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The Exclusion of Felons from Jury Service

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Abstract
The lifetime exclusion of felons from jury service is the majority rule in the U.S., used in thirty one states and in federal courts. The result is that over 6% of the adult population is excluded, including about 30% of black men.

The parallel issue of felon disenfranchisement has drawn considerable scholarly attention, despite its lower, declining, and less racially charged numbers. The racial composition of juries has been widely discussed in the literature as well. By contrast, felon jury service has been almost entirely ignored, despite a mass of legislation and appellate litigation, and despite glaring racial disparities.

One can hardly argue that the biggest problem with the American legal system is that our juries do not have enough felons on them. Nevertheless, the question of whether and when felons (principally "ex-felons") should serve as jurors involves several larger issues.

This article surveys the current law of felon exclusion and surveys its history. It then surveys and proposes constitutional arguments for and against felon exclusion, and concludes that it is constitutional either to exclude felons from juries, as most jurisdictions do, or to include them, as others do. While this result is fairly clear from current doctrine, it exposes flaws and ambiguities in that doctrine. It also undermines the principal justifications for felon exclusion (protecting the probity of the jury, and eliminating inherently biased jurors).

Because both exclusion and inclusion are legal, the remainder of the article considers policy arguments for and against felon exclusion: first, the nature of the jury, and whether felon exclusion is compatible with it; next, a similar analysis regarding the treatment of felons; and finally other, general policy arguments. The discussion concludes with a recommendation that while some felon exclusion may be appropriate, it should be carefully considered and should not be based on inflexible generalizations about crimes, criminals, and trials. Instead, felons who are worthy should have a chance to contend as individuals for a seat on a jury, under the same constraints as everyone else.

Keywords
felons, juries, civil disabilities, citizenship

THE EXCLUSION OF FELONS FROM JURY SERVICE

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INTRODUCTION

Thirteen million people, including about thirty percent of black men, are banned for life from jury service because they are felons.[1] Thirty-one states and the federal government subscribe to the practice of lifetime felon exclusion,[2] but legislators have excised this considerable swath of the jury pool rather carelessly, without adequately considering the many policy reasons for giving felons a chance to serve.

Perhaps more surprising is that scholars have ignored "felon exclusion" despite a mass of legislation and appellate litigation, and despite the glaring racial disparities.[3] On the rare occasions when felon exclusion is mentioned, commentators are oddly sanguine about it, even if they are otherwise strong advocates of felons' rights or broad jury participation.[4] In stark contrast, the parallel issue of felon voting has drawn considerable attention,[5] even though it is

1. *See infra* Appendix 2.

2. *See infra* Appendix 1.A.

3. *See, e.g.*, Hiroshi Fukurai et al., *Where Did Black Jurors Go? A Theoretical Synthesis of Racial Disenfranchisement in the Jury System and Jury Selection*, J. BLACK STUD., Dec. 1991, at 196 (discussing causes of minority under-representation on juries without mentioning felon exclusion). The only detailed treatment of felon exclusion is a legal encyclopedia article that categorizes and summarizes statutes and case law. James L. Buchwalter, Annotation, *Disqualification or Exemption of Juror for Conviction of, or Prosecution for, Criminal Offense*, 75 A.L.R. 5TH 295 (2000). Other works briefly discuss felon exclusion. *See, e.g.*, Walter Matthews Grant et al., *Special Project: The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1051-59, 1182-83 (1970); William T. Harrison, Jr., Case Comment, *Jurors: Federal Felons Not Disqualified*, 3 U. FLA. L. REV. 255, 255-58 (1950); Richard G. Singer, *Conviction: Civil Disabilities*, *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 243, 245 (Sanford H. Kadish ed. 1983).

4. *See, e.g.*, George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1905-06 (1999) (discussing felon exclusion from jury service within the context of felon disenfranchisement); Note, *The Congress, The Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Bill of 1966*, 52 VA. L. REV. 1069, 1091 n.120 (1966) [hereinafter *Jury Selection: A Critique*] (evincing little concern for disparate impact of objective jury qualifications). This complacent approach to felon exclusion might be because felon exclusion is objective, whereas subjectivity was the enemy of equality in jury selection for many years. *See id.* at 1094; *infra* Appendix 1.C (discussing history of juror qualification). The lack of research and dialogue on felon exclusion might also reflect the fact that its effect has only recently become overwhelming. *See infra* Appendix 2.

5. *See generally* Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159 (2001); Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753 (2000) [hereinafter Demleitner, *Continuing Payment*]; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999) [hereinafter Demleitner, *Preventing Internal Exile*]; Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045; Fletcher, *supra* note 4; Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727 (1998); Richard L. Lippke, *The Disenfranchisement of Felons*, 20 LAW & PHIL. 553 (2001); Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENTENCING REP. 248 (2000); Jesse Furman, Note,

rarer, less racially charged, and in decline;[6] scholars have also dwelled at length on the law and policy contours of the racial composition of juries.[7] But felon exclusion, which sits at the intersection of these two vital issues, has remained unnoticed.

Felon exclusion deserves attention not just because of its stunning magnitude, but also because of its theoretical significance. The questions of whether and when felons (principally, so-called "ex-felons"[8]) should be eligible to serve as jurors implicates several larger

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Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice, 106 YALE L.J. 1197 (1997); Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145 (1994); Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721 (1973); Gary L. Reback, Note, *Disenfranchisement of Ex-felons: A Reassessment*, 25 STAN. L. REV. 845 (1973); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 (1993); *Developments in the Law—One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939 (2002) [hereinafter *One Person, No Vote*]; Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300 (1989) [hereinafter *The Purity of the Ballot Box*].

6. One widely cited estimate suggests that 13% of black men and 3.9 million citizens overall are disenfranchised as felons. Jamie Fellner & Marc Mauer, *Convicted Felons Deserve the Right to Vote*, *in* HOW SHOULD PRISONS TREAT THEIR INMATES 40, 41 (Michele Wagner ed., 2001); *see also infra* note 588 (discussing the trend away from lifetime disenfranchisement of felons).

7. Hundreds of articles have been written on the cross-section requirement, *Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that peremptory strikes may not be used for purposeful racial discrimination), venue issues, and numerous other disputes at the intersection of race and juries. A few articles are particularly relevant to felon exclusion, even if they do not treat the issue in detail. *See, e.g.*, James H. Druff, *The Cross-Section Requirement and Jury Impartiality*, 73 CAL. L. REV. 1555, 1565-78 (1985) (critiquing and contrasting jury venire and jury panel selection policies in the contexts of diversity and impartiality); Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 712 (1993) (exploring reasons and remedies for minority under-representation on juries); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 949-66 (1998) (critiquing conflicting notions, in *Batson* and in cross-section cases, of the connection between personal views and group membership); Benno C. Schmidt, Jr., *Juries, Jurisdiction, and Race Discrimination: The Lost Promise of* Strauder v. West Virginia, 61 TEX. L. REV. 1401, 1401-14 (1983) (providing an excellent historical account of racial discrimination on juries between the Civil War and New Deal); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?*, 92 COLUM. L. REV. 725, 727 (1992) (arguing in favor of treating racial discrimination as a violation of jurors', rather than litigants', rights).

8. The term "felon" is occasionally reserved for those currently under sentence of law. Those who have already served their time are designated as "ex-felons." The more accurate definition of the word "felon," however, is "[o]ne who has committed [a] felony," 5 OXFORD ENGLISH DICTIONARY 821 (2d ed. 1989) [hereinafter OED], regardless of whether he has served his sentence. This Article uses the term "felon" in that sense—barring clemency, "felon" is a lifelong label. Given that jury service by currently incarcerated felons is not greatly contested, all discussion of "felons" in this Article refers to so-called ex-felons. For the sake of simplicity and because the overwhelming majority of felons are male, this Article will use male pronouns when referring to felons.

issues. First, felon exclusion forces society to confront its expectations of what a jury is supposed to look like and achieve, and what our society's treatment of criminals is supposed to look like and achieve. In both cases, felon exclusion reveals ambivalence and contradiction. Second, felon exclusion probably passes the constitutional "cross-section" requirement for juries, but it exposes the doctrine's flaws and ambiguities.

This Article argues that excluding all felons from all juries per se is unwise, and that at least some felons deserve the same individualized consideration in voir dire as other would-be jurors. This Article also aims to open an appropriately vigorous debate about felon exclusion. Part I surveys and proposes constitutional arguments for and against felon exclusion, and concludes that it is constitutional either to exclude felons from juries, as do most jurisdictions, or to include them, as do others. While this result is fairly clear from current doctrine, this analysis exposes weaknesses in the law.

As a result of both exclusion and inclusion being legal, the Article next turns to policy arguments for and against felon exclusion. Part II examines general considerations. The principal justifications for felon exclusion—that felons are inherently biased against the government and that they threaten the probity of the jury—may be sufficient to pass constitutional muster, but they are unsound as a matter of policy.[9] Other policy considerations, such as the long history of felon exclusion, the availability of clemency, and administrative costs, also do not suffice to justify denying felons the same individualized consideration that other jurors receive.[10] Part III turns to the more specific policy context of jury service in general, and concludes that felon exclusion clashes with the democratic, functional, and educative purposes of the jury system. Part IV engages in a similar analysis regarding the societal treatment of criminals, and finds that felon exclusion does not advance penological goals, and that it suffers from comparison to other civil disabilities imposed on felons.

Part V concludes the analytical discussion with a recommendation that felon exclusion should be carefully considered and should not be based on inflexible generalizations about crimes, criminals, and trials. Instead, some felons should have a chance to contend as individuals for a seat on a jury in some cases, under the same constraints as other citizens.

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9. *See infra* Part II.B.
10. *See infra* Parts II.C, D, E.

Finally, to support the analysis in Parts I-V, and because felon exclusion has never received a full treatment in the literature, this Article concludes with three appendices. Appendix 1 catalogs current American law on felon exclusion from juries,[11] Appendix 2 analyzes its stunning magnitude, and Appendix 3 details the history of the doctrine.

I. WHAT IS CONSTITUTIONALLY PERMISSIBLE?

As will be discussed in Appendix 3, felon exclusion (and its close relatives) has been part of Anglo-American law for centuries. The details and application of felon exclusion have been litigated extensively for much of that time.[12] Challenges to the practice itself—the subject of this Part—have a more recent pedigree, and have been uniformly unsuccessful.[13]

The case law reflects a consensus that neither mandatory exclusion nor mandatory inclusion is required by the federal constitution. The courts have not considered all of the possible arguments on the subject, however, and many courts have been cursory with those arguments they have considered. This Part will summarize and supplement the case law on felon jurors by surveying the field of possible legal arguments and concluding that while some arguments are more promising than others, none is a clear winner for felons.

A. The Constitutionality of Allowing Felons to Serve on Juries

Whether it is unconstitutional to *include* felons on juries is an issue that has not been litigated as often as the issue of exclusion. Courts considering the question have treated a jury that includes a felon as legitimate, or at least not inherently illegitimate. Specifically, some courts have held that the Sixth Amendment does not provide a right to have a felon-free jury in criminal cases,[14] and that a state law

11. The discussion will touch on the extent to which criminals other than convicted felons, such as misdemeanants and those with pending charges, are excluded. *See infra* Appendix 1.B.1, 5.

12. *See* Buchwalter, *supra* note 3, §§ 7-34 (describing modern cases on felon exclusion); L.S. Tellier, Annotation, *Intelligence, Character, Religious, or Loyalty Tests of Qualifications of Juror*, 126 A.L.R. 506, 517-26 (1940) (surveying case law dating back to the 1860s).

13. *See* Buchwalter, *supra* note 3, § 3b-6 (summarizing constitutional challenges to felon exclusion).

14. *See, e.g.*, Coleman v. Calderon, 150 F.3d 1105, 1117 (9th Cir.), *rev'd on other grounds*, 525 U.S. 141 (1998) (holding that the Sixth Amendment does not prohibit ex-felons from jury duty); United States v. Humphreys, 982 F.2d 254, 260-61 (8th Cir. 1993) ("The Sixth Amendment right to an impartial jury does not require an absolute bar on felon-jurors.") (quoting United States v. Boney, 977 F.2d 624, 633 (D.C. Cir. 1992)).

excluding felons from juries does not create a liberty interest in a felon-free jury.[15]

The Sixth Amendment argument is that felons are inherently biased, which means that allowing them on a criminal jury denies a criminal defendant his right to an impartial jury.[16] Courts' rejection of that argument sits uneasily alongside other courts' reliance on the "inherent bias" argument in cases *affirming* felon exclusion; as argued in detail in Part II.C, however, the former holding is more persuasive than the latter.

Less directly, but more commonly, courts have approved verdicts where, despite a felon exclusion law, a felon finds his way onto a jury. As detailed in Appendix I.B.4, states are tolerant of such situations, typically vacating verdicts only where a felon juror has intentionally misled the court about his criminal record, or in the rare case where actual prejudice can be shown.

Finally, twenty jurisdictions permit some felons to serve on juries,[17] and none have ever considered, let alone sustained, a direct legal challenge to the practice.

B. The Constitutionality of Barring Felons from Jury Service

The more common issue in litigation is whether automatically excluding felons from juries is unconstitutional. As the Supreme Court has said, jurisdictions are "free to confine the [jury] selection . . . to those possessing good intelligence, sound judgment, and fair character."[18] This Part will survey—and for the most part reject—all of the legal arguments against felon exclusion that have been presented, as well as some plausible ones that have not been raised. In at least one case, however, this Part will suggest that the constitutionality of felon exclusion speaks more to deficiencies in the legal standard than to the appropriateness of felon exclusion.

1. The right to have a jury

Considering whose rights felon exclusion implicates—felons, litigants, or both—is an important preliminary matter. The answer

15. *Coleman*, 150 F.3d at 1117.

16. This issue is explored in detail in *Boney*, 977 F.2d at 633, which is relied upon by *Humphreys*, 982 F.2d at 261, and *Coleman*, 150 F.3d at 1117.

17. *See infra* notes 377 (Alaska), 378 (Arizona), 381 (Colorado), 382 (Connecticut), 384 (District of Columbia), 388 (Idaho), 389 (Illinois), 390 (Indiana), 391 (Iowa), 392 (Kansas), 395 (Maine), 397 (Massachusetts), 399 (Minnesota), 409 (North Carolina), 410 (North Dakota), 413 (Oregon), 415 (Rhode Island), 417 (South Dakota), 423 (Washington), 425 (Wisconsin).

18. Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970) (confining rejection of a state jury statute to its discriminatory application).

varies according to which of the legal theories discussed below is adopted. Virtually all of the litigation regarding the composition of juries has been brought by parties to lawsuits, but it is the interests of the excluded felons that are most directly implicated.[19]

Jurors rarely choose to litigate exclusion, because their rights are limited and violation of those rights is hard to detect.[20] A juror may never be summoned for jury service, may be dismissed for cause, or may be peremptorily struck, without any necessary violation of his or her rights. As a result, it is hard for an *improperly* excluded juror even to know that a violation has occurred. Moreover, individual citizens have little incentive to monitor the demographic composition of the juries in their communities.

For litigants, however, the composition of a jury (and by extension the venire) is of the utmost importance. A litigant's interests are implicated when a biased jury hears a case, but litigants are not interested in equal and fair juries. Instead, litigants are interested in juries that are not unfair in their opponents' favor. This is not a problem if both parties can pursue a remedy; assumedly the inclusion of a particular type of juror will be sought by one side if not by the other.[21] As a result, courts freely award third-party standing to litigants to defend the rights of excluded jurors, even when the party is not a member of the same group being unfairly excluded.[22] Although this increases the likelihood that the jurors' rights will be vindicated, it does nothing to protect jurors that neither party wants to defend, such as members of groups of whom both parties are wary or jurors whose views the parties are unwilling to stereotype.

Despite the advantages of allowing the parties to litigate on behalf of excluded jurors, blanket exclusion policies still implicate excluded jurors' interests more than litigants'. For example, if a jury is selected

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19. *See generally* Underwood, *supra* note 7 (discussing whether discriminatory jury processes affect the rights of jurors or litigants). The first case where excluded jurors brought a racial discrimination challenge, for example, was *Carter*. *See Carter*, 396 U.S. at 329 & nn.8-10 (noting the novelty of the case and listing litigants' previous challenges); Underwood, *supra* note 7, at 726 & n.9 (citing *Carter*).

Felon exclusion also implicates the rights of the general public, which has an interest in judicial self-government. *See infra* Part III.B. This societal interest is represented indirectly by the prosecution in criminal cases, and in a general sense by the legislature that writes juror qualification laws.

20. *Cf.* Underwood, *supra* note 7, at 757 (stating that excluded jurors rarely litigate, because of limited economic resources, an anticipated small stake in the result, or a desire to maintain privacy).

21. *See id.* at 758-59 (discussing the nature of the injury that an unfair jury poses to a litigant).

22. *See, e.g.*, Campbell v. Louisiana, 523 U.S. 392, 400 (1998) (holding that a white defendant has standing to litigate the equal protection claims of black, would-be grand jurors).

through properly random means that result in an all white and all male jury, a party has no recourse. But if the *exact same* jury results from improper exclusion, the party would have recourse even though he is being tried by the same people.[23] The difference lies in how the *jurors* have been treated, not what will happen to the parties.

Perhaps reflecting this notion, virtually all jury qualification statutes refer to jurors, not to parties.[24] As one judge described her state's standards, the defendant is not given a right to exclude criminals from juries; rather, criminals are stripped of the right to serve.[25] The state's decision to enforce these restrictions by harnessing the self-interest of the parties is an acceptable legislative choice,[26] even if the rights at issue are more coherent when considered from the jurors' perspective.[27]

2. Rationales

Another preliminary issue that warrants a brief introduction is the rationales for felon exclusion, which are evaluated in some of the constitutional tests discussed below. The two main rationales (which will be explored and critiqued in greater depth in Parts II.B and II.C) are that felon jurors threaten the probity of the jury,[28] and that felon

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23. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition . . . ."); Underwood, *supra* note 7, at 730 (discussing the acceptability of a randomly selected all-white jury as an illustrative example that jury rights belong to jurors); *cf.* Lockhart v. McCree, 476 U.S. 162, 178 (1986) ("[I]t is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state-ordained process, yet impartial when exactly the same jury results from mere chance.").

24. *See generally infra* notes 375-426. *But see infra* notes 389 (Illinois), 391 (Iowa), 397 (Massachusetts) (allowing parties to challenge felons for cause).

25. Perez v. State, 11 S.W.3d 218, 224 (Tex. Crim. App. 2000) (en banc) (Keller, J., concurring).

26. In her concurrence, Judge Keller observed:

> To the extent that the Legislature has given a criminal defendant the right to obtain a reversal of his conviction as a result of the service of a thief or felon on the jury—a right the Legislature was not required to grant—the Legislature is also empowered to place limits upon that right and to outline the conditions for exercising that right.

Id.

27. *See generally* Underwood, *supra* note 7, at 727-50 (arguing that although litigants are pressing the issue, the current doctrine reflects jurors' interests).

28. *See, e.g.*, United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) (upholding the federal felon exclusion law on grounds of probity); United States v. Foxworth, 599 F.2d 1, 4 (1st Cir. 1979) (holding that felon exclusion "is intended to assure the 'probity' of the jury") (quoting H.R. REP. NO. 90-1076 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1792, 1796); R.R.E. v. Glenn, 884 S.W.2d 189, 193 (Tex. App. 1994) (referring to "purity and efficiency of the jury system" as the basis of criminal exclusion); Duggar v. State, 43 So. 2d 860, 863 (Fla. 1950) (Roberts, J., dissenting) (referring to the need to prevent "pollution of the jury system") (quoting Amaya v.

jurors are inherently biased.[29] (Another objection to felon jury service, more philosophical than legal, is that felons have violated the social contract and should be excluded from self-government; this is discussed in Part III.A.)

In both cases, felon exclusion is meant to define and protect juries rather than to punish or degrade felons.[30] The notion that felons represent a threat to the "probity" of a jury harkens back to the ancient formulation of the jury as "twelve good men and true." The meaning of "probity" is fairly clear: "[m]oral excellence, integrity, rectitude, uprightness; conscientiousness, honesty, sincerity."[31] But courts have been less clear as to whether the threat that felons pose to jury probity stems from their degraded status or from their actual characteristics. In either case, because many non-felons lack probity, and many felons may not, felon exclusion is under- and over-inclusive to a troubling degree.

The other common basis offered for felon exclusion is that felons are inherently biased. As one court described the argument:

> [A] person who has suffered the most severe form of condemnation that can be inflicted by the state . . . might well harbor a continuing resentment against "the system" that punished him and an equally unthinking bias in favor of the defendant on trial, who is seen as a fellow underdog caught in its toils.[32]

If felons are so inherently biased that they cannot serve on any jury, one would expect that when they do serve, accidentally or with the permission of state law, the verdict would be automatically reversed

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State, 220 S.W. 98, 99 (Tex. Crim. App. 1920)); Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction*, FED. PROBATION, Sept. 1987, at 52, 58 (citing the fact that felons "can no longer serve in a position of trust" as a basis for felon exclusion); *cf.* United States v. Barry, 71 F.3d 1269, 1273 (7th Cir. 1995) (stating in a case involving exclusion of jurors with pending felony charges that "[w]e . . . find jury probity to be the essence of the system"); People *ex rel.* Hannon v. Ryan, 312 N.Y.S.2d 706, 712 (N.Y. App. Div. 1970) (asserting, in a case involving exclusion of certain misdemeanants, that "it would be a strange system, indeed, which permitted those who had been convicted of anti-social and dissolute conduct to serve on its juries"); Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 406 (1967) (explaining that "protect[ing] society from [felons'] corrupting influence" is the purpose of civil disabilities).

29. *See, e.g.*, Carle v. United States, 705 A.2d 682, 686 (D.C. 1998) (rejecting a challenge to felon exclusion, citing inherent bias); Rubio v. Superior Court, 593 P.2d 595, 600 (Cal. 1979) (plurality opinion) (approving felon exclusion as promoting impartiality); Fletcher, *supra* note 4, at 1906 (positing bias theory); Burton et al., *supra* note 28, at 58 (describing one purpose of felon exclusion as preventing felons from "letting criminals off the hook"); *cf.* State v. Baxter, 357 So. 2d 271, 275 (La. 1978) (rejecting defendant's complaint about felon juror because of felons' tendency toward pro-defendant bias).

30. *See infra* note 330 and accompanying text.

31. 12 OED, *supra* note 8, at 540.

32. *Rubio*, 593 P.2d at 600.

because the jury was not impartial. But such verdicts are generally upheld.[33] At a more basic level, the bias rationale is a gross overgeneralization, and a needless one, given that the rest of the jury selection process is designed to make individualized determinations of partiality.

3. Cross-section

The most common legal argument against felon exclusion is that it violates litigants' right to a jury venire comprising an appropriate cross-section of the community.[34] Felons are, after all, members of the communities in which they live, at least once they have been released from prison, parole, or probation.

Roughly speaking, the cross-section requirement declares that juries must be drawn from a broadly representative pool. This requirement applies to the jury venire only, not to individual jury panels, which are too small to feasibly guarantee inclusiveness.[35] The cross-section right is most commonly asserted by criminal defendants, thus this Part will use criminal law terms in most examples, even though courts and commentators have argued that civil juries should also reflect a cross-section.[36]

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33. *See infra* Appendix 1.B.4.

34. *See, e.g.*, United States v. Barry, 71 F.3d 1269, 1273-74 (7th Cir. 1995) (rejecting a cross-section challenge to felon exclusion); United States v. Foxworth, 599 F.2d 1, 4 (1st Cir. 1979) (rejecting a cross-section challenge to felon exclusion); United States v. Best, 214 F. Supp. 2d 897, 904-05 (N.D. Ind. 2002) (finding the cross-section argument regarding felon exclusion "unavailing"); State v. Compton, 39 P.3d 833, 842 (Or. 2002) (en banc) (rejecting a cross-section challenge to felon exclusion); Carle v. United States, 705 A.2d 682, 686 (D.C. 1998) (rejecting the ineffective assistance claim relating to the cross-section argument); *Rubio*, 593 P.2d at 599 (rejecting a cross-section challenge to felon exclusion); State v. Brown, 364 A.2d 186, 190-91 (Conn. 1975) (rejecting a cross-section challenge to felon exclusion).

Criminal defendants who have argued (rather oafishly, considering their presumed denial of guilt) that their peer criminals must be included in a jury of their peers, have been defeated, and rightfully so. As one impatient court stated, "[t]he right to a jury of one's peers does not entitle him to a jury which includes convicted felons or bootleggers . . . ." Shows v. State, 267 So. 2d 811, 812 (Miss. 1972).

35. *See* Holland v. Illinois, 493 U.S. 474, 478-79 (1990) (rejecting a cross-section challenge to the racially-motivated use of peremptory challenges because peremptories do not affect the venire); Lockhart v. McCree, 476 U.S. 162, 173-74 (1986) (holding that cross-section claims apply only to jury venires and not to peremptories because imposing cross-section standards on petit juries would be pratically impossible); Mitchell S. Zuklie, Comment, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 102 (1996) ("Given their limited size, juries cannot fully replicate the diversity of the communities from which they are drawn."). *But cf.* Ballew v. Georgia, 435 U.S. 223, 239 (1978) (plurality opinion) (striking down a law allowing five-person juries, in part because it "prevents juries from truly representing their communities").

36. *See, e.g.*, Roberson v. Hayti Police Dep't, 241 F.3d 992, 996-97 (8th Cir. 2001) (noting that defendant's cross-section claim in a civil case could be viable if the

Every court that has considered a cross-section argument as applied to felon exclusion has rejected it.[37] Courts have given varying accounts of what constitutes a cross-section, why it is important, and what reasons for flouting it are constitutionally acceptable. The acceptability of felon exclusion depends on which account one uses; as cross-section doctrine currently stands, felon exclusion passes muster. On the other hand, the doctrine and its application are deeply flawed, and so a good argument can be made that felon exclusion violates a reconstructed cross-section requirement, even if current courts would not agree.

a. The meaning of the cross-section requirement

In the abstract, cross-section doctrine is too muddled to say definitively that it is either consistent or inconsistent with felon exclusion. Before applying the doctrine, some appreciation is needed of the variety of its possible meanings.

The cross-section requirement is rooted in equal protection.[38] The seminal 1880 case of *Strauder v. West Virginia*[39] held that "the very idea of a jury is a body of men composed . . . of [a criminal defendant's] neighbors, fellows, associates, persons having the same legal status in society as that which he holds."[40] In 1940, its enforcement of equal protection in jury cases renewed, the Supreme Court noted in sweeping dicta that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[41]

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evidence offered showed systematic exclusion of black people from the jury venire); Williams v. Coppola, 549 A.2d 1092, 1095 (Conn. Super. Ct. 1986) (finding that cross-section claims apply to civil juries as well as criminal juries); William V. Luneburg & Mark A. Nordenberg, *Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation*, 67 VA. L. REV. 887, 922 (1981). Indeed, the cross-section standard can be said to have originated in the civil case of *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946). *See infra* notes 42-44 and accompanying text (discussing the creation of the cross-section standard in *Thiel* in striking down the exclusion of blue-collar workers from a jury).

37. *See supra* note 34.

38. *See* Zuklie, *supra* note 35, at 107-09 (locating the origins of the cross-section standard in the U.S. Supreme Court's invocation of the equal protection rights of defendants in *Smith v. Texas*, 311 U.S. 128, 132 (1940)); Leipold, *supra* note 7, at 949-60 (finding the origins of the cross-section standard in the Court's "discomfort" with practices that excluded minorities).

39. 100 U.S. 303 (1880).

40. *Id.* at 308 (finding an equal protection violation where the state barred black jurors). *Strauder*'s cross-section standard thus excluded those of degraded "legal status" including felons (albeit tautologically). On the other hand, the *Strauder* Court gave a list of juror limitations that would not violate the Fourteenth Amendment and, while the list did not purport to be exclusive, it did not mention felons. *Id.* at 310.

41. *See* Smith v. Texas, 311 U.S. 128, 130 (1940) (approving an equal protection

The cross-section requirement was first asserted separately from equal protection in 1946 in *Thiel v. Southern Pacific Co.*,[42] where the Supreme Court used its supervisory power over the federal courts to strike down a jury selection practice that discriminated against workers.[43] The Court stressed that "[j]ury competence is an individual rather than a group or class matter."[44] In other words, the Court was concerned not with ensuring an adequate number of workers in the jury pool, but with ensuring that if any were excluded, it was on individual grounds rather than per se as members of a group. This point casts some doubt on the legitimacy of felon exclusion, but the cross-section doctrine continued to evolve.

In the same year that *Thiel* was decided, the Court clarified in *Ballard v. United States*[45] that cross-section analysis is not about representing viewpoints, but instead is about avoiding "purposeful and systematic exclusion" of groups that are an inextricable part of the community.[46] The Court understood that the proper functioning of the judicial system—not just the rights of litigants—depended on it.[47] Even to the extent that these goals are achieved through the representation of diverse viewpoints, the mechanism is intangible; while *Ballard* dealt with gender representation, it did not presume that each gender represented a particular set of views. As the Court put it: "[T]he two sexes are not fungible . . . the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost . . . ."[48] The unique

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challenge to the exclusion of black jurors). The Court used the term "cross-section" two years later. *See* Glasser v. United States, 315 U.S. 60, 83-87 (1942) (quoting *Smith* and suggesting that the defendant's claim of an unrepresentative jury could have prevailed with adequate proof).

42. 328 U.S. 217 (1946).

43. *Id.* at 224-25 (striking down jury selection practices that excluded day laborers and longshoremen and asserting supervisory power as a basis for decision). More recent cases have appeared to narrow or ignore *Thiel* by accepting jury venires that exclude blue-collar workers. *See* Zuklie, *supra* note 35, at 115-16 (noting lower courts' decisions that blue-collar workers can be systematically excluded from the jury venire).

