experiences, different points of view, and even a better perspective on how a certain community has changed over the years. The seventy and older population can immeasurably give to the court system in different ways, and the court system can benefit from utilizing this group of people even more than it is currently. Also, by increasing the opt-out age by five additional years, this action will cast a positive light on the jury system by stressing the core values of proper cross-sections, valuing all populations of citizens, and showing the public the importance of jury duty by reiterating to the public jury duty's importance to the judicial system today and in the future.

The Baby Boomers, also the newest generation to reach retirement age, continue to live longer lives and retire later than past generations.<sup>38</sup> The court systems urgently need to make changes with such a large population of people entering this "elderly" age range.<sup>39</sup> Although not every age group will always have equal representation on a jury panel, the increased opt-out age should better reflect the varying and changing populations of people in the United States. A citizen can

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<http://www.prb.org/Publications/Articles/2002/JustHowManyBabyBoomersAreThere.aspx> (last visited Nov. 6, 2017).

36. *Id.*

37. *Baby Boomers to Challenge and Change Tomorrow's Health Care System*, AM. HOSP. ASS'N, <http://www.aha.org/presscenter/pressrel/2007/070508-pr-boomers.shtml> (last visited Nov. 6, 2017).

38. Ben Steverman, *I'll Never Retire: Americans Break Past Record for Working After 65*, BLOOMBERG (May 13, 2016, 4:57 AM), <http://www.bloomberg.com/news/articles/2016-05-13/-i-ll-never-retire-americans-break-record-for-working-past-65> [hereinafter Steverman].

39. Colby & Ortman, *supra* note 11, at 1-2.

still vote, run for office, and drive a car after age seventy.<sup>40</sup> Citizens over age seventy still pay taxes, another different compulsory action the government requires.<sup>41</sup> When an individual is considered to be “elderly” or over age seventy, they still have knowledge and can contribute to society. Shouldn’t an important civic duty adapt to include a population that is qualified to serve on a jury?

Jury duty, an important judicial legacy in the United States, needs new standards to meet today’s changing and aging country.

Part II provides background on jury service and advantages of having an over-seventy juror participate in the jury duty process. Part III provides an international and domestic analysis for the reasons why increasing the jury duty opt-out age remains important to society today. Part IV serves as a recommendation for increasing the jury opt-out age. Part V concludes.

## II. Background

The origin of jury service provides convincing insight into the reasons why the United States has these particular jury standards in the first place and also show the need for these standards to be adapted to meet modern society’s needs. The origin of jury service, the current rules, and where they all stand in relation to one another provide further details for why a new “opt-out” age will better serve the current judicial system’s needs. When many of these rules and standards in place today were enacted, the type of seventy-year-old alive during that time was a completely different type of person, with different abilities and life experiences, than the seventy-year-old alive in the United States today.

Age remains as one of the most common reasons for juror’s excusals from jury service.<sup>42</sup> Twenty-seven states had a listed exemption category for age; this excusal is often extended to those people age seventy and older.<sup>43</sup> The federal standard for the jury duty opt-out age is typically seventy, and this standard is often listed in the respective

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40. See U.S. CONST. amend. XXVI § 1; *Voter Registration Age Requirements by State*, USA.GOV, <https://www.usa.gov/voter-registration-age-requirements> (last visited Nov. 6, 2017).

41. See generally TAX GUIDE FOR SENIORS 2016 FILING REQUIREMENTS I.R.S., (2016) <https://www.irs.gov/publications/p554/ch01.html>.

42. HON. MIZE ET AL., *supra* note 3, at 15.

43. *Id.*



court's "jury plan."<sup>44</sup> State courts often differ with their exact criteria for opting out for age.<sup>45</sup> Nationally, the most common age to qualify for the age exemption in state courts is also seventy, mirroring the federal age for opting out.<sup>46</sup> The exemption for age in the remaining states normally ranges from ages sixty-five to seventy-five.<sup>47</sup> The United States has fallen behind when it comes to updating policies to reflect its changing population landscape. There is a drastic need for updates and revisions for the United States' jury standards, compared to other democratic nations with juries. The United States current, yet indifferent, approach continues to put the jury system and its integrity in danger. Other countries have taken a practical approach and raised their jury duty standards to accommodate for older populations living longer. These other countries realized the need for this group to continue completing their civic duties, like jury duty.<sup>48</sup> The origins of jury service offer guidance for how the United States should preserve the integrity of its jury system, even in the twenty-first century.

#### A. Constitutional Implications and Connections to Jury Service

Constitutionally, jury service remains as an integral part of democracy.<sup>49</sup> Yet, the guidance on the subject is not incredibly detailed.<sup>50</sup>

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44. See generally JURY PLAN, *supra* note 4; U.S. DIST. CT. OF IND., PLAN FOR RANDOM SELECTION OF GRAND AND PETIT JURORS, <http://www.insd.uscourts.gov/sites/insd/files/general-ordes/Jury%20Plan.pdf>; U.S. DIST. CT. EASTERN DIST. OF N.Y., AMENDED PLAN FOR THE RANDOM SELECTION OF GRAND AND PETIT JURORS IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, [https://img.nyed.uscourts.gov/files/local\\_rules/juryplan.pdf](https://img.nyed.uscourts.gov/files/local_rules/juryplan.pdf) [hereinafter N.Y. JURY PLAN]; U.S. DIST. CT. MIDDLE DIST. OF FLA., PLAN FOR THE QUALIFICATION AND SELECTION OF GRAND AND PETIT JURORS, <https://www.flmd.uscourts.gov/forms/General/2009-AmendedJuryPlan.pdf> [hereinafter FLA. JURY PLAN]. Different district court jury plans were provided to show the similarities in federal jury plans.

45. See also HON. MIZE ET AL., *supra* note 3, at 15.

46. *Id.*

47. *Id.*

48. See generally Valerie P. Hans, *Jury Systems Around the World*, CORNELL L. FAC. PUBLICATIONS 275 (2008).

49. David Barnard & Tara Trask, *Citizen Juror: Justice Sotomayor and Steve Susman Discuss Why Jury Duty Matters*, THE JURY EXPERT (May 20, 2016), <http://www.thejuryexpert.com/2016/05/citizen-juror-justice-sotomayor-and-steve-susman-discuss-why-jury-duty-matters/> ("The right of the people to be judged by their fellow citizens was, and remains today, a necessity for ensuring the stability of public sovereignty."); Perry Deess & John Gastil, *How Jury Service Makes Us Into Better Citizens*, THE JURY EXPERT (May 1, 2009),

The United States Constitution conveys nothing directly or explicitly about the requirements for jury panels or potential juror lists, and beyond the traditional prohibition of discriminatory selection practices, the Supreme Court overall provides minimal guidance on the subject.<sup>50</sup>

The right to an impartial jury is referenced multiple times in the Constitution;<sup>51</sup> but, the standards are not specified in any clause. The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>52</sup> The Constitution’s key phrase, “impartial jury,” reiterates why a diverse jury, including a variety in ages, aligns with the Constitution’s goals.<sup>53</sup> While “impartiality” does not have a clear-cut definition, judges must insist that jurors not allow their biases to irrationally affect the verdict of the case.<sup>54</sup>

Additionally, the judicial system values diverse viewpoints on a jury, and a diverse group is desirable for any jury.<sup>55</sup> Each juror, including an older juror over seventy, will have a unique reaction to the trial based on his or her own life experiences.<sup>56</sup> Every juror’s individual nature will influence what that juror pays attention to, their thoughts on credibility, and what they recall during deliberations.<sup>57</sup> A diverse group of people—including a diverse group of ages—can help a jury system striving for impartiality.<sup>58</sup> “Group biases,” or when many peo-

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<http://www.thejuryexpert.com/2009/05/how-jury-service-makes-us-into-better-citizens/> [hereinafter Deess & Gastil].

50. See generally Alexander E. Preller, *Jury Duty Is A Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 COLUM. J.L. & SOC. PROBS. 1 (2012).

51. *Id.*

52. U.S. CONST. amend. VII. (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”); Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1117 (2014) (citing Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991)) (“Thus, the Seventh Amendment’s right to a civil jury complements the Sixth Amendment’s right to a criminal jury, and the Fifth Amendment’s right to indictment by Grand Jury.”) [hereinafter Ferguson I].

53. U.S. CONST. amend. VI.

54. Ferguson I, *supra* note 52, at 1131.

55. James J. Gobert, *In Search of the Impartial Jury*, 79 J. OF CRIM. L. & CRIMINOLOGY 269, 280 (1988) [hereinafter Gobert].

56. *Id.*

57. DEVINE, *supra* note 12, at 182.

58. *Id.*

59. Gobert, *supra* note 55, at 279–80.

ple come from similar backgrounds with similar opinions, are a concern for the jury's cross-sections, but individual biases, or predispositions, can help with impartiality.<sup>60</sup>

The ideals for representativeness are based on two assumptions tied together.<sup>61</sup> These assumptions include the statistical assumption that representativeness results in a "heterogeneous pool of jurors" and the second psychological assumption that as many segments of the community "must be included for the public to feel confident about the fairness of jury trials."<sup>62</sup> Comments, suggested standards, and ideals for jury service are copious, but getting the right assortment people to the courthouse for jury selection is the most critical piece of this puzzle.

