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## The Right to a Well-Rested Jury

Caroline Howe

*University of Michigan Law School*

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## NOTE

### THE RIGHT TO A WELL-RESTED JURY

Caroline Howe\*

*The vast amount of control that state trial judges exercise over the dynamics of their courtrooms is well established. The length of trial days and jury deliberations, however, has received little scholarly attention. Longstanding research has conclusively established the disruptive effects of sleep deprivation on many of the mental facilities necessary for juries to competently fulfill their duties. By depriving juries of sleep, trial judges may be compromising the fair rights of criminal defendants for the sake of efficiency. This Note argues that trial judges must use their discretion to ensure juries are well rested, keeping jurors' needs in mind. Further, state legislatures have a responsibility to properly fund state courts and to pass legislation that ensures overlong trial days do not impact verdicts handed down.*

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INTRODUCTION

In a small Louisiana courtroom in 1966, the government presented evidence in a three-defendant criminal trial from 3:00 in the afternoon to 11:00 that night.<sup>1</sup> Instead of heading home, the jury remained in the courthouse to hear defense counsel present their case from midnight to 3:00 a.m.<sup>2</sup> August Gueldner, William Skinner, and Alton Charbonnet were all convicted.<sup>3</sup> In a habeas petition, they claimed that their due process right to a fair trial was denied.<sup>4</sup> They argued that the expectation that jurors would be able to continue paying attention to the evidence so late into the night raised a host of constitutional problems.<sup>5</sup> But, like countless courts that have tackled this issue, the district court declined to find a constitutional violation.<sup>6</sup> In the decision, the judge held that because there had been no finding that the jurors were sleeping, and because they were conscious, jurors were presumed to be “conscientiously fulfill[ing] their oath.”<sup>7</sup>

Nearly fifty years later, Susan Walls was rushed from a Tennessee courtroom to the hospital with stroke-like symptoms at the conclusion of her trial.<sup>8</sup> Rather than wrapping up the trial for the day, the jury, judge, attorneys, and courtroom staff waited two and a half hours for the defendant to return before beginning deliberations. The jury returned a guilty verdict at 1:05 a.m.<sup>9</sup> Once again, the court found that because the jurors were awake, no constitutional violations had occurred.<sup>10</sup>

These cases are unusual, not because the jury heard evidence ten hours after the normal business day ended or because the jury deliberated well into the night, but because these issues were raised on appeal at all. Across the United States, trials are being held into the night, and jurors are deliberating long after the normal business day ends. These long days and nights have

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1. Gueldner v. Heyd, 311 F. Supp. 1168, 1174–75 (E.D. La. 1970), *aff’d sub. nom.* Unit-ed States *ex rel.* Charbonnet v. Heyd, 432 F.2d 91 (5th Cir.), and *aff’d*, 434 F.2d 1307 (5th Cir.).

2. *Id.*

3. *Id.* at 1175.

4. *Id.*

5. *Id.*

6. *Id.* at 1174–75.

7. *Id.* at 1175.

8. State v. Walls, 537 S.W.3d 892, 897 (Tenn. 2017).

9. *Id.* at 897–98.

10. *Id.*

implications for every actor in the criminal justice system. But the scope of the issue remains unknown because defense attorneys do not regularly preserve the issue for appellate review.<sup>11</sup> When they do, the claims are rarely successful.<sup>12</sup>

The problem of sleep deprivation among juries, lawyers, and judges has been largely unexplored, despite the increasing frequency of long trial days and long jury deliberations. This Note examines both trial day length and jury deliberation length in the context of state criminal trials. It considers the ways in which the attention and physical and emotional stamina of jurors, judges, counsel, witnesses, and courtroom officials are critical. During a trial, a case is presented in a method unfamiliar to most laypeople. Evidence must be introduced via ritualistic performances, witnesses must be prompted by carefully worded questions, and objections and instructions to the jury crop up routinely. Faced with such a novel format, jurors must listen carefully. Judges must be prepared to handle nuanced arguments, objections, and unexpected issues. Counsel must be prepared to object, cross-examine, and advocate. Even after all of the evidence has been presented, the job of jurors continues to be multifaceted. In deliberations, the jury discusses, dissects, and debates the evidence. While these conversations are happening, jurors need to maintain an open mind while also trying to come to the proper result. The demands of this process require concentration and care from all of these actors. This human component of the constitutional rights guaranteed to criminal defendants by the Fifth, Sixth, and Fourteenth Amendments has too often been neglected and undermined. This Note seeks to change that.

Trial judges exercise relatively unfettered discretion to manage trials and set hours in their courtrooms.<sup>13</sup> But because there is no constitutional underpinning for a due process violation on the basis of juror sleep deprivation, defendants do not have a clear avenue for relief when a judge abuses this discretion. The scientific community, however, has long been in agreement on the negative effects sleep deprivation has on cognitive performance, moral

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11. There is currently no articulated right to a well-rested jury. Defense counsel generally has little incentive to preserve fruitless issues. *See, e.g.*, Ian S. Speir & Nima H. Mohebbi, *Preservation Rules in the Federal Courts of Appeals*, 16 J. APP. PRAC. & PROCESS 281, 283–84 (2015).

12. *See infra* note 17 (listing twenty-six cases where jury fatigue was addressed on appeal, of which only four were reversed and remanded on that issue).

13. *See* Francis R. Fecteau & Jennifer Scro, *Appellate Gaul Revisited: Standards in Search of Definition*, 97 MASS. L. REV. 7, 11–12 (2015) (“[T]he concept of unguided discretion can be most readily seen in cases reviewing ‘the scheduling of trial . . . and scope of discovery and protective orders.’ In these cases, judges’ orders are rarely determined to be an abuse of discretion, mainly because they typically involve courtroom management. Therefore, there are no additional legal standards or factors that the judges must show they properly considered.” (footnotes omitted) (quoting *Hanover Ins. Co. v. Sutton*, 705 N.E.2d 279, 286 (Mass. App. Ct. 1999))); *see also* *State v. Parisien*, 703 N.W.2d 306, 311 (N.D. 2005) (“A trial court has broad discretion over the conduct of a trial, including the time in which a jury may properly deliberate, but the court must exercise this discretion in a manner that best comports with substantial justice.”).

judgment, and the retention of positive versus negative information.<sup>14</sup> Yet no modern study has examined the length of trial days in state criminal courts, or in any court in the United States.<sup>15</sup> Additionally, studies of jury deliberation length have been limited.<sup>16</sup> Without this information, it is difficult to appreciate the scope of the problem. But even without hard statistics, instances of overly long trial days and jury deliberations have found their way into published state appellate court decisions in almost half of the states and Puerto Rico.<sup>17</sup>

Despite not having a formally recognized right to relief from any state or federal court, defendants have challenged the fundamental fairness of verdicts handed down after punishingly long trial days.<sup>18</sup> When sleep-related fairness arguments have been raised, courts have failed to develop a uniform approach to handling them.<sup>19</sup> Without further research, the full extent of the problem remains unknown. But we do know that courts across the country are facing extreme budget cuts that affect their ability to manage their dock-

14. See *infra* Part II.

15. One study from 1988 compared the length of jury versus nonjury trials and criminal versus civil trials in order to discover which factors contributed to longer trials (in terms of overall trial length, not the length of a trial day). DALE ANNE SIPES & MARY ELSNER ORAM, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS 12–21 (1988). No study examining how long criminal trial courts stay in session has, to the knowledge of the author, ever been conducted.

16. Michele Bisaccia Meitl et al., *Predicting the Length of Jury Deliberations*, 40 J. CRIME & JUST. 238 (2017); Thomas L. Brunell et al., *Factors Affecting the Length of Time a Jury Deliberates: Case Characteristics and Jury Composition*, 5 REV. L. & ECON. 555 (2009).

17. See *Kimble v. State*, 539 P.2d 73, 79 (Alaska 1975); *State v. Lautzenheiser*, 864 P.2d 1058, 1062 (Ariz. Ct. App. 1993), *vacated*, 881 P.2d 339 (Ariz. 1994); *Styler v. State*, 417 A.2d 948, 950–51 (Del. 1980); *Shultheis v. Gotlin*, 919 So. 2d 546, 549 (Fla. Dist. Ct. App. 2005) (overly long trial days and jury deliberation raised in a medical malpractice suit); *Richardson v. State*, 338 S.E.2d 506, 508 (Ga. Ct. App. 1985); *State v. Dambrell*, 817 P.2d 646, 654 (Idaho 1991); *People v. Hanks*, 569 N.E.2d 205, 208 (Ill. App. Ct. 1991); *State v. Albers*, 174 N.W.2d 649, 652–57 (Iowa 1970); *Jenkins v. Commonwealth*, No. 2006–CA–000158–MR, 2007 WL 706843, at \*7 (Ky. Ct. App. Mar. 9, 2007), *rev'd*, 308 S.W.3d 704 (Ky. 2010); *People v. Sawyer*, 545 N.W.2d 6, 13 (Mich. Ct. App. 1996); *State v. Sanders*, 376 N.W.2d 196, 204 (Minn. 1985); *Grimsley v. Tyner*, 454 So. 2d 482, 485 (Miss. 1984); *State v. Wells*, 639 S.W.2d 563, 568–69 (Mo. 1982); *Jahnke v. State*, 94 N.W. 158, 168 (Neb. 1903), *rev'd*, 104 N.W. 154 (Neb. 1905); *People v. Townes*, 529 N.Y.S.2d 897, 897–98 (N.Y. App. Div. 1988); *State v. Baldwin*, 540 S.E.2d 815, 824 (N.C. Ct. App. 2000); *Parisien*, 703 N.W.2d at 315; *State v. Purdin*, No. 12CA944, 2013 WL 84897, at \*3–4 (Ohio Ct. App. Jan. 4, 2013); *Stiles v. State*, 829 P.2d 984, 994 (Okla. Crim. App. 1992); *Commonwealth v. Hammond*, 504 A.2d 940, 941 (Pa. Super. Ct. 1986); *State v. Finney*, 337 N.W.2d 167, 168–69 (S.D. 1983); *State v. Walls*, 537 S.W.3d 892, 899–900 (Tenn. 2017); *Garza v. State*, 783 S.W.2d 796, 798–99 (Tex. Ct. App. 1990); *State v. Boyd*, 25 P.3d 985, 996 (Utah 2001); *State v. Harrington*, 80-446-CR, 1980 WL 99468, at \*1 (Wis. Ct. App. Nov. 19, 1980); *Pueblo v. Figueroa Rosa*, 12 P.R. Offic. Trans. 186, 189–91 (1982).