44. *Thiel*, 328 U.S. at 220.

45. 329 U.S. 187 (1946).

46. *Id.* at 193.

47. *See id.* at 195 (stating that violations also entailed "injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts").

48. *Id.* at 193-94 (footnote omitted). This principle was also stated well in *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (plurality opinion):

> It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

perspective of felons arguably imparts such a "flavor," though admittedly felons are not as inextricable a part of the community as women.

In 1968, Congress mandated a "fair cross-section" requirement in its new federal jury selection law for both criminal and civil cases.[49] Seven years later, in *Taylor v. Louisiana*, the Court constitutionalized the cross-section requirement (in criminal trials, at least) by grounding it in the Sixth Amendment's mandate of an *impartial* jury[50] and, against the states, in the Fourteenth Amendment's incorporation of the Sixth Amendment.[51]

The *Taylor* Court held that the purpose of the cross-section requirement is threefold. First, it is "prophylactic": It ensures that the "commonsense judgment of the community" is represented and acts as a "hedge against the overzealous or mistaken prosecutor."[52] Second, "[c]ommunity participation in the administration of the criminal law" is an important component of American democracy.[53] Third, participation is "critical to public confidence in the fairness of the criminal justice system."[54] Though the first and third purposes may be roughly consistent with impartiality, the *Taylor* Court might also have meant to root the cross-section requirement more broadly in the "intrinsic nature" of the jury.[55]

In 1979, in *Duren v. Missouri*,[56] the Supreme Court finally supplied a test for determining whether the cross-section requirement has been met.[57] In *Duren*, the Court held that a prima facie case of a cross-section violation requires three elements:

> (1) that the group alleged to be excluded is a "distinctive group" in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this

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49. *See* Federal Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 101, 82 Stat. 53, 54 (codified at 28 U.S.C. § 1861 (2000)). Several congressmen apparently thought that the cross-section standard they were legislating was rooted in the Sixth Amendment. *See* Leipold, *supra* note 7, at 957 (discussing legislative history of the Jury Service and Selection Act).

50. 419 U.S. 522, 528 (1975) (declaring cross-section right to be an "essential component of the Sixth Amendment right to a jury trial").

51. *Id.* at 526 (citing Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (incorporating the Sixth Amendment under the Fourteenth Amendment to reach state criminal trials)).

52. *Id.* at 530.

53. *Id.*; *see also infra* Part III.B.

54. *Taylor*, 419 U.S. at 530-31.

55. *See* Leipold, *supra* note 7, at 958-59 (suggesting both impartiality and the "intrinsic nature of a 'jury'" as possible bases of *Taylor*).

56. 439 U.S. 357 (1979).

57. *Id.* at 364.

> underrepresentation is due to systematic exclusion of the group in the jury-selection process.[58]

The Court continued, however, noting that "'States remain free to prescribe relevant qualifications,'"[59] and holding that it would apply an intermediate sort of scrutiny to a state's choices, by looking for a "significant state interest" that is "manifestly and primarily advanced" by the state's criteria.[60] In so holding, the Court ensured that cross-section challenges would be easier to establish than equal protection challenges, because cross-section challenges do not require a showing of discriminatory intent and are not reviewed merely for a rational basis.[61]

For the purposes of this Article, the most important element of a prima facie cross-section case is the "distinctiveness" prong, because there is no question that felon exclusion causes systematic underrepresentation of felons on juries. Few groups have been deemed distinctive; while the standard is vague,[62] and seems easily met as a literal matter, the underlying purpose of the cross-section

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58. *Id.*

59. *Id.* at 367 (quoting *Taylor*, 419 U.S. at 538).

60. *Id.* at 367-68; *see also* Druff, *supra* note 7, at 1566 (describing the scrutiny mandated by *Duren* as less than strict). *Duren*'s use of this intermediate language is, perhaps, not coincidental, considering that the exclusion at issue was that of women. *See* Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 453-54 (1985) (affirming intermediate review for gender discrimination). The exclusion in *Taylor*, which was *Duren*'s basis for applying a more searching review than mere rational basis, was also based on gender. *See Duren*, 439 U.S. at 367-68 (holding that *Taylor* mandated intermediate scrutiny); *Taylor*, 419 U.S. at 534-35 (rejecting a state plan that "exclud[ed] all women"). Both cases, however, used sweeping language that tied the standard to cross-section claims in general and not gender-related ones in particular. *See Duren*, 439 U.S. at 367 ("The right to a proper jury cannot be overcome on merely rational grounds.") (quoting *Taylor*, 419 U.S. at 534).

61. *See Duren*, 439 U.S. at 368 n.26 (distinguishing cross-section from equal protection claim in terms of sufficiency in former of showing of "systematic disproportion itself" without "discriminatory purpose"); *Taylor*, 419 U.S. at 534 (distinguishing cross-section from equal protection and due process claims with mere rational basis requirement), *quoted in Duren*, 439 U.S. at 367; Zuklie, *supra* note 35, at 114 (characterizing *Duren* as eliminating the intent requirement). *But see* United States v. Greene, 995 F.2d 793, 798 (8th Cir. 1993) (applying, in essence, a rational-basis test in a cross-section case); WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 22.2(d) (2d ed. 2000) (stating the test as requiring narrow tailoring and a "valid government interest"); Leipold, *supra* note 7, at 973 (arguing that case results do not reflect a lower burden for cross-section than for equal protection).

In the voting context, some have argued that the racial disparities found with felon disenfranchisement constitute a violation of the Voting Rights Act (VRA), which also lacks an intent requirement. 42 U.S.C. § 1973 (2000); *see* Shapiro, *supra* note 5, at 573. No similarly vigorous statute protecting jury rights exists, though, and the VRA argument has never prevailed on the merits in any court. *See One Person, No Vote*, *supra* note 5, at 1954 (describing the failure of the VRA theory).

62. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 209 (1995) (describing the Court's difficulty in explaining the distinctiveness or "cognizability" requirement).

requirement—impartiality—must still be fulfilled. In the 1990 case of *Holland v. Illinois*,[63] the Supreme Court reiterated this, stating that "[t]he Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)."[64]

By reiterating so strongly that impartiality was the purpose of the cross-section requirement, *Holland* drew back from the Court's earlier statements that, intrinsically, the jury had to be drawn from a broadly representative and diverse slice of the community.[65] Perhaps the Court had belatedly realized the irony of resting a novel diversity requirement on traditional conceptions of the jury.[66] Perhaps the Court was simply reining in its doctrine, given that many groups are literally distinctive in ways that have no bearing on their performance as jurors.[67] Alternatively, the Court may have meant that the representativeness and community participation required by the cross-section standard is simply a means to the end of impartiality. In other words, maybe "'an impartial jury is one in which . . . biases have the opportunity to interact,'"[68] which is one of the reasons that juries have many members even though each juror is individually certified as impartial.

Lower courts have followed *Holland* without digging very deeply into the nature of the impartiality that the Court was seeking to protect.[69] Given that the cross-section requirement does not protect

63. 493 U.S. 474 (1990).

64. *Id.* at 480-81. Given that impartiality is paramount at the jury panel level, the failure to apply the cross-section standard to individual panels must be a practical, rather than a logical, consideration. *See supra* text accompanying note 35. *But cf.* Darryl K. Brown, *The Role of Race in Jury Impartiality and Venue Transfers*, 53 MD. L. REV. 107, 129-30 (1994) (attacking *Holland* for ignoring biases that result from unrepresentative panels).

65. *See supra* notes 45-48 and accompanying text.

66. *See* Leipold, *supra* note 7, at 960 (contrasting the traditional exclusiveness of jury membership with the modern cross-section requirement).

67. *See Holland*, 493 U.S. at 495 (Marshall, J., dissenting) (criticizing the majority's statement that impartiality is the purpose of the cross-section requirement). If this was the Court's intent, it failed badly. *See* Zuklie, *supra* note 35, at 128-29 (criticizing modern cross-section jurisprudence because it "fails to distinguish between shared attitudes that are relevant to jury service and those that are not").

68. Druff, *supra* note 7, at 1585 (quoting Comment, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1733 (1977)). Druff argues persuasively—and well before *Holland*—that the Court had long seen the cross-section requirement as a way to guarantee impartiality. *Id.* at 1559. He also argues that "the principle of balancing perspectives in the name of impartiality [is] questionable." *Id.* at 1586. *See generally* Brown, *supra* note 64 (discussing the nature of bias and its relation to cross-section analysis).

69. *See, e.g.*, United States v. Barry, 71 F.3d 1269, 1273 (7th Cir. 1995) (adopting

particular groups because of their particular viewpoints, it is very difficult to distinguish between groups whose exclusion threatens impartiality and those whose exclusion does not. The implications for felon exclusion are, therefore, as unclear as the doctrine itself. The next Part will demonstrate that, as applied, cross-section doctrine does not help felon jurors.

If instead the cross-section standard had continued to mean what it did at its inception—that exclusion should be an individualized matter—then felon exclusion would face much more serious scrutiny. The fact that it no longer means this does not, however, mean that individual jurisdictions cannot choose to include felons. Indeed, it provides grounds for them to do just that.

b. Application of the Current Standard

Whatever the cross-section standard means, it remains an obvious avenue of attack on felon exclusion. Courts have turned away all such attacks, but in doing so they have highlighted the ambiguities and contradictions in the cross-section doctrine, the sum of which suggests that felon exclusion may indeed flout the cross-section requirement when properly understood. Indeed, the court that considered the cross-section argument most thoroughly rejected it only narrowly, by a 4-3 vote.[70]

Suggesting closer linkage to its "equal protection" origins than its current "impartiality" premise, courts have used the cross-section requirement to strike down the systematic exclusion of women and racial and cultural minorities[71] from jury venires while rejecting claims concerning such various and sundry groups as:

> [Y]oung people, old people, poor people, deaf people, less educated people, college students, resident aliens, blue-collar workers, professional workers, felons, juvenile offenders, those not registered to vote, those opposed to the death penalty, those affiliated with the National Rifle Association, city residents, and residents of Minneapolis.[72]

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the *Holland* test); United States v. Grisham, 63 F.3d 1074, 1078 (11th Cir. 1995) (following the *Holland* Court's reasoning).

70. *See* Rubio v. Superior Court, 593 P.2d 595 (Cal. 1979) (plurality opinion).

71. *See* Duren v. Missouri, 439 U.S. 357, 367 (1979) (striking down a jury selection system because of its systematic exclusion of women); Taylor v. Louisiana, 419 U.S. 522, 531 (1975) (striking down a jury selection system for its systematic exclusion of racial minorities); Leipold, *supra* note 7, at 968 & nn.111-12 (reviewing case law on "distinctiveness" of ethnic and religious groups).

72. Leipold, *supra* note 7, at 968-69 (footnotes omitted); *see also* Zuklie, *supra* note 35, at 102 (criticizing the Court's "distinctiveness" test).

To see why felons are on the losing side of this confusing standard, and to question whether they should be, we must carefully apply the cross-section standard and explore its underlying contradictions.

The three prima facie elements of a cross-section claim are: (1) distinctiveness of the group and (2) underrepresentation of the group due to (3) systematic exclusion in the jury selection process.[73] Felons in jurisdictions that exclude them from juries are infinitely underrepresented, and their exclusion—being intentional and a matter of statute—is as systematic as one can imagine. This leaves only the question of whether felons are a "distinctive" group.

Unfortunately, the Supreme Court has never explained what qualifies a group as "distinct,"[74] but a common court of appeals definition has emerged:

> [A] defendant must show: (1) that the group is defined and limited by some factor (i.e., that the group has a definite composition such as by race or sex); (2) that a common thread or basic similarity in attitude, ideas, or experience runs through the group; and (3) that there is a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.[75]

The argument that felons (along with other groups that ultimately lose cross-section challenges) are "distinctive" is obvious. First, felons are easily defined as those who have been convicted of felonies. Some definitional issues at the margins exist, but surely no more than exist for race.

Next, felons have a significant common experience that produces common ideas or attitudes: They "have had the experience of being deprived of their personal liberty by the state and, upon their return to the community, of being stigmatized both publicly and privately because of their former status."[76] Besides criminal supervision and

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73. *Duren*, 439 U.S. at 364.

74. *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 174 (1986) (noting the lack of a definition of distinctiveness and declining to provide one).

75. Willis v. Zant, 720 F.2d 1212, 1216 (11th Cir. 1983); *accord* United States v. Raszkiewicz, 169 F.3d 459, 463 (7th Cir. 1999); United States v. Fletcher, 965 F.2d 781, 782 (9th Cir. 1992); United States v. Canfield, 879 F.2d 446, 447 (8th Cir. 1989); United States v. Di Pasquale, 864 F.2d 271, 277 (3d Cir. 1988); Ford v. Seabold, 841 F.2d 677, 681-82 (6th Cir. 1988); Barber v. Ponte, 772 F.2d 982, 986-87 (1st Cir. 1985) (en banc).

76. Rubio v. Superior Court, 593 P.2d 595, 598 (Cal. 1979) (plurality opinion). *But see* United States v. Barry, 71 F.3d 1269, 1274 (7th Cir. 1995) ("It is possible that an alleged tax evader may have something in common with a charged kidnapper, but the remote chance that he might, does not support a finding that the group is distinct."); State v. Compton, 39 P.3d 833, 842 (Or. 2002) (en banc) (arguing similarly that the attitude of a felon that violated environmental or tax laws is likely

stigma, felons also have the distinct experience of being arrested, charged, and convicted (if not actually tried). This seems at least as significant and common as the marks of distinctiveness used in successful cross-section challenges.[77] Some courts have said that felons have very little common experience,[78] or at least none that are helpful to jury participation considering that their most obvious commonality is that they have flouted the rules by which society lives—hardly a basis to grant and protect their power to determine society's order. These courts have held that felons are not a distinctive group for purposes of a cross-section challenge.[79] But this begs the question of whether felons who have long since served their sentences should still be considered unfit; to say simply that their status is justified by their status is circular. In any case, their common perspectives and experiences seem more patent than their stigma, which is an entirely separate matter from distinctiveness.[80]

Finally, it does not seem that others in society can claim to have sufficiently similar experiences to adequately represent the felons' perspective. One court held that relatively more savory characters, such as convicted misdemeanants, juvenile offenders, and involuntarily committed (former) mental patients, have similar enough experiences to felons that they can adequately represent their perspective.[81] But spending a year in a prison is very different from a month in a jail or time in a hospital. Moreover, the stigma attached to felonies after release differs greatly from that attached to misdemeanors or hospitalization. The litany of civil disabilities imposed only on felons bears witness to this fact.[82] (Admittedly,

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much different than one that committed rape or robbery).

77. *See, e.g.*, Smith v. State, 571 S.E.2d 740, 744 (Ga. 2002) (finding Hispanics distinctive due to "speaking of Spanish, professing the Roman Catholic faith, a strong work ethic, and strong family traditions").

78. *See, e.g.*, *Barry*, 71 F.3d at 1274 (noting diversity of criminal experiences); *Compton*, 39 P.3d at 842 (noting that although all convicted felons have been found guilty of a crime, their reasons for, and ways of, committing the crimes are very different).

79. *See, e.g.*, *Barry*, 71 F.3d at 1274; *Compton*, 39 P.3d at 842.

80. An interesting parallel is the case of *People v. Garcia*, 92 Cal. Rptr. 2d 339 (Cal. Ct. App. 2000), in which the court found lesbians to be distinctive. *Garcia* was based on a *Batson*-like challenge under state law, but applied the distinctiveness test used in cross-section cases. *Id.* at 342-46. In finding lesbians to be distinctive, the court noted that lesbians would be likely to share similar experiences in that they have been subject to persecution and discrimination and the court thought this perspective should be represented on the jury. *Id.* at 344.

81. *Rubio*, 593 P.2d at 599.

82. *See id.* at 606-07 (Tobriner, J., dissenting) (discussing the irrationality of the majority's theory). *But cf.* Lawrence v. Texas, 123 S. Ct. 2472, 2482 (2003) (discussing the significant stigma of a misdemeanor sodomy conviction). Other civil disabilities are discussed in Part IV.C, *infra*.

though, it is circular to challenge felon exclusion by arguing that felons are distinctive, in part because of felon exclusion.)

The adequate representation test makes no sense. Taken literally, at least, it would allow a jurisdiction to arbitrarily exclude black jurors "whose last names began with A through L," under the theory that those "with last names beginning with M through Z could adequately represent the viewpoints" of the excluded group.[83] The adequate representation test is also self-contradictory in any jurisdiction that subscribes to the "inherent bias" rationale for felon exclusion. Assume that felons *are* adequately represented by misdemeanants, juvenile offenders, and mental patients. If felons are supposedly too biased for jury service, how does it justify their exclusion to say that other groups with the same perspectives are not excluded? If the two groups are similar, there is no principled basis for including one but not the other. On the other hand, if the groups differ in some significant way, there is not adequate representation.[84] To be sure, adequate representation could be premised on being similarly situated rather than identically situated, but a more fitting conclusion is that either the adequate representation test or felon exclusion is arbitrary.

More broadly, the distinctiveness standard itself is vague, and a lack of distinctiveness should not be the sole basis for felon exclusion. Consider this analogy: The Supreme Court refused to deem anti-death penalty jurors "distinctive" in *Lockhart v. McCree*,[85] arguing in dicta that "groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors . . . are not 'distinctive groups' for fair-cross-section purposes."[86] Given that felon exclusion has been accepted as protecting the jury from inherent bias[87] (a "shared attitude"), the Court could easily apply *Lockhart* to felons—as one lower court has done.[88] The argument is that while felons are distinctive, their distinctive quality is their unsuitability for jury service. But this has nothing to do with distinctiveness (the plaintiff's

83. *Rubio*, 593 P.2d at 603 (Tobriner, J., dissenting).

84. *See id.* at 606-07 (arguing that felon exclusion reveals the absurdity of the adequate representation requirement).

85. 476 U.S. 162 (1986).

86. *Id.* at 174.

87. *See supra* text accompanying notes 32-33; *infra* Part II.C; *cf.* United States v. Barry, 71 F.3d 1269, 1274 (7th Cir. 1995). In *Barry*, the court stated that one purpose of the cross-section requirement is to infuse the jury with "the common-sense judgment of the community," but that those charged with crimes have revealed their poor judgment, thus justifying their exclusion under the cross-section standard. *Id.*

88. Carle v. United States, 705 A.2d 682, 686 (D.C. 1998).

prima facie case); rather it is a matter of justification (the government's response to the prima facie case). Courts should not distort the distinctiveness test to end the inquiry early; felons *do* bring something distinct to a jury, even if not all distinctiveness is worth preserving.

Because courts *do* distort the distinctiveness test, they have not sufficiently analyzed justification—the second step in the analysis—in which the state must assert a "significant" interest that is "manifestly and primarily advanced" by the exclusion.[89] The most prominent cases that performed such an analysis concerned the exclusion of those with pending criminal charges and held probity and inherent bias to constitute adequate justification.[90]

As discussed in greater detail in Parts II.B and II.C, the probity and inherent bias rationales are flawed. To summarize briefly, the probity argument is both under- and overinclusive, and somewhat circular. Many (if not most) "bad people" are not felons, and some felons who have completed their sentences are not "bad people." It is bootstrapping to define felons as the only people too "bad" to serve, based on their degraded status, especially when felon exclusion is much more common than other civil disabilities.

Defining felons as inherently biased is inconsistent with decisions affirming verdicts rendered by juries with felons, and it is also overinclusive in many cases and for many felons. Courts typically will not reverse verdicts rendered by juries with felons absent a showing of *actual* bias.[91] While some felons might be biased against the government, others might not be; any other oft-biased group receives individualized treatment, not blanket exclusion. Even if felons are biased against prosecutors, this would not render them unfit for service in civil litigation between private parties.

In addition to these flaws, both probity and bias seem significant and "manifestly and primarily advanced" by felon exclusion only in a vacuum. Old Supreme Court dicta did, in fact, give reason to conclude that probity is an intrinsic part of the government's justification requirement,[92] and classifying many or even most felons

89. *See supra* note 60 and accompanying text.

90. *See Barry*, 71 F.3d at 1274 (citing probity as an adequate justification for exclusion); United States v. Greene, 995 F.2d 793, 795-98 (8th Cir. 1993) (citing bias and probity as adequate justifications for exclusion); *see also Carle*, 705 A.2d at 686 (finding that probity and bias defeat a cross-section claim regardless of "whether one analyzes for 'distinctive group' status or asks instead whether the state has a significant interest in limiting the right of convicted felons to sit as jurors").

91. *See infra* Appendix 1.B.4.

92. *See* Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970) ("The States remain free to confine the selection to . . . those possessing . . . sound judgment, and fair

as poor candidates for jury service does have some basis. But given that without exclusion, felons would still be screened individually like every other potential juror, it is not clear that felon exclusion *adds* enough to probity or impartiality to pass muster. There is thus a basis to argue that felon exclusion violates the cross-section requirement.

A brief review of the cross-section case law reveals, however, that there is more to these cases than just an application of the nominal legal standard. What the de facto cross-section standard is—putting women and minorities on one side, and the uneducated, blue collar workers, college students, and felons on the other—is hard to pin down. Other considerations seem to be added to the legal standard *sub rosa*.

One such consideration is the problem of demographic micromanagement. Because arguing that a group is "distinctive" is not hard, and allowing systematic statistical discrepancies to creep into a jury pool is easy, courts are faced with an unmanageable number of potential bases for cross-section claims. If race and gender are both distinctive, what about the combination of the two—what if some policy of jury selection does not have an adverse effect on blacks *qua* blacks, or men *qua* men, but does have one on black men *qua* black men? Courts have been reluctant to divide society into too many subgroups, such as black men, for fear of making the cross-section requirement unmanageable.[93] This is especially true where the claim is of a "mere statistical imbalance[]" as opposed to wholesale exclusion.[94] As one court stated, the cross-section standard "requires only a cross-section that is fair, not one perfectly attuned to

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character."); Brown v. Allen, 344 U.S. 443, 474 (1953) (rejecting cross-section standard so long as jury lists "reasonably reflect[ed] a cross-section of the population *suitable in character* and intelligence for that civic duty") (emphasis added), *overruled on other grounds by* Townsend v. Sain, 372 U.S. 293 (1963).

93. *See, e.g.*, United States v. Dennis, 804 F.2d 1208, 1210 (11th Cir. 1986) (refusing to find black males distinctive as opposed to black people in general); United States v. Blair, 493 F. Supp. 398, 407 (D. Md. 1980) (finding that people between the ages of eighteen and twenty-nine are not a distinctive group). Some courts have rejected cross-section challenges to felon exclusion that are based on the disparate effect on black men without reaching the distinctiveness question, relying instead on the fact that felons are excluded *qua* felons, regardless of their race. *See, e.g.*, State v. Bell, 745 S.W.2d 858, 861 (Tenn. 1988).

94. *See* United States v. Cecil, 836 F.2d 1431, 1446 (4th Cir. 1988) ("[The state] may not *forbid* blue collar workers, chess players, Masons, etc. from serving on juries. But if there are . . . mere statistical imbalances, unexplained, the problem is different."); Anaya v. Hansen, 781 F.2d 1, 4 (1st Cir. 1986) (suggesting stricter review of wholesale exclusion cases as opposed to cases involving "mere statistical imbalance"). *But see* Johnson v. McCaughtry, 92 F.3d 585, 591 (7th Cir. 1996) (refusing to apply a different standard for intentional and systematic exclusion than for cases involving only statistical imbalance).

multiple variables."[95] This cannot explain why felons are not protected, however, because they are not subdivided in this way, and their exclusion is total, not a "mere imbalance."

Many commentators have surmised that the cross-section standard correlates with classifications that are "suspect" under equal protection doctrine, which explains why protection is afforded to women and minorities but not to felons, blue collar workers, denizens of a particular neighborhood, and the uneducated.[96] This belies the language that the case law uses to discuss cross-sections; it is hard to argue that protected groups, like Hispanics, represent a "community of interest" that is as discrete as unprotected groups, such as welfare recipients.[97] Nevertheless, this would account for the courts' failure to protect felons.

Others have suggested that the distinction is one of permanence, because gender and ethnicity are almost immutable, while unprotected characteristics such as neighborhood, college enrollment, and criminal history are more matters of choice.[98] This too might suffice as an explanation of the results of the cross-section case law, but it clashes with the asserted goals of the cross-section requirement. Differences based on mutable characteristics are no less important for impartiality or community participation than differences based on immutable characteristics. The latter may be more discrete and easier to administer, but these are practical

95. United States v. Greer, 900 F. Supp. 952, 958 (N.D. Ill. 1995).

96. *See Anaya*, 781 F.2d at 6 (tying the distinctiveness analysis to the presence or absence of a history of discrimination against the group in question); Amar, *supra* note 62, at 209-10; Leipold, *supra* note 7, at 968-69; Zuklie, *supra* note 35, at 103 ("[C]ourts . . . have collapsed their analysis of group distinctiveness into a single inquiry—whether members of the group are victims of general societal discrimination."); *id.* at 132 (criticizing interpretations of the cross-section test that render it redundant with the Equal Protection Clause). Amar rejects this equal protection approach in favor of a political-rights model, though he notes Professor Underwood's "thoughtful essay" asserting the doctrinal superiority of the former. *See* Underwood, *supra* note 7; Amar, *supra* note 62, at 210 n.40 (comparing his own approach with Underwood). Neither approach, however, follows the letter of the case law.

97. *See* Zuklie, *supra* note 35, at 103 (critiquing courts' approach to distinctiveness); *id.* at 116 n.131 (noting the rejection of food stamp recipients as a protected category).

98. *See* Lockhart v. McCree, 476 U.S. 162, 176 (1986) (justifying the exclusion of jurors who oppose the death penalty and could not accurately follow the law in a death penalty case, in part because jurors who are singled out in death penalty cases are singled out on the basis of something they can control as opposed to other groups, such as African-Americans, women, and Mexican-Americans); State v. Crocker, 982 P.2d 45, 48 (Or. Ct. App. 1999) (resting the justification of felon exclusion in part on the fact that "[t]hose who are convicted of felonies freely chose to commit felonies"); Zuklie, *supra* note 35, at 118 (citing mutability as a reason given by courts for rejecting distinctiveness of the poor).

considerations that no court has defended on legal grounds. Moreover, a lifetime label of "felon" may be a matter of choice *ex ante*, but it is largely immutable *ex post*.

In any case, none of these alternative explanations of the cross-section case law represents official elements of the cross-section test. Still, as the cross-section requirement has been applied, felons can be excluded consistently from juries without violating it. But, if the cross-section requirement means what it actually says, courts should think twice before rejecting cross-section challenges to felon exclusion.

4. Equal Protection

Felon exclusion has been challenged also as a violation of the Equal Protection Clause, but these challenges have been properly rejected. This category contains two arguments: that felon exclusion violates the equal protection rights of felons; and that the profoundly disparate racial impact of felon exclusion violates the equal protection rights of black citizens, especially black men.[99] The right being violated is that of the juror, not the complaining party, but the issue is generally litigated by the party and the Supreme Court has been generous in granting third-party standing for such challenges.[100]

The argument that felon exclusion violates the equal protection rights of felons has consistently failed.[101] This should not be surprising, though, because no court has ever held that, as a matter of federal constitutional law, jury service is a fundamental right entitled to strict or even heightened scrutiny.[102] (The Supreme Court

99. One could argue that felon exclusion discriminates against other groups besides black citizens, but the effect on them is the starkest and they receive maximum protection under equal protection law—strict scrutiny review. Therefore, if any such indirect violation were to be found, it would be regarding black citizens.

Another potential argument could be rooted in Article 25 of the International Covenant on Civil and Political Rights, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, art. 25, U.N. Doc. A/6316 (1966) [hereinafter International Covenant], to which the United States is a signatory. *Cf.* Demleitner, *Preventing Internal Exile*, *supra* note 5, at 160 (positing that felon disenfranchisement violates Article 25). That covenant states that citizens generally should have equal access to public service, though it also allows for "[]reasonable restrictions" on that access. International Covenant, *supra*.

100. *See supra* notes 19-22 and accompanying text.

101. *See, e.g.*, United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) (applying rational basis review); United States v. Greene, 995 F.2d 793, 795-96 (8th Cir. 1993) (finding that many other courts have decided the issue similarly); Rubio v. Superior Court, 593 P.2d 595, 600-01 (Cal. 1979) (plurality opinion) (stating that the right to serve on a jury is not fundamental).

102. *See* United States v. Conant, 116 F. Supp. 2d 1015, 1020 (E.D. Wis. 2000) (noting that courts have consistently found no fundamental right to jury service and no supect classification in denial of jury service). As already discussed, cross-section

has considered—and upheld—the exclusion of felons from the fundamental right of *voting*, but did so by relying on a constitutional provision that does not apply to jury service.[103]) Moreover, felons are not entitled to strict scrutiny as a suspect class.[104] All that is required, therefore, is a rational basis for the policy.[105]

Such a rational basis is easy to establish. Courts have accepted both the need to preserve the probity of the jury and the need to protect against the inherent bias of felons as rational bases.[106] For reasons explored in depth in Parts II.B and II.C, neither justification is particularly compelling. Both are strong enough, however, to survive rational-basis review. Safeguarding probity and avoiding bias are clearly legitimate purposes, and even if felon exclusion is not a sensible way to advance them, it is almost certainly rationally related.[107]

Parties can also argue that felon exclusion affects the equal protection rights of black people, especially black men. As discussed in Appendix 2, a leading estimate suggests that felon exclusion affects from 2% to 6.5% of adult citizens nationally, but 7% to 21% of black citizens, and 12% to 37% of black men.[108] An equal protection argument is difficult to sustain, however, on the sole basis of a disparate impact, even one as stark as this; showing discriminatory

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analysis provides a more forgiving standard than equal protection analysis. *See supra* notes 59-61 and accompanying text.