Universally, juries provide a system of integrating community members into the legal process. Why do we have juries in the first place? The history of juries sheds more light on their importance in the past and currently: "[p]articipation in the legal system by free men was a method to ensure fairness and to prevent state corruption from creeping into judicial systems."<sup>63</sup> Juries embody communities. Juries also serve an important purpose in government regulation.<sup>64</sup>

Juries protect the people from an overbearing government system.<sup>65</sup> It is one of the few times that a citizen has the opportunity to bring their own experiences, opinions, and beliefs to a place where they can truly make an impact on the community around them.<sup>66</sup> Jury duty provides a chance for a citizen's opinion to be heard in a formal and meaningful setting.<sup>67</sup> The jury's purpose is to guard against the exercise of arbitrary power, an issue in both state and federal govern-

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60. Compare John B. Ashby, *Juror Selection and the Sixth Amendment Right to an Impartial Jury*, 11 CREIGHTON L. REV. 1137, 1138 (1978) ("There are at least four reasons why the cross section is necessary. First is the belief that, given the differences in group behavior, a cross section will help cancel group biases.") with Gobert, *supra* note 55, at 279 ("Two jurors with competing biases will force each other to confront the merits of their opposing positions, thereby contributing to a full airing of views and impartial decision making.").

61. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 22 (1988) [hereinafter KASSIN & WRIGHTSMAN].

62. *Id.*

63. Sums et al., *supra* note 29.

64. *Id.*

65. See generally Barnard & Trask, *supra* note 15.

66. Sums et al., *supra* note 29.

67. See also *id.*

ments.<sup>68</sup> Furthermore, juries make the commonsense judgment of the community available to possibly hedge against an overzealous or mistaken prosecutor and respond to a judge's over-conditioned or biased response.<sup>69</sup>

Fitting with the constitutional perspective on jury duty, there are typically four roles that a jury is expected to fulfill: (1) articulation of public values; (2) fact finding; (3) fair decision making; and (4) educating the citizenry.<sup>70</sup> By including a broad age range of jurors, like more citizens over the age of seventy, these citizens can fulfill these roles, especially with an older citizen's unique long-standing perspective on the evolution of public values.<sup>71</sup> The Constitution encourages this exact type of participation even though it makes no mention of age or older jurors directly in the text.<sup>72</sup>

New jury duty standards will provide additional constitutional benefits for attorneys and the entire judicial system.<sup>73</sup> After all, a fair cross-section is a constitutional necessity for the jury system.<sup>74</sup> A defendant has a constitutional and statutory right to a jury selected from a fair cross-section of the community.<sup>75</sup> The Supreme Court, while typically silent on most jury issues, lists additional purposes for the Sixth Amendment's fair cross-section requirement, including the ability to "implement the belief that sharing in the administration of justice is a phase of civic responsibility."<sup>76</sup> When considering jury duty as a responsibility, elderly jurors feel equally compelled to help their society as their younger colleagues should feel.<sup>77</sup> An elderly juror, like any other juror that remains qualified for jury duty, helps to create a better

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68. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citing *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968)).

69. *Id.*

70. Wesley Morrisette, *These Aren't My Peers: Why Illinois Should Reconsider Its Age Requirement for Jury Service*, 9 NW. J. L. & SOC. POL'Y 360, 383 (2014) [hereinafter Morrisette].

71. *Id.*

72. ANDREW GUTHRIE FERGUSON, *WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION* 20-21 (2013) ("[T]he people, the vote, the church, the militia, and of course the jury represent the core participatory principles written into the Constitution.") [hereinafter Ferguson II].

73. § 48:78. Exclusion of eligible persons or classes of persons as grounds for challenge to jury panel or array—failure to represent cross section of community [hereinafter 12 CYC. OF FED. PROC. § 48:78].

74. *Powers v. Ohio*, 499 U.S. 400, 422 (1991) (citing *Holland v. Illinois*, 493 U.S. 474, 475 (1990)).

75. 12 CYC. OF FEDERAL PROC. § 48:78, *supra* note 73.

76. Morrisette, *supra* note 70, at 380.

77. *See id.*

cross-section and fulfill some of the Sixth Amendment's underlying intentions.<sup>78</sup> Cross-sections serve as an important aspirational goal, but the achievement of a "true" cross-section is often difficult.<sup>79</sup> Any opportunity judicial systems have to broaden and diversify the cross-sections should be utilized.

Considering Alexis de Tocqueville's 150-year-old opinions regarding juries, his universal thoughts hold true centuries later: a "jury raises the people itself, or at least a class of citizens, to the bench of judicial authority [and] invests the people, or that class of citizens, with the direction of society."<sup>80</sup> Tocqueville expanded on his support of juries and equated the importance of juries with the importance of voting.<sup>81</sup> Juries give citizens, starting from age eighteen,<sup>82</sup> the opportunity for involvement in the legal system, the ability to make a direct impact in society, and to help their local communities' needs.<sup>83</sup> By giving the over-seventy population such an easy way out of jury service, the United States, in part, reveals that they do not value this group as much as they value younger citizens that do not have the same excusal opportunities.

Those over the age of seventy should be a part of that "class of citizens" that Tocqueville mentioned.<sup>84</sup> Excusing older citizens because they are "too old to serve" or have "put in their time" shows that the United States does not value older Americans as much as they should. The younger generations, that may be technically more agile, are the majority group of people that participate in jury service.<sup>85</sup> It should be assumed that elderly people have an interest in their communities,

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78. *Id.*

79. See generally Harry F. Mooney et al., "A Jury of Our Peers": Is That Right?, 71 DEFENSE COUNSEL J. 106, 109 (2004) ("It is important to draw attention to the fact that both socio-economically disadvantaged and advantaged people are under-represented in the jury empaneling process. Among the economically disadvantaged, voter registration is lower than in the rest of society.") [hereinafter Mooney et al].

80. Powers v. Ohio, 499 U.S. 400, 406-07 (1991) (citing ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 334-37 (Schocken, 1st ed. 1961) [hereinafter Tocqueville]).

81. See generally SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES 89 (2016).

82. JUROR QUALIFICATIONS, *supra* note 1.

83. Deess & Gastil, *supra* note 49.

84. See also Powers, 499 U.S., at 407 (citing Tocqueville, *supra* note 80) (emphasis added).

85. See generally *id.*

which warrants fulfilling their civic duties. The importance of the jury as a part of the judicial system is clearly expressed in various governmental and constitutional perspectives.<sup>86</sup> The United States should take action now to preserve these citizens' roles on juries. It is a crucial time to modify the current standards and carefully incorporate the newly aging populations, particularly the Baby Boomers, into a new, broader standard. The United States needs to invest in and encourage the older populations to stay involved in their communities and the judicial processes.<sup>87</sup>

From a government safeguarding standpoint, a wide age range of juror ages will help preserve the standards of the jury system that the United States values the most, including diversity and impartiality.<sup>88</sup> Attorneys and judges recognize the benefit in older jurors on a jury; this population of jurors can impact specific parties in litigation with their unique perspective.<sup>89</sup> These jurors can make or break a trial outcome.<sup>90</sup> Looking at the importance of the jury system from the defendant's perspective, a defendant may benefit when a better representation of the community complies with their summons and comes to jury selection.<sup>91</sup> There are no guarantees that these older people will be selected for a jury, but it is at least a possibility. These overall benefits may apply to both defendants and plaintiffs depending on the nature of the case.<sup>92</sup>

While there may be constitutional and legal benefits from a diverse cross-section for jury service, there is a compulsory element.<sup>93</sup> This compulsory element functions as a necessary evil, and it serves also as the part of jury service that creates the most hostility from citizens.<sup>94</sup> The compulsory feature carries both benefits and drawbacks.<sup>95</sup>

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86. *Id.* at 425.

87. *Id.* at 406–07.

88. Ferguson I, *supra* note 52, at 1117 (citing Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991)).

89. See R. Rex Parris & James Wren, *Reach Jurors Across the Generations*, TRIAL 19, 19 (March 2008) [hereinafter Parris & Wren].

90. *Id.* at 19–20.

91. *Id.*

92. *Id.* at 19–24.

93. FAQ'S: JUROR INFORMATION, UNITED STATES COURTS, <http://www.uscourts.gov/services-forms/jury-service/faqs-juror-information#faq-Must-I-respond-to-my-jury-duty-notice?> (last visited Nov. 6, 2017) [hereinafter FAQ'S: JUROR INFORMATION].

94. See also *id.*

95. See also *id.*

Citizens can receive penalties for noncompliance.<sup>96</sup> If a citizen *does* correctly comply with their summons, then they are serving as a vital part of the American judicial system whether or not they are selected to serve on a jury.<sup>97</sup> Jury duty is unlike any other civic duty or opportunity offered by the government; but it likewise resembles no other democratic involvement because it is compulsory.<sup>98</sup> This civic duty should be treated as an opportunity instead of as a chore. The opportunity to participate in jury duty is unique and democratic, but courts are undermining the system when they offer an “opt-out” age with no information needed other than a birthdate.<sup>99</sup> This approach is apathetic. To reflect the value that older Americans add to society, the standards should be changed to encourage more qualified citizens to participate in the jury process, even if it means including them in the jury pool for five years longer.