18. See *supra* note 17.

19. See, e.g., *Walls*, 537 S.W.3d at 904 (“There is a lack of a clear and unequivocal rule of law concerning late night court proceedings; accordingly, no such rule could have been breached in this case, thus plain error review cannot be applied herein to grant the defendant relief.”).

ets, forcing them to do more with less.<sup>20</sup> The problem of overly long trial days and jury deliberations will not be resolved without a concerted effort on the part of judges, attorneys, and legislators.<sup>21</sup>

Three modern cases highlight the extremes of trial days and jury deliberations, as well as the often-indifferent response of appellate courts. First, in 2004, a jury was not excused to deliberate in Travis Parisien's case until 7:40 p.m.<sup>22</sup> In total, the jury worked a seventeen-hour day.<sup>23</sup> Parisien appealed the verdict, claiming that the overly long trial day and jury deliberation was coercive. The Supreme Court of North Dakota presumed that it was not, and Parisien's challenge to this overly long trial day and jury deliberation, without more, failed to sway the court.<sup>24</sup> Second, in 2005, at 12:10 a.m. in a Kentucky courtroom, a trial judge instructed a deadlocked jury to continue deliberating, and eventually it arrived at a unanimous verdict against defendant John Tim Jenkins.<sup>25</sup> The Kentucky Court of Appeals concluded that "there are situations so egregious as to amount to a deprivation of due process"; this case, however, was not one of them.<sup>26</sup> Any defining characteristics of this threshold remain unclear.<sup>27</sup> Third, in 2011, Rocky Purdin rested his defense in Ohio state court at 5:00 p.m. on a Friday.<sup>28</sup> The trial judge gave the jurors three options: (1) return to court the next day, Saturday, to deliberate at 9:00 a.m.; (2) return on Monday morning to deliberate; or (3) begin deliberating that night.<sup>29</sup> Because no juror protested staying later, the trial court sent the jurors off to deliberate at 9:00 p.m.<sup>30</sup> By 3:30 a.m., the jurors reached their verdict: the prosecution got its conviction.<sup>31</sup> The Court of Appeals of Ohio differentiated the case from a 1970 Iowa Supreme Court decision, which had reversed and remanded a jury verdict conviction handed

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20. See, e.g., Lorie S. Gildea & Matt Tews, *The Right to Simple Justice: The Primary First Principle*, 39 WM. MITCHELL L. REV. 6, 10 (2012); see also *infra* Section III.A.

21. See *infra* Part III.

22. *Parisien*, 703 N.W.2d at 309, 314.

23. *Id.*

24. *Id.* at 315. Mixed with several other errors that occurred during the jury deliberation, the court found that "the errors are so intertwined and interrelated that . . . the cumulative effect of the errors requires reversal of all three criminal judgments and a remand for a new trial." *Id.*

25. *Jenkins v. Commonwealth*, No. 2006-CA-000158-MR, 2007 WL 706843, at \*7 (Ky. Ct. App. Mar. 9, 2007), *rev'd*, 308 S.W.3d 704 (Ky. 2010).

26. *Id.*

27. *Id.* ("[W]e again emphasize that there are situations in which the spirit of a fair trial would be violated if jurors, by virtue of deliberations extending well-beyond the limits of normal endurance, were too exhausted to render a reasoned verdict. However, that situation did not obtain in this case and is not cause for reversal of Jenkins' convictions.").

28. *State v. Purdin*, No. 12CA944, 2013 WL 84897, at \*3 (Ohio Ct. App. Jan. 4, 2013).

29. *Id.*

30. *Id.*

31. *Id.*

down at 4:30 a.m.<sup>32</sup> By comparison, the judge claimed that despite the 3:30 a.m. verdict, there was “no indication that the jury was fatigued or that there was a ‘premium on stamina and strength rather than judgment.’”<sup>33</sup> For the court, that single hour seemed to have made all the difference between a fair and a fundamentally unfair trial.

This small sampling of cases exemplifies how physically taxing it can be for defense counsel, witnesses, court employees, and jurors to participate in the criminal trial process. It also illustrates appellate courts’ typical indifference to the due process rights of the defendants who raise these issues. Something important is being lost in translation for these judges.<sup>34</sup>

This Note argues that judges must exercise their discretion to ensure defendants’ fair trial rights are not eroded by overly long trial days or jury deliberations. Part I explains how overly long trial days and deliberations are in tension with defendants’ constitutional rights to a fair and speedy trial as well as to effective assistance of counsel. Part II examines scientific research on how sleep deprivation affects reasoning and moral judgment and concludes that sleep deprivation during the presentation of evidence and jury deliberation violates the right to a fair trial. Part III contends that the best solutions to these violations is a combination of (a) judicial discretion exercised to cabin trial day length, and (b) legislative action to set hard limits. These solutions empower judges, counsel, and legislators to extend constitutional guarantees to criminal defendants in areas where rights infringement regularly occurs.

## I. CONSTITUTIONAL UNDERPINNINGS OF THE RIGHT TO A WELL-RESTED TRIAL

An overburdened, underfunded criminal justice system jeopardizes defendants’ constitutional guarantees to a fair trial and effective assistance of counsel. Without strong protections against practices like requiring defense counsel to present evidence at midnight<sup>35</sup> or pressuring a jury to continue deliberations for twenty-four hours straight,<sup>36</sup> these constitutional guarantees are guarantees in name only. In too many cases, overwhelmed state judiciaries make compromises for the sake of efficiency that reduce protections for defendants and forfeit these guarantees. These compromises are particu-

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32. *Id.*

33. *Id.* (quoting *State v. Albers*, 174 N.W.2d 649, 656 (Iowa 1970)).

34. See *State v. Parton*, 817 S.W.2d 28, 34–35 (Tenn. Crim. App. 1991) (“When a trial continues into the late night, other participants do not function to their optimal abilities. The judge gets tired, whether he or she admits it. . . . Witnesses cannot perform their function to the best of their ability when they are weary after a long and stressful day. . . . Many participants just want to get the case over with and go home. . . . [And w]hen the adversarial activities are concluded, the jurors’ ultimate duties begin.”).

35. See *Gueldner v. Heyd*, 311 F. Supp. 1168, 1175 (E.D. La. 1970), *aff’d sub. nom.* *United States ex rel. Charbonnet v. Heyd*, 432 F.2d 91 (5th Cir.), and *aff’d*, 434 F.2d 1307 (5th Cir.).

36. *DeGrandis v. Fay*, 335 F.2d 173, 174 (2d Cir. 1964).

larly harmful in criminal court, where defendants' liberty is at stake. Speedy trial rights place courts in the uncomfortable and unconstitutional position of trading fair trials for efficient trials that allow more cases to be pushed through an overloaded docket. Overly long trial days and jury deliberations serve as easy solutions for state judiciaries and legislatures in need of quick fixes, but these solutions also regularly defeat the espoused principle of a fair trial.

#### A. *Right to a Fair Trial*

The U.S. Constitution guarantees defendants a fair trial.<sup>37</sup> Not every error that occurs in a trial rises to the level of a due process violation—trials are a messy, adversarial business.<sup>38</sup> However, a trial must be *fair*.<sup>39</sup> To protect the integrity of the adversarial process, the right to a fair trial must include the right to reasonably alert and attentive actors participating in the trial, during both the trial and the deliberations. Without this guarantee, it is impossible to ensure the fair exercise of other rights to which a defendant is entitled.<sup>40</sup>

While the right to a fair trial manifests in the form of specific rights, such as an impartial jury and the right to confront one's accuser, it is not a hard-and-fast concept. Indeed, "[d]ue process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept. . . . What is fair in one set of circumstances may be an act of tyranny in others."<sup>41</sup> Courts animate this open-ended standard with substantive expectations for counsel, jurors, and judges; they, in turn, must advocate for the correction of injustices.

Within the right to a fair trial is another implicit guarantee: attentive participants. Defense attorneys who are unable to effectively communicate during their closing arguments and jurors who are too exhausted to continue

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37. U.S. CONST. amends. VI, XIV; *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (citations omitted) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984))).

38. See *Crane*, 476 U.S. at 690–91.

39. Standard elements of a fair trial include: the presumption of innocence, an impartial jury, examination of adverse witnesses, the ability to offer testimony, and representation by counsel. See U.S. CONST. amend. VI. Some of these rights are explicitly stated in the text of the Constitution, and others courts have developed over time. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

40. *State v. McMullin*, 801 S.W.2d 826, 832 (Tenn. Crim. App. 1990) ("The protection of the right of the defendant to the assistance of competent counsel requires that the court schedule not be such that counsel competency is eroded by unusually long in-court hours. The defendant's right to due process of law requires that the jury deciding guilt or innocence be shielded from fatigue that affects their mental and physical ability to function at normal levels.").

41. *Snyder v. Massachusetts*, 291 U.S. 97, 116–117 (1934).

debating the fairness of a particular outcome violate the core concept of procedural fairness. The right to a fair trial must be reimagined to include within its scope the right to reasonably attentive participants, from the first minute of voir dire to the final vote during deliberation.