103. Richardson v. Ramirez, 418 U.S. 24, 41-56 (1974). The *Richardson* Court relied on section 2 of the Fourteenth Amendment to reject an equal protection challenge to felon disenfranchisement, finding that section 2 was inconsistent with any notion that the Fourteenth Amendment prohibited a ban on felon voting. *Id.* Section 2 provides:

> But when the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced . . . .

U.S. CONST. amend. XIV, § 2 (emphasis added). *But cf.* Hunter v. Underwood, 471 U.S. 222, 233 (1985) (rejecting a section 2 argument in a case involving purposeful racial discrimination in the enforcement of criminal law).

104. *See* Hilliard v. Ferguson, 30 F.3d 649, 652 (5th Cir. 1994) (holding that felons are not a suspect constitutional class and applying the rational basis standard to discrimination against felons).

105. *Id.*; *Arce*, 997 F.2d at 1127; *Rubio*, 593 P.2d at 600-01.

106. *See, e.g.*, *Arce*, 997 F.2d at 1127 (accepting probity as a rational basis for discrimination); *Greene*, 995 F.2d at 795-96 (accepting probity and bias as rational bases); *Rubio*, 593 P.2d at 600-01 (accepting probity and bias as rational bases).

107. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988) (explaining levels of scrutiny and respective tests).

108. The lower figures are based on numbers of felons currently in custody. The higher figures are based on the estimated number of felons in or out of custody. In the case of the numbers for black citizens, they also reflect upper-bound estimates; the lower bounds are 6% of black citizens and 29% of black men, which is still very disparate. *See infra* note 499 and accompanying text.

intent is necessary for applying any sort of heightened scrutiny.[109] The law would be ruled invalid only in the rare case where an individual who challenges a felon exclusion law is able to show that it is rooted in discriminatory intent.

Any such case would rely heavily on *Hunter v. Underwood*,[110] in which the Supreme Court struck down a felon disenfranchisement provision on grounds that it was a thinly veiled Jim Crow law.[111] The problem with basing equal protection arguments on the Jim Crow pedigree of felon exclusion statutes is that such arguments are decades too late. The fatal flaw with the provision in *Hunter* was that disenfranchising crimes were chosen (and enforced) so that black people would be affected vastly more than white people; this discriminatory intent, coupled with persistent disparate impact, rendered the provision unconstitutional.[112] While several states structured their felon disenfranchisement provisions this way, felon exclusion laws relied instead on the discretion of jury commissioners.[113] Moreover, most states have changed their felon exclusion laws since 1900, and now exclude all felons rather than some, and decide to exclude based on objective criteria rather than commissioners' whims.[114] The exceptions are Alabama, Arkansas, and Illinois,[115] of which only Alabama has a history of intentionally using civil disabilities for racial cleansing.[116] In the absence of intentionally

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109. *See* Washington v. Davis, 426 U.S. 229, 246 (1976) (finding that intentional discrimination is required as opposed to simply a disparate impact); United States v. Barry, 71 F.3d 1269, 1272-73 (7th Cir. 1995) (holding that racial disparity in the exclusion of those with pending felony charges did not warrant strict scrutiny). *But see* Amar, *supra* note 62, at 256 (hinting that political rights like jury service might be entitled to a more watered-down intent requirement).

110. 471 U.S. 222 (1985).

111. *Id.* at 226-33. While the Alabama statute in *Hunter* (unlike the Mississippi statute discussed in the text accompanying notes 563-64, *infra*) excluded all felons, it also excluded those committing misdemeanors involving moral turpitude, which the state intentionally enforced disparately against black citizens. *Id.* at 226-27.

112. *Id.*; *cf. infra* text accompanying notes 563-65 (explaining a similar system in Mississippi under which convictions for "white" crimes like murder did not result in disenfranchisement).

113. *See infra* text accompanying note 561.

114. *See infra* Appendix 3.C. Even before *Hunter*, the Supreme Court expressed concern about the racist misuse of commissioners' discretion. In *Turner v. Fouche*, 396 U.S. 346 (1970), the Court upheld a Georgia law barring grand jury service by "unintelligent" or not "upright citizens." *See id.* at 355 n.13 (denying that "the present requirements serve no rational function other than to afford an opportunity to state officials to discriminate against Negroes"). In doing so, however, it ruled that using the law almost exclusively against black citizens was constitutionally troubling enough to warrant a remand. *See id.* at 359; *see also* Carter v. Jury Comm'n, 396 U.S. 320, 332-37 (1970) (refusing to strike down a jury law according discretion that the Court found was abused).

115. *See infra* notes 376 (Alabama), 377 (Alaska), 389 (Illinois).

116. *See* Shapiro, *supra* note 5, at 541 (naming Alabama, Louisiana, Mississippi,

discriminatory application of these three states' jury laws, only Alabama's law might be susceptible to an equal protection challenge.

The Alabama law has, in fact, been challenged on a similar ground.[117] Rather than attacking the discretionary portion of the Alabama law ("honest and intelligent and . . . esteemed in the community for integrity, good character and sound judgment"), the challenger, citing *Hunter*, attacked the portion that excluded those who had been disenfranchised for crimes involving moral turpitude.[118] Citing Supreme Court precedent, the Alabama Court rejected the challenge, noting the absence of a Jim Crow history behind the moral turpitude exclusion law—especially because it was limited by *Hunter* to felonies and because its linkage to disenfranchisement was recent.[119] The United States Supreme Court denied certiorari.[120]

Viewed from another angle, felon exclusion was practiced at common law, long before black people—felons or non-felons—had any chance to serve on juries.[121] Thus, imputing racial animus to the *historical* practice of felon exclusion is difficult. As in *Hunter*, a successful equal protection challenge would require clear evidence of discriminatory intent in actively maintaining or enacting a particular felon exclusion law.

One could argue that felon exclusion *is* marked by a sort of racially discriminatory intent. Prominent critics have noted that the War on Drugs has led to a vast rise in the number of convicted felons, and larger increases in rates of imprisonment for black citizens than for white citizens.[122] In the Jim Crow era, felon exclusion was justified on

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South Carolina, and Virginia as having Jim Crow felon disenfranchisement stratagems); *infra* text accompanying notes 560-65.

117. Anderson v. State, 542 So. 2d 292 (Ala. Crim. App. 1987).

118. *Id.* at 299.

119. *Id.* at 299-303.

120. Anderson v. Alabama, 493 U.S. 836 (1989).

121. *See infra* Appendix 1; *cf.* Ewald, *supra* note 5, at 1065 (making a similar point about felon disenfranchisement). *But cf.* ANGELA BEHRENS ET AL., BALLOT MANIPULATION AND THE "MENACE OF NEGRO DOMINATION": RACIAL THREAT AND FELON DISENFRANCHISEMENT IN THE UNITED STATES, 1850-2000, at 30-32 (Northwestern Univ. Inst. for Policy Research, Working Paper 02-40, 2002) (finding an association between the enactment of felon disenfranchisement laws and the enfranchisement of black men during Reconstruction), *at* http://www.northwestern.edu/ipr/publications/workingpapers/wpF02.html (on file with the American University Law Review). The Behrens paper does not account, however, for changes in "character" requirements that were previously used to exclude felons from the electorate.

122. *See, e.g.*, JAMIE FELLNER & MARC MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 13-14 (1998) (discussing the effect of the War on Drugs on black imprisonment rates); Kweisi Mfume, *Reenfranchisement* (citing an eightfold increase in the imprisonment of black citizens for state drug crimes, compared to a fourfold increase for whites), *at*

the grounds that exclusion could be avoided by refraining from committing crimes—a reasonable enough request, but for the fact that enforcement of these laws was racially biased.[123] If one believes that the enforcement of the criminal law is substantially racially biased today, and that any contemporaneous law maintaining or expanding felon exclusion is tainted with that bias, then the seeds exist for an equal protection argument—or even legislation.[124] This Article is not asserting that argument here,[125] but it certainly bears mentioning because of the prominence with which its underlying premises seem to be held. This is the only way, however, to hold that felon exclusion violates the Equal Protection Clause.

5. Due process

Another potential ground for challenging felon exclusion is a litigant's due process right to a fair tribunal.[126] This challenge properly fails as well. Due process is a vague concept, which means that a party's due process rights could be understood in different

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http://www.naacp.org/work/voter/reenfranchisement.shtml (on file with the American University Law Review); *see also* Bernard E. Harcourt, *The Shaping of Chance: Actuarial Models and Criminal Profiling at the Turn of the Twenty-First Century*, 70 U. CHI. L. REV. 105, 117-27 (2003) (presenting an actuarial thought experiment showing the self-fulfilling nature of racial profiling); MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 82 (1995) (charging that the War on Drugs was a "calculated effort" to increase black imprisonment). *But see* Drew S. Days III, *Race and the Federal Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 180, 187 (1996) (providing non-racial explanations for some of the racial disparity in "drug use and drug arrest statistics").

123. *See infra* text accompanying note 565.

124. If felon exclusion represents a violation of equal protection, Congress could pass legislation preventing states from excluding felons from juries, pursuant to its powers under section 5 of the Fourteenth Amendment. But a finding of a violation would need to be based on judicial standards, not more expansive legislative ones, thus legislation would not improve opponents' options much beyond litigation. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (holding that Congress does not have "power to decree the substance of the Fourteenth Amendment's restrictions on the States"). Congress has debated legislation to ban felon disenfranchisement, but the legislation has never passed and has similar constitutional problems. *See* H.R. 5510, 107th Cong. (2002) (proposing a law guaranteeing the voting rights of ex-felons); *Right of Prisoners to Vote in Federal Elections: Hearing on H.R. 906 Before the House Subcomm. on the Constitution of the Comm. on the Judiciary*, 106th Cong. (1999) (containing testimony debating the constitutionality of similar legislation), *available at* http://www.house.gov/judiciary/con1021.htm (on file with the American University Law Review); Symposium, *Enfranchising the Disenfranchised*, 9 J.L. & POL'Y 249, 284 n.105 (2001) (describing earlier incarnations of legislation); *see also* Fletcher, *supra* note 4, at 1902 (arguing that Congress has Fifteenth Amendment power to bar felon disenfranchisement based on racially disparate impact).

125. A related argument about prosecutorial self-dealing, rooted in policy rather than civil rights law, is presented in Part II.G.

126. *See In re* Murchison, 349 U.S. 133, 136 (1954) ("A fair trial in a fair tribunal is a basic requirement of due process.").

ways.[127] One way is through the incorporation of the Sixth Amendment right to criminal trial by jury into the Fourteenth Amendment Due Process Clause. Thus, one may argue that a jury with a particular composition is not a "jury" in the Sixth Amendment sense of the word. Unfortunately, this approach is open-ended and ill-defined.[128] If the problem is that the jury is biased, the Sixth Amendment's impartiality and cross-section requirements already provide a remedy. If the problem is that norms of equality inherent in the concept of the jury have been violated, equal protection already supplies a solution.

Another, more general, approach to due process is to assert that a jury is illegally constituted.[129] Under such a framework, though, a challenge to a felon exclusion statute once again must be rooted in some other constitutional violation—one treated in some other portion of this Article.

The due process rubric quite possibly adds to the reach of the rights in question. At the very least, it clarifies the fact that the party is litigating on his own behalf instead of on behalf of the excluded juror.[130] It may also limit the need to show actual bias: As one Supreme Court opinion asserted in 1972, "due process is denied by circumstances that create the *likelihood or the appearance* of bias."[131] As a practical matter, this means that if a jury has been selected "in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States," then there is a due process violation even in the absence of a showing of actual bias or harm.[132] But, the quoted opinion represented only a plurality, and the Court has since resisted describing the due process right more definitively.[133] In short, due process requirements do not strengthen the case against felon exclusion.

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127. *See* Underwood, *supra* note 7, at 737-50 (presenting various approaches to analyzing the due process right to be free from racial discrimination in jury selection). Underwood concludes that "the jury trial claim . . . has more to do with antidiscrimination norms than with fair trial rights." *Id.* at 739.

128. *See id.* at 738 (discussing the limitations of this approach).

129. *See id.* at 739-50 (discussing the notion of a right to a "lawfully constructed tribunal").

130. *See supra* Part I.B.1.

131. Peters v. Kiff, 407 U.S. 493, 502 (1972) (plurality opinion) (emphasis added).

132. *Id.*

133. *See, e.g.*, Campbell v. Louisiana, 523 U.S. 392, 401 (1998) (noting that a "majority of Justices could not agree on a comprehensive statement of the rule"). Many courts, including federal courts, have been fairly strict about requiring a showing of bias before reversing the result of a trial in which the felon exclusion laws have been breached. *See infra* Appendix 1.B.4. This is a different point than the main one of this Part, though, because it relates to challenges to the inclusion of felons, while this Part deals with challenges to their exclusion.

6. Fifteenth Amendment

Relying mainly on the insights of Vikram Amar, one could argue that the Fifteenth Amendment and other voting amendments are the sources of jury service rights. Amar's theory is only slightly helpful to the constitutional case against felon exclusion, however, and even to the extent that it is, no court has adopted it.

Amar described his theory in a 1995 article as such:

> [T]he Fifth, Sixth, and Seventh Amendments (providing for juries) must be harmonized with the spirit of the Twenty-Sixth (dealing with age discrimination), just as they have already in effect been brought into alignment with the Fifteenth (dealing with racial discrimination), Nineteenth (dealing with gender discrimination), and Twenty-Fourth (dealing with class discrimination). In the end, the groups protected from discrimination in jury service should be the same groups protected from discrimination in voting, regardless of how these groups fare under Sixth Amendment or equal protection approaches.[134]

Amar makes a persuasive case that the Fourteenth Amendment was intended to protect only civil rights, as distinguished from "political" rights, such as voting and jury service, which are the domain of the Fifteenth Amendment.[135] Thus, Amar argues against conceiving of juror rights in terms of Fourteenth Amendment due process or equal protection.[136]

A second step is required, though, to conclude that the Fifteenth Amendment, which mentions only voting, covers jury service as well. Amar notes that the Fifteenth Amendment originally contained language specifically forbidding discrimination not just for voting but for office holding as well, and he suggests that the language was excised in a way that implicitly maintained protection of office holding.[137] Jurors resemble office holders in important ways,[138] and to

134. Amar, *supra* note 62, at 206.

135. *See id.* at 222-38 (explaining that the drafters could not have intended for the Privileges and Immunities and Equal Protection Clauses to apply to political rights). Indeed, if the Fourteenth Amendment was understood to cover political rights—as we understand it to do today—then the Fifteenth Amendment would not have been needed. *Id.* at 222-23 (quoting Justice Harlan's statement that the passing of the Fifteenth Amendment alone is evidence of the belief that the Fourteenth Amendment did not proscribe voting discrimination).

136. *Id.* at 236-38.

137. *See id.* at 228-34 & n.156 (noting that many believed the right to freedom from discrimination in voting subsumed the right to freedom from discrimination in holding office). *But see* Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 372 & n.122 (collecting sources to the contrary and stating that Congress did *not* intend to protect black office holding).

138. *See infra* text accompanying notes 339-41.

the extent that they do not, they resemble voters.[139] Among Amar's most compelling evidence is that the Civil Rights Act of 1875, which forbids juror discrimination on grounds of race, uses language that directly follows the Fifteenth Amendment's language.[140]

Ergo, according to Amar's argument, the Fifteenth Amendment should protect the right of equality in jury service. But no court has adopted Amar's suggested approach,[141] and even if they did, Amar's argument does not answer the question of how ex-felons should be treated. One must find a way, in other words, in which the Fifteenth Amendment approach is more helpful than the Fourteenth or other Amendments for would-be felon jurors.

Viewed broadly, Amar's theory could mean that the right to serve on a jury must be coterminous with the right to vote.[142] The simplest application of Amar's theory, then, would be to note the many states in which felons are allowed to vote but are barred from jury service.[143] Unlike black people, women, the poor, and the young, however,

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139. *See* Amar, *supra* note 62, at 239-41 (discussing the analogy between jury service and office holding and the stronger analogy between jury service and voting). For example, jurors perform their duty through acts of voting. *See id.* at 205 (noting Justice Kennedy's observations about jurors in *Powers v. Ohio*, 400 U.S. 499 (1991)); AKHIL REED AMAR, THE BILL OF RIGHTS 274 (1998) (stating that voting is a main function performed by jurors).

140. *See* Amar, *supra* note 62, at 238 (pointing out that the Act does not track the language of the Fourteenth Amendment). Other provisions in the Act, struck down in the *Civil Rights Cases*, 109 U.S. 3 (1883), protected civil rights and were rooted in the Fourteenth Amendment. *See* Amar, *supra* note 62, at 228 (discussing the provision for freedom from discrimination in office holding).

141. *See, e.g.*, United States v. Olson, 473 F.2d 686, 687-88 (8th Cir. 1973) (holding that "there is no support in law or logic for the proposition that the right of jury service is a concomitant subsidiary of the franchise" and rejecting a Twenty-Sixth Amendment challenge to an age minimum for jury service). Perhaps most strikingly, the landmark *Strauder* case in 1880 analyzed a state law excluding black men from juries solely in terms of the Fourteenth Amendment. *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (finding that a state may discriminate when prescribing the qualifications of jurors, but it may not discriminate on the basis of race or color). It may be significant, though, that the facts in the case occurred in 1874, before the passage of the 1875 Civil Rights Act. *Id.* at 304.

142. Amar notes de Tocqueville's statement that "it is essential that the jury lists should expand or shrink with the lists of voters," and de Tocqueville's citation of the fact that all states besides New York provided as much. *See* Amar, *supra* note 62, at 220 & nn.102-03 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 250-51, app. I at 702 (J.P. Mayer & Max Lerner eds., George Lawrence trans., 1966)). As discussed below, jury service was more restricted than voting in the mid-nineteenth century, but property qualifications had begun melting away. *See infra* note 546 and accompanying text.

For his part, Amar makes a subtler argument that jury service should be located "in the broader context of political participation rights." Amar, *supra* note 62, at 207. This does not necessarily mean that the Court will provide causes of action for excluded jurors based on the Voting Amendments. *See id.* at 254-59 (providing other doctrinal bases for application of Amar's insight).

143. *See infra* text accompanying note 332.

felons have no amendment protecting their right to vote. Moreover, the Constitution does not implicitly require that felons be allowed to vote, despite litigation and other foment to the contrary.[144] If jury service is linked to voting, felons lose.

An argument that attempts to combine Thirteenth and Fifteenth Amendment protections to protect felon jurors is equally unavailing. In *People v. DeStefano*,[145] a criminal defendant unsuccessfully challenged felon disenfranchisement by tying together the Thirteenth and Fifteenth Amendments.[146] The Fifteenth Amendment prohibits voting discrimination on grounds of "previous condition of servitude,"[147] and the Thirteenth Amendment allows "involuntary servitude . . . as a punishment for crime,"[148] and thus *DeStefano* read the Fifteenth Amendment as precluding discrimination on the basis of a criminal conviction. Bolstering this view is historical evidence that the Jim Crow-era criminal justice system was a *de facto* reintroduction of slavery; losing one's status as a citizen—voter and juror—was an obvious badge and incident of this status.[149]

But servitude is not coterminous with a felony conviction,[150] and felon exclusion is based on a conviction, not servitude. Put another way, exclusion does not stem from servitude as forbidden by the Fifteenth Amendment; rather, exclusion and servitude both stem from conviction. The argument is also historically inadequate. The design of the Fifteenth Amendment seems to have stemmed from the recognition that it would not have done much good to strike down a state statute that said "black people cannot vote" if the state could simply pass a new statute saying "former slaves cannot vote." By the time the Fifteenth Amendment was added, however, felon disenfranchisement and exclusion from juries were widespread and

144. *See supra* notes 4, 103; *infra* note 333.

145. 212 N.E.2d 327 (Ill. App. Ct. 1965).

146. *See id.* at 362 (finding defendant's contention to be without merit); *see also* Ewald, *supra* note 5, at 1131 (calling the Thirteenth Amendment disenfranchisement argument "not implausible" but unlikely to succeed in court); Fletcher, *supra* note 4, at 1904 (endorsing Thirteenth/Fifteenth Amendment argument); Grant et al., *supra* note 3, at 1174-75 (expressing sympathy for the argument in *DeStefano*).

147. U.S. CONST. amend. XV.

148. *Id.* amend. XIII.

149. *See* NICOLE HAHN RAFTER & DEBRA L. STANLEY, PRISONS IN AMERICA 12-13 (1999) (describing the system of harsh sentences for minor offenses coupled with the state's renting of prisoners as unpaid labor); Schmidt, *supra* note 7, at 1411-12 (describing the racist use of the criminal justice system in the South as a "pipeline for forced labor").

150. *See* Furman, *supra* note 5, at 1223 ("As late as the late nineteenth century, courts held that a prisoner was for all intents and purposes a slave of the state. Today, however, courts no longer hold such a view.") (footnote omitted). More directly, most felons are not sentenced to prison. *See infra* note 322.

long accepted.[151] For these reasons, the Thirteenth Amendment would not combine with Amar's theory to help felons who would be voters—or jurors.

A final Amarian path, and the only one with any promise, is for black felons to assert that the racial disparity that their exclusion entails is so severe as to constitute a violation of the Fifteenth Amendment. Amar argues that the Fifteenth Amendment goes farther than the Fourteenth Amendment in allowing plaintiffs to premise their claims on a showing of disparate impact; if his argument on this point is ever accepted, felon exclusion would be a very vulnerable target.[152]

7. Bill of attainder and ex post facto

Some have argued that civil disabilities imposed on felons are bills of attainder, and thus are unconstitutional.[153] Punishments, such as disqualification from voting or jury service, must be imposed individually by a court, and not categorically by a legislature, to be constitutional.[154] But a felon is not barred from jury service because a legislature has considered his case and decided to punish him; rather, a court of law has convicted him individually.[155]

This explanation does not apply, however, when a new felon exclusion law is applied retrospectively.[156] Such a situation arguably implicates both attainder and the Constitution's ban on ex post facto criminal punishment.[157] To violate these provisions, though, felon exclusion must be a "punishment."[158] The typical response to such

151. *See* Richardson v. Ramirez, 418 U.S. 24, 48-53 & n.14 (1974) (describing the status of felon disenfranchisement law during the adoption of the Fourteenth Amendment, which was adopted two years before the Fifteenth Amendment); *infra* text accompanying notes 546-54.

152. *See supra* text accompanying notes 108-24; note 109 (discussing Amar and disparate racial impact arguments); *cf. supra* notes 59-61 and accompanying text (discussing the lack of an intent requirement under the cross-section standard).

153. U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1 (banning bills of attainder); *see, e.g.*, Green v. Bd. of Elections, 380 F.2d 445, 449-50 (2d Cir. 1967) (rejecting an attainder attack on felon disenfranchisement); Fletcher, *supra* note 4, at 1905 (making an attainder argument against felon disenfranchisement); Note, *supra* note 28, at 418-22 (considering and rejecting an attainder argument against civil disabilities).

154. *See* Fletcher, *supra* note 4, at 1905 (making an attainder argument against felon disenfranchisement).

155. *See Green*, 380 F.2d at 450 (rejecting an attainder attack on felon disenfranchisement); Note, *supra* note 28, at 418-22 (rejecting an attainder argument on civil disabilities).

156. *See, e.g.*, *infra* note 398 (Michigan). *But see infra* note 423 (Washington) (applying new law prospectively).

157. *See* U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1 (banning ex post facto laws); Collins v. Youngblood, 497 U.S. 37, 42 (1990) (defining ex post facto laws as including laws that increase punishment for a crime after its commission).

158. *See* Bell v. Wolfish, 441 U.S. 520, 537 (1978) (requiring an actual infliction of

challenges has been to say that it is not a punishment,[159] a conclusion that is consistent with current case law.

Felon exclusion from jury service, like felon disenfranchisement, can be seen as a sort of expulsion from the realm of full citizenship.[160] It can be analogized accordingly to the case of *Kennedy v. Mendoza-Martinez*,[161] in which a felon sentenced to prison was also stripped of his citizenship; in that case, the Supreme Court ruled that the loss of citizenship was a punishment.[162] An even more direct analogy is the Civil War-era attainder/ex post facto case of *Cummings v. Missouri*,[163] which treated the exclusion of a priest from his profession as punishment, and stated that punishment "embrac[ed] deprivation or suspension of political or civil rights."[164] The fact that a pardon is required to undo felon exclusion also suggests that it is a penalty.

Assorted analogies aside, though, more recent case law has treated issues like felon exclusion as regulation, not punishment. For one thing, felon exclusion usually does not *purport* to be punishment. Most states treat it as a condition of eligibility, alongside citizenship, literacy, and physical ability.[165] The inquiry does not end there, though such a legislative characterization is difficult to override.[166] The Supreme Court has looked to seven factors, five of which are applicable here:

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punishment for designation as ex post facto); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 472-73 (1976) (noting the same for categorization as a bill of attainder). *See generally* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1280-86 (1998) (exploring Supreme Court jurisprudence on the definition of punishment).

159. *See, e.g.*, Garrett v. Weinberg, 31 S.E. 341, 344-45 (S.C. 1898) (applying felon exclusion retroactively).

160. *See infra* Part III.A.

161. 372 U.S. 144 (1963).

162. *Id.* at 147, 165-66 (1963) (holding unconstitutional the imposition of punitive sanction without Fifth and Sixth Amendment protections). The *Mendoza-Martinez* standard for determining punitive character has been used in ex post facto and attainder cases. *See, e.g.*, Smith v. Doe, 123 S. Ct. 1140, 1149 (2003) (discussing ex post facto); *Nixon*, 433 U.S. at 478 (involving attainder).

163. 71 U.S. (4 Wall.) 277 (1866).

164. *Id.* at 322.

165. *See generally* Appendix 1.A. Recent legislative arguments in favor of felon exclusion emphasize jury qualification, not punishment. *See infra* note 325. To be sure, though, some states do discuss felon exclusion as a criminal punishment instead of, or in addition to, a juror qualification. *See infra* notes 378 (Arizona), 388 (Idaho), 396 (Maryland), 417 (South Dakota); *see also* Young v. United States, 694 A.2d 891, 895 (D.C. 1997) ("[T]he historical reasons for keeping felons out of the jury pool have had more to do with notions of punishment or civic service than perceived bias."). An older court took the alternative tack of construing jury service as a burden, not a right subject to protection from "devesting." Garrett v. Weinberg, 31 S.E. 341, 344 (S.C. 1898).

166. *See Smith*, 123 S. Ct. at 1147 (according deep deference to legislative intent).

> [W]hether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose.[167]

Felon exclusion has a long pedigree, but not as a punishment.[168] It imposes something of an affirmative disability—as does any law that imposes burdens—but not a physical or economic restraint.[169] It does not promote the penological aims of retribution and deterrence.[170]

Most significant is the "rational connection" of felon exclusion to its non-punitive purpose: safeguarding the jury process. As already discussed, the notion that felon exclusion protects the jury's probity and impartiality may be somewhat flawed, but it is rational enough to clear this low threshold.[171] This result is consistent with most courts' treatment of other civil disabilities, such as sex offender registration, disenfranchisement, and firearms restrictions.[172] For these reasons, the attainder and ex post facto arguments against felon exclusion are unavailing.

C. Conclusion

Several constitutional challenges to felon exclusion suggest themselves, mainly because felon exclusion produces juries that are less representative and much more white. The standard legal tests,

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167. *Id.* at 1149 (citing *Mendoza-Martinez*, 372 U.S. at 168-69). The other two factors, "whether [the regulation] comes into play only on a finding of *scienter*" and "whether the behavior to which it applies is already a crime," are redundant given the fact that felon exclusion requires a felony conviction by definition. *See id.* at 1154 (making analogous point for a "regulatory scheme [that] applies only to past conduct, which was, and is, a crime").

168. *See infra* note 330 and accompanying text.

169. *See Smith*, 123 S. Ct. at 1151 (analyzing the "disability or restraint" factor); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 471 (1977) (stating that the attainder ban is not meant to "invalidat[e] every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals").

170. *See infra* Part IV.B; Hudson v. United States, 522 U.S. 93, 99 (1997) (defining "traditional aims of punishment" as "retribution and deterrence") (quoting *Mendoza-Martinez*, 372 U.S. at 168-69).

171. *See supra* text accompanying notes 106-07.

172. *See, e.g.*, *Smith*, 123 S. Ct. at 1153-54 (sex offender registration); Green v. Bd. of Elections, 380 F.2d 445, 450 (2d Cir. 1967) (felon disenfranchisement); State v. Schmidt, 23 P.3d 462, 471-72 (Wash. 2001) (en banc) (firearms restriction); *see also infra* note 330; Trop v. Dulles, 356 U.S. 86, 97 (1958) (plurality opinion) (dicta on felon disenfranchisement); Melanie Popper, Note, *Retrospective Application of State Firearm Prohibitions Triggering Enhanced Sentencing under Federal Law: A Violation of the Ex Post Facto Clause? The Circuits Split*, 27 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 307, 313-23 (2001) (describing 2-1 circuit split against treating firearm prohibitions as punishment).

however, grant substantial deference to the justifications for the practice that jurisdictions have asserted: probity and inherent bias. These justifications are weak but not wholly empty, and they probably suffice under currently accepted doctrine to protect felon exclusion from unconstitutionality. Should courts ever take a properly robust view of the cross-section standard, or a dimmer view of the flawed probity and inherent bias theories, felon exclusion could be struck down. Failing that, and given the fact that felon inclusion is not unconstitutional either, the main debate over felon jurors should be one of policy, to which this Article will now turn.