As the population of older people increases, there should be more systematic analysis of their needs and rights within the judicial branch of the government.<sup>100</sup> The opt-out situation currently in place revolves around a premature opt-out age including many consequences for the integrity of the jury system.<sup>101</sup> Although age exists as only one factor of many to consider for jury selection purposes, age is an important and added benefit to a jury.<sup>102</sup>

#### **B. Generational and Age-Based Differences: The Benefits of Older Jurors**

Idyllically, a jury should be a group of “one’s peers.”<sup>103</sup> The necessity of having “peers” on a jury also requires the dutiful incorporation of cross-sectional goals and standards.<sup>104</sup> When elderly individu-

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96. *Id.*

97. *See id.* (explaining that yes, jury duty is legally required, and there are penalties for noncompliance. Jurors perform a vital role in the American system of justice. Jury service is an important civic function that supports one of the fundamental rights of citizens—the right to have their cases decided by a jury of their peers.)

98. Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury*, 39 L. AND SOC’Y REV. 600, 601 (2005).

99. *See* JUROR QUALIFICATIONS, *supra* note 1.

100. Rothman et al., *supra* note 30, at 77.

101. *Id.* at 70.

102. 28 U.S.C. § 1863 (2018); *see also* United States v. Blair, 493 F. Supp. 398, 405 (D. Md. 1980).

103. Morrissette, *supra* note 70, at 362.

104. *Id.* at 368–69.

als are given the opportunity to opt-out of jury service early, particularly at age seventy, the courts squander and lose massive amounts of wisdom and experience from that population group. It gives that group an easy way to ignore their civic duty. People in this group continue to utilize these outdated standards to their own advantage.

The U.S. Census reports that, by 2030, 9% of the entire United States population will be ages seventy to seventy-nine.<sup>105</sup> This proposed “opt-out” age increase creates a proactive approach; these staggering statistics on the growing elderly population deserve a second look. In future decades, as the average age of the population increases, the “elderly” age group will remain as a significant portion of the United States’ population.<sup>106</sup> According to the U.S. Census Bureau’s middle series projections, the elderly populations will more than double between now and 2050, to 80 million people.<sup>107</sup> By 2050, as many as one in five Americans have the potential to be classified as “elderly.”<sup>108</sup> Most of this growth should occur until 2030, as the Baby Boomers enter their elderly years.<sup>109</sup> The statistics confirm that older Americans are here to stay for the years to come. The rampant growth of this age group should not be ignored because this population growth is already in full swing. This means that by 2050, the cross-sections will be even worse off than they are currently.<sup>110</sup> By simply looking at the number of old age people in the United States now and in the immediate future, the current opt-out ages are off-target.

Bearing in mind the timeframe for these drastic changes, the time to act and adjust the jury standards is now. Attorneys, judges, and the judicial system as a whole can no longer assume that cross-sections are adequate or even close to adequate.<sup>111</sup> These aspirational goals for adequate cross-sections now are met with shortages of elderly jurors.<sup>112</sup> Another aspirational goal for the judicial system is that ju-

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105. Colby & Ortman, *supra* note 11, at 1.

106. *Id.*

107. *Id.* at 15 (emphasis added).

108. *Id.* at 2.

109. *Sixty-Five Plus in the United States*, US CENSUS BUREAU (May 1995), <https://www.census.gov/population/socdemo/statbriefs/agebrief.html> [hereinafter *Sixty-Five Plus*].

110. See Colby & Ortman, *supra* note 11, at 15.

111. See also Mooney et al., *supra* note 79, at 109.

112. Diane C. Lade, *Many Seniors Choose to Skip Jury Duty Based on Their Age*, SUN SENTENTIAL (May 20, 2002), [http://articles.sun-sentinel.com/2002-05-20/news/0205200104\\_1\\_jury-system-palm-beach-county-senior-citizens](http://articles.sun-sentinel.com/2002-05-20/news/0205200104_1_jury-system-palm-beach-county-senior-citizens) [hereinafter Lade].



ries come with a unique set of standards, beliefs, and contributions.<sup>113</sup> By keeping the current jury system status quo, the risk grows that juries will lack impartiality and proper cross-sections.<sup>114</sup>

The constitutional and policy-based reasons are not the only grounds to request an updated opt-out age. Each juror, including an elderly juror, has something unique to offer a jury. Elderly jurors act as assets for the judicial system. There is an expectation and hope in most court systems that jurors stay “open about their backgrounds, views, and life experiences.”<sup>115</sup> On this occasion, elderly people clearly have their age and experience on their side. They have the most life experience in comparison to any other generation alive today simply because of their age and wisdom. It is vital to have prospective jurors, and consequently selected jurors, that embody years of real life experience, and older people can “actually [make] better use of the extra information that comes with experience.”<sup>116</sup> An over-seventy juror offers extensive life experience, wisdom, and thought to a jury. Jurors bring their prejudices and passions to the jury at any age, so the judicial system needs to use this older generation while they are still alive and able to serve.<sup>117</sup>

The way this dynamic generation has acted in the past, and likely will act in the future, shows that they are from “feeble” or “complacent” group of people. The United States needs to appreciate an older juror’s perspective and utilize this population now more than ever. By taking action now, it will create benefits with regard to cross-section standards, but also it will help courts refine their standards to acquire a distinct, yet authentic, jury pool. Elderly jurors are potentially excellent jurors and should not be easily dismissed because they have reached a milestone birthday.<sup>118</sup> Citizens, especially those over the age of seventy, are far from strangers to the judicial system; for this reason, they should not receive jury duty excusals now.<sup>119</sup>

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113. Sonya Hamlin, *Who Are Today’s Jurors and How Do You Reach Them?*, 27 LITIG. 9, 9 (2001) [hereinafter Hamlin].

114. See Mooney et al., *supra* note 79, at 109.

115. Mary R. Rose, *A Dutiful Voice: Justice in the Distribution of Jury Service*, 39 L. & SOC’Y REV. 601, 611 (2005).

116. Dr. Ken Broda-Bahm, *Trust Your Older Jurors (or Judges)*, PERSUASIVE LITIGATOR (Jan. 30, 2014), <http://www.persuasivelitigator.com/2014/01/trust-your-older-jurors-or-judges.html> [hereinafter Broda-Bahm].

117. Hamlin, *supra* note 114, at 9.

118. See also Broda-Bahm, *supra* note 117.

119. See David J. Garrow, *Four Supreme Court Justices Are Older Than 75. Is That A Problem?*, L.A. TIMES (Feb. 2, 2016, 5:00 AM),

Presently, in the United States, a double standard pervades the typical seventy-year-old opt-out age standard. Numerous federal judges reach the meaningful seventy-year-old birthday and still continue to sit on the bench.<sup>120</sup> In fact, many of the most influential individuals in the judicial system include elderly citizens.<sup>121</sup> Currently, three Supreme Court justices are over the age of seventy-five.<sup>122</sup> In as recently as 2016, there were four Supreme Court justices over the age of seventy-five, prior to the death of Justice Antonin Scalia.<sup>123</sup> The United States values the efforts of these elderly justices immensely, and a similar standard is needed for potential elderly jurors and their value they bring to the court. Frequently, Supreme Court justices are profoundly called an “elderly leadership group.”<sup>124</sup> Given the pure influence elderly people in general have in the judicial system,<sup>125</sup> other elderly people need to realize their influence and embrace jury duty after they turn seventy. This crucial age group needs accountability, especially for people their own age, and for the role they still play in society. Elderly jurors, regularly common citizens, deserve the recognition as “elderly leaders” outside the Supreme Court when they participate in the jury selection process.<sup>126</sup>

Older Americans unfailingly exercise another civic duty, voting; the elderly often have a large voter turnout during most elections.<sup>127</sup> Consequently, for other important civic duties like jury service, their involvement should be equally encouraged, as well.<sup>128</sup> There should not be a contradictory standard that allows numerous judges’ “peers” the ability to opt-out so early on, provided they are still able-bodied

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<http://www.latimes.com/opinion/op-ed/la-oe-0202-garrow-aging-judiciary-20160202-story.html>.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. Ross M. Soltzenberg & James Lindgren, *Retirement and Death in Office of U.S. Supreme Court Justices*, 47 *DEMOGRAPHY* 269, 281 (2010) (citing Samuel H. Preston, *Mortality Trends*, 3 *ANN. REV. SOC.*, 163, 171 (1977)).

125. *Id.*

126. *Id.*

127. See generally Thom File, *Who Votes? Congressional Elections and the American Electorate: 1978-2014*, U.S. CENSUS BUREAU (July 2015), <https://www.census.gov/content/dam/Census/library/publications/2015/demo/p20-577.pdf> (explaining that since 1986, Americans 65 and older have voted at higher rates than all other age groups. In 2014, for example, the voting rate for the 65 and older group was 59.4 percent, about 10 percentage points above the next-highest age group.).