### B. *Right to Effective Assistance of Counsel*

One of the essential components of a fair trial is the right to effective assistance of counsel, safeguarded by the Sixth Amendment and strengthened by subsequent Supreme Court precedent.<sup>42</sup> Counsel cannot meaningfully serve this purpose if they are unable to physically and mentally meet the demands of their profession because they are undergoing undue exertion during trial.<sup>43</sup>

The Supreme Court has recognized that effective assistance of counsel requires the presence, advice, assistance, and advocacy of counsel during “critical stage[s] of [the defendant’s] trial.”<sup>44</sup> Without this representation, defendants are denied the bundle of protections the Constitution affords them when presenting a defense.<sup>45</sup> Thus, in addition to operating as its own independent guarantee to help defendants navigate the intricacies of the criminal process, the right to counsel provides for the effective exercise of other constitutional guarantees. The right to reasonably alert counsel is a right implicated during the presentation of evidence by both sides at trial, but it directly affects the evidence jurors will have available during their deliberations.<sup>46</sup>

The grueling nature of trial work is an accepted part of the criminal defense profession.<sup>47</sup> Attorneys working in criminal law operate in a field rife with mental illness, substance abuse, and suicide.<sup>48</sup> Given the stressful, high-stakes nature of the profession, it is no surprise that “[l]awyers . . . average

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42. U.S. CONST. amend. VI; see, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending the right to counsel to misdemeanors); *Gideon*, 372 U.S. 335 (extending the right to counsel to indigent defendants facing state felony charges).

43. See, e.g., *Thornton v. State*, 369 So. 2d 505, 506 (Miss. 1979).

44. *United States v. Cronin*, 466 U.S. 648, 659 (1984); see also *Burdine v. Johnson*, 262 F.3d 336, 338 (5th Cir. 2001).

45. *Gideon*, 372 U.S. at 342–43; *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

46. See *Burdine*, 262 F.3d at 349.

47. It is important to acknowledge how many defendants will not benefit from any of the changes recommended in this Note. By some estimates, 94 percent of state and 97 percent of federal felony convictions are the result of plea bargains—those cases will never go to trial. Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> [<https://perma.cc/V3KR-65V8>].

48. *Suicide*, A.B.A. (Nov. 21, 2017), [https://www.americanbar.org/groups/lawyer\\_assistance/resources/suicide/](https://www.americanbar.org/groups/lawyer_assistance/resources/suicide/) [<https://perma.cc/9DDW-5GEH>].

less sleep than almost any other working professionals.”<sup>49</sup> And trial is the big show. As one law firm writes, a case is “often won during the trial by hard work each and every night to prepare for the surprises of the next day and to adjust to the inevitable changes in tactics and strategy required due to the moves of the other side.”<sup>50</sup>

Despite the crucial influence assistance of counsel has on a defendant’s fate, the Supreme Court has only gradually and sparingly acknowledged the right to *effective* assistance of counsel.<sup>51</sup> Though the Court set a base standard by which to measure counsels’ performance in *Strickland v. Washington*, lower courts have given excessive deference to counsel under the label of “strategy.”<sup>52</sup>

Two cases from Mississippi demonstrate how extraordinary the proofs must be for an appellate court to find error. In *Thornton v. State*, after the state rested its case at 6:00 p.m., the defendant’s attorneys—two of whom were in their seventies—filed a motion for recess given the late hour, the witnesses and evidence they planned on presenting, their age, and their habit of going to bed early.<sup>53</sup> The judge denied defense counsels’ motion for recess at 6:00 p.m. and denied a second motion to dismiss four hours later at 10:00 p.m.<sup>54</sup> During closing arguments, one defense attorney became extremely disoriented and was subsequently hospitalized for days after being diagnosed with “chronic organic brain syndrome.”<sup>55</sup> The jury convicted the defendant,

49. Kimberly Sachs, Note, *You Snooze, You Lose, and Your Client Gets a Retrial: United States v. Ragin and Ineffective Assistance of Counsel in Sleeping Lawyer Cases*, 62 VILL. L. REV. 427, 428 (2017).

50. *Trial Preparation: What Happens in the Month Before Trial*, STIMMEL, STIMMEL & ROESER, <http://www.stimmel-law.com/en/articles/trial-preparation-what-happens-month-trial> [<https://perma.cc/FZC5-HRMB>].

51. Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 427 (1996).

52. *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* established a two-pronged test: counsel’s performance must be both unreasonable and prejudicial to the outcome at trial. Under *Strickland*, “[a] defendant must show not only that his lawyer was incompetent, but that the trial’s outcome would likely have been different had the attorney been more capable.” Ken Armstrong, *What Can You Do with a Drunken Lawyer?*, MARSHALL PROJECT (Dec. 10, 2014), <https://www.themarshallproject.org/2014/12/10/what-can-you-do-with-a-drunken-lawyer> [<https://perma.cc/5HST-AEDP>].

53. 369 So. 2d 505, 506 (Miss. 1979).

54. *Thornton*, 369 So. 2d at 506.

55. *Id.* at 505. This portion of the Supreme Court of Mississippi’s opinion is worth noting:

[A]fter speaking five or six minutes, . . . [the attorney] picked up the [jury] instruction . . . and read it completely to the jury four successive times. . . . He appeared completely disoriented and [his] son thought he was having a heart attack . . .

. . . [U]pon reaching the emergency room . . . the attorney [was] obviously disoriented and extremely confused. . . . The diagnosis was that the attorney was suffering with a chronic organic brain syndrome because of stress. . . .

but, on appeal, the Mississippi Supreme Court held that he had been deprived of effective assistance of counsel.<sup>56</sup> In another Mississippi case, the state's highest court also found ineffective assistance of counsel after defense counsel's motion for a recess at 6:30 p.m. was denied.<sup>57</sup> After ten hours of work that day, including jury selection and cross-examination, defense counsel informed the court that he was "extremely fatigued."<sup>58</sup> The trial judge candidly explained why he needed to try the case into the night: "It is imperative I get through the case tomorrow. I have some official business that I have got to attend to, and it is very imperative that I be there on Friday."<sup>59</sup> A scheduling conflict is a common but inappropriate reason to force defense counsel to the point of physical collapse. These two cases demonstrate how incredibly high the standard of proof is to find ineffective assistance of counsel.

Given the stressful nature of trial work and the legal profession's general disregard for healthy sleep habits, it could be argued that limitations on trial day length are immaterial. But while the personal habits of attorneys must be left to their individual discretion, state governments cannot be responsible for forcing attorneys to abandon healthy sleep habits, particularly during the most stressful periods of their profession. When faced with analogous dilemmas, governments have imposed time restrictions even when they cannot guarantee that workers actually sleep more. For example, laws requiring commercial vehicle drivers to have at least ten hours of nondriving time after a shift do not purport to measure the amount of sleep drivers actually get.<sup>60</sup> Such a mandate would be—as a practical matter—beyond the scope of the state's legislative power. But attorneys should not be forced to perform crucially important, constitutionally mandated roles without the *opportunity* for adequate rest.<sup>61</sup> Effective counsel requires adequate rest to cognitively perform as well as sufficient preparation time to be ready for the next day's chal-

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... Even a panel of young jurors or an array of young attorneys would be prejudiced by going through such an ordeal.

*Id.* at 506–07.

56. *Id.* at 507.

57. *Edge v. State*, 393 So. 2d 1337, 1342 (Miss. 1981).

58. *Id.*

59. *Id.* at 1341–42. The Supreme Court of Mississippi continues to cite pre-*Strickland* cases on attorney exhaustion with approval. *E.g.*, *Moffett v. State*, 49 So. 3d 1073, 1113 (Miss. 2010) (citing *Gregg v. Georgia*, 428 U.S. 153, 166–67 (1976)).

60. *See, e.g.*, CONN. GEN. STAT. § 14-274 (2019).

61. The case for defendants with overworked counsel has also not been successful. Public defender offices stretched to the breaking point like the Orleans Public Defenders have stopped accepting felony cases in order to give each of their clients sufficiently effective counsel rather than reducing their professional standards. *New Orleans Public Defenders Refuse New Cases to Highlight Underfunding*, NPR (Jan. 29, 2016, 4:29 PM), <http://www.npr.org/2016/01/29/464893246/new-orleans-public-defenders-refuse-new-cases-to-highlight-underfunding> [<https://perma.cc/EEB7-FMS9>].

lenges. Judges who keep counsel late during trial should acknowledge the relationship between adequate sleep and effective representation.

### C. *Right to a Speedy Trial*

A sleep-deprived courtroom also implicates the right to a speedy trial.<sup>62</sup> This guarantee is incredibly powerful and, if violated, can lead to the dismissal of charges against the accused.<sup>63</sup> The Supreme Court applies four factors when considering an alleged violation of a defendant's speedy trial rights: "(1) the length of the delay between arrest and trial, (2) the cause of that delay, (3) the defendant's assertion of their speedy trial right, and (4) the prejudice experienced by the defendant due to the delay."<sup>64</sup> This balancing test helps the reviewing court decide whether the defendant or the state is primarily at fault for the delay.<sup>65</sup> The defendant's assertion, or lack thereof, is often viewed as the decisive factor in the analysis.<sup>66</sup>

A defendant's access to a speedy trial is inexorably linked to court funding. Members of both the state and federal judiciary are at the mercy of legislators who set their budgets.<sup>67</sup> Although judicial operations typically absorb only 1 to 4 percent of a given state's budget, they are a frequent target of spending cuts.<sup>68</sup> Courts in a majority of states report budget cuts along with increasing case backlogs.<sup>69</sup> Across the nation, courts in some states are clos-

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62. U.S. CONST. amend. VI.

63. Austin N. Priddy, Comment, *Rethinking Indigent Defense in Louisiana: How Speedy Trial Claims Can Actualize the Constitutional Right to Counsel Funded by the States*, 89 TUL. L. REV. 491, 505 (2014).