II. GENERAL POLICY CONSIDERATIONS

This Part considers a series of general policy arguments concerning felon exclusion. It critiques four common bases for the practice: history, maintaining probity, maintaining impartiality, and reliance on the clemency process. It then confronts additional policy considerations that bear deeper analysis: difficulties in administration, racial disparities, agency costs, and, finally, the ideal of individualization. Although this discussion raises arguments for and against felon exclusion, it suggests that felon exclusion is fundamentally flawed.

A. A History of Exclusion

As discussed in Appendix 3.A, felon exclusion's pedigree is extensive. Almost as long as there have been juries, the law governing their operation has sought to exclude felons. Intrinsically, then, the very idea of the jury is of "twelve *good* men and true."[173] Even so, the history of felon exclusion does not justify its continued practice.

For grand juries, felon exclusion dates back to the Assize of Clarendon in 1166 and, in more specific form, to a 1410 statute of Henry IV.[174] As Oliver Wendell Holmes famously stated, however:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[175]

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173. 3 WILLIAM BLACKSTONE, COMMENTARIES *348 (1769).

174. *See infra* text accompanying notes 513-15.

175. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). The spirit of Holmes's admonition could be seen in this 1914 attack on civil disabilities by the Oklahoma Supreme Court:

> [T]he principles of law which this verbiage literally imports had its origin in

After all, one could argue just as easily for the exclusion of female jurors because a jury has always meant "twelve good *men* and true." Indeed, women were not allowed to serve as jurors in every state until 1966, which was decades after women achieved suffrage.[176] But women's place in America has changed, as have the places of juries and felons.

One can debate the value of Holmes's statement in a legal argument. In the realm of policy, however, it is a fair comment that should be addressed by asking whether this rule has persisted merely from "blind imitation of the past," and whether there are "no better reason[s]" for its continued existence (the latter point being discussed in the other Subsections of this Part). While the nature of the jury has changed over the centuries, felon exclusion has not varied accordingly. As discussed in Appendix 3, while jury participation has broadened and a citizen's qualification for jury service has become the rule rather than the exception, felon exclusion has persisted. In context, then, the history of felon exclusion has been one of relative change.

Also changing in recent years is the nature—or, more to the point, the number—of felons.[177] Regardless of whether the increase in the population of felons reflects an increase in those qualities from which felon exclusion seeks to insulate juries, the fact remains that ostracism means something very different now then it did in the 1970s, when the proportion of felons in the population was less than one-half of what it is today.[178]

> the fogs and fictions of feudal jurisprudence and doubtlessly has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government.

Byers v. Sun Sav. Bank, 139 P. 948, 949 (Okla. 1914) (striking down a civil disability that precluded a felon from entering into a contract).

176. *See* Karen L. Cipriani, *The Numbers Don't Add Up: Challenging the Premise of* J.E.B. v. Alabama *ex rel.* T.B., 31 AM. CRIM. L. REV. 1253, 1255-58 (1994) (detailing the history of female jurors). Also, a jury of *twelve* good men and true is not constitutionally required. *See* Williams v. Florida, 399 U.S. 78, 86 (1970) (ruling that a twelve-person panel of jurors is not required under the constitutional definition of "trial by jury").

177. *See infra* text accompanying notes 488-90.

178. *See* Christopher Uggen et al., Crime, Class, and Reintegration: The Scope and Social Distribution of America's Criminal Class, Paper delivered to American Society of Criminology 17 (Nov. 18, 2000) (unpublished manuscript, on file with the American University Law Review). I am rounding off the Uggen figures, which show that an estimated 3% of the population were felons from 1968 to 1978, compared to 6.5% in 2000. *See also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 494 tbl. 6.23 (2002) (providing incarceration rates from 1925 to 2001, suggesting that Uggen's 1978 figure was stable back to the 1920s).

In this regard, the most troubling aspect of the persistence of the historical practice of felon exclusion is not that it exists, but rather that a more probing discussion has not accompanied it. The question of the proper place of felons in society or the best way to constitute a jury are hardly rarefied or unpopular topics. If the meaning of a jury and the meaning of being a felon have changed significantly, then perhaps felon exclusion policy needs to be adjusted accordingly to serve its original goals.[179] Even if the long history of felon exclusion is impressive, it does not demonstrate that the practice is necessary. Instead, the extensive history of a substantial minority of states—which have maintained functioning jury systems for generations without excluding felons—suggests the opposite.[180]

B. Probity

The principal justification for felon exclusion has been protection of the probity of the jury.[181] The precise mechanism by which felons threaten jury probity is unclear. Two possibilities are felons' actual characteristics, and their badges of shame. If the problem is felons' actual characteristics—poor character or innate untrustworthiness—then blanket felon exclusion is both under- and overinclusive. Asserting that felons are or were presumably "bad" in this way is not unfair. As one pro-exclusion commenter resoundingly declared, "[i]f someone is not responsible enough to follow the law, how can they [sic] be responsible enough to decide guilt or innocence[?]"[182] But some felons are responsible enough to follow the law now, at least as much as other non-felons like misdemeanants, juvenile offenders, and everyone in the population who has ever committed a crime without being caught.[183]

Assume hypothetically that 95% of felons lack probity, that just 10% of non-felons do, and that only felons—all felons—are excluded from juries. If 6.5% of the jury-age population are felons,[184] then over

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179. *Cf.* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1264 (1993) ("[A]rguments from translation accommodate changes in context so as to preserve meaning across contexts."). Lessig was referring to constitutional interpretation, not policy decision making; nonetheless, his ideas are relevant.

180. *See infra* Appendix 1.A.

181. *See supra* Part I.B.2.

182. State of Oregon Special Election Voters' Pamphlet, Ballot Measure 75, Arguments in Favor (1999) (on file with the American University Law Review).

183. *Cf.* Lippke, *supra* note 5, at 563 (discussing the line drawing problems presented by the argument that committing crime reveals an inherent "contempt for democratic political processes").

184. *See infra* note 499 and accompanying text.

60% of those who are unfit to serve would be *non*-felons who are not excluded. If anything, this hypothetical is extremely conservative. Many adult Americans, if not most, have committed crimes; for example, over 40% of adult Americans have used illegal drugs.[185] The fact that these non-felons are the beneficiaries of limited police resources and prosecutorial discretion does not render them sufficiently responsible to determine guilt and innocence. If one concludes that they are able to be responsible now if they have not recently broken the law, why could not that same assumption be made for some felons?

A jurisdiction may conclude fairly that felons are inherently "bad" enough and non-felons are inherently "good" enough that excluding all felons (with exceptions dealt with through clemency) and including non-felons (with exceptions dealt with through voir dire) is simply more efficient. Because discretionary grants of clemency are rare, however, most "good" felons will be left out.[186] As for the "bad" non-felons, society seems to assume (with an excess of optimism) that the combination of voir dire, challenges for cause, and peremptory strikes suffice to remove the remainder of the wicked. But if this assumption is correct, then it should work *a fortiori* on unreformed felons, without the "false negatives" associated with blanket felon exclusion. The question is, how many false negatives are too many? If 99% of felons are so inherently immoral that they would bring infamy to the jury, and voir dire does not work properly, then excluding the other 1% is a small loss to the system. If the number of false negatives is 5%, 10%, 20%, or higher, though, felon exclusion becomes less appropriate.

A jurisdiction that would like to ban felons from juries because the felons' bad character threatens the probity of the jury should make two initial determinations. First, the state should ask whether it has a reliable mechanism for excluding from juries "bad" characters who are not felons. If it does not, then excluding felons probably is not completely solving its probity problem. If it does have such a mechanism, it should use it for felons instead of relying on a blanket exclusion, unless it can make a second determination—that there are

185. *See* 2001 NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE tbl. H.18 (showing that 43.3% of adults report illicit drug use during their lifetimes), *available at* http://www.samhsa.gov/oas/NHSDA/2k1NHSDA/vol2/appendixh_1.htm (on file with the American University Law Review). Many of these people may have committed these crimes as minors, though the same survey data showed that 11.6% of adults reported illegal drug use in the past year and 6.6% in the previous month. *Id.*

186. *See infra* note 451 and accompanying text.

very few "good" felons that the blanket exclusion eliminates. A jurisdiction might sincerely make both of these determinations. Alternatively, it could conclude that removing many "bad" people from juries is worthwhile, even if some "bad" people remain and some "good" ones are lost. But it should confront these issues and wrestle with their ramifications, rather than conclude blithely that felon exclusion is appropriate because felons are "bad."

The other possibility broached above is that felons threaten the probity of the jury because of their degraded status; whether or not individual felons are "bad," the idea of having tainted people on juries might undermine the integrity of the institution. That this is anyone's intention is belied by the fact that jurisdictions speak of probity rather than the appearance of probity. Nevertheless, it is an argument worth considering.

The "taint" argument is arbitrary. Considering that most states that exclude felons from juries nevertheless allow them to vote is proof of this arbitrariness.[187] If a state truly subscribes to the taint theory, it must account for why appearances on a jury are different from those in the electorate. There are, to be sure, ample differences between jury service and voting,[188] but why an electorate with some percentage of felons in it is not tainted as badly as a jury with the same percentage is unclear. Indeed, juries are less tainted insofar as they are screened through voir dire—a fact that may explain why courts are usually untroubled when a banned felon somehow ends up on a jury, another mark of arbitrariness.[189]

The arbitrariness of the taint argument is also evident from the fact that most states exclude felons but not misdemeanants.[190] While the taint from felons might be more significant, who is to say that misdemeanants do not discredit the institution of the jury as well? Arguing that "felons are felons" is the difference may have historical or metaphysical importance, but it may also just be a bootstrap.

As with the argument on personal characteristics, the taint argument may be defensible, but only if the jurisdiction confronts the underlying assumptions and the potential contradictions. Such careful consideration might—and should—reduce the prevalence and scope of felon exclusion.

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187. *See infra* text accompanying note 332.
188. *See infra* text accompanying notes 331-36.
189. *See infra* Appendix 1.B.4.
190. *See infra* Appendix 1.B.1. The Supreme Court has noted the arbitrariness of the distinction in another context. *See* Tennessee v. Garner, 471 U.S. 1, 14 (1985) (criticizing the common-law rule allowing police to shoot fleeing felons but not fleeing misdemeanants).

C. Inherent Bias

The notion that felons should be excluded from jury service because they are inherently biased against the government may pass the rational basis test, but that is meaningless from a policy standpoint. The inherent bias theory is inconsistent with broad participation in the venire and with trust in the integrity of voir dire. Other groups that are highly likely to be biased in certain cases are, nonetheless, allowed into the venire and screened individually. Only felons are automatically excluded *en masse*. The notion that felons are so biased against the government that they must be banned from even going through voir dire is not persuasive.

The core of the inherent bias argument is that felons remain adversarial to the government, and will sympathize unduly with any criminal defendant.[191] Alternately, a felon's "former conviction and imprisonment [may] ordinarily incline him to compassion for others accused of crime."[192] In other words, a felon will be less willing, if not unwilling altogether, to subject another person to the horrors of punishment that he has endured, and may engage in nullification. He may also exhibit mistrust of police and prosecutors, and give unduly short shrift to their testimony and arguments. One could argue further that a community with many felons probably suffers from high crime, a situation that would be worsened by turning over adjudicatory discretion to the criminals themselves, and alleviated by excluding them.[193]

All of this is undoubtedly an accurate description of how some felons would approach some criminal cases. It falls short, however, of justifying excluding all felons, per se, from all cases. Most obviously, the inherent bias argument does not explain why felons should be excluded from civil juries in cases where the government is not a party. Nevertheless, virtually every state fails to distinguish between the two types of trials.[194]

Another point is that many groups have generally strong biases in criminal cases. For example, in the case of crime victims, the justice system does not presume that they are *all* incapable of being objective in *all* trials, but it is concerned enough about the possibility that individualized analyses are performed. They are screened in voir

191. *See, e.g.*, *supra* text accompanying note 32.
192. State v. Baxter, 357 So. 2d 271, 275 (La. 1978).
193. *Cf.* Clegg, *supra* note 5, at 177 (making a similar argument in the context of felon disenfranchisement).
194. Only Oregon distinguishes between the two types of trials; Michigan did so until October 2003. *See infra* notes 398 (Michigan), 413 (Oregon).

dire, and if the crime was particularly traumatic, or if the type of offense was similar to the one then being tried, such jurors are presumably excluded by defense counsel, if not by the court for cause. Families of crime victims, victims of torts and their families, police officers, and many others are similarly screened.

Perhaps these disparate processes are justifiable because victims deserve more solicitude than perpetrators. Treating a would-be juror the same as other would-be jurors—presuming inclusion but testing for bias just in case—is not solicitude, though. The question is not why biased felons should be treated differently than the rest of the population, but rather why they should be treated differently than the rest of the *biased* population?

If the answer is only that felons are more likely to be biased than victims, there is a numerical problem similar to that with probity-based exclusion discussed above.[195] Because crime victims vastly outnumber convicted felons—not to mention close relatives of crime victims—eliminating just felons leaves plenty of unaccounted bias.[196] To the extent that voir dire and peremptories root out this other bias, the same processes could be applied to felons, while reducing the number of felons who are unduly excluded. Only if every, or almost every, felon is irretrievably biased against the government might it make sense to have a blanket exclusion of felons from criminal juries on these grounds.

Such a notion of universal, unidirectional bias is not particularly plausible. A felon could have other inclinations besides wanting to acquit a defendant. Indeed, most complaints about the presence of felons on juries are lodged by criminal defendants. To be sure, this is largely a function of defendants' powerful incentive to complain about any plausible basis for reversal of a conviction.[197] Nevertheless,

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195. *See supra* text accompanying notes 184-85.

196. The Justice Department once predicted, based on crime data from the 1970s and 1980s, a ninety-nine percent lifetime probability of being the victim of theft, and an eighty-three percent probability for rape, robbery, or assault. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LIFETIME LIKELIHOOD OF VICTIMIZATION 3 (1987). One study of Washington, D.C. jurors found that one-fourth of prospective jurors responded affirmatively when asked in voir dire if they or their close family members had been the victim of a crime, but 46% responded affirmatively when asked the same question by researchers in a non-courtroom environment. Richard Seltzer et al., *Juror Honesty During Voir Dire*, J. CRIM. JUST. 451, 455 (1991).

197. *See* State v. Hopper, 203 So. 2d 222, 244 (La. 1967) (asserting in a case rejecting a criminal defendant's challenge to the striking of a juror that "[h]ad [the juror] been accepted, these same [defense] attorneys would be arguing to the Court now, that this juror was incompetent"), *vacated on other grounds*, 392 U.S. 658 (1968); *cf.* Commonwealth v. Aljoe, 216 A.2d 50, 54 n.6 (Pa. 1966) ("It is well known by Judges and lawyers that in the selection of a jury, most defense lawyers welcome a person who has been previously convicted of a crime.").

some of the pro-conviction bias arguments they have made are at least potentially valid. For example, a felon who is on parole or probation, or who is still under the watchful eye of the local authorities, might wish to please the prosecutor's office by voting to convict.[198] Relatedly, a felon's experiences might lead him to develop such biases as a "callous cynicism about protestations of innocence," or an outsized desire to prove himself, "lead[ing] him to display an excess of rectitude."[199] A felon also might have a "hazing" mentality and be inclined to replicate the treatment he suffered from his jury by convicting the defendant. Alternatively, a felon might be a forceful advocate for acquittal, but knowing of his degraded status, the other jurors might be less inclined to follow his lead.[200]

Anti-government sentiments also may not be inherently inappropriate. A juror should be excluded for bias if he is so anti-government that he cannot follow his instructions and view the evidence as a reasonable juror. But what if a felon is *reasonably* skeptical of police and prosecutors? What if a felon is *reasonably* wary of convicting the defendant when he is not certain of the defendant's guilt? To the extent that inherent bias among felon jurors leads to legitimate skepticism, the automatic exclusion of felons is less acceptable, and smacks of viewpoint discrimination.[201] The practice of determining disqualifications for jury service based on viewpoints, rather than on ability to follow instructions and decide cases impartially, is highly suspect.

Courts do allow some viewpoint discrimination in jury selection, namely the exclusion from death penalty juries of people who have strong qualms about applying the death penalty.[202] But anti-death

198. *Cf. infra* note 479 and accompanying text (discussing a similar rationale for excluding those with pending charges from jury service). *But see* Young v. United States, 694 A.2d 891, 896 (D.C. 1997) (rejecting such an argument because of unlikelihood that the juror's parole officer had any interest in the result of trial).

199. United States v. Boney, 977 F.2d 624, 642 (D.C. Cir. 1992) (Randolph, J., dissenting).

200. *See infra* note 298 (citing an actual case in which a juror reported these facts).

201. Some might even argue that the likelihood of *nullification* is no reason to exclude felons either. In a provocative essay, former federal prosecutor Paul Butler discusses the phenomenon of black jurors nullifying prosecutions against black defendants in drug cases. Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 678 (1995). Butler's Essay suggests a presumption of nullification for nonviolent *malum prohibitum* crimes, and a presumption against nullification that is rebuttable for nonviolent *malum in se* crimes. *Id.* at 715. My statement presumes that those subscribing to Butler's views would likely be unwilling to exclude people whose convictions they feel should have been nullified in the first place.

202. *See* Lockhart v. McCree, 476 U.S. 162, 165 (1986) (noting that it is constitutionally permissible to remove jurors for cause whose opposition to capital punishment would impair their role as impartial jurors).

penalty jurors are not thrown out of the venire altogether; they are tested for bias during voir dire and excluded from the small subset of cases in which their views are so strong as to "substantially impair the performance of their duties as jurors."[203] Felons' ability to perform their duties, by contrast, are not rated at all. Ending felon exclusion thus would just make felons more like these death penalty jury castoffs.

A final inconsistency in the "inherent bias" argument emerges from the treatment of verdicts from juries that include a felon. If felons are really inherently biased, then any jurisdiction that allowed them on a jury would violate the constitutional requirement of jury impartiality. This, however, is not the case; exclusion based on inherent bias may be permissible, but it is not mandatory. Similarly, if within a single jurisdiction felons are considered so inherently biased that they cannot serve, one would expect that if a felon somehow slipped onto a jury, the resulting verdict would be reversed automatically, without the need to demonstrate actual bias. But this is not the case either, suggesting that in these jurisdictions the inherent bias theory is a convenience rather than a sincere belief.[204]

In sum, the inherent bias argument has little to commend it. It should be rejected, or at least seriously questioned, as a policy basis for excluding felons wholesale instead of screening them individually for bias.

D. Clemency

One defense of felon exclusion is that any felon deserving and desirous of serving on a jury can seek a pardon.[205] This argument is compelling in structural, abstract terms because it treats felons and their cases individually; thus it theoretically eliminates over-exclusion. Felon exclusion is only an injustice to the extent that there are improper exclusions—people who should be eligible for consideration for jury service but are not. Improper inclusions—people who should be excluded but are not—are troublesome too, but cannot result from felon exclusion. Unfortunately, reducing improper exclusions tends to increase improper inclusions, and vice versa. All improper inclusions can be avoided by not allowing any felons on juries, but this creates improper exclusions. All improper exclusions can be avoided by allowing all felons on juries, but this

203. *Id.*
204. *See infra* Appendix 1.B.4.
205. *Cf.* Otsuka v. Hite, 414 P.2d 412, 418 (Cal. 1966) (declining to strike down felon disenfranchisement in part because of the availability of pardons).

may cause improper inclusions. This problematic trade-off, however, only exists with one-size-fits-all solutions; with a clemency process, an initial rule that errs on the side of exclusion can be used, but then improper exclusions can be eliminated on a case-by-case basis.[206]

This approach harnesses the asymmetric incentives present in exclusion. Compare two felons who, assuming *arguendo*, know about their jury eligibility.[207] One felon lives in a state that excludes all unpardoned felons but he feels worthy of serving on a jury. The other felon lives in a state that allows all felons into the venire once their sentences expire, but he feels unreformed and unworthy of serving on a jury. It would seem that the former felon would be more motivated to rectify his situation (via clemency) than the latter felon would be to assert his unfitness.

Relying on clemency, however, is problematic. Pardon processes are typically small-scale and cumbersome.[208] Very few felons apply for restoration of their rights, and even fewer of those have their petitions granted.[209] A pardon is an exceptional remedy and requires a careful case-by-case review to ensure that the petitioner's case somehow falls outside the mainstream of felons' usual treatment. Like the naturalized citizen whose requisite knowledge of American history is superior to that of relatively ignorant natural-born citizens, the usual felon whose political rights have been restored may be overqualified to serve on a jury, while merely adequate felons remain in the cold.

The more case-specific the clemency process becomes, the more the process will be resource-intensive. Assuming that a state does not want to allocate too many of its resources in this way, it is forced to adopt a sweeping default rule with a small number of individualized exceptions. This is exactly the path that many states have followed. Most states reject most petitions and only those with compelling facts or significant references receive detailed consideration.[210] A few states use generalized rules to restore rights automatically upon the completion of a sentence.[211] One state restores rights automatically

206. *Cf.* KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 167-68 (1989) (discussing the usefulness of pardons in retributive punishment "when the lingering effects of a felony conviction add punishment beyond what is deserved").

207. *Cf. infra* Part II.E (discussing deficiencies in felons' awareness of their status).

208. *See infra* note 451 and accompanying text; Grant et al., *supra* note 3, at 1158-59 (criticizing state pardon and clemency processes).

209. *See infra* note 451 and accompanying text (using examples to show the rarity of pardons).

210. *See id.*

211. *See, e.g.*, *infra* notes 377 (Alaska), 399 (Minnesota), 409 (North Carolina), 425

only to first-time offenders.[212] Such approaches are efficient, but like any bright-line rule, they trade efficiency for accuracy and forgo the benefits of individualized treatment enjoyed by more cumbersome and restrictive processes.

Of course, there is another solution that avoids the one-size-fits-all problem without requiring as large an allocation of resources. Instead of excluding most felons and including a few exceptions via clemency, states can include most felons and exclude the exceptions via voir dire. Like clemency, this avoids the trade-off between improper exclusions and inclusions. Unlike clemency, it takes advantage of a system that is already in automatic and comprehensive use.

These are all policy decisions, and states can choose from a range of reasonable options to structure a program as they see fit, depending on their particular feelings about felon jurors. They can even combine approaches. For instance, a jurisdiction could err on the side of exclusion, make broad exceptions for categories of relatively worthy felons (e.g., nonviolent, not sentenced to prison, long ago), and allow for individual applications for clemency for the remainder.[213] Alternatively, a jurisdiction could err on the side of inclusion, make broad exceptions for categories of relatively unworthy felons (e.g., deceptive, recently released, repeat offenders) and rely more heavily on voir dire.[214]

E. Administration

As in any theoretical discussion, one must eventually return to reality. One reality of felon exclusion is that record keeping is not perfect or even very good. While some people might entertain a notion of the jury list as a computerized file from which names are deleted when their owners suffer convictions, the reality is much less formal. In fact, states typically rely on self-reporting to screen felons from the jury pool, asking those summoned for jury duty to check off a box on a form if they have been convicted of a felony.[215]

(Wisconsin). States whose process is this automatic are not listed in Appendix 1.A as having lifetime exclusion.

212. *See infra* note 378 (noting that the Arizona statute restores civil rights to first-time offenders after they complete their sentences).

213. *See, e.g.*, *infra* note 421 (noting that Vermont excludes only felons sentenced to prison).

214. As related in Appendix 1.A, several states limit exclusion to time spent in prison or under sentence. Arizona imposes a lifetime exclusion only if a felon is convicted more than once. *See infra* note 378 and accompanying text.

215. A sampling of jurisdictions revealed that reliance on self-reporting is common. *See* Telephone Interview by Jeff Jocks with Marilyn Tokarski, Baltimore

Unfortunately, self-reporting is inadequate.[216] Many jurors may misunderstand the felony/misdemeanor distinction or fail to remember their records in detail.[217] Some may misunderstand clemency, either because the law is confusing, or because they entertain peculiar notions—such as the felon who did not report his felon status because he was a born-again Christian and felt that he had been absolved of his sins.[218]

County, Maryland Jury Commissioner (Nov. 20, 2002); Telephone Interview by Jeff Jocks with Clyde Carson, Shelby County, Tennessee Jury Commissioner (Nov. 18, 2002); Telephone Interview by Jane Edwards with Henrico County, Virginia County Clerk's Office (Feb. 13, 2003). This was also the author's experience when, while writing this Article, he served on a criminal jury in Michigan District Court. *See also* Lance Salyers, Note, *Invaluable Tool vs. Unfair Use of Private Information: Examining Prosecutors' Use of Jurors' Criminal History Records in Voir Dire*, 56 WASH. & LEE L. REV. 1079, 1092 & n.87 (1999) (discussing problems with self-reporting).

216. The numerous cases dealing with illicit felon jurors who participate in cases and render verdicts make clear that the error rate is not negligible. *See, e.g.*, Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1058-62 (9th Cir. 1997) (explaining that a juror answered "no" to questions about criminal history despite a felony conviction and several misdemeanor convictions); *see also infra* Appendix 1.B.4. In one assessment, Joseph G. Weis reports that validity coefficients between official records and self-reporting of official records "are high, in the .8 [eighty percent] range." Joseph G. Weis, *Issues in the Measurement of Criminal Careers*, *in* 2 CRIMINAL CAREERS AND "CAREER CRIMINALS" 1, 13-14 (Alfred Blumstein et al. eds., 1986). That may be high by social science standards, but anything short of one hundred percent validity presents a problem in a legal context.

217. *See, e.g.*, United States v. Ippolito, 10 F. Supp. 2d 1311, 1312 (M.D. Fla. 1998) *vacated sub nom.* United States v. Carpa, 271 F.3d 962 (11th Cir. 2001) (discussing, forgivingly, a juror's "mistaking or misunderstanding the distinction between a misdemeanor and a felony or in misjudging the taxonomic effect of a withheld adjudication"); Salyers, *supra* note 215, at 1080 (describing a hypothetical juror who thinks a conviction was not a felony because the sentence was a fine). David Feige, *Bumble in the Bronx*, LEGAL AFFAIRS, July/Aug. 2002, at 22, depicts a real life example where a felon juror ends up on a jury and is charged with contempt. The following exchange took place with his public defender:

> "Look," I asked, "were you ever convicted of a felony?"
>
> "I don't think so," he said. "I mean, I got some time, but it was for possession, not sale." This seemed like a perfectly reasonable explanation to me. Most of the people I represent have some mistaken but understandable notions about the meanings of legal terms.
>
> "Did you want to be on a jury?" I asked.
>
> "Not at all," Fred said. "I got that thing in the mail and I didn't want them to put a warrant out on me, so I went down. I figured that since they sent it to me, I had to go."
>
> "Did the fact that you were in jail make it hard for you to send someone else to jail?"
>
> "Nah. On my last trial, I found the guy guilty."
>
> "Your last trial?" I asked, gulping.
>
> "Yeah, right there in that same building, a few years ago."
>
> Oh boy, I thought. Here we go.

Id. at 25. The juror was jailed and, after his release, was summoned again for jury duty. *Id.* at 27.

218. Commonwealth v. Kelly, 609 A.2d 175, 176 (Pa. Super. Ct. 1992). The *Kelly* Court vacated the judgment of the jury on which the man served and remanded for a new trial. *Id.* at 177.

Others may simply lie, for a variety of reasons. Some felons may be too ashamed to admit their record in "public."[219] Others might have a strong desire to get on the jury, perhaps out of an ironic desire to serve the system or, potentially, out of a desire to undermine it.[220] Indeed, research suggests that jurors—felons and non-felons—lie quite often in voir dire.[221]

In the absence of better maintenance of juror lists, two problematic asymmetries will persist. First, the most understanding and law-abiding felons will be excluded disproportionately more than less intelligent or iniquitous ones. Second, the prosecution in criminal cases will have an informational advantage over the defense because of the former's superior knowledge of, and access to, criminal prosecution histories. This is a problem not just where felons are supposed to be excluded but also where they are not.[222] While this problem may seem easily remedied, it raises complicated privacy concerns.[223]

In many cases, the same states that are so adamant about keeping felons off of juries seem wholly untroubled when one slips through and makes it onto a jury.[224] This may just reflect a belief that other safeguards reduce the potential danger. Voir dire is supposed to screen out biased or insufficiently intelligent jurors. Therefore, if a felon really should not be on a particular jury, he will be tossed out even if he slips past the per se felon exclusion. It may also reflect a realistic balancing of the practical costs and benefits of felon exclusion—the cost of absolutely perfect exclusion may exceed the cost of occasional mistakes, which in turn is outweighed by the benefit of broad-but-imperfect exclusion. As one court asserted, while discussing the biases of felons: "Because these antisocial feelings would often be consciously or subconsciously concealed . . . the risk of such prejudice infecting the trial outweighs the possibility

219. *Cf.* Salyers, *supra* note 215, at 1080 (describing a hypothetical juror who is humiliated by a prostitution arrest).

220. *See, e.g.*, Green v. White, 232 F.3d 671, 672-75 (9th Cir. 2000) (overturning a murder conviction because of the possibility that a felon juror lied about his status in order to serve on the jury and act upon prejudicial assumptions about the defendant); State v. Harris, 652 N.W.2d 585, 592-93 (Neb. 2002) (concluding that a felon juror deliberately concealed a criminal record in order to serve on a jury).

221. *See* Seltzer et al., *supra* note 196 at 452-53, 460 (reviewing literature and research indicating jurors' lack of candor during voire dire).

222. This is also a problem whether the defense generally wants felon jurors or not. The defense might mistakenly exclude someone, unaware he is a felon, or mistakenly include him, unaware he is a felon.

223. *See generally* Salyers, *supra* note 215.

224. *See infra* Appendix 1.B.4.

of detecting it in jury selection proceedings."[225] A state should be certain, however, that it truly believes that the costs balance this way, and that it sufficiently distrusts the adequacy of voir dire, before it imposes felon exclusion.