128. *Id.*

and capable of serving.<sup>129</sup> Even with the many obstacles of old age, unless a documented medical problem permits a formal excusal, “[y]ou don’t lose the capacity for decision making and the capacity for analysis.”<sup>130</sup> Juries need good decision-makers,<sup>131</sup> well-rounded individuals, and the current opt-out system permits important elderly citizens to slip through the cracks. The current system makes it too easy for this critical part of the population to simply “opt-out” and choose not to participate in an important part of government. Those people ages seventy to seventy-five add significant value to a jury. With a new standard for the federal opt-out age, and subsequent state opt-out ages, the jury duty standards will echo this appreciation for over-seventy jurors.

Baby Boomers bring unparalleled perspectives to juries. This generation’s work experiences, life experiences, and overall perseverance are unmatched by any other generation today. Baby Boomers, and consequently Baby Boomers selected as jurors, are more accustomed into putting time and effort into getting information, an excellent skill for a juror to have.<sup>132</sup> This generation is not to be underestimated. They can significantly affect trial outcomes, and this generation lives tremendously different lives than Generation X and Y.<sup>133</sup> Generation X and Y jurors, the younger generations, may appreciate a Baby Boomer perspective during jury deliberations. Baby Boomers may have a favorable view towards either the defense or the prosecution because of their different life experiences in comparison to the younger generations.<sup>134</sup> One recent jury generational study even went so far to tell defense attorneys: “[b]eware of the X,”<sup>135</sup> meaning that the defense attorneys should “avoid jurors from Generation X who tend

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129. See JURY PLAN, *supra* note 4.

130. Larry Neumeister & Tom Hays, *Aging of Federal Judges: A Retirement Case Study*, WASH. TIMES (Feb. 26, 2012), <http://www.washingtontimes.com/news/2012/feb/26/aging-of-federal-judges-a-retirement-case-study/>.

131. *Id.*

132. Hamlin, *supra* note 114, at 9.

133. Parris & Wren, *supra* note 89, at 19. (The Baby Boomers are seen as a separate generation from Generations X and Y. The next generation after the Baby Boomers is Generation X is comprised of those Americans born from about 1966 to 1976-77. Generation Y, called the “millennials,” is comprised of those people born from about 1978 to 2000.).

134. *Id.*

135. Delaney et al., *Understanding Jurors’ Generational Differences to Win at Trials and Mediations*, Presentation from the Voices of the Defense Bar (2014), [www.dri.org/DRI/course-materials/2014-Asbestos/pdfs/13\\_Delaney.pdf](http://www.dri.org/DRI/course-materials/2014-Asbestos/pdfs/13_Delaney.pdf) (last visited Nov. 6, 2017).

to be more plaintiff-oriented on liability and damages.”<sup>136</sup> Generational differences can add or detract from a jury and an outcome.<sup>137</sup> Depending on the side of the litigated matter, selection of a Baby Boomer juror may be a strategic move in order to better serve their client and try to get a particular outcome.<sup>138</sup>

Older jurors are important to juries because jurors’ seniority or youth can help one side in the litigation proceedings more than the other.<sup>139</sup> One study from the University of Chicago showed that “[w]hen the average age of the jury pool is younger than 50, conviction rates are only 68 percent.”<sup>140</sup> Conversely, with a jury including those over age fifty, the possibility exists that conviction rates increase.<sup>141</sup> Excusals for age should not be taken lightly when it comes to juries. Age should be considered equally as important as other factors that are often controversial, like race and gender.<sup>142</sup> Age alone can have significant bearing on trial outcomes and convictions.<sup>143</sup>

Baby Boomers have a distinct perspective to offer society and the jury system. This group is no stranger to adversities, as well as achievements. This generation is full of ambitious, loyal workers; they experienced different wars and movements like the Vietnam War and the Civil Rights Movement, and even lost faith in American corporations after events like the Enron scandal.<sup>144</sup> They even go far as to blame executives instead of corporations, and a poll showed that 76% of Baby Boomers felt unfavorable toward anyone described as a “corporate defense lawyer.”<sup>145</sup> Baby Boomers remain comfortable climbing the corporate ladder vertically, gaining power, and considering their jobs as major investments.<sup>146</sup> Depending on the type of lawsuit, whether it involves civil rights or a massive corporation, age is a factor to importantly consider for these cases and should not be a factor to effortlessly brush aside. In the aggregate, all of this group’s understand-

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136. *Id.*

137. *Id.*

138. *Id.*

139. Shamena Anwar et al., *The Role of Age in Jury Selection and Trial Outcomes*, 57 J.L. & ECON. 1001, 1001 (2014) [hereinafter Anwar et al.].

140. *Id.*

141. *But see id.*

142. *Powers v. Ohio*, 499 U.S. 400, 425 (1991) (citing *Swain v. Alabama*, 380 U.S. 202 (1965)).

143. *See also* Anwar et al., *supra* note 140, at 1001.

144. Parris & Wren, *supra* note 89, at 20.

145. *Id.*

146. *Id.*

ings and sentiments create unique and valuable jurors. Life experiences, hardships, and successes that come with older jurors cannot be taught overnight to younger generations. These essential capabilities can only be offered by older jurors.

### C. Over-70 and Over-Qualified

A juror over age seventy serves to help a jury, not hinder it.<sup>147</sup> As Baby Boomers reach the age of seventy and beyond, their value to society, and consequently the judicial system, continues to flourish.<sup>148</sup> This generation of elderly citizens and future elderly citizens is far from taking their last bow any time soon. If anything, their work ethic speaks for itself.

This generation has worked longer than any generation before them, another unique trait of the Baby Boomer population.<sup>149</sup> Employers view their generation as skilled and valuable and some companies choose not to replace them as they age.<sup>150</sup> Regularly, a citizen working past age sixty-five predominates as the common standard.<sup>151</sup> The Baby Boomers' work ethic and longevity in the workforce serve as other factors that set this group apart from other age groups.<sup>152</sup> Baby Boomers embody a respectable group of citizens. Juror pools and the judicial systems equally should not be so quick to discount them. The jury standards and the judicial system should see the worth in an older juror. Even if Baby Boomers decide to retire from their careers and live a more stress-free life, retiring from one's civic duty should not be an option for someone as young as seventy.

One advantage of retired Baby Boomers summoned for jury service is that they have fewer work obligations if they are retired. Many potential jurors' are concerned about absences from work.<sup>153</sup> If a Baby Boomer is retired, more common for an age group rapidly reaching retirement age, then this prospective juror, relatively speaking, is a

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147. Anwar et al., *supra* note 140, at 1001.

148. Steverman, *supra* note 38.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. See generally *When Duty Calls: Don't Interfere With Employees' Jury Duty*, HR Specialist: New York Employment Law, BUS. MGMT. DAILY (Nov. 12, 2010), <https://www.businessmanagementdaily.com/12415/when-duty-calls-dont-interfere-with-employees-jury-duty>.

more eligible juror because they have fewer work obligations than those people that are employed full time.<sup>154</sup>

The federal and state judicial systems, including state and federal systems, need to adjust their standards now to meet the rapidly approaching change of Baby Boomers reaching age seventy; this ensures that juries in the United States continue to represent various groups of the current population.<sup>155</sup> Today, if a Baby Boomer lives well into their nineties, then they consequently have the ability to opt-out of jury duty for nearly twenty years. Thus, this citizen takes a back seat to an important civic duty for decades, and allows for other people make the decisions about their communities for them. It is possible that an over-seventy citizen is an active member of their community, continues to vote, and simply opts-out because option presents itself so early on.<sup>156</sup>

With older jurors, an inevitable concern and disadvantage for an increased opt-out age is that more potential jurors will be dismissed because of their declining physical and mental activities.<sup>157</sup> Mental and physical abilities of older jurors do warrant valid concerns from the judicial system.<sup>158</sup> Attorneys and judges expect that they can present cases to those people able and healthy enough to serve. Many courts justify the current excusals for people seventy and older as a way to save time and resources.<sup>159</sup> When dealing with hundreds or thousands of jurors every year, efficiency is important and courts may find it "more efficient to excuse whole classes of jurors [those over age seventy] before the voir dire process based on the assumption that attorneys will dismiss these jurors once the voir dire process has begun."<sup>160</sup> The voir dire process involves questioning jurors and leads to the final selection of the jury.<sup>161</sup> If a disability or infirmity produces an issue for a potential juror's ability to serve, regardless of the age, then a thought-

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154. Steverman, *supra* note 38.

155. Newman, *supra* note 14, at 211.

156. See also Emily Brandon, *Why Older Citizens Are More Likely to Vote*, U.S. NEWS (Mar. 19, 2012, 9:25 AM), <http://money.usnews.com/money/retirement/articles/2012/03/19/why-older-citizens-are-more-likely-to-vote> [hereinafter Brandon].

157. See generally JURY PLAN, *supra* note 4 ("Pursuant to 28 U.S.C. § 1865(b), any person shall be deemed qualified for jury service unless he or she . . . is unable, by reason of mental or physical infirmity, to render satisfactory jury service.").