64. *Id.* at 505–06; see also *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

65. *Barker*, 407 U.S. at 530 ("A balancing test necessarily compels courts to approach speedy trial cases on an *ad hoc* basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right."); Priddy, *supra* note 63, at 506 ("[I]f the cause of the delay is primarily or solely the fault of the state, then it is more likely that a dismissal on speedy trial grounds will be granted.")

66. *Barker*, 407 U.S. at 531–32 ("The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.")

67. Gildea & Tews, *supra* note 20.

68. *Id.* at 10 ("While state court budgets have been in decline over the last decade, the financial crisis beginning in 2008 brought on the deepest cuts. In the three years after 2008, 'the courts of most states [were] forced to make do with 10 to 15% less funding than they had in 2007' . . . despite the fact that the courts of every state make up only a tiny portion of the overall budget[] . . ." (footnotes omitted) (quoting *The ABA Task Force on the Preservation of the Justice System, Report to the House of Delegates by the American Bar Association Task Force on Preservation of the Justice System—Crisis in the Courts: Defining the Problem*, 83 PA. B. ASS'N Q. 29 (2012))).

69. H. Mills Gallivan, Opinion, *Disgraceful Injustice: Lack of Court Funding*, POST & COURIER (Jan. 18, 2015), <https://www.postandcourier.com/opinion/disgraceful-injustice-lack->

ing on certain days of the week, suspending civil trials for lengthy periods of time, and, in some cases, permanently closing courthouses.<sup>70</sup>

The consequences of such a massive shortage of funding for the right to a speedy trial vary. Some states have kept untried defendants in local jails for extended periods of time or have been forced to release them.<sup>71</sup> Recent examples from Minnesota, Georgia, and Oregon highlight the bind that these courts are in: either house people for impermissibly lengthy periods of time or drop charges and release defendants without a trial.<sup>72</sup> The Supreme Court has held that “[u]nintentional delays caused by overcrowded court dockets or understaffed prosecutors are among the factors to be weighed less heavily than intentional delay.”<sup>73</sup> These factors are still critical to consider because they are the government’s obligation, not the defendant’s.<sup>74</sup>

But the right to a speedy trial cannot and should not be an excuse for a lack of a fair trial. Speedy trial guarantees and fair trial guarantees are not interchangeable—both are equally essential to the fundamental fairness of a criminal trial. Judges should not be in the business of pushing cases through the system at accelerated rates because they have overcrowded dockets. Similarly, legislators should not put such enormous pressure on an already precarious system. The current solution of allowing trial courts to exercise their discretion to force through cases by trying them late into the night compromises the fair trial rights of the defendant whose liberty hangs in the balance.

\* \* \*

Late night trials and jury deliberations raise a whole host of constitutional concerns, but they are not the only practices that regularly intrude on criminal defendants’ fair trial rights. Our criminal justice system is breaking under the pressure of attempting to provide fair process to too many people with too few resources.<sup>75</sup> Criminal defendants, particularly indigent defendants, often face a fundamentally unfair system. The issues raised in this Note

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of-court-funding/article\_3a5caacc-9d05-511b-b99c-b115e85d388a.html [https://perma.cc/G9HD-PTVK].

70. Gildea & Tews, *supra* note 20, at 11.

71. *Id.* at 14–15.

72. *Id.* at 14–16. People held pre-trial are typically those defendants who either cannot afford bail or who are considered a “flight risk” or a “danger to the community.” See ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE §§ 10–1.5, 5.8 (3d ed. 2007), [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/pretrial\\_release.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf) [https://perma.cc/UFE6-EM3H]. But judges and legislatures could lower the bail they set or do away with bail altogether. These options remain available avenues to dealing with overcrowded dockets and speedy trial issues.

73. *Strunk v. United States*, 412 U.S. 434, 436 (1973).

74. *Barker v. Wingo*, 407 U.S. 514, 531 (1972).

75. Oliver Laughland, *The Human Toll of America’s Public Defender Crisis*, *GUARDIAN* (Sept. 7, 2016, 6:55 AM), <https://www.theguardian.com/us-news/2016/sep/07/public-defender-us-criminal-justice-system> [https://perma.cc/D86E-9G2R].

rest at the very center of many of these concerns: courts pushing cases through their dockets so fast that fair process becomes a secondary or even tertiary consideration, neglect for fundamental principles of fairness, and a failure to understand how many of the basic elements of the criminal justice system's design implicitly favor conviction.<sup>76</sup> While many of the issues above cannot easily be solved, this Note offers practical solutions for government and private actors that will provide more robust protection for criminal defendants and better fulfill the principles—accuracy and fairness—that provide the foundation for our criminal justice system.<sup>77</sup>

## II. THE SCIENCE OF SLEEP DEPRIVATION

Sleep deprivation is a well-understood human phenomenon, but human institutions, especially the courts, have been remarkably unwilling to adapt their practices to basic human needs. The scientific community uniformly recognizes the negative effects sleep deprivation has on moral judgments, retention of negative emotions, and emotional processing, including increased irrationality.<sup>78</sup> In particular, vigilance decreases when a person experiences sleep deprivation.<sup>79</sup> Without well-rested, fully functioning actors, the fundamental rights to a fair trial and effective assistance of counsel are compromised.

### A. *Making Moral Judgments*

A conviction entered by a sleep-deprived jury, whose members have an impaired ability to make moral judgments, violates a defendant's fair trial rights. Jurors who are deciding whether or not a defendant is guilty must grapple with difficult moral decisions as they apply the law to the facts. Bound up in these factual determinations are implicit moral judgments. From sexual impropriety to crimes of poverty and violence, much of a state's criminal code involves understanding why people behave the way they do in

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76. See, e.g., Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2318–20 (2013); Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 195–209 (2017); Cecelia Klingele et al., *Essay, Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 955–63.

77. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 398 (1993) (“[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent. . . . In any system of criminal justice, ‘innocence’ or ‘guilt’ must be determined in some sort of a judicial proceeding.” (citation omitted)).

78. See Paula Alhola & Päivi Polo-Kantola, *Sleep Deprivation: Impact on Cognitive Performance*, 3 NEUROPSYCHIATRIC DISEASE & TREATMENT 553, 553–55 (2007); Jeffrey S. Durmer & David F. Dinges, *Neurocognitive Consequences of Sleep Deprivation*, 25 SEMINARS NEUROLOGY 117, 120–121 (2005).

79. Alhola & Polo-Kantola, *supra* note 78, at 555.

a particular situation and then casting judgment on those actions.<sup>80</sup> A study comparing participants' responses to morally difficult situations before and after sleep deprivation showed that "when sleep deprived, individuals appear to be selectively slower in their deliberations about [moral personal] dilemmas relative to other types of dilemmas."<sup>81</sup> Sleep deprivation has a "particularly debilitating effect on judgment and decision making processes that depend heavily upon the integration of emotion with cognition."<sup>82</sup> Tasks such as hearing evidence and deliberating on a defendant's guilt—tasks rife with real-world morality and challenging judgment calls—become vastly more difficult when jurors are sleep deprived.<sup>83</sup> Many of the studies discussed in this Part examine participants under far longer periods of sleep deprivation than jurors would typically experience. The results, however, demonstrate just how little sleep loss it takes to impact a person's psychology and physiology.<sup>84</sup>

A second study found that sleep deprivation causes a greater retention of negative emotion as opposed to positive emotion.<sup>85</sup> Links between depression and sleep deprivation also highlight this connection.<sup>86</sup> The difference between finding a defendant guilty or not guilty often depends on how positive and negative evidence are processed and weighed by jurors and judges. Frequently, a verdict in a criminal trial depends on counteracting negative evidence, such as witness testimony or scientific evidence. Positive evidence, such as an alibi or alternative explanation for negative evidence, would be likely to receive less attention and be given less weight by a sleep-deprived jury.<sup>87</sup> If negative testimony is given more weight—even unconsciously—by sleep-deprived jurors, the defendant's right to a fair trial is compromised. Animating this open-ended trial right with concrete evidence of the necessity of well-rested jurors would ensure that defendants' evidence is given equal weight and credence by jurors.

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80. See Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1402–03 (1986).

81. William D.S. Killgore et al., *The Effects of 53 Hours of Sleep Deprivation on Moral Judgment*, 30 SLEEP 345, 351 (2007).

82. *Id.* at 350.

83. *Id.* at 351.

84. See *infra* Section II.D.

85. Robert Stickgold & Peter Wehrwein, *Health for Life: The Link Between Sleep and Memory*, NEWSWEEK (Apr. 17, 2009, 8:00 PM), <http://www.newsweek.com/health-life-link-between-sleep-and-memory-77579> [<https://perma.cc/75XD-WE2V>]; see also Ninad Gujar et al., *Sleep Deprivation Amplifies Reactivity of Brain Reward Networks, Biasing the Appraisal of Positive Emotional Experiences*, 31 J. NEUROSCIENCE 4466 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3086142/> [<https://perma.cc/FZ3R-4HTR>].

86. Stickgold & Wehrwein, *supra* note 85.

87. Els van der Helm et al., *Sleep Deprivation Impairs the Accurate Recognition of Human Emotions*, 33 SLEEP 335, 335 (2010) ("Sleep deprivation selectively impairs the accurate judgment of human facial emotions, especially threat relevant (Anger) and reward relevant (Happy) categories, an effect observed most significantly in females.").