To be sure, jurisdictions cannot take for granted that other safeguards will exclude felons whose convictions are unknown to the parties. This Article has argued repeatedly that voir dire may be reliable enough to root out felons who are unfit for jury service, but if a felony conviction is relevant to this individualized inquiry, this confidence in voir dire must be tempered. To function properly, voir dire requires good information, and the data on criminal convictions are not always good. Then again, it is also not good for other crucial questions regarding bias.[226] In general, this may reflect a need to upgrade record keeping more than it justifies felon exclusion.

F. Racial Disparity

Reducing the representation of black men on juries by thirty percent without dissent is difficult to imagine, but felon exclusion does just that. Answering concerns about this racial disparity by pointing helplessly at the racial disparity in the commission of crimes, arrests, prosecutions, convictions, and imprisonment is not sufficient.[227] Those disparities—or at least their magnitude—are of recent origin, may reflect affirmative choices by legislators and prosecutors, and are far from inevitable.[228] Further, other facially neutral policies of jury administration also have a dampening effect on minority participation.[229] The imposition of civil disabilities is a legislative choice, not a requirement, and trumpeting the formal neutrality of their criteria "allow[s] self-serving, subjective statements of non-discrimination to trump racial reality."[230]

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225. Rubio v. Superior Court, 593 P.2d 595, 600 (Cal. 1979) (plurality opinion).

226. *See supra* notes 196, 216 (denoting the unreliable aspects of voir dire).

227. Harvey, *supra* note 5, at 1157-59 (describing the comparatively harsher sentencing of black criminals).

228. *See supra* note 122 (discussing the racial imbalance that pervades the imprisonment rate for drug crimes).

229. *See* Fukurai et al., *supra* note 3, at 201-05 (discussing the racially disparate effect of residency requirements, blue ribbon juries, smaller-than-twelve juries, and non-unanimity rules). *See generally* Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT'L BLACK L.J. 238, 239 (1994) (examining "the variety of legal and non-legal factors that play a significant role in Black representativeness on both petit and grand juries").

230. Jeffrey S. Brand, *The Supreme Court, Equal Protection, and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 622. Brand is writing about the *Batson* line of cases, not civil disabilities; the self-serving statements of non-discrimination to which he refers are excuses given for using peremptory challenges against black jurors, such as living in a neighborhood with a "history of bad relations with the

Limiting felon exclusion would reduce racial disparities in absolute terms, but it would not reduce them in relative terms, and gaping imbalances would remain. This can be seen from federal jury numbers. Instead of eliminating 29 to 37% of black men and 16 to 21% of all black adults versus 6.5% for the entire adult population, excluding current inmates alone would bar "only" 8% of black men and 4% of all black adults versus 1% of the entire adult population.[231] Barring those under sentence would yield intermediate figures of 12%, 7% and 2% respectively.[232]

Racial disparities are worth eliminating, all other things being equal. The catch is that all other things are not equal. Felons may be more likely to be unsuitable jurors than non-felons; indeed, it is hard to gauge the effect of felon exclusion precisely, because felons would likely be challenged and dismissed disproportionately even if they were eligible to serve. In the absence of careful consideration and persuasive reasons to exclude felons from juries, however, the sheer size of these racial disparities should give pause to any jurisdiction that is satisfied with the racial neutrality of its juror qualification standards.

G. Prosecutorial Self-Dealing

Another policy argument against felon exclusion is that it gives prosecutors too much power to control the content of juries in criminal cases over the long term. Prosecutors choose who to prosecute; those who they prosecute successfully are taken out of the jury pool, and those who they leave alone are not. This is a serious "agency cost" given that juries are supposed to be an independent "hedge against the overzealous or mistaken prosecutor."[233]

As with the racial disparity problem, self-dealing is only an issue if there is a high prosecution rate or a significant exercise of prosecutorial discretion. For example, when Jim Crow laws kept jury

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police." *Id.* at 613. The point is that defending the racial disparity present with felon exclusion on grounds that it is a neutral criterion overlooks the reasons for the disparity and begs the question of whether all felons are actually unsuitable for jury service. *Cf.* King, *supra* note 7, at 768-72 (discussing the uses of "affirmative action" in rectifying disparate representation of minorities on juries). Professor King recognizes that race-conscious measures may appear unfair and promote the notion that a juror's race determines his or her vote, and so she advocates exhausting race-neutral methods first. *Id.* at 768-71.

231. Uggen et al., *supra* note 178, at 16-17. If felons are not banned outright, they might still be disproportionately struck for cause or via peremptory strikes. This might push the disparate racial impact back up, at least partially.

232. *Id.* at 17.

233. Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

boxes lily white—even as late as the 1970s—they did so by means of prosecutorial discretion.[234] A prosecutor cannot make a white person black, but he can make a non-felon a felon if the non-felon meets him halfway. By contrast, if prosecution rates are low and resources are high enough that prosecutors do not have to choose to overlook large numbers of crimes and criminals, their discretion will not distort the content of the jury venire.

If a prosecutor wants certain criminals off of his juries but can tolerate others, he need only prosecute crimes accordingly. If a defendant in a criminal case wants to reduce the number of (unconvicted) drug dealers, or tax evaders, or illegal gun owners on his jury, however, he must rely on his intuition, on the honesty of the jurors (not all of whom would answer the question "are you a law breaker?" honestly at voir dire), and on his peremptory challenges.

Admittedly, stacking the deck on future juries seems like, at most, a peripheral factor in a prosecutor's decision of whom to prosecute, compared to more direct factors like crime control and immediate cost-benefit issues. Then again, one relatively direct constraint on prosecutorial discretion is political accountability, either through the direct election of local prosecutors or their appointment by state and federal superiors. This raises the specter of self-dealing very prominently in the case of felon disenfranchisement—the prosecutor can target for prosecution (and thus remove from the electorate) people or groups that are likely to vote against him. In the case of felon exclusion from juries, the effect is less direct but still worth considering—the prosecutor can target for prosecution (and thus remove from the venire) people or groups that are more likely to be unsympathetic jurors and to interfere with his agenda.[235]

H. The Ideal of Individualization

The theme of individualization has recurred throughout this Article, and it is worth summarizing and elaborating here. As with other civil disabilities, most felon exclusion statutes treat all felons uniformly.[236] In sharp contrast to the blunt imposition of civil

234. *See* Turner v. Fouche, 396 U.S. 346, 358-59 (1970) (objecting to the fact that ninety-six percent of the uses of the discretionary "unintelligent or not upright" grand jury disqualification standard were against black citizens).

235. To take the starkest of examples, prosecutors afraid of potential nullifiers could increase their prosecution of them. *Cf.* Butler, *supra* note 201, at 715 (advocating nullification of nonviolent drug prosecutions by black jurors).

236. Only a few states provide distinctions. *See infra* notes 378 (Arizona) (treating repeat offenders more harshly), 382 (Connecticut) (disqualifying anyone in prison, convicted of a felony within seven years, or with pending felony charges), 392

disabilities, the other significant elements of a criminal's path through the justice system are individualized. Only some wrongdoers are arrested, only some arrestees are charged. The precise charges leveled may be based even on a compromise with the prosecutor. Many criminal defendants are acquitted, and those that are not receive sentences based on their personal histories and the details of their particular offenses.[237] Parole, probation, and clemency are also generally individualized.

Similarly, jury qualification is otherwise a largely individual matter.[238] Voir dire and peremptory challenges are individualized, and they are based not just on the juror but on the case. For example, a juror who is struck in a slip and fall civil case might be perfectly acceptable in a murder case. By the same token, a just-released rapist would not be a very good juror for a rape trial, but someone convicted forty years ago for defacing a gravestone might be just fine.[239]

(Kansas) (disqualifying anyone under sentence or convicted of a felony within ten years of service), 397 (Massachusetts) (disqualifying anyone in prison or convicted of a felony within seven years), 423 (Washington) (providing a mechanism for early relief from civil disabilities); *cf.* Note, *supra* note 28, at 403 (complaining that the government often classifies people as "forever unfit" as opposed to examining the particular circumstances of their cases); *id.* at 423 (decrying "automatic, indirect sanctions following upon a conviction without regard to the merits of the individual involved") (quoting *Governor's Memoranda*, MCKINNEY'S SESSION LAW NEWS, July 10, 1966, at A-266).

237. While sentences are individualized, they are much more uniform than they were in previous decades. *See* Harcourt, *supra* note 122, at 105-07 (discussing shift from individualized treatment of offenders to "mandatory sentences, fixed guidelines, and sentencing enhancements" and to "actuarial" methods of fighting crime).

In an article critiquing the Federal Sentencing Guidelines, Professor Alschuler makes some cogent points that are ready analogies for felon exclusion. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991). He notes the distinction between treating like cases alike and treating all cases alike. *Id.* at 916. The Sentencing Guidelines, like felon exclusion, treat like cases alike only in the sense that they *define* them as like cases. *Id.* at 917. By analogy, then, instead of defining all felons as unsuitable for jury service and congratulating themselves for being consistent when they apply such a sweeping rule, jurisdictions could distinguish between different sorts of crimes, different sorts of criminals, and different sorts of juries; they could create paradigmatic cases and allow judges to reason by analogy and make individualized determinations within the bounds of a "common law" of sentencing. *See id.* at 939-49 (making a similar proposal for sentencing in general); *infra* Part V.

238. To the extent that there are other objective qualifications, such as literacy, age, and infirmity, they are distinguishable. *See infra* notes 277-80 and accompanying text (describing such classes of people statutorily excluded from jury service in certain states).

239. *See* Grant et al., *supra* note 3, at 1155 & n.2 (decrying the imposition of civil disabilities based on a potential one-year sentence under a Massachusetts gravestone defacement law (citing MASS. ANN. LAWS ch. 272, § 73 (1968))).

A final analogy is instructive. Felon jury disqualification shares historical roots with felon witness disqualification.[240] The common law rejected the notion that a known felon or convict of *crimen falsi* could give reliable testimony, given that he had revealed himself to be generally dishonest and antisocial.[241] To find someone liable or guilty on the basis of the testimony of a scoundrel would taint the verdict and, by extension, the authority of the court that issued it. The truth—the object of the trial—needed protection from such unsavory influences.[242] The parallels to felon exclusion are obvious. At some point, though, the common law recognized that reliability was a matter of degree, and that the entire process of presenting evidence to the fact finder rested on the assumption that it could decide for itself, based on all of the variables, whether testimony was entitled to consideration or not.[243] The cost to society of excluding evidence that was at least potentially reliable was greater than the benefit of continuing to shun criminals. Just because all testimony was subject to impeachment did not mean that felon witnesses were placed in the same position as other witnesses, considering that felon witnesses offered more fodder for impeachment. But the outright ban on felon testimony faded into history.

Just as the common law eventually recognized that the mechanism by which all other testimony was gauged could be applied to felon testimony, policy makers today could recognize that the same jury selection process used for non-felons would be valid for felons too. Further, just as the common law of evidence recognized that the costs of erring on the side of exclusion were not worthwhile, so too could the common policy of jury service.

I. Conclusion

There are many reasons to exclude released felons from juries, but current policy is based more on inertia than careful consideration. Felon exclusion is arbitrary, overinclusive, underinclusive, difficult to administer, presents agency costs, and threatens racial equality. The

240. *See infra* note 517 and accompanying text.

241. *See* 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 519, at 725-29 (James H. Chadbourn rev. ed., 1979) (explaining that a man who has been convicted of an egregious crime cannot be trusted).

242. *See id.* at 726 (explaining that, alternatively, an honest man's oath is credible).

243. *See* GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL EVIDENCE 294-95 (4th ed. 2001) (describing modern practice under FED. R. EVID. 609); 2 WIGMORE, *supra* note 241, § 519, at 727 (explaining that the aforementioned common-law rule has been abolished).

courts of those jurisdictions that do allow felons on juries have not crumbled under the weight of opprobrium or bias; to conclude otherwise would be to conclude that the general jury selection process for non-felons is inadequate. As a matter of general policy, felon exclusion is questionable at best. As the next two Parts discuss, it is also questionable as a matter of jury and penal policy.

III. THE NATURE OF THE JURY

In discussing whether felons should ever serve on juries, it is worth considering if *anyone* should. Despite the centuries-old grounding of the jury in the Anglo-American legal tradition (or perhaps because of it), it is not particularly clear why the jury is used today. Some theories and thoughts on the nature of jury trial have coalesced in the literature, however, and they are elaborated in this Part. Cross-cutting these themes and this discussion are three general justifications for jury trials: They are beneficial for society, litigants, and the jurors themselves.[244] Felon exclusion is not fatally incompatible with these ideals, but it does them a disservice. Felons are part of the community, they would bring specialized knowledge and experiences to the task of finding and interpreting facts, and they stand to benefit greatly from the engagement that jury service demands.

A. The Nature of Jury Service and the Nature of Citizenship

If jury service is a "basic right[] of citizenship,"[245] it is not a particularly vigorous one, and it is subject to substantial limitation and qualification. Large swathes of the citizenry are routinely barred from juries, and the Supreme Court has repeatedly asserted that "[s]tates [may] prescribe relevant qualifications for their jurors,"[246]

244. *Cf.* Lippke, *supra* note 5, at 556 (classifying "interests secured by a right to participation in democratic political processes" as societal—improving outcomes, or personal—improving status or civic education).

245. Lockhart v. McCree, 476 U.S. 162, 176 (1986) (referring to complete exclusion from jury service as "substantial deprivation of [a] basic right[] of citizenship"); *see also* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 131, 138 n.9 (1994) (referring to women's constitutional right to serve on juries); United States v. Caron, 941 F. Supp. 238, 255 (D. Mass. 1996) (describing jury service as a "crucial civil right"); *cf.* Carafas v. Lavallee, 391 U.S. 234, 237 (1968) (using petitioner's exclusion from jury service as a basis for a habeas corpus challenge to a sentence already served).

246. Carter v. Jury Comm'r, 396 U.S. 320, 332 (1970); *see also* Brown v. Allen, 344 U.S. 443, 474 (1953) (rejecting cross-section challenge so long as jury list "reasonably reflect[ed] a cross-section of the population *suitable in character* and intelligence for that civic duty") (emphasis added), *overruled on other grounds by* Townsend v. Sain, 372 U.S. 293, 313 (1963).

and that "[j]ury service is a duty as well as a privilege of citizenship."[247] Some state courts have gone further, saying that jury service is no right at all, and is instead just "a duty imposed by the state on such terms as the state may set."[248] The rights of the parties are protected more scrupulously than those of jurors, who are seen as simply performing a democratic chore.[249] After all, it is called jury "duty." Those citizens who, after being randomly selected, do qualify for petit jury service are subject to dismissal on practically any ground, via peremptory challenges. It is therefore a bit odd to think of jury service itself as a right; at most it is a right to have a fair *chance* at jury service.[250] Further mitigating the notion of jury service as a "right" is the fact that jury service is distasteful to many people.[251] One might ask whether excluding a person from jury service is really a penalty, or if instead it is actually something of a reward.[252] Given how unpleasant most people find being called for jury duty, one could almost suggest that felons be *required* to serve on juries to reduce the burden on law-abiding citizens.[253] Excluding felons is perfectly sensible under such an understanding.

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247. Thiel v. S. Pac. Co., 328 U.S. 217, 224 (1946); *see also Carter*, 396 U.S. at 330 (reiterating that jury service can be considered a right, privilege, or duty).

248. State v. Bojorquez, 535 P.2d 6, 12 (Ariz. 1975) (in banc); *see also* State v. Haynes, 514 So. 2d 1206, 1211 (La. Ct. App. 1987) (distinguishing the rights to vote, work, and hold office—the fundamental rights of citizenship—from the more legislatively limitable ability to serve on jury).

249. *See, e.g.*, WIS. STAT. ANN. § 756.001 (West 2001) ("(1) Trial by jury is a cherished constitutional right. (2) Jury service is a civic duty."); *see also* Adams v. Superior Court, 524 P.2d 375, 379 (Cal. 1974) (explaining that although trial by jury is part of the constitutional system of justice, jury service is considered more of a duty or privilege than a right).

250. *See Adams*, 524 P.2d at 379 (stating that citizens cannot demand to serve on a jury; they are only entitled to be considered for service); *Jury Selection: A Critique*, *supra* note 4, at 1124 (explaining that an individual's right to serve on a jury cannot be distinctively identified because jury lists only contain a representative sampling rather than all eligible jurors).

251. *See, e.g.*, *Jury Selection: A Critique*, *supra* note 4, at 1124 (characterizing jury service in the eyes of many potential jurors as an "onerous" burden rather than a right). Though distaste for jury service is much storied, most people who actually serve on juries look favorably upon their experience. *See* George L. Priest, *Justifying the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 103, 104-05, 110 (Robert E. Litan ed., 1993) (describing "nearly uniform[]" perception of jury service by civil jurors as "interesting," "important," and "educational"); *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408, 1440 (1997) [hereinafter *The Civil Jury*] (stating that most citizens' experiences serving as jurors are positive).

252. This question has been important to some courts as a legal matter too. *See, e.g.*, Garrett v. Weinberg, 31 S.E. 341, 344 (S.C. 1898) (explaining that serving on a jury is a public duty that is enforceable by penalties and is usually regarded as a burden rather than a privilege); *see also* William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721, 1730 (2001) (criticizing Justice Powell's opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986), for treating jury service as "a pain in the neck").

253. My colleague Mae Kuykendall deserves credit for this proposal, which she

But if jury service is not quite a "right," it is not just a chore either. So what is it? Comparing jury service to voting is helpful because felon disenfranchisement parallels felon exclusion in important ways. Both practices are often justified in the name of probity and propriety.[254] Both voters and jurors play a part in democratic self-government, controlling the power to lead in one case and the power to punish or enrich in the other. But voting is a more robust right. About four times as many states ban felon jurors for life as ban felon voters for life.[255] The Constitution speaks of a right to vote, but not a right to serve on a jury.[256] The right to vote is comprehensive—any voter can vote, even if most people usually do not—while jury service is a matter of a chance selection and the whim of the parties. Conversely, voting is voluntary, while jury service is coerced.[257]

While jury service resembles voting in some ways, it resembles the (erstwhile) draft and militia systems in others. In each case, the government summons a citizen to appear, tests him for fitness, and coerces him to serve if he passes muster.[258] It gives him and his squadron awesome powers over the lives of others, but for most of the time it just uproots and bores them. More to the point of their nature as rights, though, even if an individual does not want to be drafted—either into the military or onto a jury—at least a draftee is considered part of the community.[259]

When we focus on self-government in this way, the complex interplay that the jury exemplifies takes shape; the political rights of citizens, marshaled in the service of the political institutions of a democratic republic, marshaled in turn in the service of the civil rights of citizens. Defining the right to serve on a jury in this way—as

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made only somewhat facetiously.

254. *See The Purity of the Ballot Box*, *supra* note 5, at 1301-03 (discussing the policy justifications for felon disenfranchisement); *supra* Part I.B.2 (discussing the rationales of felon exclusion).

255. *See infra* note 588 and accompanying text (listing the eight states that still disenfranchise felons for life).

256. The Voting Amendments all mention "the right of the citizens of the United States to vote." U.S. CONST. amends. XV, XIX, XXIV, XXVI. The only "rights" concerning juries that the Constitution mentions are those of criminal defendants and civil litigants. *Id.* amends. VI, VII.

257. *See* ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 63 (2001) (noting the uniqueness of jury's forced participation).

258. *See* Akhil Reed Amar, *The Second Amendment: A Case Study in Constitutional Interpretation*, 2001 UTAH L. REV. 889, 894 (analogizing juries to militias).

259. For an important discussion that goes further in linking juries and militias, see *id.* (linking juries and militias in the Founders' world-view); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1171, 1183-89 (1991) (analogizing militias and juries as localist, democratic, educative, and temporary institutions).

a political right rather than a civil right—clarifies the fact that jury duty is not simply some right to be free from government interference, but rather an amalgam of right and responsibility and of power and duty.[260] Viewed in this light, the irony of felon exclusion—that it strips a right from a felon by lifting a disagreeable burden from him—evaporates. Both the right and the burden are the product of a broader sense of citizenship. Excluding a felon from a jury means excluding him from society even after his term of direct supervision has ended. It also means exempting him from a responsibility that other members of the community share, and increasing the burden on those members.

This implicates the theories of social contractarianism and civic republicanism. An analysis of felon exclusion under either theory could be the subject of its own article; both theories are too broad and diverse to be summarized and applied mechanically here.[261] What is evident is that both theories can be deployed either in favor of or against felon exclusion.

Civic republicanism emphasizes moral competence and civic responsibility as important components to any understanding of government, citizenship, and rights.[262] The jury is a quintessential civic republican institution because it brings the moral authority of the community to bear in self-government, and it demands dutiful participation, dialogue, and service from average citizens.[263] Felons can fairly be said to have demonstrated through their crimes that

260. *See* Eskridge, *supra* note 252, at 1723 (discussing Francis Lieber's nineteenth-century theory that a citizen's relationship with the state involves the "exercise of civic virtue," rather than mere compliance with its laws).

261. Articles discussing civic republicanism and social contractarianism in the context of civil disabilities include Demleitner, *Preventing Internal Exile*, *supra* note 5, at 158 (discussing theoretical bases for denying "citizenship rights" to felons); Ewald, *supra* note 5, at 1095-120 (critiquing social contract and civic republican justifications for felon disenfranchisement); Furman, *supra* note 5, at 1221-26 (discussing the self-contradiction of Rawlsian theories when applied to felon disenfranchisement); and *The Purity of the Ballot Box*, *supra* note 5, at 1304-09 (discussing social contract and civic republican theories in the context of felon disenfranchisement).

262. *See* Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 806-10 (1993) (discussing civic virtue, which is "the leitmotif of all civic republican theory"). Obviously there is much more to civic republican theory than can be summarized in this single phrase. *See id.* at 804-06 (discussing the difficulty of defining civic republicanism).

263. *See* Taylor v. Louisiana, 419 U.S. 522, 531 ("[S]haring in the administration of justice is a phase of civic responsibility.") (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting)); SWARD, *supra* note 257, at 59 (stating that, in the United States, the jury is the sole "civic republican or communitarian government institution").

they lack the moral competence and civic responsibility necessary for participation in self-government.[264]

On the other hand, some reckonings of civic republicanism emphasize the role of government and civic participation in *nurturing* moral competence and civic responsibility.[265] The jury is also important as a civic republican institution because it educates and nurtures citizens to be citizens, and it disserves these goals to exclude the most civically needy citizens.[266] While placing the power of the community in the hands of irreparable moral monsters would be counterproductive, a civic republican might at least want to try to rescue those felons who are morally salvageable. Excluding a felon who was convicted of a single crime during his youth, for example, and who has not reoffended since, harms the community by limiting community participation, and the felon by foreclosing his moral development.[267] Excluding someone with repeated felon convictions who appears incapable of or uninterested in performing his civic duty is another matter altogether. Jurisdictions could make such distinctions, however, rather than excluding all felons.

The application of social contractarianism yields similarly ambiguous results. At first blush, the notion of a social contract

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264. This undertone can be detected in cases approving felon exclusion in the name of defending the probity of the jury. *See supra* Part I.B.2 (discussing the rationales of felon exclusion). An analogous argument has been made in felon disenfranchisement cases. *See, e.g.*, Washington v. State, 75 Ala. 582, 585 (1884) ("[O]ne rendered infamous by conviction of felony . . . is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship."); *The Purity of the Ballot Box*, *supra* note 5, at 1307-08 (discussing cases that argue that felons lack the moral competence to vote in elections); *see also* Elizabeth Simson, *Justice Denied: How Felony Disenfranchisement Laws Undermine American Democracy* (Mar. 2002) (attributing felon disenfranchisement to the "exclusionary tendency" of civic republicanism), *at* http://www.adaction.org/lizfullpaper.pdf (on file with the American University Law Review).

265. *See, e.g.*, MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 128-33 (1996) (discussing the Founders' belief that the form of government would cause citizens to become attached to their nation, which would promote the virtue they believed was necessary for the success of a republican government); *The Purity of the Ballot Box*, *supra* note 5, at 1309 (stating that one aim of republicanism is to instill civic virtue in citizens).

266. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 226 (Bruce Frohnen ed. & Henry Reeve trans., 2002) ("The jury, and more especially the jury in civil cases, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions."); Ewald, *supra* note 5, at 1112 (describing contemporary republicans as believing that voting can "redeem wrongdoers"); *infra* Part III.D (discussing the role of the jury as a forum for civic education and democratic engagement); *cf.* SANDEL, *supra* note 265, at 348 (praising federalism for creating civic activity and political power that engenders virtue and prepares citizens for self government).

267. *See The Purity of the Ballot Box*, *supra* note 5, at 1309 (discussing a civic republican self-critique favoring an increased sense of inclusiveness).

justifies felon exclusion quite easily: "A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact."[268] Such a black-and-white notion of citizenship may have been appropriate in the age of "civil death" statutes and property qualifications for voting, but in an age where citizenship is seen as more universal and immutable, it no longer goes without saying.[269] A felon who has served his sentence—who has paid his debt to society—could just as easily be deemed to have re-contracted with society. Even before returning to society, a felon retains some constitutional rights; once he has returned he regains more, including in most states the right to work, vote, and serve in public office.[270] This belies the notion that a felon is wholly excluded from the social contract for life.[271]

Classifying jury service as an inferior right that can be stripped casually from inferior citizens is insufficient. Jury service is more textured. It is an amalgam of a right, a duty, and a badge of community membership, and excluding felons deprives them of all of this. Viewed most simply, being a felon may still be incompatible with the essence of the citizen-juror, but a more modern and nuanced

268. Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967) (Friendly, J.). *Green* discussed disenfranchisement, but the point is applicable to juries. *See also* Ewald, *supra* note 5, at 1073-75 (discussing the well-engrained Lockean notion that criminals give up the liberties and protections that the social contract affords); *The Purity of the Ballot Box*, *supra* note 5, at 1304-07 (citing *Green* and analyzing contractarians' approach to felon disenfranchisement).

269. *See* Ewald, *supra* note 5, at 1107-08 (summarizing the democratic shift of modern liberal contractarian thought away from Locke); Furman, *supra* note 5, at 1219-20 (discussing Supreme Court precedent that state citizenship is an inalienable right that cannot be revoked as a punishment); *infra* note 520 (explaining that felons were considered "civilly dead" and forfeited their civil and property rights); *see also The Purity of the Ballot Box*, *supra* note 5, at 1306 (discussing the Rawlsian notion that some rights pursuant to social contract cannot be bargained away).

270. *See infra* notes 328-29 and accompanying text (discussing felon restrictions on voting and holding a public office).

271. Contractarianism has a more liberal, nurturing side as well. *See The Purity of the Ballot Box*, *supra* note 5, at 1306 (stating that the aim of a social contract is to allow citizens to realize freedom and development, not simply repressing impulses, which is why a single criminal act does not destroy the entire contract); *see also* Harvey, *supra* note 5, at 1170 (applying Lockean and Rawlsian theories to argue against felon disenfranchisement); Afi S. Johnson-Parris, Note, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109 (2003) (condemning contractarian justifications for felon disenfranchisement on grounds that the social contract is unconscionable). Additionally, to the extent that felon exclusion is harsh treatment, it exposes an illiberal ambivalence in Rawlsian thought toward the inevitability of crime in modern society. *See* Furman, *supra* note 5, at 1231 (arguing that a certain amount of crime is part of a normal, healthy society whose norms permit an amount of laxity).

view is that the essence of the citizen-jury is incompatible with excluding every felon.

B. For Society: Democratic Self-Government

To a degree often unappreciated, jury trials serve the interests not just of jurors and litigants but of the public as a whole.[272] As G.K. Chesterton once wrote:

> Our civilization has decided, and very justly decided, that determining the guilt or innocence of men is a thing too important to be trusted to trained men. . . . When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, it uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round.[273]

This is the essence of democratic self-government. Having a group of citizens decide who is guilty of a crime or liable for damages—as opposed to having elites decide—is perhaps the most feasible way to have cases decided by "the community."[274] For all of their learning and training, judges—even elected ones—do not represent the community as well as a jury.[275]

To be representative, a jury must stand for the whole community, not just subsets of it.[276] Given the semi-skilled nature of the juror's task, it is necessary to impose some qualifications; to understand testimony and be able to deliberate about it, jurors must be physically and mentally capable of understanding testimony and

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272. *See supra* text accompanying notes 52-54; HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (1981) (stating that the Anti-Federalists' concern with preserving jury trials was rooted in protecting the role of citizens in government administration more than in protecting individual rights); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1174 (1995) (explaining that the jury's constitutional function serves the people rather than litigants because it allows the people to participate in the administration of justice and democracy).

273. Shirley S. Abrahamson, *A View from the Other Side of the Bench*, 69 MARQ. L. REV. 463, 493 (1986) (quoting G.K. Chesterton, *The Twelve Men*, *in* TREMENDOUS TRIFLES 56-58 (1968)).

274. That it is proper as a matter of policy to have the community adjudicate cases is something of an article of faith. *See* Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 50 (1994) (decrying the typical facile conflation of democracy and juries that avoids analyzing adjudicatory competencies of the latter).

275. *See* United States v. Caron, 941 F. Supp. 238, 255 (D. Mass. 1996) (describing jury service as the most important example of direct democracy in America). A single elected judge cannot be as representative as a group of six or twelve randomly selected jurors.

276. *See* Leipold, *supra* note 7, at 1006-07 (stating that a verdict rendered by a diverse, rather than a homogeneous, jury pool would be more likely to mirror local sentiment).

communicating with the other jurors in English.[277] Jurisdictions may also have minimum age, residency, or citizenship requirements.[278]

None of these qualifications threaten the representativeness of the jury as felon exclusion does. Automatic physical and mental disqualifications have largely receded.[279] Age and residency requirements are inherently temporary. Excluding aliens interferes with representativeness, especially in communities with large immigrant populations, but compared with getting a pardon, it is much easier, more common, and a matter of personal choice to be naturalized.[280]

By contrast, felon exclusion is a permanent disqualification of about 6.5% of the adult population nationally, and much more in urban and poor communities.[281] Admittedly, the fact that felon exclusion affects many people does not answer the question of whether felons deserve to be considered part of "the community" as a

277. *See, e.g.*, 28 U.S.C. § 1865(b)(2)-(4) (2000) ("In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form; (3) is unable to speak; (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service.").