158. *Id.*

159. Mooney et al., *supra* note 79, at 108.

160. *Id.*

161. John Guinther, *THE JURY IN AMERICA* 51 (1988).

ful consideration is needed on that juror's ability to serve, particularly concerning that juror's cognitive abilities.<sup>162</sup> Yet, cognitive decline is not universal amongst all elderly people or potential elderly jurors.<sup>163</sup>

It is difficult to put all people that are "elderly" or "old" in one category with the same abilities and disabilities because the aging process occurs differently for each person.<sup>164</sup> Some people, including potential older jurors that are qualified for jury service, can "retain excellent cognitive function well into their seventies and eighties and perform as well as or better than younger adults."<sup>165</sup> While cognitive decline deserves valid attention for those older citizens that have the potential to be summoned, a blanket excusal process, like the one in place, does not help the jury system. Additionally, if mental or physical disabilities are a concern for a juror age seventy through seventy-five, the current jury system provides appropriate dismissals for any disability or health problem that may affect a juror's capacity to serve.<sup>166</sup>

Whereas physical and mental infirmities are unavoidable and more common with any elderly population,<sup>167</sup> the courts allow for excusals from jury service based on physical or mental disabilities.<sup>168</sup> There are safeguards present in the jury system today that ensure that citizens are not forced to comply with jury service if physical or mental disabilities will affect their ability to serve.<sup>169</sup> It is often as simple of a process to "opt-out" for a medical excuse as it is for age.<sup>170</sup>

Changing the opt-out age has many benefits for the United States, but it is important to consider some shortcomings with a more comprehensive standard for older people. Increasing the opt-out age makes juries more representative of the local populace, and the judicial system will benefit greatly from elderly jurors' wealth of experience. Valid health problems and disability excusals will not be disre-

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162. See generally JURY PLAN, *supra* note 4. ("Pursuant to 28 U.S.C. § 1865(b), any person shall be deemed qualified for jury service unless he or she . . . is unable, by reason of mental or physical infirmity, to render satisfactory jury service.")

163. See Elizabeth L. Glisky, *Changes in Cognitive Function in Human Aging*, Nat'l Ctr. for Biotechnology Information, BRAIN AGAIN: MODELS, METHODS, AND MECHANISMS 4, 4 (David R. Riddle ed., 2007).

164. *Id.*

165. *Id.*

166. See generally FAQ'S: JUROR INFORMATION, *supra* note 93.

167. See Colby & Ortman, *supra* note 11, at 1.

168. See generally FAQ'S: JUROR INFORMATION, *supra* note 93.

169. *Id.*

170. *Id.*

garded if the opt-out age was increased to seventy-five because these problems are more common with an older population.<sup>171</sup>

For potential elderly jurors, the most prominent problems include health issues as well as problems concerning transportation.<sup>172</sup> This transportation problem is another weakness of including older people in the jury pools because a lack of transportation is not a valid excuse from jury duty.<sup>173</sup> Transportation to and from the courthouse can be a problem for the “elderly” group that more often is home-bound.<sup>174</sup> Fewer people drive as they get older,<sup>175</sup> so another difficulty incurred with an older opt-out age is, if the juror is eligible, but lacks proper transportation. Each court has their own set of excusal procedures in their own jury plan.<sup>176</sup> Transportation for older jurors deserves consideration if the opt-out age was increased. Regardless of the problem or hardship, there are proper protocols in place to help these jurors and will properly excuse them for other reasons besides their age.

#### D. What Jurors Can Gain From Jury Service After Seventy

After completing jury service, citizens often have positive feedback about the experience and benefits of completing this civic duty.<sup>177</sup> It was poignantly stated that jury duty mimics what democracy looks like, “[w]hatever our visible differences.”<sup>178</sup> As American citizens receive summons for jury service, the common thread between these people is often their zip code, not necessarily their backgrounds and ideals.<sup>179</sup> Each citizen has their own diverse paths and choices that led them to where they are today, but their purpose when they show up to the courthouse on their summons date on the same day remains the

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171. See also Colby & Ortman, *supra* note 11, at 1.

172. See generally Lade, *supra* note 113.

173. UNITED STATES DIST. COURT NORTHERN DISTRICT OF ILLINOIS: JURY INFORMATION <http://www.ilnd.uscourts.gov/JuryInfo.aspx> (last visited Nov. 13, 2016) (“Lack of transportation or distance from your home to the court is not a valid excuse for not serving as a juror.”) [hereinafter JURY INFORMATION].

174. See generally Lade, *supra* note 113.

175. INS. INST. FOR HIGHWAY SAFETY, HIGHWAY LOSS DATA INSTITUTE: OLDER DRIVERS, <http://www.iihs.org/iihs/topics/t/older-drivers/fatalityfacts/older-people> (last visited Nov. 9, 2017).

176. George et al., *supra* note 2, at 27–28.

177. Christopher M. Duncan, *Summoned: How Jury Duty Restored My Faith in America*, COMMONWEAL MAG. (Oct. 21, 2016), <https://www.commonwealmagazine.org/summoned>.

178. *Id.*

179. *Id.*



same: “to serve the city, county, or state and its laws.”<sup>180</sup> Jury duty sometimes does not receive positive reviews because of the systems in place, including lines of people, long waiting times, and strangers put together in a room. The end result after a day of jury service is often met with different sentiments.<sup>181</sup> Typically, citizens develop a positive attitude about the use of lay legal decision-making and about the legal system after jury duty.<sup>182</sup> This positivity about jury duty does not necessarily have an age limit. Jury service provides for great opportunities for an older person because it provides an opportunity for an older person to get involved in their community and can make them feel motivated to remain active in the community.<sup>183</sup> This morale and responsibility to help one’s community cannot be matched by any other civic duty.

The benefits of jury service are numerous, whether the citizen is selected to serve on a jury or not. Not only is a proper jury system a constitutional right, it is a vital part of the country’s checks and balances.<sup>184</sup> Jury duty offers ordinary citizens the opportunity to participate in a government process, expand their knowledge on the judicial system, voice their opinions, and provide a peaceful method of dispute resolution.<sup>185</sup> Jury duty provides a glimpse into the often-intimidating judicial system.<sup>186</sup> Most citizens view jury duty as a hassle, and they are distraught when they have to press the pause button on their own lives to deal with the needs of others. From a financial standpoint, jury duty compensation is not necessarily generous; in Illinois, jurors are paid \$17.20 in state court and receive roughly \$40 for federal jury service.<sup>187</sup> Financially, jury service does not amount to winning the lottery,<sup>188</sup> but it is a rare opportunity presented to a citizen

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180. *Id.*

181. *Id.*

182. Valerie P. Hans, et al., *Deliberate Democracy and the American Civil Journey*, 11 J. OF EMPIRICAL LEGAL STUDIES 697, 704 (2014).

183. WHY JURY TRIALS ARE IMPORTANT TO A DEMOCRATIC SOCIETY, THE NAT’L JUDICIAL COLL. 1, <http://www.judges.org/uploads/jury/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf> (last visited Nov. 6, 2017).

184. *Id.* at 2.

185. *Id.*

186. JUROR EXPERIENCES, U.S. COURTS, <http://www.uscourts.gov/services-forms/jury-service/learn-about-jury-service/juror-experiences> (last visited Nov. 6, 2017) [hereinafter JURY EXPERIENCES].

187. JURY INFORMATION, *supra* note 174 (Compensation for federal jury duty is \$40 for each day of attendance. Also, jurors are compensated 53.5 cents per mile, round trip.); FAQs COOK COUNTY, *supra* note 23.

188. JURY INFORMATION, *supra* note 174; FAQs COOK COUNTY, *supra* note 23.

to make an impactful change in their community. Overall, opinions of jury duty remain relatively positive after the process is complete.<sup>189</sup> Fellow citizens are counting on these jurors, and it is privilege to help the judicial system in this way.<sup>190</sup>

### III. Analysis

Clear expectations for the potential and actual jurors within the system reveal the significance of this civil duty. Before a juror's important role is even defined, it is important to understand how the courts acquire jurors from the beginning. A detailed and orchestrated process takes place before any prospective juror steps foot in the courthouse.<sup>191</sup> The answer of how jury summons get from a courthouse to a mailbox comes from juror pools. Sometimes called juror lists, as well as jury pools, these lists include the names of the individuals that had their names randomly selected for a particular summons date.<sup>192</sup> These lists are usually constructed from driver's license registration, tax, voter registration, or other administrative databases, and unfortunately these lists systematically under-represent certain groups.<sup>193</sup> The flaws in the system are evident because often minority and lower income groups are not appropriately a part of the pool.<sup>194</sup> The government attempts to include a broad range of citizens in juror pools and various sources to compose jury lists.<sup>195</sup>

To work on the shortcomings of the system and move towards more representative pools and lists, particularly from an age perspective, the opt-out age needs to be increased.<sup>196</sup> As a whole, the United States is behind in this realm of the jury world for its own jury pools, but other countries set important examples for embracing and utilizing elderly jurors.<sup>197</sup> Other countries changed their jury pool systems to

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189. See Barnard & Trask, *supra* note 15 ("The empirical evidence shows that most adults have a highly positive view of jury service once they have served.").