### B. *Heightened Emotions and Irrationality*

In addition to making moral judgments during deliberations, jurors often discuss and evaluate highly emotional evidence and testimony. Sleep deprivation compromises jurors' ability to perform this task. In one study from Harvard Medical School and the University of California, Berkeley, researchers found that sleep deprivation "excessively boost[s] the part of the brain most closely connected to depression, anxiety and other psychiatric disorders."<sup>88</sup> According to the senior author of the study, "[i]t's almost as though, without sleep, the brain had reverted back to more primitive patterns of activity, in that it was unable to put emotional experiences into context and produce controlled, appropriate responses."<sup>89</sup> For example, if a person with healthy sleep patterns watches a violent movie, "the prefrontal cortex lets the brain know that the scene is make-believe and to settle down."<sup>90</sup>

That same neurological response is missing in sleep-deprived people. Instead, the oldest section of the brain releases a chemical, noradrenaline, to protect against risks to the person's survival.<sup>91</sup> Even in people without diagnosed psychiatric disorders, sleep deprivation can mirror "certain pathological psychiatric patterns."<sup>92</sup> Another study from the same researchers explored how the brain's executive functions are altered during sleep deprivation. People become "hypersensitive to rewarding stimuli," making "emotional responses . . . heightened" and creating irrational behavior.<sup>93</sup>

This research suggests that sleep-deprived jurors are more susceptible to respond to emotionally charged evidence in a visceral, irrational manner. Preventing jurors from resting enhances the intense emotions involved in an already overtly emotional process of hearing details of disturbing crimes. Jurors' inability to properly contextualize their responses to difficult evidence due to state-imposed sleep deprivation exposes defendants to a "trial by emotion," thereby violating their right to a fair trial. Forcing jurors to hear evidence and deliberate in such a high intensity situation without the benefit of reflection and rest exposes the defendant to too much prejudice.<sup>94</sup>

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88. Yasmin Anwar, *Sleep Loss Linked to Psychiatric Disorders*, U.C. BERKELEY NEWS (Oct. 22, 2007), [https://www.berkeley.edu/news/media/releases/2007/10/22\\_sleeploss.shtml](https://www.berkeley.edu/news/media/releases/2007/10/22_sleeploss.shtml) [<https://perma.cc/MCW6-PBZK>].

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Moheb Costandi, *The Sleep-Deprived Brain*, DANA FOUND. (July 18, 2018), <https://dana.org/article/the-sleep-deprived-brain/> [<https://perma.cc/T44Y-FBDX>]; Gujar et al., *supra* note 85.

94. *Cf.* FED. R. EVID. 403 (articulating the standard that courts should exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice, which suggests that courts should take into account the prejudicial effect of sleep deprivation on a juror's ability to fairly hear a case).

### C. Focus and Forgetfulness

Another symptom of sleep deprivation is increased forgetfulness and the inability to retain information. While there are no definitive answers about exactly why sleep is a biological necessity,<sup>95</sup> many researchers believe that one of the important functions of sleep is memory consolidation.<sup>96</sup> Though a person creates and recalls memories while awake, the intermediary stage—consolidation—is necessary for memories to be stored properly and retrieved more easily later.<sup>97</sup> When jurors deliberate after hours—often days—of hearing complex evidence, memory retrieval is essential. Jurors denied adequate rest may lose their memories of the trial itself. A defendant is denied their right to a fair trial when the jury is not actually recalling and weighing the evidence that was presented.<sup>98</sup>

Additionally, sleep deprivation compromises one's ability to focus. Concentrating on a specific task becomes far more difficult after only twenty-four hours of sleep deprivation.<sup>99</sup> Sleep deprivation also has links with disorders like Attention Deficit Hyperactivity Disorder (ADHD).<sup>100</sup> The two conditions are closely linked: “[A]s many as 75 percent of people with ADHD . . . may have a chronic, underlying sleep problem.”<sup>101</sup>

For jurors who are attempting to engage with complex evidence, even a small dose of sleep deprivation can compromise their ability to focus on a specific task or engage with multiple pieces of evidence. Focus also has implications for defense counsel and judges during long trial days. Defense counsel must be constantly vigilant during the presentation of evidence in order to object, conduct effective direct and cross-examinations, and make

95. Jerome M. Siegel, *Why We Sleep*, SCI. AM., Nov. 2003, at 92, 92 (“[W]e have no comparably straightforward explanation for sleep.”).

96. E.g., Michael Breus, *Here’s Why You Can’t Think Straight When You’re Sleep Deprived*, SLEEP DR. (Apr. 17, 2018), <https://thesleepdoctor.com/2018/04/17/heres-why-you-cant-think-straight-when-youre-sleep-deprived/> [<https://perma.cc/BDV2-F7ZV>].

97. *Id.*

98. The issue of memory consolidation is even more important in states and jurisdictions where jurors are not allowed to take notes, a process known to increase recall. Vaiva Kalnikaitė & Steve Whittaker, *Does Taking Notes Help You Remember Better? Exploring How Note Taking Relates to Memory*, UNIFR (Sept. 4, 2007), <https://diuf.unifr.ch/people/lalanned/MeMos07/files/kalnikaite.pdf> [<https://perma.cc/3MX9-2MSH>]; *Notetaking by Jurors*, USLEGAL, <https://courts.uslegal.com/jury-system/issues-pertaining-to-the-jurys-performance-of-its-duties/notetaking-by-jurors/> [<https://perma.cc/S6D4-98GV>] (“Although only one state expressly prohibits this practice, in most jurisdictions whether members of a jury are allowed to take notes will depend upon the discretion of the judge. One survey indicated that 37 percent of the judges in state courts indicate they do not allow jurors to take notes during a trial.”).

99. Eve Wiggins et al., *24-h Sleep Deprivation Impairs Early Attentional Modulation of Neural Processing: An Event-Related Brain Potential Study*, 677 NEUROSCIENCE LETTERS 32, 32 (2018).

100. Breus, *supra* note 96; Vatsal Thakkar, *How Sleep Deprivation Looks a Lot Like ADHD*, ADDITUDE (updated June 18, 2019), <https://www.additudemag.com/symptoms-of-insomnia/> [<https://perma.cc/2YJG-PKN8>].

101. Breus, *supra* note 96.

off-the-cuff decisions about trial strategy. These decisions become monumentally more difficult if the attorney is unable to focus. Judges must mediate any conflicts arising between the prosecution and defense, monitor the progress of the trial, and ensure that all actors are fulfilling their roles effectively. The memory and attention of all trial participants are thus compromised when they do not get sufficient sleep during the high-stress, high-stakes trial and deliberation days.

#### D. *Length of Sleep Deprivation*

Somewhat surprisingly, sleep deprivation experienced over even short periods of time can still wreak havoc on people's ability to perform cognitively. One study conducted by two psychologists found that moderate sleep deprivation, or seventeen to nineteen hours without sleep, produces the same effects as alcohol intoxication on cognitive and motor performance.<sup>102</sup> Jurors come into the courthouse from many walks of life—everyone from parents of small children to students to workers fresh off of a night shift. Add to that reality a trial day lasting past 5:00 p.m., and every person in the courtroom feels the fatigue of a long, exhausting day. Jurors may simply not be well rested enough to be effective decision makers if they are forced to hear evidence or deliberate late into the night.

It is true that, even if the trial court or state legislature were to designate certain hours for rest during the trial and deliberation, it would be up to the individual discretion of each attorney, judge, or juror to take advantage of this period of potential rest. While the state cannot regulate how jurors spend their free time, the state should still not actively *prevent* attorneys, judges, or jurors from getting adequate rest, should they so choose. As with other constitutional guarantees—the right to effective assistance of counsel,<sup>103</sup> the right to a jury selected by racially impartial means<sup>104</sup>—the right to well-rested trial participants may not always be perfectly achieved, but the state can refrain from standing in the way.

#### E. *Other Areas of the Law*

Other areas of the law, ranging from motor vehicle regulation to confession law, have acknowledged the vital role sleep plays in decisionmaking processes.<sup>105</sup> Legislators, supported by research, have determined that oper-

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102. A M Williamson & Anne-Marie Feyer, *Moderate Sleep Deprivation Produces Impairments in Cognitive and Motor Performance Equivalent to Legally Prescribed Levels of Alcohol Intoxication*, 57 OCCUPATIONAL & ENVTL. MED. 649, 649 (2000); see also Nicole Lamond & Drew Dawson, *Quantifying the Performance Impairment Associated with Fatigue*, 8 J. SLEEP RES. 255 (1999) (finding similar results).

103. *Strickland v. Washington*, 466 U.S. 668 (1984).

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

105. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (“In determining whether a defendant’s will was overborne in a particular case, the Court has assessed the totality of all the

ating a commercial vehicle after sleep deprivation risks unsafe consequences on the road for the truck driver and other drivers.<sup>106</sup> For confessions obtained while a person is in police custody, the Supreme Court has held that sleep deprivation is an important consideration in determining the voluntariness of the confession.<sup>107</sup> If legislators and judges already recognize that sleep deprivation must be prevented when it comes to community safety and the accuracy of convictions, they should expand these safeguards to trial and jury deliberations.

A groundbreaking study on judges' food breaks underscores important parallels with overly long trial days and jury deliberations. A study of Israeli judges revealed that judges rule more favorably for defendants at the beginning of the workday and after a food break as compared with times later in the day.<sup>108</sup> The study found that:

[E]xperienced parole judges in Israel granted freedom about 65 percent of the time to the first prisoner who appeared before them on a given day. By the end of a morning session, the chance of release had dropped almost to zero.

After the same judge returned from a lunch break, the first prisoner once again had about a 65 percent chance at freedom.<sup>109</sup>

The authors suggested a potential reason for this discrepancy: making decisions repeatedly wears out one's brain in the same way that repeated exercise wears out one's other muscles.<sup>110</sup> Tiredness inevitably leads to shortcuts. Shortcuts lead to less nuanced decisionmaking: "[O]ne of the easiest shortcuts is to uphold the status quo—in this case, denying parole."<sup>111</sup> The

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surrounding circumstances—both the characteristics of the accused and the details of the interrogation. Some of the factors taken into account have included . . . the use of physical punishment such as the deprivation of food or sleep . . ."; *Farrell v. State*, 622 N.E.2d 488, 492 (Ind. 1993) ("The importance of sleep is also recognized in various laws. For example, the number of hours motor carriers may operate is regulated.").