278. Some states require jurors to be older than eighteen. *See, e.g.*, ALA. CODE § 12-16-60 (1995) (requiring jurors to be over the age of nineteen); MISS. CODE ANN. § 13-5-1 (2002) (requiring jurors to be twenty-one); MO. ANN. STAT. § 494.425 (West 1996) (requiring jurors to be twenty-one); NEB. REV. STAT. § 25-1601 (1995) (requiring jurors to be over nineteen). Residency requirements vary; the most extreme is one year. *See, e.g.*, 28 U.S.C. § 1865(b)(1) (2000) (requiring prospective jurors to live in the judicial district for one year); ALA. CODE § 12-16-60 (1995) (requiring prospective jurors to be residents of the county for more than one year); LA. CODE CRIM. PROC. ANN. art. 401(a)(1) (West 2003) (requiring prospective jurors to live in the judicial parish for more than one year). No state uses non-citizens as jurors; LA. REV. STAT. ANN. § 13:3041 (West 1991) (incorporating the criminal standard by reference for civil juries).

279. *See* Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 WILLAMETTE L. REV. 1, 18-24 (1997) (describing cases invalidating statutes that automatically excluded physically disabled persons from jury service). Weis notes the recent liberalization in treatment of disabled jurors and explains that state statutes no longer automatically exclude disabled potential jurors, though he details and criticizes the less absolute barriers that remain. The distinction between per se exclusion and case-by-case exclusion is, of course, at the heart of this Article. *Cf. id.* at 40 (noting that, although there are no longer per se exclusion statutes, judges can achieve the same effect of excluding disabled jurors by finding them incapable on a case-by-case basis).

280. Courts have accepted non-citizen exclusion, even when the numbers are stark. *See* United States v. Gordon-Nikkar, 518 F.2d 972, 977-78 (5th Cir. 1975) (finding no violation of cross-section requirement even where 30% of the population were resident aliens); United States v. Morillo, 34 F. Supp. 2d 105, 106 (D.P.R. 1999) (discussing cases where non-citizens were lawfully excluded from jury service).

281. *See infra* text accompanying note 499 (discussing the racial demographics of the adult felon population).

theoretical or legal matter.[282] But if the numbers become sufficiently high, the notion of the jury system as self-government begins to fade. If community participation is truly an essential underpinning of "our democratic heritage," and that absence injures "the democratic ideal reflected in the processes of our courts," then a system of qualification that eliminates such a wide swath of the community is suspect.[283]

C. For Parties: Impartial, Canny, Unassailable Decision Makers

Jury trials would not be held if criminal defendants and civil litigants did not want them, regardless of their benefits to society and the jurors themselves.[284] This confidence in juries has both an idealistic and a cynical basis. The idealistic notion is that juries are good at deciding cases. A group of six or twelve jurors is considered "a superior fact-finder," compared with a single judge, because of "the knowledge and experience that citizen-jurors bring to bear on a case."[285] Juries are designed and tested to ensure their impartiality. They bring a sense of shrewdness, common knowledge, and "street smarts" to the process that is missing from cosseted, elite judges. Jury decision making is usually done in a "black box"—so long as a case can reasonably be decided for either party, the jury chooses the winner and no one other than the jurors needs to know why. From judges, by contrast, extra accountability and openness in the form of written findings are expected. Juries thus possess a superior sort of legitimacy that allows society to be comfortable with having lives and livelihoods altered by untrained, unaccountable, ordinary people. Parties are essentially choosing this impartiality, these sensibilities, and this legitimacy when they choose to have a jury trial.

But that is the idealistic vision. Alternatively, criminal juries might persist because pro-jury defendants perceive juries not as impartial and shrewd, but rather as sympathetic and naïve. Similarly, the

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282. *See supra* Part III.A (discussing the role of the jury under civic republican theory); *cf.* Ewald, *supra* note 5, at 1045 (stating that the contradictory paradoxes of inclusion and exclusion are part of American political theory and that of other democracies).

283. Rubio v. Superior Court, 593 P.2d 595, 605 (Cal. 1979) (Tobriner, J., dissenting) (quoting Ballard v. United States, 329 U.S. 187, 195 (1946)). Tobriner is not making this precise point, but he uses the quoted language.

284. *See* Patton v. United States, 281 U.S. 276, 293-98 (1930) (refusing to hold waiver of criminal jury trial unconstitutional despite language of U.S. CONST. art. III, § 2, cl. 3, that "The Trial of all Crimes . . . shall be by Jury"); Bank of Columbia v. Okley, 17 U.S. (4 Wheat.) 235, 244 (1819) (holding that the right to civil jury trial can be waived).

285. *In re* United States Fin. Sec. Litig., 609 F.2d 411, 431 (9th Cir. 1979) (approving the use of a civil jury in complex civil litigation).

persistence of the civil jury may reflect the fact that when both parties perceive the predilections and tendencies of their judge the same way, it is likely that one of them will want a jury to decide the case instead of the judge. Moreover, there are plenty of cases in which neither party trusts a jury to handle the case. Thus, parties may choose jury trials—when they do—not because of juries' virtues, but because of their self-interested gaming of the system. If the cynical explanation controls, it does not matter whether felons are included on juries or not; the parties will simply adjust their analyses accordingly and any proposal for more or less participation by felons would be based on the perception of a particular substantive outcome.

If the idealistic vision is the rationale for choosing jury trials, including felons cuts both ways. Felons might bring certain biases, antisocial behavior, and disrepute to juries. At the same time, however, they might also bring perspective and specialized knowledge. If the jury has retained its usefulness, centuries after straying from its origin as a source of "local knowledge . . . unavailable to the judge," it may be because of the related notion expressed by Professor Haddon that "truth is socially constructed and that the interchange of views of members of diverse communities . . . meaningfully contributes to the derivation of truth."[286] Indeed, society expects jurors to process evidence in light of their common sense.[287] As a result of their common sense being informed by experiences with crime, dealing both first- and second-hand with criminals and police, felons can make an important contribution to the jury's construction of the truth, particularly in criminal cases. Taking felons out of the jury pool leaves a remainder of jurors who have skewed or ignorant views on such matters.

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286. Haddon, *supra* note 274, at 52; *see also id.* at 81 (arguing that properly assembled juries can guarantee the social construction of truth); Brown, *supra* note 64, at 140-47 (discussing the "antifoundationalist-hermeneutic" notion that social diversity within a jury is essential to all of its tasks, including fact-finding); M. Catherine Miller, *Finding "the More Satisfactory Type of Jurymen": Class and the Construction of Federal Juries, 1926-1954*, 88 J. AM. HIST. 979, 987 & n.20 (2001) (discussing evidence from the 1950s and 1960s that jurors' class affected their beliefs about property and justice). The social construction of truth may be more apparent when the "truth" being sought concerns an actor's intent rather than whether some event occurred. *See* Brown, *supra* note 64, at 140-41 (suggesting the relative ease of discovering historical facts compared to assessing moral culpability).

The value of a diverse jury might also lie in "improving the effectiveness and experience of the deliberation process," independent of any effects on the verdict itself. Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659, 701 (2002) (discussing advantages of gender-diverse juries).

287. *See* Abrahamson, *supra* note 273, at 487 (discussing jury instructions to use "experiences, knowledge, and common sense").

To be sure, felons' exposure to such situations might also make them jaded or partial to the point where their participation threatens the search for truth. But the same can be said of many groups—crime victims, police officers, lawyers, and others—who are tested individually for such biases rather than excluded wholesale. As members of their communities who are otherwise unrepresented, felons who make it through voir dire are likely to add more to the jury's collective aptitude than they subtract.

D. For Jurors: Education, Democratic Engagement, and Dialogue

Jury service is also of benefit to jurors themselves. This benefit has traditionally been described as educative, democratic, and dialogic because serving on a jury teaches jurors about life and the law, engages them in self-government, and forces them into a serious civic interchange with their fellow jurors.[288] All of these benefits are applicable to felons. While the utility enjoyed by jurors alone cannot justify the decision to include particular jurors or to use a jury system, in marginal cases, such as felon exclusion, every factor counts. Put simply, because felons gain from jury service, excluding them makes less sense.

The educative value of jury service to jurors has long been recognized. Alexis de Tocqueville famously opined in the 1830s: "I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation."[289] Specifically, de Tocqueville saw jury service as "a gratuitous public school" in which jurors not only learn about the law and the real-life conflicts of others, but also learn "to practice equity" and apply the Golden Rule.[290] Another visitor from France later in the century expressed these similar sentiments:

> The Americans consider and value the jury otherwise than as a judicial institution; they think that the jury constitutes the best political school in a popular government. Its operation puts the people in repeated contact with the elite of democratic countries, the lawyers and magistracy. In this instructive business, [the juror]

288. A good example of this understanding of jury service can be found in AMAR, *supra* note 139, at 93-96; *see also* THE COMPLETE ANTI-FEDERALIST 214, 249 (Herbert J. Storing ed., 1981) (stating that, during the constitutional ratification period, it was believed that the jury gives citizens the opportunity to become involved with and learn about the affairs of society and government). *But see* Priest, *supra* note 251, at 104 (arguing that there is no foundation for the idea that jury duty can transform someone from a modest to heroic person).

289. DE TOCQUEVILLE, *supra* note 266, at 226-27.

290. *Id.* at 226.

> is initiated into the ideas of law and of justice; he develops respect for the laws and for the feeling of dignity and individual responsibility.[291]

Felons are more in need of this sort of training and experience than other members of society, though they might come to the task particularly ill-equipped to learn.

Jury service is the pinnacle of democratic participation; by serving on a jury, an individual is a citizen in the most direct way.[292] Voting is relatively anonymous and one vote almost never makes a difference.[293] Jurors, by contrast, have direct and obvious effects. Where a unanimous verdict is required, jurors vote publicly (if they reach a verdict) and one vote *always* makes a difference. Even where unanimity is not required, and even when a juror is on the losing side, the interchange that is required to reach a verdict brings the juror closer to the ideals of direct democracy than any other activity. Such democratic participation is valuable to anyone who engages in it, and perhaps more so to felons.[294]

The dialogic value of jury service is significant to all of the participants: "In our multicultural society of often estranged individuals and communities, jury duty can be a useful opportunity for citizens to come together in a public setting which promotes exchange . . . [and] to explore competing or emerging normative understandings and to achieve consensus through deliberation."[295] In

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291. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 876 n.47 (1994) (quoting HORACE HELBRONNER, LE POUVOIR JUDICIAIRE AUX ETATS-UNIS: SON ORGANISATION ET SES ATTRIBUTIONS 10 (Imprimerie de A. Parent, 1872)).

292. *See* SWARD, *supra* note 257, at 52 (stating that the jury is an example of participatory democracy); *cf.* Powers v. Ohio, 499 U.S. 400, 407 (1991) (explaining that, for the majority of citizens, jury duty is their most significant participatory experience in the democratic process, besides voting).

293. *But cf.* Washington v. State, 75 Ala. 582 (1884) (describing the threat posed by felon-voters "at least in close political contests").

294. *See* Rubio v. Superior Court, 593 P.2d 595, 605 n.11 (Cal. 1979) (Tobriner, J., dissenting) ("[T]he political and social value of governmental participation through jury service may be especially significant to groups historically disenfranchised and victimized by public and private discrimination, as [felons] are.").

On the other hand, participatory democracy may be understood to require certain minimum qualifying commitments, and being a felon may cast a person outside of this democratic circle. *See supra* Part III.A; *cf.* Eskridge, *supra* note 252, at 1727 ("[T]he Court ought to insist upon . . . jury service . . . as a . . . right . . . that the states are essentially prohibited from apportioning on a discriminatory basis . . . because it denies [citizens] the respect and community bonding entailed in their assuming the obligations of citizenship."). Eskridge believes that jury service is a particularly weighty "appurtenance of citizenship." *Id.* at 1729.

295. Haddon, *supra* note 274, at 52; *see* Zuklie, *supra* note 35, at 145 (discussing the value of dialogue). Haddon makes the additional point that judges can be educated by their exposure to jurors with "differences." Haddon, *supra* note 274, at 62. *But cf.* Eskridge, *supra* note 252, at 1751 (stating that jury service is "erod[ing] as

other words, juries bring together diverse people who might rarely even see each other, let alone speak to each other or debate and decide the fortunes of others.[296] Jurors are thus exposed not just to the problems of one criminal or two civil litigants; they are also exposed to the perspectives of five or eleven or twenty-two of their fellow citizens.

This exposure to different people may affect the juror and the dialogue for better or worse. In the best sense of diversity, a juror may be forced to confront (and may learn to appreciate) different ways of looking at the world. A juror might also be more reluctant to express certain sentiments—such as sexist or racist or classist ones—about litigants if it would offend a fellow juror.[297] A felon could reap these sorts of benefits from engaging in dialogue with non-felons, and vice versa. On the other hand, diversity is not always for the best. A juror may be turned off by the perceived shortcomings of her "neighbors" through this sort of dialogue, or her fear of offending fellow jurors might lead her to suppress sentiments that are valid. Jurors can also mistreat each other, and felons would seem particularly vulnerable to such negative experiences,[298] but one could say the same thing for women and minorities as well—such paternalistic protection hardly justifies wholesale exclusion of any of these groups from the venire.

In sum, felons can benefit from serving on juries, and their fellow jurors can benefit from their presence as well. Excluding felons wholesale means foregoing these benefits, however modest they may be.

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[a] *bridging* institution that bring[s] people together") (emphasis added).

296. *See* SWARD, *supra* note 257, at 64 (noting the jury's distinction as a rare situation where diverse people are put together and made to interact); *The Civil Jury*, *supra* note 251, at 1440-41 (discussing value of deliberation in providing "communal voice in law"); Abrahamson, *supra* note 273, at 491 ("We were twelve . . . strangers chosen at random from a county of more than 300,000 . . . sitting in judgment of another human being to decide whether the community labels him a thief . . . .").

297. For an empirical study of the effects of diversity on the quality of deliberations, see Marder, *supra* note 286. Professor Marder found that gender diversity improved the harmony of deliberations, but that racial diversity had no such effect. *Id.* at 687. The effect was the same on jurors' satisfaction with their experience. *Id.* at 692; *cf.* Miller, *supra* note 286, at 988 (describing "paeans to women's special competence" as jurors in the 1930s).

298. *See, e.g.*, State v. Bongalis, 378 S.E.2d 449, 455 (W. Va. 1989) ("[T]he juror . . . indicates that during the deliberations, he and three other jurors were inclined toward acquitting the defendant. When he revealed that he was an ex-felon, the other three jurors then shifted to a guilty verdict."); Feige, *supra* note 217, at 22 (describing the case of a felon juror jailed after being improperly accused by a fellow juror of partiality during contentious deliberations).

E. Conclusion

Trial by jury serves the interests of society, the parties to a case, and the jurors themselves. In each case, on balance, these interests are advanced when felons are left in the jury pool. When felons are excluded, the result is a less representative, more blinkered, and less enlightening jury. Gaining the full range of benefits offered by the jury system requires that the full range of qualified citizens be given a chance, at least, to participate.

IV. THE TREATMENT OF CRIMINALS

Ever since the death penalty ceased to be the principal sentence in Anglo-American criminal law, the question of what to do with convicted felons has loomed large—and remained unresolved.[299] This Part discusses in turn the main goals suggested for criminal punishment as they relate to felon exclusion: rehabilitation, deterrence, incapacitation, punishment, and retribution. It concludes that felon exclusion is not particularly consistent with these goals, and to some degree interferes with them. Thus, as a policy matter, felon exclusion is penologically unjustified. Felon exclusion is also part of the package of civil disabilities doled out to felons upon conviction. It is imposed more widely than any other civil disability, and with less justification.[300]

A. Rehabilitation

Intrinsic to the practice of imprisonment that arose in the early years of the Republic was the rehabilitative ideal.[301] The ideal dominated penology up through the 1960s.[302] Scores of training, education, and treatment programs were created, with the notion

299. *See* RAFTER & STANLEY, *supra* note 149, at 24 (asserting that prison managers, along with the general public, have conflicting views on the penal system's purpose); *see also id.* at 3-4 (describing eighteenth-century revolution in penal theory, influenced by the works of Beccaria, which recast punishment as a debt to society for damage done rather than a harm to be done to the prisoner through capital punishment or harsh treatment); Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343, 345-52 (2001) (discussing parallel decline of the death penalty and rise of other dispositions, including the rehabilitative ideal).

300. *See* Demleitner, *Preventing Internal Exile*, *supra* note 5, at 154 (illustrating how jury exclusion is a collateral sentencing consequence).

301. *See* Rubin, *supra* note 299, at 346-52. The very name of the "penitentiary" suggests the redemptive purposes of confinement. *See* RAFTER & STANLEY, *supra* note 149, at 26 (making this verbal connection); *see also infra* text accompanying notes 536-37 (relating history of pre-imprisonment penology to felon exclusion).

302. *See* RAFTER & STANLEY, *supra* note 149, at 16 (stating that, historically, rehabilitation was viewed as the primary purpose of prison).

that recidivism was preventable through these avenues.[303] In 1974, though, an influential meta-analysis by Robert Martinson asked the question *What Works?* and concluded that none of these rehabilitative programs were actually successful.[304] When combined with a sense of resentment that criminals were being "rewarded" with resources and benefits that were unavailable to underprivileged law-abiding folk, rehabilitation as a goal began waning.[305] In its place rose other objectives such as deterrence, incapacitation, punishment, and retribution.

Rehabilitation, though, has never completely faded away as a goal of penology.[306] Dozens of programs are still employed in prisons to educate, train, and rehabilitate criminals, and some of them work—even if only a few prisoners avail themselves of these programs.[307] Given that most felons will leave prison some day, and that recidivism is high, rehabilitation can be viewed as a means of crime control, not just as a reward to a malefactor. Indeed, states have taken legislative steps toward reducing the civil disabilities imposed on felons, with the express purpose of helping their rehabilitation.[308] In any case, it seems fair to assume that most people would prefer, all other things being equal, that felons become productive and law-abiding members of society.

Felon exclusion does not aid in rehabilitation. Granted, it is unclear if jury service helps either, but if it has any effect on the mind of a felon, it is likely a positive one. Additionally, declaring felons unfit for jury service for life amounts to a societal admission that in-

303. *See id.* (describing the efforts to promote rehabilitation as a goal of the penal system).

304. *See* Rubin, *supra* note 299, at 343-44 (discussing Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974)). Martinson later backed away from his claims. *See id.* at 367 & n.87 (citing Robert Martinson, *New Findings, New Views: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979)).

305. *See* RAFTER & STANLEY, *supra* note 149, at 27 (discussing the "principle of least eligibility," which suggests that criminals are the group least deserving of social services).

306. *See* Rubin, *supra* note 299, at 366-70 (explaining that rehabilitation has historically been and remained the driving concept behind American prisons); *The Purity of the Ballot Box*, *supra* note 5, at 1301 n.4 (illustrating the history of rehabilitation in the American penal system).

307. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 93-97 (2003) (describing participation); Rubin, *supra* note 299, at 366-68 (debunking the notion that rehabilitation is ineffective).

308. *See, e.g.*, Froede v. Holland Ladder & Mfg., 523 N.W.2d 849, 852 (Mich. Ct. App. 1994) (discussing the legislative purpose of rehabilitating offenders by preventing the denial of vocational licenses solely because of conviction); Note, *supra* note 28, at 423 (quoting the Governor of New York's statement praising a new law reducing civil disabilities).

prison rehabilitation is futile.[309] Of course, if rehabilitation is considered impossible to achieve in prison, achieving it after prison by any means available is all the more imperative.[310]

Opponents of felon disenfranchisement have argued vociferously that political disabilities undermine rehabilitation and promote recidivism.[311] The inability to vote, they say, promotes alienation and a sense of ostracism.[312] But these arguments seem exaggerated, both because other more immediate factors such as employment and education make more of a difference in rehabilitation and recidivism, and because voting is voluntary and unpopular.[313] One critical

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309. *See* Demleitner, *Preventing Internal Exile*, *supra* note 5, at 154 (detailing the practical message that is sent, regarding rehabilitation, by barring felons from sitting on juries); *cf. The Purity of the Ballot Box*, *supra* note 5, at 1306-07 (arguing that felon disenfranchisement belies any confidence in the possibility of rehabilitation). An example of the lack of faith in the power of penology to rehabilitate felons can be seen in one case in which the court supported lifetime felon exclusion:

> [A]rticle I, section 15 of the Bill of Rights [] requires the legislature to maintain the purity and efficiency of the jury system. It cannot be said that such purity and efficiency is maintained by permitting juries to be composed of thieves, robbers, murderers, kidnappers, perjurers, rapists, drug dealers and others convicted of felonies simply because they successfully completed their terms of probation.

R.R.E. v. Glenn, 884 S.W.2d 189, 193 (Tex. App. 1994) (holding that a statutory provision terminating probation did not restore the right to serve on a jury).

310. *See* Lynne Goodstein, *Inmate Adjustment to Prison and the Transition to Community Life*, J. RES. IN CRIME & DELINQ., July 1979, at 246, 247 (describing feelings of "personal inefficacy" and problems with initiative that result from "forced dependency" of prison life); Louis Hiken & Marti Hiken, *Imprisonment—America's Drug of Choice*, 52 GUILD PRAC. 65 (1995) (describing an increasing structure of isolation in prisons as opposed to reintegration).

311. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting) ("[T]he denial of the right to vote . . . is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens."); NAT'L ADVISORY COMM'N ON CRIMINAL STANDARDS AND GOALS, CORRECTIONS 593 (1973) (supporting the stance that disenfranchisement detracts from the ability to rehabilitate); Roger Chesley, *Efforts to Restore Voting Rights to Ex-Felons Grind Along*, VIRGINIAN-PILOT, Nov. 17, 2001, at B9 (quoting Marc Mauer's statement that "[m]ore than 95 percent of felons sentenced to state prisons are coming home someday . . . . If they feel a sense of community, they're less likely to victimize their neighbors"), *available at* 2001 WL 26280862; Demleitner, *Preventing Internal Exile*, *supra* note 5, at 160-61 (detailing the effects of disenfranchisement); Itzkowitz & Oldak, *supra* note 5, at 732 (supporting the position that disenfranchised felons are less likely to rehabilitate completely).

312. *See* Fletcher, *supra* note 4, at 1907 (discussing the relation between disenfranchisement and alienation); Grant et al., *supra* note 3, at 1228 (attributing this effect to juror exclusion and office holding restrictions).

313. *See* PETERSILIA, *supra* note 307 (recounting, with excellence and completeness, the barriers facing ex-prisoners); *see also* Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 187-88 (1995) (discussing effects of licensing restrictions on felons); *A Stigma That Never Fades*, THE ECONOMIST, Aug. 10, 2002, at 25, 26 (reporting survey data showing that 65% of employers in five major American cities "would not knowingly hire an ex-convict"); *cf.* Grant et al., *supra* note 3, at 1229 n.372 (describing survey data in which most ex-offenders and businessmen

analysis decrying felon disenfranchisement asked: "How can [prisoners] reclaim their role in society if they cannot exercise the most basic right of citizenship?"[314] The obvious retort is that they can rejoin society by working, living, raising families, and doing all of the other things that other Americans—few of whom vote very often—do. Moreover, felons who are public-spirited enough to want to vote are probably the least likely to withdraw from society and return to an anti-social life of crime, and are the most likely to obtain clemency. Disenfranchisement certainly does not help matters, but the notion that it is, by itself, a key barrier to rehabilitation seems overstated.

Compare disenfranchisement to felon exclusion, about which much less has been written in the context of rehabilitation.[315] In one sense, felon exclusion is less alienating than disenfranchisement because one or more opportunities typically occur to vote every year, while jury service is much rarer. Voting is also much more visible; one cannot help but be aware of an election, whether or not one votes. Jury trials are more hidden and those who are not involved have no particular reason to notice or feel excluded.

In another sense, though, felon exclusion is more alienating. Typically, felons are on the jury rolls and are excluded only after being called, when it is established that they are felons.[316] Those affected by felon exclusion, therefore, necessarily experience it as a direct slap at their citizenship, as opposed to the disenfranchised, most of whom have no contact with the electoral system anyway. Moreover, one is either allowed to vote or not, but in the jury system one is either "chosen," "excluded," or "rejected." Those who are excluded from juries (whether as felons or in some other way) are in effect declared unworthy, and may take rejection quite personally. Of course, if felons are not automatically excluded they may still be struck from a jury, but a peremptory challenge does not render the same decisive stamp of unfitness as a disqualification.

On the flip side, and more significantly, when a felon is allowed to serve on a jury, it contributes positively to engagement in the community, which is an important part of rehabilitation.[317] As

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said that jury exclusion affected a criminal's ability to "be a good citizen and earn a decent living," though most other civil disabilities were perceived that way by even more respondents).

314. Jeremy Travis et al., *Prisoner Reentry: Issues for Practice and Policy*, CRIM. JUST., Spring 2002, at 12, 17.

315. *But see* Grant et al., *supra* note 3, at 1183 (arguing that jury service can restore felons' faith in the judicial system).

316. *See supra* text accompanying note 215.

317. *See* PETERSILIA, *supra* note 307, at 213 (describing positive effects of "social networks"); Tucker Carlson, *Thy Neighbor's Rap Sheet*, POL'Y REV., Spring 1995, at 50

described in Part III.D, jury service presents a rare opportunity for empowerment, civic education, the instilment of civic virtue, and commitment. Citizens who serve on juries, whether felons or not, enjoy these benefits during their experiences.[318] Depriving felons of this opportunity robs them of an opportunity to better themselves in a way that could aid their rehabilitation.

It may strain credulity to picture a felon returning to prison thinking that he would not have returned to a life of crime, if only he had been allowed to serve on a jury. At the same time, though, it is hard to picture a felon who is empowered and engaged in the community readily resuming his life of crime. Real life lies somewhere in between these two portraits. Jury service surely is not enough to rehabilitate felons on its own, but it might help, and cannot hurt, the rehabilitation effort.

B. Other Goals of Penology

Besides rehabilitation, the criminal justice system has been employed in the service of other goals such as deterrence, incapacitation, punishment, and retribution.[319] Excluding felons from juries may be somewhat consistent with the latter two goals, but it is not consistent with the former two.

General deterrence (giving the public incentives not to commit a crime) and special deterrence (giving the particular offender such incentives) are not served by felon exclusion. Whether felon exclusion even meets the first criterion of an incentive—being known—is unclear.[320] Even if would-be criminals and actual criminals are aware that felons cannot serve on juries, there is little evidence to suggest that jury duty is a particularly cherished right. Those citizens who serve on juries tend to appreciate and see the value in them, to be sure, but it is hard to imagine a criminal undeterred by the prospect of incarceration until the prospect of being barred from jury service is included.[321]

(describing how community involvement and support can prevent crime and recidivism).

318. *See supra* note 251 (describing the emotions jurors experience during jury duty).

319. *See* RAFTER & STANLEY, *supra* note 149, at 25-27 (surveying penological goals). One source adds "denunciation" as a goal that civil disabilities fail to fulfill. Demleitner, *Preventing Internal Exile*, *supra* note 5, at 160.

320. *Cf.* Demleitner, *Preventing Internal Exile*, *supra* note 5, at 154 ("Sentencing courts should announce all collateral consequences publicly and factor them into the overall sentence.").

321. *Cf.* Lippke, *supra* note 5, at 568 (questioning the marginal deterrent effect of disenfranchisement).

Incapacitation is a reason to hold criminals under lock and key, not to keep them off of juries. The only exception to this is the possibility of those crimes that one can commit as a juror, such as selling a verdict. Given the other safeguards that exist to prevent such crimes, though, incapacitation provides little support for the practice of excluding all felons for life.

Punishment, or "just deserts," is a more promising candidate. It is plausible to say that someone who has committed a felony no longer deserves to participate fully in civic society. The deserts must be just, however; punishment must be proportionate. While it is true that felonies are serious crimes whose commission merits the most serious of consequences, excluding felons from juries does not always fit. One can make a much better case for banning serial murderers or jury tamperers from juries for life than young, nonviolent offenders sentenced to probation. One would think that imprisonment or probation—the terms of which are highly variable depending on the crime and the circumstances—represent the principal punishments for a crime.[322] Indeed, an American ideal is that a criminal who has finished his term of criminal supervision has "paid his debt to society" and is seen as fit to rejoin it.[323] Perhaps part of the debt for some felons should include exclusion from juries, but for others it should not. At the very least, exclusion from jury service should not be a one-size-fits-all component of punishment any more than should be the original sentence.

Another problem with categorizing felon exclusion as an element of punishment is that courts considering the constitutionality of felon exclusion classify it *not* as punishment for the offender but rather as protection of the sanctity of the jury.[324] These decisions likely reflect a realization that removing the obligation of jury service is hardly the keenest weapon in the penological arsenal. Even supporters of felon exclusion recognize this, relying as they do on other rationales to promote the practice.[325]

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322. Most felons are not imprisoned. *See* Uggen et al., *supra* note 178, at 16-17 (estimating total population of prisoners and ex-prisoners at about five million, out of a total population of felons of about thirteen million).

323. *See* Richardson v. Ramirez, 418 U.S. 24, 56 (1974) (Marshall, J., dissenting) ("The Court today holds that a State may strip ex-felons who have fully paid their debt to society of their fundamental right to vote without running afoul of the Fourteenth Amendment."); *cf.* Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 347, 352 (1968) (discussing Enlightenment-era Tuscan/Austrian practice of restoring rights to released prisoners based on liberal contractarian notion of having repaid debt to society).