190. See JURY EXPERIENCES, *supra* note 187.

191. See also KASSIN & WRIGHTSMAN, *supra* note 61.

192. *Id.*

193. See generally LEHMANN & SMITH, *supra* note 6.

194. *Id.*

195. *Id.*

196. *Id.*

197. See Clive Coleman, *Jury Age Limit To Be Raised to 75 in England and Wales*, BBC NEWS (Aug. 20, 2013), <http://www.bbc.com/news/uk-23763074> [hereinafter Coleman]; JURORS FREQUENTLY ASKED QUESTIONS, GOV. OF W. AUSTL. DEPT. OF JUST.: CT. AND TRIBUNAL SERVS., [http://www.courts.dotag.wa.gov.au/J/jurors\\_frequently\\_asked\\_questions.aspx?](http://www.courts.dotag.wa.gov.au/J/jurors_frequently_asked_questions.aspx?)

adjust to the population changes occurring around the world.<sup>198</sup> The United States needs to look at these international systems as inspiration for updating and modernizing its own system.

#### A. The Age Seventy-Five: An Australian Inspiration

In 2010, Western Australia set their jury service standard to an ideal number, age seventy-five, and they saw the value in including this portion of the population in their jury pools.<sup>199</sup> Australia is split up into six states, Western Australia being one of the six.<sup>200</sup> In Western Australia, similar to parts of Great Britain, which will be discussed in section B, the government sets an age limit on jury service and does not permit their citizens to participate jury service after age seventy-five.<sup>201</sup> Western Australia does differ from the United States with their overall jury procedures and age excusal limits.<sup>202</sup> The primary difference between the United States and the Australian jury system is that jury service in Western Australia does not permit any jurors over age seventy-five to be on juries.<sup>203</sup> Nevertheless, this rather forward-looking Australian state recently realized the value in the aging Baby Boomer generation and an over-seventy juror, and the state now includes people age seventy to seventy-five in their jury pools. The United States should take note of this Australian state's recent change and standard when it comes to its own age standards.<sup>204</sup>

During Western Australia's decision process to increase the jury duty age in 2010, many factors were considered.<sup>205</sup> Western Australia, similar to the United States, has an aging population like most other developed nations and states.<sup>206</sup> The United States can learn from the

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uid=2110-6806-2288-7004 (last visited Nov. 6, 2017) [hereinafter FAQs WESTERN AUSTRALIA].

198. See generally FAQs WESTERN AUSTRALIA, *supra* note 197.

199. *Id.*

200. STATE AND TERRITORY GOVERNMENT, AUSTL. GOV., <http://www.australia.gov.au/about-government-works/state-and-territory-government> (last visited Nov. 6, 2017).

201. See generally FAQs WESTERN AUSTRALIA, *supra* note 197.

202. *Id.*

203. *Id.*

204. *Id.*

205. SELECTION ELIGIBILITY AND EXEMPTION OF JURORS FINAL REPORT, LAW REFORM COMM'N OF W. AUSTL. 1, 3 (April 2010), [http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3812809aa86380427e6648d3482577d6002bf9fa/\\$file/tp2809.pdf](http://www.parliament.wa.gov.au/publications/tailedpapers.nsf/displaypaper/3812809aa86380427e6648d3482577d6002bf9fa/$file/tp2809.pdf) [hereinafter SELECTION ELIGIBILITY].

206. ABORIGINAL AND TORRES STRAIT ISLANDER POPULATION ESTIMATES, AUSTRALIAN DEMOGRAPHIC STATISTICS (Mar. 2017),

factors that Western Australia considered, given the similarities in their governments and the comparative judicial processes. The United States,<sup>207</sup> and Western Australia understand and realized that their older citizens were staying in the workforce longer than people had before.<sup>208</sup> Western Australia chose to take action and make a change. Raising the jury duty age in Western Australia ensured that juries were more representative of the general community.<sup>209</sup> Additionally, the Australian government saw an enormous benefit for older jurors to partake in the jury selection process as well as this age group's ability to bring a wealth of experiences to the jury.<sup>210</sup> The government further cites a Council on the Ageing (COTA) study that emphasized that jury service functions as an "important aspect of citizenship [and that] the experience and knowledge of seniors will enhance the work of the courts."<sup>211</sup>

Other states in Australia observed this and also are considering changing their own rules and standards for jury service after the recent change in Western Australia.<sup>212</sup> South Australia, another state, considered changing their standards to include people over seventy in their juries after their COTA analyzed the issue and "agreed with COTA's view that older South Australians had a wealth of experience to contribute."<sup>213</sup> In South Australia, the oldest age to serve is also seventy, aligning with the outdated United States standard, instead of a more progressive Western Australian standard.<sup>214</sup> The United States

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<http://www.abs.gov.au/ausstats/abs@.nsf/0/1CD2B1952AFC5E7ACA257298000F2E76?OpenDocument>.

207. Steverman, *supra* note 38.

208. SELECTION ELIGIBILITY, *supra* note 206, at 44.

209. *Id.* at 3.

210. *Id.*

211. *Id.* (citing Council on the Ageing, Submission No. 32 (Feb. 3, 2010)); *see also* Nita Sadler, Submission No. 37 (Jan. 29, 2010); *see generally* FAQs, COTA OLDER AUSTRALIANS, <http://www.cota.org.au/australia/faqs.aspx> (last visited Nov. 6, 2017) ("COTA Australia promotes the concerns of older people at the highest level of government and associated organisations.").

212. Brad Crouch, *School Students Put Spotlight on 70-Year Age Anomaly for South Australia*, ADELAIDE NOW, <http://www.adelaidenow.com.au/news/south-australia/school-students-put-spotlight-on-70-year-age-anomaly-for-jurors-in-south-australia/news-story/0b698ec3138dd0608e5f082b8ad42a59> (last visited Nov. 6, 2017).

213. *Jury Duty Age Limit of 70 Set To End In South Australia After Year 12 Students Highlight Discrimination*, ABC NEWS (Feb. 23, 2016), <http://www.abc.net.au/news/2016-02-24/jury-age-limit-remove-john-rau-legislation/7195532> [hereinafter *Jury Duty Age Limit*].

214. *See generally* JUROR QUALIFICATIONS, *supra* note 1;

and South Australia can both learn a lesson from the proactive nature of the Western Australia government and increase their jury duty opt-out age. The United States citizens, like Western Australian citizens, have a wealth of experience to contribute to the judicial system.<sup>215</sup> In addition to Western Australia's proactive approach, another hands-on government saw the importance of raising the jury duty age range across much of it in recent years.<sup>216</sup>

#### **B. Great Britain: A Continued International Perspective for Jurors' Ages**

Great Britain's England and Wales recently changed their jury age limit to seventy-five in 2013.<sup>217</sup> Scotland, also a country that is part of Great Britain, maintains a younger age excuse.<sup>218</sup> The old standard for jury service in England and Wales allowed everyone over age seventy to be excused and not allowed to participate in the jury duty process after they reached that age.<sup>219</sup> Today, the majority of Great Britain has a different system for jury service than the United States because they have an age limit for participation; however, some of Great Britain's countries are more progressive when it comes to age, mirroring the Western Australian standards, as well.<sup>220</sup> In the United States, there is no age limit that restricts service, instead the United States allows for optional jury service, otherwise known as "opt-out" programs, after you reach seventy for federal jury service, and it can vary for the ages for state courts.<sup>221</sup>

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SELECTION, COURTS ADMINISTRATION AUTHORITY OF SOUTH AUSTRALIA, <http://www.courts.sa.gov.au/ForJurors/Pages/Selection.aspx> (last visited Nov. 6, 2017).

215. See generally *Jury Duty Age Limit*, *supra* note 214.

216. *Id.*

217. See generally *Coleman*, *supra* note 197.

218. See generally ARE YOU QUALIFIED FOR JURY SERVICE IN THE HIGH COURT OR SHERIFF COURT?, SCOTTISH COURT SERVICE, <http://www.scotcourts.gov.uk/docs/default-source/scs---court-users/juryhighcourtsheffcourt.pdf?sfvrsn=4> (last visited Nov. 6, 2017) (Age 71 is the age of excusal for old age in Scotland.); Ben Johnson, *The UK & Great Britain - What's the Difference?*, HISTORIC UK, <http://www.historic-uk.com/HistoryUK/HistoryofBritain/The-UK-Great-Britain-Whats-the-Difference/> (last visited Nov. 6, 2017).

219. See generally *Coleman*, *supra* note 197.

220. *Id.*

221. Compare JUROR QUALIFICATIONS, *supra* note 1, with FREQUENTLY ASKED QUESTIONS ABOUT JURY SERVICE IN NEW JERSEY, NEW JERSEY COURTS 5 <https://www.judiciary.state.nj.us/juryreporting/juryfqa.pdf> (last visited Nov. 6, 2017).