106. *E.g.*, Maggie's Law: National Drowsy Driving Act of 2003, H.R. 968, 108th Cong. § 2 (2003) (presenting congressional findings on the dangers of driver fatigue and sleep deprivation); *see also Acute Sleep Deprivation and Risk of Motor Vehicle Crash Involvement*, AAA (Dec. 2016), <http://aaafoundation.org/acute-sleep-deprivation-risk-motor-vehicle-crash-involvement/> [<https://perma.cc/3MM7-PTE3>] ("The results of this drowsy driving study indicate that drivers who usually sleep for less than 5 hours daily, drivers who have slept for less than 7 hours in the past 24 hours, and drivers who have slept for 1 or more hours less than their usual amount of sleep in the past 24 hours have significantly elevated crash rates.").

107. *Bustamonte*, 412 U.S. at 226; *see also Carter v. State*, 241 P.3d 476, 486 (Wyo. 2010) ("We have recognized that sleep deprivation and intoxication are factors which can make a statement involuntary.").

108. Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. 6889 (2011).

109. Binyamin Appelbaum, *Up for Parole? Better Hope You're First on the Docket*, N.Y. TIMES: ECONOMIX (Apr. 14, 2011, 10:00 AM), <https://economix.blogs.nytimes.com/2011/04/14/time-and-judgment/> [<https://perma.cc/T9XJ-YEXU>].

110. *See* Danziger et al., *supra* note 108, at 6889.

111. Appelbaum, *supra* note 109.

results of this study show just how prone judges, like all humans, are to the effects of variables like hunger, which in turn lead to inevitable biases.<sup>112</sup>

This study peels back the shroud of judicial mystique. Judges are people too and are susceptible to the same psychological pressures as everyone else. If a judge's temporal proximity to a meal can have such a powerful effect on the outcome of their decisions, a full night of sleep will surely have profound consequences on *all* participants in the system—not just experienced and professional judges. Sleep deprivation and hunger are both predictable human conditions. And while there will inevitably be variation, especially given the wide variety of outside influences (habits, childhood environment, lifestyle, health), the medical community is in agreement on the impacts of both.<sup>113</sup>

The effects of intoxication—including compromised cognitive abilities—are also well understood and well regulated.<sup>114</sup> Among other symptoms, drinking is linked to issues with reasoning and memory, mood changes, memory loss, and harm to fine motor skills.<sup>115</sup> It is likewise understood that “[i]nadequate sleep exerts a similar influence on our brain as drinking too much.”<sup>116</sup> But proof of prolonged substance use and abuse during a trial has not historically been enough for the Court to rule counsel ineffective: “In cases where a criminal defendant's attorney has been impaired due to alcohol or drugs, the lower courts have uniformly applied the *Strickland* test to evaluate a claim of ineffective assistance of counsel and required the defendant to show prejudice.”<sup>117</sup> Abuses of everything from cocaine to prescription medications have likewise been dismissed in state and federal courts across the country as “not creat[ing] *per se* ineffectiveness.”<sup>118</sup> Modern courts have shied away from calling for automatic mistrials when jurors indulge, but such behavior can still be grounds for a mistrial if the defendant is “prejudiced or deprived of some right as the result of such use.”<sup>119</sup> Appellate courts' failure to sanction juror and counsel intoxication is troubling because

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112. Danziger et al., *supra* note 108, at 6889.

113. See Williamson & Feyer, *supra* note 102, at 649; Jennifer MacCormack, *The Science of Hangry*, QUARTZ (June 14, 2018), <https://qz.com/1305653/why-do-you-get-hangry-the-science-of-hungry-angry/> [<https://perma.cc/73NF-7UAN>].

114. Jerry R. Balentine, *Alcohol Intoxication*, EMEDICINEHEALTH (updated Dec. 13, 2018), [https://www.emedicinehealth.com/alcohol\\_intoxication/article\\_em.htm](https://www.emedicinehealth.com/alcohol_intoxication/article_em.htm) [<https://perma.cc/FS6J-F3NZ>] (“Most states have specific levels at which the driving of a motor vehicle is forbidden.”).

115. *How Alcohol Impacts the Brain*, NW. MED., <https://www.nm.org/healthbeat/healthy-tips/alcohol-and-the-brain> [<https://perma.cc/L2P5-W6NR>].

116. *New Study Reveals Sleep Deprivation Disrupts Brain-Cell Communication*, MED. Xpress (Nov. 6, 2017), <https://medicalxpress.com/news/2017-11-reveals-deprivation-disrupts-brain-cell.html> [<https://perma.cc/4GBK-DD5F>].

117. Kirchmeier, *supra* note 51, at 455.

118. *Id.* at 457–58.

119. C.R. McCorkle, Annotation, *Use of Intoxicating Liquor by Jurors: Criminal Cases*, 7 A.L.R.3d § 2[a] (1966).

intoxication, like sleep deprivation, “lessen[s] respect for and confidence in the courts and the integrity of jury trials.”<sup>120</sup>

The notion that a defendant could be deprived of a sober attorney or jury and still enjoy a functioning and uncompromised fair trial is untenable. Counsel must exercise constant vigilance throughout each day of trial, deciding whether to object to testimony, cross-examine a witness, or present evidence and working to appear professional and appropriate in front of twelve people deciding their client’s fate. Intoxication, just as with sleep deprivation, impairs a person’s reasoning, memory, and ability to control themselves,<sup>121</sup> which would actively hinder an attorney from performing any of their essential trial duties. For jurors, the effects of drugs, alcohol, or sleep deprivation compromise their ability to absorb new information, process that information, and come to an agreement with other people.<sup>122</sup> Sleep deprivation affects more than blood sugar—it alters a person’s ability to make moral judgments, process emotions, focus, and remember information, all after only one night without adequate sleep.<sup>123</sup> Thus, courts are wrong to conclude, as they often do, that attorneys, jurors, and judges suffering from too little sleep have not fundamentally impaired a defendant’s constitutional guarantees.<sup>124</sup>

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The scientific studies discussed in this Section only confirm what most people already intuitively understand: sleep is essential to our ability to function, especially in a high-stakes, pressure-filled environment like a courtroom trial. While sleeping prevents a juror, judge, or attorney’s cognitive performance altogether, sleep deprivation alters it.<sup>125</sup> The effects of a lack of adequate sleep are not up for debate. Among the biggest bets a defendant makes is placing faith in the competence of his or her counsel, the prosecutor, the judge, and the jury at trial. Defendants deserve, and are constitutionally entitled to, adequately rested and cognitively functioning participants.

To date, only the Indiana Supreme Court has found it useful to rely on the overwhelming evidence establishing the negative impacts of sleep deprivation.<sup>126</sup> On appeal, the defendant in *Farrell v. State* argued that his right to a fair trial was violated by the judge’s decision to continue jury deliberations

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120. See *id.*

121. *How Alcohol Impacts the Brain*, *supra* note 115.

122. See *id.*

123. See *supra* Sections II.A–D.

124. See Rhandi Childress, *Convicted by a Sleeping Jury: Harmless Error or a Challenge to the Integrity of Our Criminal Justice System?*, 44 J. MARSHALL L. REV. 751, 772 (2011) (“Sleeping jurors impair the fairness of our criminal justice system, and they should not be tolerated any more than sleeping counsel.”).

125. Stickgold & Wehrwein, *supra* note 85.

126. See *Farrell v. State*, 622 N.E.2d 488, 492 (Ind. 1993).

despite clear indications of juror fatigue. That court found that the necessity of sleep “for rational human activity has been established by various sleep-deprivation studies.”<sup>127</sup> The court continued, “[t]hese studies show that people who are deprived of adequate sleep are less capable of thinking clearly, maintaining long attention spans, controlling anger, and, most importantly in the context of a criminal trial, making appropriate judgments.”<sup>128</sup> Courts should rely on the science of sleep deprivation to draw clearer lines between acceptable uses of judicial discretion and wholesale abrogation of a defendant’s constitutional rights. The next Section examines how judges, legislators, and attorneys can use their influence and their positions to protect a defendant’s fair trial rights, even in a system designed to always push one more case through a crowded docket.

### III. MAKING JUDICIAL DISCRETION OPERATE MORE EFFECTIVELY

This Part discusses solutions that have the greatest likelihood of improving lengthy trials and jury deliberations and ensuring a fair and speedy trial for defendants. The most important actors with the greatest opportunity to effect change—owing to their enormous discretion—are judges. As previously noted, judges enjoy considerable discretion in establishing the norms and procedures in their courtrooms. Too often, that discretion has been misused to compel late-night trials, in which sleep-deprived jurors are expected to consider evidence and deliberate well past business hours. But judges’ discretion could be wielded differently. By setting new norms in their courtrooms and by refusing to allow trials and jury deliberations to run late, judges have the power to refuse legislators’ expectations that they will cut corners by holding lengthy trial days. Reform could also come from three other avenues: model jury instructions that empower jurors to request reasonable trial hours, preserving the issue of sleep deprivation for a successful appeal, and state legislative solutions that mitigate the budgetary and policy pressures on trial judges.