324. *See supra* note 165 and accompanying text.

325. *See, e.g.*, *infra* note 406; State of Oregon Special Election Voters' Pamphlet,

The same is true, albeit to a lesser degree, for retribution. Retribution may explain some part of the popularity of felon exclusion.[326] Nevertheless, felon exclusion applies to "victimless crimes" as well. Even where retribution is implicated, felon exclusion does not seem like a particularly substantial payback. Moreover, as with just deserts, supporters of felon exclusion typically do not advance retribution as a significant justification—a telling fact, given the general popularity of retributive arguments elsewhere in public discourse.[327]

In sum, felon exclusion is only somewhat consistent with the goals of punishment and retribution, and not enough to motivate supporters of felon exclusion. Felon exclusion is incompatible with other penological goals, subtracting further from its justification as prudent public policy.

C. Other Civil Disabilities

Exclusion from jury service is only one of many civil disabilities imposed on felons, including limitations on voting, office holding, gun ownership, and occupational licensing. These other disabilities have been the subject of a vigorous dialogue comprising litigation, legislation, and scholarship.[328] By contrast, exclusion from jury service has not been widely discussed, despite being the most commonly applied civil disability of the lot.[329] Comparing and

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supra note 182 (imputing bias to felon jurors by asking: "If you were a crime victim, would you want a jury of fair-minded citizens? Or instead, would you like to have a jury full of felons, sex offenders, and thieves?") (emphasis omitted).

326. *See* Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, FED. PROBATION, Sept. 1996, at 10, 16 ("[T]he push for punishment and retribution, in light of growing legal restrictions for former felons, has pushed the issue of correctional reintegration aside.").

327. *See* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 845-47 (2002) (discussing the ascendancy of retributivism).

328. *See generally* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1996) [hereinafter DEP'T OF JUSTICE SURVEY]; Demleitner, *Preventing Internal Exile*, *supra* note 5; Alan Ellis & Peter J. Scherr, *Federal Felony Conviction, Collateral Civil Disabilities*, CRIM. JUST., Fall 1996, at 42; Grant et al., *supra* note 3; Olivares et al., *supra* note 326. On voting restrictions, see *supra* note 5. On office holding restrictions, see Steven B. Snyder, *Let My People Run: The Rights of Voters and Candidates under State Laws Barring Felons from Holding Elective Office*, 4 J.L. & POL. 543 (1988). On firearm restrictions, see *infra* notes 342-43 and accompanying text. On licensing restrictions, see May, *supra* note 313.

329. *See supra* note 3; DEP'T OF JUSTICE SURVEY, *supra* note 328, at 3 (deeming jury service the "right generally hardest to regain" for felons); Olivares et al., *supra* note 326, at 15 (describing jury service as the "most restricted" right of felons); *see also* Ellis

contrasting felon exclusion with these other disabilities further illuminates its lack of justification.

Like the ban on felon jurors, all of these civil disabilities are justified primarily as a safeguard for the public (i.e., protecting the ballot box, public offices, consumers, and potential gun victims), not as punishment for felons per se.[330]

Voting restrictions have been the most fertile ground for debate.[331] Only eight states impose a lifetime ban on voting by felons, compared to thirty-one that exclude felons from juries.[332] Relative to the steady support for felon exclusion, felon disenfranchisement has waned significantly; only a generation ago, forty-two states stripped felons of the vote for life.[333]

Voting and jury service have important differences that may account for the more liberal treatment of the former. The cost of including a voter on the fringes of the community—like a felon—is much lower than the cost of including such a juror. A juror must interact intimately and publicly with her neighbors. In individual cases, numerous potential jurors may be excluded to ensure that the jury is properly composed. By contrast, voting is a more atomized, anonymous experience, and elections are generally inclusive; voting thus does not require as robust a notion of "community" membership. One policy justification for felon disenfranchisement is that felons might produce an anti-law enforcement voting bloc; this argument has been rightly criticized and largely rejected.[334] Inherent

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& Scherr, *supra* note 328, at 43 (describing the harsh treatment of jury rights and noting that in Vermont jury service is the sole right lost by felons).

330. *See, e.g.*, *supra* notes 165-72, 282 and accompanying text; Amaya v. State, 220 S.W. 98, 99 (Tex. Crim. App. 1920) (affirming the use of an out-of-state conviction as a basis for exclusion, in part because of perceived legislative intent toward "the protection of the society against the pollution of the jury system by committing its execution to persons whose moral status has been judicially established as criminal"); Tex. Supporters of Workers v. Strake, 511 F. Supp. 149, 153 (S.D. Tex. 1981) ("The State has a valid interest in ensuring that the rules of its society are made by those who have not shown an unwillingness to abide by those rules."); Grant et al., *supra* note 3, at 961-62 (describing majority view that "disability statutes are designed to protect the public's interests rather than to punish the offender"); May, *supra* note 313, at 190-91 (describing protective purposes of licensing laws); Popper, *supra* note 172, at 309-10 (describing the legislative purpose of federal felon gun restriction); Snyder, *supra* note 328, at 566-70 (discussing office holding restrictions as protecting offices and the public); *cf.* Damaska, *supra* note 323, at 354 (referring to newly obsolete Continental civil disabilities: "There is little doubt that the motive behind their infliction is that of degrading the offender . . . ."). *But see* Grant et al., *supra* note 3, at 964-65 (describing minority view of the purpose of civil disabilities as punishment).

331. *See supra* note 5.

332. *See infra* text accompanying note 588.

333. *See infra* note 588 and accompanying text; *infra* Appendix 1.C.

334. *See, e.g.*, Ewald, *supra* note 5, at 1080, 1099-102 (criticizing the "subversive

bias is not a problem in voting, where participants are supposed to be partial, by definition.[335] Moreover, a bloc is most effective as part of a majority.[336] Compare this to the jury, where a bloc of one can define the result of a trial, and where impartiality is expected. While felon exclusion is easier to justify than felon disenfranchisement, however, this does not establish that it is, on the whole, justified.

Office holding restrictions provide an interesting analogy to felon exclusion; the two disabilities are comparably defective. Jurors do not hold an office per se, but in some ways jury service resembles office holding more than it does voting. Voters select representatives; jurors and office holders are representatives. Voters simply vote; jurors and office holders deliberate, and then act. Some states bar official misfeasors from jury service alongside felons.[337] On the other hand, jurors do not formulate "broad governmental policy" the way that office holders do.[338]

Office holding restrictions on felons are common, but less so than jury restrictions.[339] An important parallel between them is that they duplicate—and thus trivialize—existing safeguards. Typically, public officials (if high-ranking enough to be subject to felon exclusion[340]) are either elected or appointed by an elected official. If voters or top officials know about a candidate's criminal history but would choose

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voting" justification for felon disenfranchisement). The rejection of this idea is implicit in the fading popularity of felon disenfranchisement. *See supra* text accompanying note 333.

335. *See* Richardson v. Ramirez, 418 U.S. 24, 81-82 (1974) (Marshall, J., dissenting) (citing cases for the proposition that disenfranchisement cannot be based on "differences of opinion"); Carrington v. Rash, 380 U.S. 89, 94 (1965) (stating that the right to vote "cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents"); Fletcher, *supra* note 4, at 1906 (distinguishing between the exclusion of felons from voting and serving on juries on the grounds that "voting is precisely about expressing biases"). *But cf.* Rubio v. Superior Court, 593 P.2d 595, 601 n.13 (Cal. 1979) (plurality opinion) (distinguishing the treatment of felon jurors and felon voters by arguing that felons would feel more strongly about a jury trial than an election).

336. *See* Ewald, *supra* note 5, at 1102 (downplaying "voting bloc" problem in felon disenfranchisement because of majority rule).

337. *See infra* notes 376 (Alabama), 380 (California), 402 (Montana).

338. This fact does not make jury service any less of a fundamental right than office holding; indeed, if it did, voting would be even less of a "fundamental right," which is certainly not the case. It just makes it more of an individual right and less of a right or interest inhering in the community as a whole. Justice Tobriner of California made this point in *Rubio*, 593 P.2d at 610 n.21 (Tobriner, J., dissenting).

339. *See* Olivares et al., *supra* note 326, at 12 (listing between eighteen and twenty-five states as disqualifying some felons from office); Snyder, *supra* note 328, at 544 & n.6, 575-77 (listing between twenty-one and thirty-one states that disqualify some felons from office for life). The discrepancies in reporting are due to states that only disqualify for specified offenses.

340. *See* Olivares et al., *supra* note 326, at 13 (listing only six states that bar felons from all public employment).

him anyway, it is undemocratic to prevent him from serving.[341] Similarly, jurors are subjected to a process of selection that weeds out unfit jurors, either on the agreement of one party and the court, or at the whim of one party alone. Felon exclusion disparages this process.

The analogy, nevertheless, is not perfect. The initial panel from which a jury is drawn is selected at random, not by the parties; keeping a particular person off of a jury does not violate an affirmative democratic expression the same way as does keeping the winner of an election out of office. But if the parties would not exclude a particular felon from their panel, it is hard to understand why he should not be able to serve. If they would exclude him, he has simply been treated the same as any other unfit juror—or any candidate for office who, while allowed to serve if chosen, simply was not elected or appointed. If restrictions on felons holding office and serving on juries are justified, it suggests that society feels that voters and litigants need to be protected from themselves. As a matter of policy, such a sentiment is questionable.

The restriction of gun ownership by felons provides a telling contrast. Federal law bars felons from owning guns unless they have had their rights restored by the authority that convicted them.[342] Felons convicted in a jurisdiction that restores rights only with a pardon, then, are essentially banned for life from owning guns in the same way that they are banned in most states from serving on a jury. Individual consideration of each felon's suitability for safe gun ownership does not occur, which makes this the only civil disability

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341. *See* Snyder, *supra* note 328, at 558-62 (arguing that office holding restrictions on felons violate voters' rights). The most prominent example of the democratic process politically nullifying a conviction is the eighteenth-century case of John Wilkes. For a good description of the Wilkes case, see Powell v. McCormack, 395 U.S. 486, 527-29 (1969). Though the *Powell* case turns on specific constitutional grounds and does not involve a felon, it is a hallmark of the right of the people to select their own representatives, regardless of the indignation of others.

342. *See* 18 U.S.C. § 922(g)(1) (2000) (making it unlawful for felons to "possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce"), § 921(a)(20)(B) (restoring the firearms possession rights of felons whose civil rights were restored after their convictions); Beecham v. United States, 511 U.S. 368, 372 (1994) (holding that the restoration of a felon's civil rights restores the felon's firearms possession privileges only when the rights were restored by the convicting jurisdiction); *see also* United States v. Bean, 537 U.S. 71 (2002) (forbidding judicial review of a felon's application to restore firearms privileges where the initial authority to grant the application is vested in an administrative body that cannot act on the application because of congressional budget restrictions). *But see* 18 U.S.C. § 921(a)(20)(A) (2000) (exempting certain business-related crimes from the federal ban). *See generally* Ryan Laurence Nelson, Comment, *Rearming Felons: Federal Jurisdiction under 18 USC § 925(C)*, 2001 U. CHI. LEGAL F. 551, 552-57 (reviewing the history of federal firearms restrictions on felons).

that, like felon exclusion, is both pervasive and absolute. But firearm restrictions on felons do not supplant an underlying individualized procedure—if someone is *not* a felon, he undergoes no voir dire before obtaining a gun—which quite readily distinguishes felon exclusion.[343]

A final civil disability is the exclusion of felons from certain licensed occupations. Most states make licensing determinations a matter of discretion, and about half require either that the conviction be related in some way to the occupation, or that it be used only as evidence in the determination of qualifications.[344] Even those that allow a conviction to be a sufficient basis for denial of a license usually make it a matter of the licensing authority's discretion.[345] Here too, then, felons receive individualized consideration, and even if most are subjected to a disability as a rule, they at least have a chance to be an exception.

In sum, comparing and contrasting felon exclusion with other civil disabilities provides further evidence that it is not a good policy. It is imposed much more widely than disenfranchisement. Unlike licensing restrictions it is applied with a broad brush. Firearm restrictions are applied with a broad brush as well but do not supplant an underlying system of safeguards the way felon exclusion supplants voir dire. The only civil disabilities applied in a similar way,

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343. The statute containes other per se limits on gun possession. *See* 18 U.S.C. § 922(g) (2000) (restricting gun rights of fugitives, drug addicts, "mental defective[s]," some aliens, dishonorably discharged veterans, United States citizens who have renounced their citizenship, subjects of certain restraining orders, and those convicted of misdemeanor domestic violence).

344. *See* DEP'T OF JUSTICE SURVEY, *supra* note 328 (surveying approaches to licensing restrictions for felons in American jurisdictions); 51 AM. JUR. 2D *Licenses and Permits* § 84 (2000) (indicating that a state may not deny an individual an occupational license on the basis of a past criminal conviction unless the crime directly relates to the profession); 53 C.J.S. *Licenses* § 39 (1987) (stating that an individual may only be denied an occupational license on the basis of a prior criminal conviction if the conviction is relevant to the conduct of the occupation for which the license is sought). The *C.J.S.* and *Am. Jur. 2d* statements appear to be overstated. *See, e.g.*, Darks v. City of Cincinnati, 745 F.2d 1040, 1042-44 (6th Cir. 1984) (rejecting due process and equal protection challenges to the city's practice of automatically denying dance hall licenses to felons). Characterizing licensing statutes is difficult because they typically vary within states, and different vocations receive differing treatment. A study in the early 1970s revealed 1,948 provisions that limited the ability of persons with criminal convictions to gain occupational licenses. *See* May, *supra* note 313, at 193 (listing barbers, beauticians, and hearing aid dealers among occupations where the licensing of felons is restricted).

345. *See* DEP'T OF JUSTICE SURVEY, *supra* note 328 (surveying approaches in all American jurisdictions). For a typical example, see GA. CODE ANN. § 43-11A-15 (2003) (stating for dietician licensing that "[t]he board *may* refuse to grant . . . a license" if the applicant is a convicted felon) (emphasis added).

and with similar frequency, are restrictions on office holding, but this means only that such restrictions have similar flaws as well.

D. Conclusion

Felon exclusion highlights American ambivalence about rehabilitating criminals. Although the rehabilitative effects of jury service itself are unclear, shutting out felons from civic participation is plainly inconsistent with any notion of restoring them to a productive place in the social order. It serves no other penological purpose—deterrence, incapacitation, punishment, or retribution—very robustly either, if at all. Finally, it is the worst of the civil disabilities imposed on felons in terms of its combination of poor justification and widespread application.

As a policy matter, felon exclusion must be justified as an essential ingredient in forming proper juries, as an important part of proper treatment of felons, or in some other way. Thus, because a lifetime, blanket felon exclusion may clash with the purposes of the jury system; because it is not a well-suited element of criminal punishment; and because it is insufficiently justified on any other policy grounds, the policy value of felon exclusion is quite low.

V. A SUGGESTED APPROACH

The problem with felon exclusion is not that all felons should be on juries; some should not. The problem is not that it does not go far enough; some felons would be perfectly fine jurors. The problem is that the typical state statute makes no effort to distinguish between good and bad felon jurors. The solution is to avoid blanket exclusion in favor of a more nuanced system. This proposal is not original. A presidential task force recommended in 1967 that:

> [T]here seems little justification for . . . permanently disqualifying all convicted felons from serving as jurors. Reliance should instead be placed primarily on the powers given both parties to challenge jurors, since they and the judge are in a position to consider the relevance of a particular case. The legislature might prescribe certain convictions as grounds for challenge for cause; the judge could allow other convictions to constitute such grounds according to their relevance to the case. In addition, it might be appropriate for the legislature to provide for disqualification in certain cases at least for some period of years.[346]

346. TASK FORCE ON CORRECTIONS, THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 90 (1967) (footnote omitted) (analyzing the American corrections system in 1967 and recommending

This Part will consider and elaborate on the task force's recommendation, suggesting ways in which jurisdictions can treat felon jurors more sensibly. The simplest approach, followed by ten states,[347] is to allow felons to serve on juries after they have been released from prison or completed their sentences. The discussion that follows considers some intermediate alternatives.

A. Individualized Treatment of Crimes

Blanket felon exclusion considers that there is something inherent in a felony—any felony—that makes one who is convicted of it unfit for jury service. This conclusion is permissible as a matter of law, but it lacks appeal as a matter of fact. To be sure, certain felonies may be so heinous that heavy stigma and civic exclusion are appropriate. But most felonies are not even serious enough to warrant imprisonment.[348] If the same act could be charged either as a misdemeanor or a felony, a state could just as easily err on the side of inclusion as exclusion. A state could also tie the length of exclusion to the length of a sentence, so that short sentences allowed for relatively swift restoration of jury eligibility.

Perhaps too, a jurisdiction could distinguish between violent and non-violent crimes, victimizing and victimless crimes, *malum in se* and *malum prohibitum*, deceptive versus non-deceptive felonies, or repeated versus first-time offenses. In each case, it could elect to make only the former a ground for disqualification. Alternatively, different categories could be paired with different terms of exclusion: zero, life, or any number of years in between. The point is not that one or another of these distinctions should be made. Rather, the point is that more jurisdictions should be willing to consider making such distinctions in the first place.[349]

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future changes).

347. *See infra* Appendix 1.A (detailing how each U. S. jurisdiction addresses felon exclusion from jury service).

348. *See supra* note 322 (noting that the majority of felons are not imprisoned); *cf.* Note, *supra* note 28, at 411 (noting that minor felonies may not "indicate irredeemable moral turpitude").

349. Generally, states that make distinctions do so to *extend* exclusion to specified misdemeanors, not to eliminate its application to specified felonies. *See infra* note 435 and accompanying text. That said, one state does carve out more liberal treatment for first-time offenders. *See infra* note 378 (noting Arizona's statute that grants automatic restoration of civil rights to first-time felons). States also must be careful that they use neutral considerations, given the historical use of racist distinctions. *See infra* text accompanying notes 563-64.

B. Individualized Treatment of Criminals

Even if a jurisdiction is not willing to rely wholly on voir dire to screen felon jurors, each step in the criminal justice process provides an opportunity to filter out felons who do not need to be excluded per se from juries. A state could decide to require a prosecutor to recommend exclusion—in effect, a charge of conduct unbecoming a citizen—before that disability could be imposed. A sentencing judge could decide to impose exclusion—in effect, a conviction for conduct unbecoming a citizen, with a "sentence" of variable length depending on the extent to which the conduct was unbecoming.[350] A parole or probation authority could determine, based on its personal file on a particular offender, whether and when he should be able to be readmitted to the citizenry.

None of this is inconsistent with the idea that felon exclusion is a means of defending the jury rather than punishing the felon.[351] A state still must decide whom it is defending the jury *from*. A state might decide that all felons pose a threat to all juries, or that none do, but it can just as easily make an individualized determination—along with the others it already makes—that some offenders do and others do not.

Governors and pardon boards are already involved in the enterprise of redeeming the most earnest and worthy felons, but clemency is typically reserved for exceptional or unusual cases.[352] The everyday job of determining who should be punished and how, or who is fit for jury service, belongs to the courts and its representatives in the parole and probation system. If a state believes that felon exclusion should be the rule with rare exception, then relying on clemency may be appropriate. But if a state believes that every freed felon should be judged for readmission as a citizen, it should expand its consideration beyond the clemency process.

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350. *See* Demleitner, *Preventing Internal Exile*, *supra* note 5, at 154 ("Sentencing courts should announce all collateral consequences publicly and factor them into the overall sentence."); Grant et al., *supra* note 3, at 1235-36 (arguing that civil disabilities "should be imposed only when a convict's offenses bear a direct relationship to the functions and responsibilities of the right or privilege"); *see also infra* notes 403 (excluding persons from jury service in Nebraska when they have been convicted of a felony in another state and incarcerated after the conviction) and 421 (excluding felons from jury service in Vermont only if they were incarcerated after a felony conviction); *cf.* Demleitner, *Continuing Payment*, *supra* note 5, at 760-61 (discussing the German system of deciding whether to disenfranchise a felon on a case-by-case basis as a part of the individual sentencing decision).

351. *See supra* note 330 and accompanying text.

352. *See infra* note 451 and accompanying text.

C. Individualized Treatment of Trials

Even if all felonies and all felons were the same, all trials are not. The core of the jury selection system is individualized, because any generally qualified juror might be unfit to serve in a particular case. Even if, hypothetically, most felons would be struck for cause because they exhibit anti-government bias or anti-social tendencies, this may still leave others who would not be struck. More directly, a felon might be too biased to sit for one kind of case, such as one involving either the same crime that he himself was convicted of[353] or the same arresting officer, but perfectly fine to sit for another, like a simple civil case.[354]

Distinguishing between types of trials, therefore, makes sense. Unless a state can justify a total ban, felons should only be excluded from those cases where they are not fit to serve. Luckily, the usual jury selection process is designed to make that determination. Where total bans are rejected, felons should be allowed the chance to get at least to voir dire, where the relevance of their criminal conviction to their fitness for jury service can be assessed by the court and the parties.[355] If a state believes that most felons will be unfit, it need only make a criminal conviction the basis of a challenge for cause, which would still allow the judge to make an individual determination on service.[356] If it believes that many felons will be unfit, it can make felons challengeable for cause if other criteria (like a connection between the crime committed and the issue in the current trial) are met.[357]

D. Waiting for Recidivism

A final avenue for fine tuning felon exclusion involves recidivism. Some states may accept the faults of lifetime exclusion but be

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353. *Cf.* Crockett v. State, 38 Ala. 387, 387 (1862) (following a state statute to uphold exclusion in a murder trial where the prospective juror had been indicted within the past year of assault with intent to commit murder).

354. *See infra* notes 413 (restoring more quickly a felon's right to serve on civil juries than criminal juries in Oregon) and 419 (excluding some misdemeanants from criminal juries but not from civil juries in Texas).

355. *See* Singer, *supra* note 3, at 245 (suggesting that the disclosure of a would-be juror's criminal history is preferable to an outright ban on felons serving on juries).

356. *See, e.g.*, *infra* notes 389 (discussing Illinois's lenient standard of allowing felons to be dismissed for cause during voir dire), 391 (noting that in Iowa, a felony conviction is cause for dismissal during voir dire in both civil and criminal trials), and 397 (reviewing Massachusetts statute allowing courts to strike jurors on the basis of past felony convictions).

357. *Cf. supra* note 344 and accompanying text (discussing occupational licensing statutes that disqualify felons only if the crime is related to the occupation for which the license is sought).

disturbed by high recidivism rates. Indeed, some put a time limit on felon exclusion, excluding recently released felons from juries but acknowledging that they can eventually rejoin the community.[358] A larger number of states achieve a similar effect by allowing felons on juries only after they have successfully completed their terms of parole or probation.[359]

The recidivism justification is compelling when one considers that most incarcerated felons return to prison within three years.[360] If an individual who is excluded from jury service is more than likely to re-disqualify himself, there is less reason to hurry to lift the exclusion. On the other hand, the argument that felons should be barred from juries because they are, as a group, likely to re-offend seems incompatible with notions of due process and the individual presumption of innocence. Any other group singled out for exclusion on the basis of a high probability that its members will commit crimes in the future would have a valid complaint.[361] But felons are excluded from jury service while in prison; the issue is when to permit them to serve again.[362] There is a difference between excluding an individual and refusing to re-include him.

Therefore, providing a minimum wait to regain juror eligibility after completion of a sentence may make sense.[363] States could

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358. *See, e.g.*, *infra* notes 382 (excluding felons from jury service in Connecticut for up to seven years), 384 (excluding felons from jury service in D.C. for ten years), 392 (excluding felons from jury service in Kansas for up to ten years), 397 (excluding felons from jury service in Massachusetts for up to seven years), and 413 (excluding felons from service on criminal juries in Oregon for fifteen years).

359. *See infra* notes 377 (Alaska), 378 (Arizona), 388 (Idaho), 390 (Indiana), 392 (Kansas), 399 (Minnesota), 409 (North Carolina), 415 (Rhode Island), 417 (South Dakota), and 425 (Wisconsin). Most parolees do not successfully complete their terms. *See A Stigma That Never Fades*, *supra* note 313, at 26 (reporting that only 42% of parolees successfully completed their parole in 1999).

360. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 7 (2002) [hereinafter BUREAU OF JUSTICE STATISTICS 1994] (reporting that 67.5% of prisoners released in 1994 were re-arrested within three years, and more than half were sent to prison either for new convictions or parole or probation violations), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf (on file with the American University Law Review).

361. *See* Mark H. Moore, *Purblind Justice: Normative Issues in the Use of Prediction in the Criminal Justice System*, *in* 2 CRIMINAL CAREERS AND "CAREER CRIMINALS", *supra* note 216, at 314, 317-18 (discussing the problems and benefits of identifying proper variables upon which to rely in predicting future criminal behavior).

362. *But see infra* notes 381 (providing no exclusion of prisoners from petit juries in Colorado) and 395 (allowing, in theory, felons currently incarcerated in Maine to serve on juries).

363. *See* Grant et al., *supra* note 3, at 1239 & n.402 (recommending that felons' civil rights be restored within a maximum of five years of their release from incarceration). England and Wales have a system that relies on fixed terms. *See* Demleitner, *Preventing Internal Exile*, *supra* note 5, at 162 (describing the English model of automatic restoration of civil rights for some felons after a fixed waiting

determine the length of the wait by seeking the point at which a felon, having not yet committed a new offense, is not appreciably more likely to do so than is anyone else.

Unfortunately, there are probably not enough data extant to make such a determination very precisely. The most comprehensive recent study on recidivism was the Department of Justice's study of prisoners released in 1994.[364] That study found that 68% of the prisoners were rearrested within three years, 47% were reconvicted, and 25% were re-sentenced to prison.[365] In addition, another 27% were imprisoned for parole or probation violations, meaning that more than half were back in prison within three years.[366] These figures did not differ much from a previous study conducted on 1983 releases.[367] The timing of recidivism is telling, but not altogether clear. The incidence rises steeply in the first two years and begins to level off by the third year.[368] The study does not provide data after three years, and the curve does not level off completely at that point, though there is some reason to believe that it would have flattened significantly after five years.[369] Some recidivism undoubtedly occurs after three years, but in the absence of firm data, drawing the line at three to five years seems reasonable.

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period); Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Convictions*, 56 CAMBRIDGE L.J. 599, 602 (1997) (describing the English system of excluding from jury service for life convicts sentenced to over five years imprisonment and excluding all other convicts from jury service for ten years).

364. BUREAU OF JUSTICE STATISTICS 1994, *supra* note 360 (tracking the rearrest rates of prisoners released from U. S. prisons in 1994).

365. *Id.* at 1, 7.

366. *Id.*

367. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983, at 1 (1989) [hereinafter BUREAU OF JUSTICE STATISTICS 1983] (reporting that of prisoners released in 1983, within three years 63% were rearrested, 47% were reconvicted, and 41% were returned to prison), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr83.pdf (on file with the American University Law Review).

368. *See* BUREAU OF JUSTICE STATISTICS 1994, *supra* note 360, at 3 (noting that, of criminals released in 1994, 59% had been rearrested within two years and 68% had been rearrested within three years); BUREAU OF JUSTICE STATISTICS 1983, *supra* note 367, at 3 (reporting that, of criminals released in 1983, 55% had been rearrested within two years and 63% had been rearrested within three years).

369. Recidivism is generally measured based on a one- to five-year observation period. 1 CRIMINAL CAREERS AND "CAREER CRIMINALS", *supra* note 216, at 27. One study tracked criminals for six years and found that the recidivism rate continued to increase through the sixth year, although the rate of increase decelerated over time. *See* Peter B. Hoffman & Barbara Stone-Meierhoefer, *Reporting Recidivism Rates*, 8 J. CRIM. JUST. 53, 57 (1980). The annual increments of increase in the rates of reconviction from year one to year six were 15%, 10%, 7%, 4%, 3%, and 3%. *Id.* In Uggen et al., *supra* note 178, at 2, the authors derive a trend line from Hoffman and Meierhoefer to calculate ten-year and fifty-year recidivism rates, though they appear not to have taken life cycle data into account, which might cause them to overstate recidivism among elderly ex-criminals.

A more individualized waiting period may be provided by probation and parole. These may be part of a felon's sentence, and even if they are applied in cookie-cutter fashion, they provide an individual test of the felon's ability to stay "clean." Because they also represent continued constraints on everyday life, continuing civic restrictions in the mean time is less inappropriate. The end of a term of parole or probation is a symbolic (if not always accurate) declaration that the felon is now fit to rejoin society without restrictions.

To be sure, using probation and parole as the backstop is not perfect. Almost twenty percent of prisoners are released without any term of supervised release because they were either ineligible or adjudged unworthy, neither of which are good criteria for allowing an immediate return to jury service.[370] Why such offenders should enjoy restored rights sooner than offenders on parole or probation is unclear. In such cases, a mandatory minimum term of exclusion after release might be appropriate.

It is worth considering, then, that felons be excluded while on parole or probation, and/or for a fixed term of three to five years after the expiration of their sentence. The number of felons who return to prison during that time may be too high to justify ending their exclusion any earlier. Then again, it might not; individual states should consider the question carefully and decide accordingly.

CONCLUSION

Lifetime felon exclusion is the majority rule in the United States.[371] It affects an estimated thirteen million people and about thirty percent of black men.[372] Though its historical roots are deep, those roots reflect notions of narrow juries and scarce felons that are alien to our current system; recent history has transformed felon exclusion into something too novel to be justified by its long practice.[373]

Admittedly, one would be hard pressed to argue that the biggest problem facing the American legal system is that our juries do not have enough felons on them. Moreover, felon exclusion is probably acceptable under current constitutional law. But this reveals the flaws

370. *See* PETERSILIA, *supra* note 307, at 59, 73-74 (discussing the unintended negative consequences of unsupervised release).