England and Wales decided to make their changes in order to have a more inclusive system and reflective of a modern society.<sup>222</sup> England and Wales share similar aging population changes like the United States, and 29.5% of people in the United Kingdom, which includes Great Britain, will be over age sixty by 2039.<sup>223</sup> The basis for Great Britain's change to age seventy-five further explains the universal benefits of older jurors: "[T]hey have a great deal of life experience and many remain astute, savvy and mentally agile well into later life and will be a valued addition to any jury."<sup>224</sup> Great Britain also believed that the jury system should be adapted to meet their historical standards and the right to be tried by one's peers.<sup>225</sup>

Great Britain references the cornerstone of the jury system—in the Magna Carta almost 800 years ago.<sup>226</sup> A trial by jury serves to shield against oppression, and the Magna Carta reaffirms this message.<sup>227</sup> This historical perspective directly compares to the American system where there is a value for juries of one's peers: the jury panel must contain a composition, or a mix of all types of people, living in the community.<sup>228</sup> The way the laws stand now, for maintaining a relevant and modern jury pool, the United States' need for change remains long overdue. Other countries, like Great Britain's England and Wales, and parts of Australia, see the value in an older juror and improved their laws accordingly to fit these new ideals.

### C. Urgent Updates Needed in the United States: Florida

Certain states in the United States need to act quicker than other states due to their rapidly aging state populations. These states are risking the legitimacy of their juries when they keep these outdated standards. States can create their own laws, including jury require-

222. See also Coleman, *supra* note 197.

223. *UK Population 'to Top 70 Million in 12 Years*, BBC NEWS (Oct. 29, 2015) <http://www.bbc.com/news/uk-34666382>.

224. See generally Coleman, *supra* note 197.

225. FERGUSON II, *supra* note 72; Terri Judd, *Grey Jurors Given the Nod as Age Limit Raised from 70 to 75*, INDEP., (Aug. 19, 2013), <http://www.independent.co.uk/news/uk/home-news/grey-jurors-given-the-nod-as-age-limit-raised-from-70-to-75-8775036.html> [hereinafter Judd].

226. See Judd, *supra* note 226.

227. Stephen J. Wermiel, *Magna Carta in Supreme Court Jurisprudence*, 15 INSIGHTS ON L. & SOC'Y 1 (2014).

228. FERGUSON II, *supra* note 72 ("[T]he jury must be selected out of a representative cross section of the community . . .").

ments for state court.<sup>229</sup> Florida, a state with one of the oldest populations in the country,<sup>230</sup> must adapt and change their outdated opt-out standards sooner rather than later to meet the needs of the state. If these states, including Florida, keep their archaic standards, they will only provide a disservice to their state and their judicial processes. In federal court, the juror opt-out age is seventy in Florida.<sup>231</sup> In Florida state court, the jury duty opt-out age is also seventy years old.<sup>232</sup>

Meanwhile, the states with large amounts of elderly people need to look closely at their current laws in comparison to their population are generally different from those with the largest. Florida is one of the states with the average population remaining older than other states' populations.<sup>233</sup> Currently in Florida, 19% of their population is elderly.<sup>234</sup> Statutorily speaking, in the Florida state laws, a person seventy years of age or older can receive an excusal upon request, and that same seventy-year-old person can receive a *permanent* excusal if requested in writing.<sup>235</sup> According to a 2001 Sun Sentinel analysis from the Broward County and Palm Beach County courts, "[s]eniors also are an increasingly greater percentage of the population and yet remain a fraction of the seated jurors because they turn out in such limited numbers."<sup>236</sup> The low turnout rate for older people can be due to many factors like health problems or transportation issues, but the opt-out programs enables older people to avoid jury duty, as well.<sup>237</sup> If the national jury service standards received updates, this change will hopefully combat the problems with low jury duty turnout rates in states like Florida. If more jurors are not excused through an opt-out

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229. HON. MIZE ET AL., *supra* note 3.

230. Lauren Kent, *Where Do the Oldest Americans Live?*, PEW RES. CTR. (July 9, 2015), <http://www.pewresearch.org/fact-tank/2015/07/09/where-do-the-oldest-americans-live/> [hereinafter Kent].

231. See generally FLA. JURY PLAN, *supra* note 44.

232. Fla. Stat. Ann. § 40.013(8) (2016) ("A person 70 years of age or older shall be excused from jury service upon request. A person 70 years of age or older may also be permanently excused from jury service upon written request. A person who is permanently excused from jury service may subsequently request, in writing, to be included in future jury lists provided such person meets the qualifications required by this chapter.").

233. *Sixty-Five Plus*, *supra* note 110.

234. *Sixty-Five Plus*, *supra* note 110.

235. Fla. Stat. Ann. § 40.013 (2016), [http://www.leg.state.fl.us/Statutes/index.cfm?App\\_mode=Display\\_Statute&URL=0000-0099/0040/0040.html](http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&URL=0000-0099/0040/0040.html).

236. Lade, *supra* note 113.

237. *Id.*

system for age until after they turn seventy-five, the juror pool will increase in size and also clearly reflect the state's expectations they have for older jurors to participate in the judicial system later in life.

Florida courts readily excuse prospective jurors who are citizens "70 years of age or older."<sup>238</sup> The standard should not be to "readily excuse" prospective jurors in any regard because of their age or the underlying implications that come with being elderly.<sup>239</sup> A seventy-year-old is far from feeble and dependent in today's society. The new jury duty standard needs open-mindedness and should encourage elderly jurors to participate in jury service. The current jury service laws need stricter standards to help combat this vicious cycle of easily dismissing elderly jurors from the jury pool simply because of their age.

Florida has made some positive changes to their jury standards with regards to age. Florida has taken some measures to prevent discrimination once the jurors come in for jury selection<sup>240</sup> by addressing the importance of elderly people in the juror pools. Florida is one of "three states [create] rules relating to discriminatory practices of attorneys against prospective jurors."<sup>241</sup> In particular, "Florida, Illinois, and Rhode Island have regulations explicitly prohibiting discrimination on racial, gender, and other regularly cited grounds."<sup>242</sup> Yet, only Florida added age specifically to its list of protected classifications and, the state has taken a small initiative to combat the issues with age exemptions for jurors.<sup>243</sup> Adding age to a list of protected classifications may help, but the archaic age standards still undermine Florida's new goals and lists of protected classifications.<sup>244</sup> These rules for discriminatory practice indicate that Florida recognizes age as an important factor for the jury selection process, but currently Florida is still not doing enough. In order to meet the population growth of older people, a small step will not suffice; the federal and state governments need to make leaps towards new standards in order to accommodate for the current and impending jury duty problems.

Although these measures do have some merit, the state of Florida could do more.<sup>245</sup> For a stereotypically elderly state, a jury of "one's

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238. Sums et al., *supra* note 29.

239. *Id.* (emphasis added).

240. Rothman et al., *supra* note 30, at 72.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 70.

245. *Id.* at 72.



peers” is far from guaranteed in Florida.<sup>246</sup> The United States as a whole is aging, so Florida is not the only state that has problems with jury duty standards.<sup>247</sup> Florida’s rather minor actions to fight these jury duty issues continue to fall short.<sup>248</sup> This lack of significant change is all the more reason the federal government in particular, but also sensitive state governments, like Florida, should reconsider their current standards immediately.

Indirectly, these obsolete jury rules encourage the exclusion of vital portions of the population, like the Baby Boomers, from jury participation. These processes currently make it too easy for someone over age seventy to take a backseat to their civic duties. While jury duty is not viewed in the same light as other civic duties, like voting, because of the time commitment and effort involved, older generations need to realize their value in willingly participating in the jury process.<sup>249</sup> There is more effort, and time involved when attending jury service than voting.<sup>250</sup> But, when the elderly populations vote, they clearly demonstrate that they understand the value in the democratic process.<sup>251</sup> They should understand the value in furthering other democratic ideals like jury service.<sup>252</sup> While these two duties are not exactly similar obligations, they trace back to the United States’ fundamental ideals and the judicial system’s original foundation.<sup>253</sup> The United States is at a pivotal point today. As each Baby Boomer continues to grow older every day, the jury duty standards in place stray farther away from their practical and constitutional roots. The country needs to take steps now to ensure that the United States plants new roots with regards to jury service to serve its aging society.

#### IV. Recommendation

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246. Kent, *supra* note 231; see generally *Fair-Cross-Section Requirement*, BLACK’S LAW DICTIONARY (10th ed. 2014).

247. Rotham et al., *supra* note 30, at 70.

248. See Fla. Stat. Ann. § 40.013 (2016).

249. See generally Brandon, *supra* note 157

(quoting Professor Eitan Hersh, “[p]eople over 65 have more residential stability. The longer you are in a place, the more ties you have to the community and the more campaigns that are likely to mobilize you”).