#### A. *Judicial Discretion*

The most important and necessary solution to the problem of late-night trial and jury deliberations will be the rigorous exercise of judicial discretion. At both the state and federal level, trial court judges are granted a vast amount of discretion in the operation of their courts.<sup>129</sup> Undoubtedly, those

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127. *Id.*

128. *Id.*

129. *E.g.*, *Geders v. United States*, 425 U.S. 80, 86–87 (1976); *State v. Tennant*, 265 So. 2d 230, 234 (La. 1972) (noting that trial courts in Louisiana, within their hours of operation, have “broad discretion . . . to supervise and administer the trial and its incidents within constitutional and legislative guidelines”); RICHARD C. RUSKELL, DAVIS AND SHULMAN’S GEORGIA PRACTICE AND PROCEDURE § 19:1 (2019–2020 ed.) (“It is the duty of the trial judge to direct and supervise the course of the entire trial. In doing this he is vested with a large discretion

judges are faced with numerous pressures to move their dockets, try cases fairly and efficiently, and use resources effectively.<sup>130</sup> But in elevating efficiency over effective justice, current norms have damaged defendants' rights instead of upholding them. Given the far-ranging power allotted to trial judges, their demands for appropriate trial time limits might slow the pace of trials. But these time limits would provide greater protection to defendants' fair trial rights. Further, it would signal to state legislators judges' refusal to be complicit in the underfunding of trial courts. Judges often consider the desires of the constituencies that elect them (or the constituencies of the legislators that appoint them).<sup>131</sup> If judges slow the pace of trials via setting explicit trial day lengths and sticking to them, legislators will lose an easy funding shortcut. Taking such a public stand for better funding may be difficult for judges considering electoral constraints, but by implicitly demanding resources, judges are fulfilling their basic constitutional duties. Like the public defender offices that have refused additional cases,<sup>132</sup> trial court judges can signal their unwillingness to be complicit in systemic constitutional violations.

In order to exercise discretion, trial court judges should focus on norm setting. Norm setting tailors expectations of all parties involved and signals to outside parties, such as legislators, that judges are employing their discretion to afford parties in their courtrooms adequate time to try cases. Examples of effective norm setting include establishing certain times at which the court must recess or setting a certain number of hours in the day that the court will operate. For instance, the Tennessee Criminal Appellate Court has used its discretion to enforce the expectation that "a defendant is entitled to reasonably alert lawyers and witnesses."<sup>133</sup> As a result, trial judges who kept courts in session for unreasonably lengthy periods of time were rebuked for violations of defendants' due process rights.<sup>134</sup>

Other courts have also endorsed the idea that jurors should have access to rest periods during deliberations. These courts generally found that trial judges overstepped their discretion and contradicted state statutes providing

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which will not be interfered with by the appellate courts unless manifestly abused. In supervising the trial, it is the duty of the court to administer the law and guide the proceedings before him so as to protect the rights of the parties.").

130. Peter T. Grossi, Jr. et al., *Crisis in the Courts: Reconnaissance and Recommendations*, NAT'L CTR. FOR ST. CTS.: TRENDS ST. CTS. (2012), <https://www.ncsc.org/sitecore/content/microsites/future-trends-2012/home/better-courts/1-2-crisis-in-the-courts.aspx> [https://perma.cc/Z2K2-WZ4Y].

131. See *Methods of Judicial Selection*, NAT'L CTR. FOR ST. CTS., [http://judicialselection.us/judicial\\_selection/methods/limited\\_jurisdiction\\_courts.cfm?state=](http://judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm?state=) [https://perma.cc/B7UZ-CTL3].

132. See *supra* note 61.

133. 10 DAVID LOUIS RAYBIN, *TENNESSEE PRACTICE: CRIMINAL PRACTICE AND PROCEDURE* § 24:9 (2008).

134. See, e.g., *State v. McMullin*, 801 S.W.2d 826, 827 (Tenn. Crim. App. 1990); *Hembree v. State*, 546 S.W.2d 235, 243 (Tenn. Crim. App. 1976).

for lodging of sequestered jurors. Iowa is a particularly friendly state for juror overnight lodging and has repeatedly upheld the necessity of housing jurors in hotels rather than asking them to continue to deliberate late into the night. For example, in *State v. Albers*, the Iowa Supreme Court was dismissive of out-of-state case law upholding late-night deliberations as “vestiges of the early development of the jury system.”<sup>135</sup> Before the English Juries Act of 1870, unanimity in a jury was achieved through coercion, such as requiring deliberation “without meat, drink or fire . . . until they did agree.”<sup>136</sup> But, according to the court, the jury system has moved away from a time when “the premium [was] on stamina and physical strength rather than judgment.”<sup>137</sup>

In another notable Iowa Supreme Court case, *State v. Green*, the court emphasized that the conditions of the deliberations, not merely their duration, determined their fairness.<sup>138</sup> Indeed, the conditions were deeply troubling: five jurors stated after the trial that they were so tired they could not properly deliberate, and some jurors changed their vote from acquittal to conviction because of their fatigue.<sup>139</sup> While both the total time of deliberation and the conditions (i.e., how long a jury goes without food or rest) are “within the sound discretion of the trial court,” that discretion is not without limits.<sup>140</sup> As the Supreme Court of Iowa held, “the discretion to be exercised [falls] within the framework of repeated pronouncements by this court that unreasonably late deliberations by a jury are not conducive to a fair trial.”<sup>141</sup> Further, in another Iowa Supreme Court case, *Kracht v. Hoepfner*, the court

135. 174 N.W.2d 649, 655 (Iowa 1970). *Albers* was cited as recently as 2013 to distinguish a case where the jury had been “provided . . . with the opportunity to inform the court that late-night deliberations would be a hardship” before they began deliberations at 9:00 p.m. and ended at 3:30 a.m. *State v. Purdin*, No. 12CA944, 2013 WL 84897, at \*2–3 (Ohio Ct. App. Jan. 4, 2013). While it is heartening that *Albers* has informed another state court of appeals, the distinctions drawn by the Ohio Court of Appeals are not particularly meaningful. Jurors may be more motivated by their desire to finish jury duty than by a desire to carefully deliberate, and it is the responsibility of the trial judge to ensure that such deliberation occurs.

136. *Albers*, 174 N.W.2d at 655.

137. *Id.* at 656.

138. 121 N.W.2d 89, 93 (Iowa 1963).

139. *Green*, 121 N.W.2d at 93–95. It is possible that an exhausted jury could vote for acquittal out of exhaustion, but “holding out” for acquittal is typically viewed by jury experts as the harder task. Adam Liptak, *Guilty by a 10-2 Vote: Efficient or Unconstitutional?*, N.Y. TIMES (July 6, 2009), <https://www.nytimes.com/2009/07/07/us/07bar.html> [<https://perma.cc/RW87-56H2>]. One juror describes voting for conviction while believing the defendant was innocent:

We were required to deliberate during the entire 27 hours without being given an opportunity to go to bed or get any sleep. I voted for the acquittal of the defendant in every ballot that was taken except the very last ballot, and I did not think he was guilty when I voted for conviction on the last ballot, but gave in and voted for conviction because I was completely worn out.

*Green*, 121 N.W.2d at 94.

140. *Albers*, 174 N.W.2d at 653–55.

141. *Id.* at 655.

found “no valid reason to require a jury to deliberate all night” and mandated that jury members either go home or have hotel rooms secured for them.<sup>142</sup> The court later found that the cost of accommodation and the practice of not obtaining accommodation were not valid excuses for allowing the all-night deliberations.<sup>143</sup>

Some courts, however, are unwilling to entirely overrule verdicts on the grounds of inadequate juror rest but still admonish trial courts for creating such hostile conditions. For example, in *United States v. Parks*, the First Circuit skirted around hard-and-fast time limits on juror deliberation length but noted its disapproval with the practice of keeping jurors late, particularly after a long trial: “[A]ny verdict returned at 3:07 in the morning after many hours of deliberation following a long trial is much more likely to be the product of mental and physical fatigue than of true deliberation.”<sup>144</sup> In *Coulthard v. Keenan*, the Iowa Supreme Court noted that “sending a jury back to its jury room about 2:10 a.m. after it reported it was hopelessly deadlocked and after orally urging an agreement is not to be commended.”<sup>145</sup>

While courts have repeatedly given weight to the jury’s preference in continuing with the trial or deliberation late at night, relatively little attention has been paid to the power dynamics within a courtroom. Timid jurors may not speak up in such an unfamiliar, formal, and rigidly controlled environment, even if a judge offers them a choice.<sup>146</sup> Further, jurors may have interests that caution against giving them the deciding vote in these instances. Eager to get back to work, their families, and their regular routines, they may feel motivated to get the trial over with, rather than fully deliberate.<sup>147</sup> It is up to judges in those instances to be aware of and wary of those impulses.

There are potential downsides to norm setting. First, not all trials are for serious offenses. Trials have a wide range of impacts on defendants’ lives if they are found guilty. The difference between, for example, probation as compared to a life sentence is enormous; perhaps the resources required for a lengthy trial over a trivial offense are better spent elsewhere. But the Constitution does not specify a range of trial guarantees according to the punishment a defendant faces. A right to a fair trial is a guarantee for everyone,

142. 140 N.W.2d 913, 916 (Iowa 1966).

143. *Albers*, 174 N.W.2d at 654; *Green*, 121 N.W.2d at 93.

144. 411 F.2d 1171, 1173 (1st Cir. 1969).

145. 129 N.W.2d 597, 602 (Iowa 1964).

146. See *State v. McMullin*, 801 S.W.2d 826, 831 (Tenn. Crim. App. 1990) (“Judges must also bear in mind that many jurors hesitate to complain to the court, and are greatly influenced by what the will of the judge is perceived to be. Judges, in deciding the competency of jurors to continue working, should rely upon more than just their expressed agreement to continue. A careful objective judgment should be made.”).

147. The 1957 classic *12 Angry Men* thoughtfully illustrated this very point. As one of the twelve jurors states during deliberations, “[s]omebody saw the kid stab his father, what more do we need? You guys can talk the ears right off my head, you know what I mean? I got three garages of mine going to pot while you’re talking! So let’s get done and get out of here!” 12 ANGRY MEN (Orion-Nova Productions 1957).

regardless of the magnitude of the charge or punishment.<sup>148</sup> Indeed, given the volume of misdemeanors that rotate in and out of trial courts daily,<sup>149</sup> it can be easy for those regularly involved in the system to forget the impact even a small charge can have on a defendant. Lost shelter, jobs, child custody, and reputation are only some of the collateral consequences of a brush with the criminal justice system.<sup>150</sup> Judges should not be looking to the seriousness of the offense to determine the time and care with which a case should be handled. Limitations on court hours remain essential for the fair administration of justice in these cases.

Trial judges and their staff stand to benefit from regulated trial hours, in addition to the benefits for jurors, defendants, and counsel. Judges, too, are overworked.<sup>151</sup> By guaranteeing themselves a standard day's work in the "office" of the courtroom, they will need to become more creative in allocating resources. But they will gain time before and after trial to resolve other matters. Jurors too will be more willing to serve jury duty with assurance that they will keep reasonable hours each day.<sup>152</sup> Jurors may spend more days participating in jury trials, but adequate compensation for their service will hopefully diminish this concern.

#### B. *Establishing Reasonable Jury Expectations*

Courts should use all of the tools at their disposal, including the trial calendar and official communications with jurors, to establish reasonable norms and expectations for jury service. While jury duty has never been popular, trial courts are experiencing a wave of apathy in response to jury duty.<sup>153</sup> Innovative solutions like the ones proposed by District Court Judge Mark Bennett could improve jurors' perception of jury duty as well as its actual execution. Judge Bennett's trials begin at 8:30 a.m. and run until 2:30 p.m. Lawyers are limited with hard timelines for the presentation of evi-

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148. As long as that punishment involves six months or more of imprisonment. *See* U.S. CONST. amend. VI ("In all criminal prosecutions . . ."); *see also* *Baldwin v. New York*, 399 U.S. 66, 68–69 (1970).

149. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 277 (2011) ("Misdemeanor adjudications have exploded in recent years, with one recent study estimating that the volume of misdemeanor cases nationwide has risen from five to more than ten million between 1972 and 2006.").

150. *Id.* at 363–67; Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435, 436 (2003–2004).

151. Jennifer Bendery, *Federal Judges Are Burned Out, Overworked and Wondering Where Congress Is*, HUFFPOST (Sept. 30, 2015, 2:15 PM), [https://www.huffpost.com/entry/judge-federal-courts-vacancies\\_n\\_55d77721e4b0a40aa3aaf14b](https://www.huffpost.com/entry/judge-federal-courts-vacancies_n_55d77721e4b0a40aa3aaf14b) [<https://perma.cc/5MWP-DS7R>].

152. Andrew Guthrie Ferguson, *A Juror Bill of Rights*, ATLANTIC (Sept. 11, 2015), <https://www.theatlantic.com/politics/archive/2015/09/the-juror-bill-of-rights/404833/> [<https://perma.cc/M4HX-8QZP>].

153. *See id.* ("In trial courts across America, jurors are skipping jury duty.").

dence. The judge's personal clock counts down each lawyer's time.<sup>154</sup> Other judges generally allow lawyers to present admissible evidence without a hard-and-fast time allowance.<sup>155</sup> As Judge Bennett states: "If trial judges embraced WWJW [What Would Jurors Want] it would engender greater respect for jurors and lead to trial innovations which would significantly enhance the juror experience."<sup>156</sup> Potential pitfalls also exist with prioritizing juror comfort. In a courtroom in which attorney time is heavily policed, defense attorneys may miss important opportunities to go off script in ways that help their client. But judges who police time will also cut down on time wasted due to lack of preparation on both sides and better hold jurors' attention.

Along the same lines, changes to model jury instructions and guides could significantly improve the fairness of jury trials as well as the experience of jurors. Across the country, many state and federal courts provide jurors with fact sheets that include basic information about when and where to report for jury duty, what to bring, and what number to call the morning of the trial.<sup>157</sup> However, very few courts give any information about how long the trial day will actually last.<sup>158</sup> Providing information about the length of a trial day would improve the juror experience by allowing jurors to better plan their day(s) and decrease the maze of scheduling conflicts during voir dire.<sup>159</sup>

### C. *Preserving the Issue for Appeal*

Keeping the issue of a fair trial alive for appeal by raising it at trial is also essential. Defense counsel's failure to object waives errors, even constitutional ones.<sup>160</sup> Additionally, a failure to object can serve as implicit permission for the trial judge to continue with the trial: obtaining jury approval quells many courts' doubts about an unduly long trial day.<sup>161</sup> Any day the trial

154. *Id.*

155. Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: A Federal Trial Judge's View*, 48 ARIZ. ST. L.J. 481, 494 (2016).

156. *Id.* at 481.

157. *See, e.g.*, UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN, ANN ARBOR DIVISION, JUROR INFORMATION (2018), <http://www.mied.uscourts.gov/Jury/AAeJurorInfoLetter.pdf> [<https://perma.cc/ET2W-9ECA>].

158. *See* a list of 36 counties that provide information online about the length of the trial day, including the counties that acknowledge these hours are flexible per discretion of the individual judge (on file with the *Michigan Law Review*).

159. *See* Ferguson, *supra* note 152.

160. *E.g.*, Garza v. State, 783 S.W.2d 796, 798 (Tex. Ct. App. 1990); *see also* People v. Sawyer, 545 N.W.2d 6, 13 (Mich. Ct. App. 1996) ("Defendant failed to object to the length of the day below and this issue is not preserved for appeal.").

161. *See* State v. McMullin, 801 S.W.2d 826, 827-31 (Tenn. Crim. App. 1990) (citing Seelbach v. State, 572 S.W.2d 267 (Tenn. Crim. App. 1978)) ("At 9:13 p.m. counsel for one of the defendants pointed out the lateness of the hour and the judge immediately adjourned court and reconvened Saturday morning. . . . Implicit in that case is that no objection was made until 9:13 p.m. . . .").

court continues past a reasonable hour, the defense attorney should state their objection on the record so that the issue can be appealable beyond clear error. Courts should also be concerned with the fatigue of the attorneys, witnesses, and judges themselves.<sup>162</sup> Additionally, a successful appeal of this issue requires that defense counsel preserve sufficient evidence of an unduly long trial day.<sup>163</sup>

Another benefit of raising the issue at trial is the opportunity for the trial judge to preemptively solve the problem. By bringing to a judge's attention any potential issues with timing, the judge can speak with the attorneys, defendant, and jurors about their preferences or simply send everyone home for the night. The judge can also articulate their reasoning for stopping or continuing the trial, which will allow reviewing appellate judges to better understand the problems facing their colleagues at the trial level.

A well-preserved record makes it easy for a neutral observer to figure out what went wrong and when. It may seem futile in districts that are unsympathetic to long trial days to raise this issue. But if trial attorneys continuously object and appeal the issue, appellate courts will be forced to acknowledge the problem and begin to more seriously consider its effects on all parties involved.

#### D. *Legislative Solutions*

New Hampshire is pioneering legislative solutions to the problem of overlong trial days. There, a state statute requires courts to provide housing to jurors and establishes a mandatory time at which deliberations must end and jurors must sleep:

Jurors shall not be required to continue their deliberations without sleep and rest later than 12:00 in the evening. At that hour, or earlier, under such safeguards and conditions as the court may direct, they shall be afforded suitable opportunity for sleep and rest, at the expense of the state, for at least 8 hours before again taking up their deliberations.<sup>164</sup>

This limitation on jury deliberations demonstrates an awareness of the issue of juror sleep and its central importance to a fair trial. By making explicit these requirements, New Hampshire—and other states that follow its example—recognize that oppressive physical conditions are coercive to the jury deliberation process. Legislatures across the country should expand on this type of language to include trial day length as well. The coercion that operates on sleep-deprived jurors is just as offensive to the constitutional guaran-

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162. See *id.* at 830.

163. See *Garza*, 783 S.W.2d at 799 (“Appellant could have supported the claim he now makes by affidavits from jurors attached to his motion for new trial, but he did not. . . . In the absence of any evidence that the jurors reached their verdict because they felt coerced to do so, appellant has not demonstrated fundamental error.”).

164. N.H. REV. STAT. ANN. § 519:25 (2007).

tee of a fair trial whether during the presentation of evidence or in the deliberation room.

Legislative solutions force the branch of government with the purse strings to directly undertake substantive reform measures. But these solutions have the benefit of impacting defendants who do not raise the issue at trial or whose trial judges do not raise the issue themselves. Legislators can and should champion fair trial rights, as they are increasingly doing across the country on a wide range of issues.<sup>165</sup> In an era of increased awareness around the problems of mass incarceration and concern for fair trial rights, legislators may find it politically advantageous to create rules that place the onus on the judicial branch to carry out its constitutional burden.

#### CONCLUSION

Overly long trial days and jury deliberations are only one part of a broadly dysfunctional criminal justice system. Other areas of reform, including bail reform, prosecutorial discretion, and the war on drugs, provide vital context to the problem presented in this Note. Like most aspects of the criminal justice system, the consequences of overly long trial days and jury deliberations fall most heavily on indigent criminal defendants. But unlike many other areas of criminal justice reform, the problems presented here have the potential to be easier fixes, as long as actors in the criminal justice system are willing to acknowledge they are in fact constitutional problems.

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165. See, e.g., Jaweed Kaleem, *The Feds Just Passed Criminal Justice Reform. Here's Why State-Level Efforts Matter More*, L.A. TIMES (Dec. 30, 2018, 4:00 AM), <https://www.latimes.com/nation/la-na-criminal-justice-reform-20181230-story.html> [<https://perma.cc/TQB5-CBPZ>]; see also Julia O'Donoghue, *Louisiana Criminal Justice Reform Passed by Legislature*, NOLA.COM (June 6, 2017, 2:40 AM), [https://www.nola.com/news/politics/article\\_37e2770d-f7e8-5fc4-bf15-e483ecc7b8bc.html](https://www.nola.com/news/politics/article_37e2770d-f7e8-5fc4-bf15-e483ecc7b8bc.html) [<https://perma.cc/6CMZ-PFC6>].