250. See *id.*

251. See *id.*

252. *Id.*

253. Barnard & Trask, *supra* note 15, at 2.

With laws that will soon be obsolete for the society they cater to, it is important to maintain and preserve an integral part of the United States judicial system. Now is the time to be proactive. Proponents of the jury system have maintained that trial by jury continues to play a critical role in the American justice system.<sup>254</sup> A jury serves many different people and is involved directly in protecting the rights of criminal defendants, resolving intractable civil disputes, and promoting public trust and confidence in the courts.<sup>255</sup>

Yet, one of the most recent revisions to this critical judicial process took place fifty years ago, when the Jury Selection and Service Act was passed in 1968.<sup>256</sup> This Act was enacted in response to a 1961 report that informed the government that each of the ninety-two federal district courts used different methods for jury selection; the common thread was that none of these courts produced a jury that adequately matched the local population.<sup>257</sup> No country should strive for a commonality like this, so the federal government took action.<sup>258</sup> While the Jury Selection and Service Act did mitigate some of the problems in the federal district courts, the standards it established appear more outdated with each passing day for today's society. This law was committed to litigants' rights to juries that are selected at random with a fair cross-section.<sup>259</sup> It went further to specify that the jury pool should include eligible voters and names that are selected randomly.<sup>260</sup> Few changes have been made to the federal standards since then. With regard to age, no major federal updates have been put in place since 1968; this is a law so outdated that it was enacted only a few years after some the Baby Boomers were still being born.<sup>261</sup> The current laws, and the standards in place that followed the Jury Selection and Service Act, all need a new perspective.

The informal guidance and public opinions on jury service remains plentiful, but credible guidance for elderly jurors is minimal. More recently than the Jury Selection and Service Act of 1968, the American Bar Association (ABA) adopted the Principles for Juries and

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254. HON. MIZE ET AL., *supra* note 3.

255. *Id.*

256. KASSIN & WRIGHTSMAN, *supra* note 61.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.*; Parris & Wren, *supra* note 89.

Jury Trials in 2005.<sup>262</sup> The ABA's Commission on the American Jury promulgated these principles as the newest standards for the jury system.<sup>263</sup> The only reference to age in the ABA's new principles involves a reference to jurors' *minimum* age for service.<sup>264</sup> Although the aspirational goals for juror pools appear comprehensive, "source pools should be assembled so as to assure representativeness and inclusiveness;"<sup>265</sup> in reality, older jurors are not being factored in for this "representativeness." Moreover, the ABA further elaborates that eligibility for jury service should not be denied or limited on the basis of many factors, including age.<sup>266</sup> The goals and guidance have gaps because they are not addressing how to deal with the older jurors, a group more prevalent in society today. The way that courts reacted to the Jury Selection and Service Act of 1968, the ABA principles, and other minor updates was when the courts set up their respective "opt-out" processes. Although not technically limiting or denying elderly jurors, these standards simply enable elderly citizens to ignore their civic duty.

These standards include laws and rules when a citizen in the United States can be excused from jury duty any time after they reach the age of seventy in most federal and state courts. The confusion over the opt-out age affects all areas of the country, not just Illinois. New Jersey, one of the few state court systems with a progressive approach to the jury system, requires an older age for excusal because their opt-out age cutoff for those citizens is seventy-five.<sup>267</sup> Yet, the United States District Court for New Jersey's "Jury Plan" directly contradicts the state court's designated excusal age because the federal opt-out age in New Jersey is still seventy.<sup>268</sup> A hypothetical seventy-two-year-old from New Jersey could choose to opt-out federal jury duty due to age, but that same person would have to report for state jury duty because of their age. These mixed messages about age and opting out come

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262. Judge William Caprath et al., *Assessing and Achieving Jury Pool Representativeness*, 55 JUDGES' J. 16, 16 (2016).

263. *Id.*

264. See PRINCIPLES FOR JURIES AND JURY TRIALS § 2(A) (AM. BAR ASS'N 2005) (emphasis added).

265. *Id.* at § 10(A).

266. *Id.* at § 2(B).

267. NEW JERSEY COURTS, FREQUENTLY ASKED QUESTIONS ABOUT JURY SERVICE IN NEW JERSEY (2017), <https://www.judiciary.state.nj.us/juryreporting/juryfqa.pdf>.

268. N.Y. JURY PLAN, *supra* note 44.

with more confusion than anything else. The need to streamline the process is now.

Not every state is alike with regards to their population size, age ranges, or their jury duty standards.<sup>269</sup> Different states have unique needs for their varying age populations. For example, there is a county in Florida where the median age is a staggering 65.5 years old; this can be contrasted with another county in Idaho where the median age is 23.1.<sup>270</sup> The needs are diverse across the United States and appropriate cross-sections hang in the balance while state and federal governments continue to use nearly ancient rules and laws. The solution to this problem calls for one uniform standard, ideally an initial change from the federal government and then subsequent changes for the state courts, which will likely follow by example. A uniform increase in the standards for the opt-out ages across the country can alleviate confusion and help send one message to the United States people about jury duty expectations. The message is positive. Older people, and older jurors, should be included in these important judicial systems and the jury decisions. If the standards for older citizens increase their inclusivity for older Americans, the younger generations equally will realize that jury service is not to be taken lightly and the service is held to a high standard for important reasons.

With the Baby Boomer generation aging and the size of the population of older people growing substantially, the opt-out age needs to meet the changing landscape in the United States. The new federal jury duty opt-out age should be seventy-five. This means that jury service needs to be compulsory until someone reaches age seventy-five instead of seventy. After age seventy-five, jury service should remain as a voluntary or optional civic duty for these older American citizens. When the federal jury duty opt-out age changes to seventy-five, the expectation is that states will follow suit to update their own jury standards. Reflecting on the comprehensive and proactive reasons why Western Australia and Great Britain's England and Wales initially increased their jury duty maximum ages to seventy-five,<sup>271</sup> the Unit-

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269. See generally AS THE NATION AGES, SEVEN STATES BECOME YOUNGER, CENSUS BUREAU REPORTS, CENSUS REPORTS (June 26, 2014), <http://www.census.gov/newsroom/press-releases/2014/cb14-118.html>.

270. *Id.* ("There was a more than 42-year difference in the median ages of the county with the highest median age—Sumter, Fla., at 65.5—and the county with the youngest median age—Madison, Idaho, at 23.1.").

271. SELECTION ELIGIBILITY, *supra* note 206, at 44.

ed States should follow this example and set a similar age standard for jurors. An elderly juror should not be able to benefit from an outdated excuse for jury duty because they are a group that continues to work longer, live longer, and remain active with other civic duties long after they reach age seventy. Now is a crucial time to change the law for the Baby Boomers and the following generations.

## V. Conclusion

The time to act and adapt is now. The jury system's credibility hangs in the balance as more and more citizens, who are over seventy, continue to receive excusals because of their age. The current aging and changing population groups in the United States further demonstrate why their jury standards desperately need updates, and hopefully soon. If the United States maintains the out-of-date jury standards, the jury system will continue to stray farther away from what the authors of the Constitution and the original advocates of the jury system intended for it. For almost fifty years, the jury system and its fundamental standards have stayed stagnant, and they are in dire need of attention.<sup>272</sup>

In order to adapt to the changing factors and demographics of the country, the United States needs to first acknowledge the gap, one growing wider as each Baby Boomer reaches age seventy, and then the country needs to find solutions to these gaps in the system, like increasing the opt-out age to seventy-five. After the Baby Boomers reach this pivotal age of seventy, they are often easily dismissed from jury service if they choose to do so.<sup>273</sup> By presenting this current opt-out opportunity to older citizens at such a young age like seventy, it sends mixed messages to older American. The United States needs to change its indifferent attitude towards the current jury duty standards. It is a disservice to the United States and the judicial system if the jury duty standards remain the same and do not meet the needs of an aging society and include well-qualified Baby Boomers.

Reflecting on a worldwide standpoint on juries, other countries acknowledge the value of a diverse group of jurors, including the elderly population.<sup>274</sup> The United States should follow the lead of the

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272. See Ashby, *supra* note 7, at 1143; see also SELECTION ELIGIBILITY, *supra* note 206, at 44; Coleman, *supra* note 197 at 1-2.

273. Lade, *supra* note 113.

274. *Id.*

governments in Western Australia and Great Britain's England and Wales and meet them at the important age of seventy-five.<sup>275</sup> Furthermore, there are certain states, like Florida, that should have more concern than other states in the United States because their standards do not reflect and accommodate for the current continually aging population.<sup>276</sup> There are numerous benefits for both the judicial system and jurors by increasing the jury duty opt-out age in the United States. Although states make their own decisions about juries and their jury standards, their age requirements often reflect the federal system's standards.<sup>277</sup> As the Baby Boomers continue to age, and the ripple effects are felt across the nation, the United States needs to now closely consider the jury system and its reliability today. These outdated standards need immediate change in order for the judicial system to preserve its integrity for future generations. The Baby Boomers are a generation known for many things, but by leaving a lasting mark on the judicial system with these new jury standards, encouraging Baby Boomer jury participation, these actions would highlight the true value of their influential group now and forever.

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275. SELECTION ELIGIBILITY, *supra* note 206, at 3; Coleman, *supra* note 197, at 1-2.

276. Lade, *supra* note 113.

277. HON. MIZE ET AL., *supra* note 3; George et al., *supra* note 2, at 27-28.