371. *See infra* Appendix 1.A (reviewing the duration of felon exclusion from jury service in all United States jurisdictions).

372. *See infra* Appendix 2 (discussing the number of people who are excluded from jury service as felons).

373. *See infra* Appendix 3 (detailing the history of the exclusion of felons and other socially undesirable people from juries in England and the United States).

of recent doctrine more than the virtues of excluding felons. Those virtues—a jury with enhanced probity, free from people who probably hate the government and have cast themselves out of society—are reasonable enough to be legal, but are flawed enough to warrant more serious debate. In a system of otherwise inclusive jury venires and carefully selected jury panels, casting out every felon in every case, forever, is excessive. This is evident from the fact that the jury system still functions in the minority of states that allow felons to serve, and in the majority that do not, but allow felon-tainted verdicts to stand.

While a successful campaign has been waged against felon disenfranchisement, felon exclusion has been largely ignored. Whether or not it should continue as the majority rule is a matter on which reasonable minds can disagree, but not one that they should ignore any longer.

APPENDIX 1: FELON EXCLUSION STATUTES

Most jurisdictions bar felons from juries for life, but many do not. Jurisdictions apply a patchwork of standards of different durations, applied to different crimes and to different kinds of juries. Jurisdictions also vary in their treatment of foreign convictions, clemency, and pending charges, and their methods of resolving errors in application. This Appendix will survey the diversity of approaches to felon exclusion.

A. Duration of Exclusion

The following list categorizes the duration of felon exclusion in the fifty states, the District of Columbia, and federal courts. Exclusion laws ban felons from juries either for life, during sentence or supervision (prison, parole, and probation), during imprisonment, or some combination thereof. Many "life" states bar felons unless civil rights have been restored, but have broad restoration provisions. Others make restoration automatic; for such states, felon exclusion is *not* listed as lifelong.[374]

FEDERAL: Life[375]

ALABAMA: Life[376]

ALASKA: During supervision[377]

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374. Some "automatic" restorations of rights are not actually automatic. In Texas, for example, an eligible felon must actually apply for a discharge, and if he fails to do so, the state can continue to bar him from jury service. *See* Wolfe v. State, 917 S.W.2d 270, 277 (Tex. Crim. App. 1996) (rejecting a challenge to the exclusion of a juror who had not applied for an order of discharge).

375. *See* 28 U.S.C. § 1865(b)(5) (2000) (disqualifying from grand and petit juries anyone who "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored").

376. *See* ALA. CODE § 12-16-60(a) (1995) (qualifying for jury service only one who "is generally reputed to be honest and intelligent and is esteemed in the community for integrity, good character and sound judgment" and who "[h]as not lost the right to vote by conviction for any offense involving moral turpitude"), § 12-16-150(5) (allowing challenges for cause if juror "has been convicted of a felony"); ALA. CONST. art. VIII, § 182 (disqualifying from voting "those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude"). Alabama also disqualifies those with pending felony charges, or charges for "an offense of the same character as that with which the defendant is charged." ALA. CODE § 12-16-150(3) (1995).

377. *See* ALASKA STAT. § 09.20.020(2) (Michie 2002) (disqualifying from jury service anyone who "has been convicted of a felony for which the person has not been unconditionally discharged"), § 33.30.241 (excluding felons from jury service until they have been unconditionally discharged), § 12.55.185(15) (defining

ARIZONA: Life (repeat offenders) or during sentence (first offenders)[378]

ARKANSAS: Life[379]

CALIFORNIA: Life[380]

COLORADO: No exclusion for petit juries; life for grand juries[381]

CONNECTICUT: During incarceration or seven years from conviction, whichever is longer[382]

DELAWARE: Life[383]

DISTRICT OF COLUMBIA: During supervision plus ten years[384]

FLORIDA: Life[385]

GEORGIA: Life[386]

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unconditional discharge as release from imprisonment, parole, and probation).

378. *See* ARIZ. REV. STAT. ANN. § 13-904(A)(3) (West 2002 & Supp. 2002) (suspending the jury service "right" upon felony conviction), § 21-201(3) (disqualifying from grand or petit jury service those "convicted of a felony, unless [their] civil rights have been restored"), § 13-912(A) (restoring "automatically" first-time offenders' civil rights after completion of sentence).

379. *See* ARK. CODE ANN. § 16-31-102(a)(4)-(5) (Michie 1999) (disqualifying from grand or petit jury service those "who have been convicted of a felony and have not been pardoned" and those "who are not of good character or approved integrity, are lacking in sound judgment or reasonable information, are intemperate, or are not of good behavior").

380. *See* CAL. CONST. art. VII, § 8(b) (requiring legislature to make laws "to exclude persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crimes . . . from serving on juries"); CAL. CIV. PROC. CODE § 203(a)(5) (West Supp. 2003) (disqualifying from jury service those "who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored").

381. *See* COLO. REV. STAT. § 13-71-105(3) (2002) (disqualifying "prospective grand juror[s]" who have "previously been convicted of a felony" but not mentioning petit jurors). Colorado disqualified felons from petit and grand jury service until 1989. COLO. REV. STAT. § 78-1-1 (1963) (repealed 1989); *see also* DEP'T OF JUSTICE SURVEY, *supra* note 328, at 33 (describing changes in Colorado law).

382. *See* CONN. GEN. STAT. ANN. § 51-217(a)(2) (West Supp. 2003) (disqualifying from jury service anyone who "has been convicted of a felony within the past seven years or is a defendant in a pending felony case or is in the custody of the Commissioner of Correction").

383. *See* DEL. CODE ANN. tit. 10, § 4509(b)(6) (1999) (disqualifying from jury service "[c]onvicted felons who have not had their civil rights restored").

384. *See* D.C. CODE ANN. § 11-1906(b)(2)(B) (2001) (disqualifying felons from jury service for "not less than one year after the completion of the term of incarceration, probation, or parole"), § 11-1904(a) (delegating power to promulgate a specific jury plan to the Board of Judges of the Superior Court); JURY PLAN FOR THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA § 7(f) (1988) (requalifying felons for jury service "ten years after the completion of their entire sentence, including incarceration, probation and parole").

385. *See* FLA. STAT. ANN. § 40.013(1) (Harrison 1998) (disqualifying from jury service those "under prosecution for any crime," and those convicted anywhere "of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights").

386. *See* GA. CODE ANN. § 15-12-60(b)(2) (Harrison 1998) (disqualifying from grand juries anyone "who has been convicted of a felony and . . . not been pardoned or had his or her civil rights restored"), § 15-12-120 (stating that petit jurors are selected "in the same manner that grand juries are drawn"), § 15-12-163(b)(5)

HAWAII: Life[387]

IDAHO: During supervision[388]

ILLINOIS: Challengeable for cause (for life)[389]

INDIANA: During sentence[390]

IOWA: Challengeable for cause (for life)[391]

KANSAS: During supervision or ten years from conviction, whichever is longer.[392]

(stating a basis for challenge for cause if a "juror has been convicted of a felony in a federal court or any court of a state of the United States and the juror's civil rights have not been restored"), § 17-7-95(c) (specifying that conviction based on nolo contendere plea does not disqualify one from service); *see also* 1983 Ga. Op. Att'y Gen. 69 (No. 83-33), *available at* 1983 WL 41667, *4 (stating that "the qualifications for serving on a trial jury are the same as for service on a grand jury").

387. *See* HAW. REV. STAT. ANN. § 612-4(b)(2) (Michie 2002) (disqualifying from jury service those "convicted of a felony in a state or federal court and not pardoned").

388. *See* IDAHO CODE § 18-310(1) (Michie 2002) (specifying suspension of civil rights during incarceration and restoration of "all civil rights that are not political" during parole or probation). Although jury service arguably is a civil right and not a political right, political rights are "consistent with direct or indirect participation in establishing or administering government," which would seem to include jury service. 1986 Idaho Op. Att'y Gen. 81 (No. 86-16), *available at* 1986 WL 193894, *3 (giving as examples of political rights "the right of sufferage [sic], the right to hold public office, and the right of petition," as opposed to merely civil rights such as "property, marriage, contract, protection of law, etc."); *see also supra* text accompanying note 135.

389. *See* 705 ILL. COMP. STAT. ANN. 305/2-3 (West 1999) (requiring jurors to be "[f]ree from all legal exception, of fair character, of approved integrity, of sound judgment"). It appears that a felony conviction will satisfy this standard, but that the ultimate decision to exclude is within the discretion of the trial judge. *See* People v. Gil, 608 N.E.2d 197, 206 (Ill. App. Ct. 1992) (stating that "[a] venire person may be excused for cause where he or she has been previously charged with various crimes") (citing People v. Seaman, 561 N.E.2d 188, 200 (Ill. App. Ct. 1990)); *see also* Telephone Interview by Jane Edwards with Barbara Maddex, Jury Commissioner, Nineteenth Judicial Circuit Court, Lake County, Ill. (May 28, 2003) (indicating that potential jurors with recent or extensive criminal histories are automatically excused on request); *cf.* HAZEL B. KERPER & JANEEN KERPER, LEGAL RIGHTS OF THE CONVICTED 34 & n.132 (1974) (characterizing Illinois standard as equivalent to barring those with criminal records); John F. Decker, *Collateral Consequences of a Felony Conviction in Illinois*, 56 CHI.-KENT L. REV. 731, 741 (1980) (summarizing the more lenient interpretation, which did not bar felons from jury service, in place prior to the *Seaman* decision).

390. *See* IND. CODE § 33-4-5-7(b)(4) (Lexis 1998) (disqualifying from jury service anyone "under a sentence imposed for an offense"), § 33-5.5-11(b)(4) (disqualifying felons whose rights are not restored); *see also* United States v. Brown, 235 F. Supp. 2d 931, 934 n.6 (S.D. Ind. 2002) (clarifying that disqualification includes probationary period, and that restoration of rights implicitly occurs with expiration of sentence). This statute would seem to disqualify misdemeanants as well.

391. *See* IOWA CODE ANN. R. 1.915(6)(a) (West 2002) (making a civil juror challengeable for cause for "[c]onviction of a felony"), R. 2.18(5)(a) (making a criminal juror challengeable for cause for "previous conviction of . . . a felony").

392. *See* KAN. STAT. ANN. § 21-4615(1)-(2) (2002) (disqualifying from jury service any "person who has been convicted in any state or federal court of a felony" until he "has completed the terms of the authorized sentence"), § 43-158(c) ("excus[ing] from jury service" anyone convicted "within 10 years immediately preceding"). In Kansas, a felon is not discharged from parole or probation until he applies for a

KENTUCKY: Life[393]
LOUISIANA: Life[394]
MAINE: No exclusion[395]
MARYLAND: Life[396]
MASSACHUSETTS: During incarceration or seven years from conviction, whichever is longer; removable for cause for life[397]

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certificate of discharge, which he cannot do until a year after the end of parole or probation. *Id.* § 22-3722.

393. *See* KY. REV. STAT. ANN. § 29A.080(2)(e) (Banks-Baldwin 2002) (disqualifying from jury service one who "[h]as been previously convicted of a felony and has not been pardoned or received a restoration of civil rights").

394. *See* LA. CODE CRIM. PROC. ANN. art. 401(A)(5) (West 2003) (disqualifying from criminal jury service one "convicted of a felony for which he has not been pardoned" or "under indictment for a felony"); LA. REV. STAT. ANN. § 13:3041 (West 1991) (incorporating criminal standard by reference for civil juries). The Louisiana Constitution provides that "[f]ull rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense." LA. CONST. art. I, § 20. However, jury service is not considered a "right of citizenship" for these purposes. *See* State v. Haynes, 514 So. 2d 1206, 1211 (La. App. 1987) (explaining inapplicability of art. I, § 20 to jury service).

395. *See* ME. REV. STAT. ANN. tit. 14, § 1211 (West 2003) (providing disqualifications for jury service, none of which refer to criminal history). This does not necessarily permit criminals to serve on Maine juries. As one court official from Maine explained: "Although [incarcerated criminals] could be bound over day to day until they are free from incarceration, it is logical to excuse them from service for this term. Again, [it is] up to the individual judge." E-mail from Connie Fletcher, Judicial Secretary, Cumberland County (Maine) Superior Court, to Jeff Jocks, researcher at Michigan State University-DCL College of Law (June 28, 2002) (on file with the American University Law Review).

396. *See* MD. CODE ANN., CTS. & JUD. PROC. § 8-207(b)(5) (2002) (excluding from jury service one charged with or convicted of "crime punishable by a fine of more than $500, or by imprisonment for more than six months," who has received such a sentence, "and has not been pardoned"). Maryland law contains several other provisions disqualifying jurors. In sum, Maryland excludes:

(1) Felons and misdemeanants sentenced to more than six months or fined more than $500. *Id.*

(2) Others with lesser sentences convicted of lying on a jury form, MD. CODE ANN., CTS. & JUD. PROC. § 8-207(b)(6) (2002), or jury bribery, MD. CODE ANN., CRIM. LAW § 9-202(c) (2002).

(3) Others who have lost their right to vote which, in addition to the offenses already mentioned, may be for "theft or other infamous crime" if the offender is either under criminal supervision or is a repeat offender, or for "buying or selling votes." MD. CODE ANN., CTS. & JUD. PROC. § 8-207(b)(1) (2002) (excluding from jury service those who lack the right to vote); *see* MD. CODE ANN., ELEC. LAW § 3-102(b) (2002) (excluding criminals specified above from voting). "Infamous crimes" probably comprise common-law felonies, treason, and *crimen falsi* such as perjury, embezzlement, theft, and fraud. *See* State v. Giddens, 642 A.2d 870, 874 & n.5 (Md. 1994) (defining infamous crimes and *crimen falsi* in the context of a rule for impeaching witnesses).

397. *See* MASS. GEN. LAWS ANN. ch. 234A, § 4(7) (West 2000) (disqualifying from grand or petit jury service one who "has been convicted of a felony within the past seven years or is a defendant in pending felony case or is in the custody of a correctional institution"), ch. 234, § 8 (allowing the "justice holding court" to relieve or strike jurors "convicted of any felony" or "guilty of gross immorality"). Oddly, a Massachusetts criminal sentenced to life and paroled after ten years can serve on a jury the day he leaves prison, while a small-time drug dealer sentenced to two years of

MICHIGAN: Life (effective October 2003)[398]
MINNESOTA: During sentence[399]
MISSISSIPPI: Life[400]
MISSOURI: Life[401]
MONTANA: Life[402]
NEBRASKA: Life[403]

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probation must wait for five years after his probation expires before he is eligible to serve. *See* United States v. Estrella, 104 F.3d 3, 6 (1st Cir. 1997) (asserting that "[s]ome might think it odd that a felon still on parole should be seated on a jury"). Of course, the judge can still dismiss our hypothetical parolee for cause *sua sponte*.

398. *See* Act of Dec. 30, 2002, Pub. L. No. 739, 2002 Mich. Legis. Serv. 739 (West) (effective Oct. 1, 2003) (amending MICH. COMP. LAWS § 600.1307a to disqualify felons convicted in any jurisdiction from jury service for life). Though the official legislative history contains no evidence, one commentator described this new legislation as "[a] late add-on" to legislation raising juror pay. *Just Wage for Justice*, GRAND RAPIDS PRESS, Jan. 7, 2003, at A6, *available at* 2003 WL 4839862. Michigan's previous system disqualified only those "under sentence of felony at the time of jury selection," MICH. COMP. LAWS § 600.1307a(1)(e), though felons could be excluded for cause for life in criminal cases. *See* Froede v. Holland Ladder & Mfg., 523 N.W.2d 849, 852 (Mich. Ct. App. 1994).

399. *See* MINN. R. CRIM. P. 26.02(5)(1)(2) (West Supp. 2003) (making felon jurors challengeable for cause in criminal cases unless rights have been restored); MINN. GEN. R. PRAC. 808(b)(6) (West 1993) (qualifying for jury service convicted felons who have had their civil rights restored); MINN. STAT. ANN. § 609.165(2) (West 1987) (restoring rights "[u]pon expiration of sentence").

400. *See* MISS. CODE ANN. § 13-5-1 (2002) (qualifying for jury service only those who have "not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years"), § 1-3-19 (defining "infamous crime" as a felony). It is possible to interpret section 13-5-1 as restoring the right to serve on a jury five years after the conviction. *See, e.g.*, DEP'T OF JUSTICE SURVEY, *supra* note 328, at 81 (permitting the restoration of the right to serve on a jury as long as the individual is either a qualified elector or a resident freeholder). Mississippi courts, however, apparently do not. *See, e.g.*, Fleming v. State, 687 So. 2d 146, 148 (Miss. 1997) (citing section 13-5-1 as establishing simply that "persons convicted of 'infamous crimes' are not competent to serve on juries"). In either case, section 13-5-1 also excludes from jury service those who are not "qualified elector[s]," and the Mississippi Constitution disenfranchises those convicted of "murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy." MISS. CONST. art. 12, § 241.

401. *See* MO. REV. STAT. § 494.425(4) (1996) (disqualifying from grand or petit jury service "[a]ny person who has been convicted of a felony, unless such person has been restored to his civil rights"), § 561.026(3) (providing that a person convicted of a felony "shall be forever disqualified from serving as a juror"). The latter statutory language is apparently not as absolute as it sounds. *See id.* comment to 1973 proposed code (clarifying that a pardon would restore a jury right).

402. *See* MONT. CODE ANN. § 3-15-303(2) (2001) (declaring incompetent to serve on a jury anyone "who has been convicted of malfeasance in office or any felony or other high crime"). *But see* § 46-18-801(1) (requiring civil disabilities imposed on convicts either to come from the state constitution or to be "specifically enumerated by the sentencing judge as a necessary condition of the sentence directed toward the objectives of rehabilitation and the protection of society," and if the latter, to be restored upon expiration of the sentence). One source indicates, without citation, that the Montana Attorney General has advised that "the right to sit on a jury [is] restored only by a pardon." DEP'T OF JUSTICE SURVEY, *supra* note 328, at 86.

403. *See* NEB. REV. STAT. § 25-1601(f) (1995) (disqualifying from grand or petit jury service "persons who have been convicted of a criminal offense punishable by

NEVADA: Life[404]
NEW HAMPSHIRE: Life[405]
NEW JERSEY: Life[406]
NEW MEXICO: Life[407]
NEW YORK: Life[408]
NORTH CAROLINA: During supervision[409]
NORTH DAKOTA: During incarceration[410]
OHIO: Life[411]

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imprisonment in a Department of Correctional Services adult correctional facility, when such conviction has not been set aside or a pardon issued"), § 29-112 (declaring incompetent for jury service "[a]ny person sentenced to be punished for any felony, when sentence shall not have been reversed or annulled"), § 25-113 (barring those convicted in other jurisdictions and actually imprisoned from jury service). At one time, Nebraska restored civil rights automatically upon the completion of one's sentence, but it changed that practice when it amended section 83-1,118 of the Nebraska Revised Statutes in 2002. *See* L.B. 1054, 97th Leg., 2d Sess. § 28 (Neb. 2002) (providing that restoration of civil rights requires an application and hearing before the Board of Pardons).

404. *See* NEV. REV. STAT. 6.010 (2001) (qualifying for jury service those "who ha[ve] not been convicted of treason, felony, or other infamous crime").

405. *See* N.H. REV. STAT. ANN. § 500-A:7-a(V) (West Supp. 2002) (stating that "[a] juror shall not have been convicted of any felony which has not been annulled"). This law became effective in 1999. *Id.* history. Previously, New Hampshire placed no restrictions on felons, either before or after incarceration, though trial judges could exclude a felon *sua sponte*. *See* DEP'T OF JUSTICE SURVEY, *supra* note 328, at 92 (describing previous law); Burton et al., *supra* note 28, at 52 (describing the discretionary power of the court).

406. *See* N.J. STAT. ANN. § 2B:20-1(e) (West 2002) (requiring that jurors "shall not have been convicted of any indictable offense under the laws of this State, another state, or the United States"). Between 1995 and 1997, New Jersey allowed felons to serve on juries after they had completed their sentences. *See id.* Assembly Judiciary Committee statement (indicating that the statute removed the per se disqualification any person serving a sentence); *Senate O.K.'s Girgenti Bill to Bar Convicted Criminals From Jury Duty*, THE ITALIAN VOICE, Mar. 7, 1996, at 1, *available at* 1996 WL 15721471 (explaining the concerns underlying restoration of the exclusion, including citizens' aversion to "go[ing] down to the courthouse and find[ing] convicted criminals sitting next to them in the jury box").

407. *See* N.M. STAT. ANN. § 38-5-1 (Michie 1998) (requiring for jury service eligibility that one "is not a convicted felon").

408. *See* N.Y. JUD. § 510(3) (McKinney 1992 & Supp. 2003) (qualifying for jury service those not convicted of a felony).

409. *See* N.C. GEN. STAT. § 9-3 (2002) (qualifying for jury service persons who "have not been convicted of a felony . . . or if convicted . . . have had their citizenship restored pursuant to law"), § 13-1 (restoring rights automatically upon unconditional discharge from prison, parole, or probation).

410. *See* N.D. CENT. CODE § 27-09.1-08(2)(e) (Supp. 2001) (disqualifying from jury service anyone who "[h]as lost the right to vote because of imprisonment in the penitentiary . . . or conviction of a criminal offense which by special provision of law disqualified the prospective juror for such service"), § 12.1-33-01(1)(a) (1997) (specifying that felons cannot vote while incarcerated). Until 1993, North Dakota made felons challengeable for cause for life. *See* City of Mandan v. Baer, 578 N.W.2d 559, 563 (N.D. 1998) (describing legislative changes that allowed felons to serve on juries after incarceration).

411. *See* OHIO REV. CODE ANN. § 2961.01 (Anderson 1996) (declaring "[a] person convicted of a felony under the laws of this or any other state or the United States . . .

OKLAHOMA: Life[412]

OREGON: During incarceration plus fifteen years (criminal and grand juries) or during incarceration (civil juries)[413]

PENNSYLVANIA: Life[414]

RHODE ISLAND: During supervision[415]

SOUTH CAROLINA: Life[416]

SOUTH DAKOTA: During supervision[417]

TENNESSEE: Life[418]

TEXAS: Life[419]

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incompetent to be . . . [a] juror").

412. *See* OKLA. STAT. tit. 38, § 28(B)(6) (1999) (deeming unqualified for jury service "[p]ersons who have been convicted of any felony" if not "fully restored to his or her civil rights").

413. *See* OR. CONST. art. I, § 45(1)(a)-(b) (restricting criminal and grand jury service to those not convicted of or serving sentences for a felony within the last fifteen years, or convicted of a "misdemeanor involving violence or dishonesty" within last five years); OR. REV. STAT. § 10.030(2)(d) (2001) (declaring ineligible for civil juries one who has had rights and privileges withdrawn pursuant to section 137.281(1)(a), (7), which provides for the loss of the right/privilege to serve on a jury until "discharge[] or parole[] from imprisonment," at which point the right/privilege is "restored automatically"). The constitutional provision was adopted by a citizen initiative in 1999. OR. CONST. art. I, § 45(1), historical notes. A similar initiative was passed in 1996 but voided on a technicality. *See* Armatta v. Kitzhaber, 959 P.2d 49, 51 (Or. 1998) (striking down 1996 initiative).

414. *See* 42 PA. CONS. STAT. ANN. § 4502(a)(3) (West 1981 & Supp. 2002) (disqualifying from jury service one who "has been convicted of a crime punishable by imprisonment for more than one year and has not been granted a pardon or amnesty therefor").

415. *See* R.I. GEN. LAWS § 9-9-1.1(c) (Supp. 2002) (barring from jury service one "convicted of a felony . . . until completion of such felon's sentence, served or suspended, and of parole or probation").

416. *See* S.C. CODE ANN. § 14-7-810(1) (Supp. 2002) (disqualifying from jury service anyone "convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and [whose] civil rights have not been restored by pardon or amnesty").

417. *See* S.D. CODIFIED LAWS § 16-13-10 (Michie Supp. 2002) (declaring ineligible for jury service "[a]ny person who has been convicted of a felony unless restored to civil rights"), § 23A-27-35 (declaring the right to serve on a jury "suspend[ed]" during "sentence of imprisonment"), § 24-15A-6 (mandating that a prisoner be either imprisoned or under parole supervision for "total sentence length"). *But see* DEP'T OF JUSTICE SURVEY, *supra* note 328, at 122 (stating that felon exclusion in South Dakota is only during incarceration).

418. *See* TENN. CODE ANN. § 22-1-102(a) (1994) (declaring incompetent to serve as jurors those convicted of "certain infamous offenses, specially designated in this code," theft, "perjury or subornation of perjury," as well as "[p]ersons of unsound mind and habitual drunkards"). While it is unclear what is meant by "certain" infamous offenses, all felons are treated as infamous. *See id.* § 40-20-112 (stating that "[u]pon conviction for any felony, it shall be the judgment of the court that the defendant be infamous"); Tennessee v. Bishop, No. 01C01-9309-CR-0033, 1994 WL 474874, at *1 (Tenn. Crim. App. Sept. 1, 1994) (holding that "[f]elons are rendered infamous and are disqualified from service on a jury").

419. *See* TEX. GOV'T CODE ANN. § 62.102(7) (Vernon 1998) (disqualifying from petit jury service all but those "not . . . convicted of a felony"); TEX. CODE CRIM. PROC. ANN. art. 19.08(4)-(5) (Vernon Supp. 2003) (disqualifying from grand jury service those convicted of or indicted for "theft or of any felony"), 35.16(a) (disqualifying

UTAH: Life[420]

VERMONT: Life[421]

VIRGINIA: Life[422]

WASHINGTON: During supervision (life if committed before July 1984)[423]

WEST VIRGINIA: Life[424]

WISCONSIN: During sentence[425]

WYOMING: Life[426]

Thus the clear majority rule, used by the federal government and thirty-one states, is to exclude felons from juries for life, unless their rights have been restored pursuant to discretionary clemency rules.[427]

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from petit criminal jury those convicted of or indicted for "theft or . . . any felony").

There is currently a dispute under Texas law regarding the restoration of the right to serve. The law, TEX. CODE CRIM. PROC. ANN. art. 42.12, § 20 (Vernon Supp. 2003), gives trial courts the power to restore the rights of worthy felons sentenced to community supervision. *See* Cuellar v. State, 70 S.W.3d 815, 818-19 (Tex. Crim. App. 2002) (citing law). In 1994, however, a panel of the Texas Court of Appeals held that the statute conflicted with the state constitution's exclusive grant of the pardon power to the executive branch. R.R.E. v. Glenn, 884 S.W.2d 189, 193 (Tex. App. 1994). Subsequently, other panels have disagreed. *See, e.g.*, Hoffman v. State, 922 S.W.2d 663, 668 (Tex. App. 1996) (providing a list of cases differing from the holding in *Glenn*).

420. *See* UTAH CODE ANN. § 78-46-7(2) (2002) (declaring incompetent for jury service anyone "who has been convicted of a felony that has not been expunged").

421. *See* VT. STAT. ANN. tit. 4, § 962(5) (Lexis 1999) (declaring qualified for jury service those who "ha[ve] not served a term of imprisonment in this state after conviction of a felony").

422. *See* VA. CODE ANN. § 8.01-338(2) (Michie 2000) (disqualifying from jury service anyone "convicted of treason or a felony").

423. *See* WASH. REV. CODE ANN. § 2.36.070(5) (West Supp. 2003) (declaring incompetent for jury service anyone "convicted of a felony [who] has not had his or her civil rights restored"). Disabilities from offenses committed before July 1, 1984 are subject to discretionary restoration. *See* §§ 9.92.066, 9.95.240, 9.96.050. For post-July 1, 1984 offenses, restoration is automatic upon completion of one's sentence, including parole or probation, with a possibility of early discretionary relief after half of the term of probation has been completed. *Id.* § 9.94A.637.

424. *See* W. VA. CODE § 52-1-8(b)(6) (2000) (disqualifying from jury service one "convicted of perjury, false swearing or other infamous offense"); State v. Bongalis, 378 S.E.2d 449, 455 (W. Va. 1989) (holding all felonies "infamous" for jury exclusion purposes).

425. *See* WIS. STAT. ANN. § 756.02 (West 2001) (disqualifying from jury service anyone who "has been convicted of a felony and has not had his or her civil rights restored"), § 304.078 (restoring rights upon completion of sentence).

426. *See* WYO. STAT. ANN. § 1-11-102 (Michie 2001) (disqualifying from jury service any "person who has been convicted of any felony" and not had rights restored).

427. *See also* ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT std. 4(e) (rev. ed. 1993) [hereinafter ABA JUROR USE] (barring from jury service felons whose civil rights have not been restored); MODEL SENTENCING & CORRECTIONS ACT § 4-1002 (1979), *cited in* 47 AM. JUR. 2D *Jury* § 169 (1995) (barring felons from jury service for life); *cf.* UNIF. JURY SELECTION & SERV. ACT § 8, *cited in* 47 AM. JUR. 2D *Jury* § 169 (1995) (barring felons from juries if they are disqualified as voters). *But see* MODEL PENAL CODE § 306.3 (1998) (excluding a convict from jury service only "until he has satisfied his sentence"); ABA STANDARDS FOR CRIMINAL JUSTICE std. 23-8.5 (2d ed. 1983) [hereinafter ABA CRIMINAL JUSTICE] (barring jury service only by those

At the other extreme, two states do not exclude felons as felons from juries at all.[428] Three others allow parties to challenge felons for cause for life at the discretion of the court, the effect of which obviously varies.[429] These rules are ultimately a matter of degree: No state manages to keep all felons off of its juries, and no state lets all of them on.[430] Lifetime disqualification still means that a felon may appear on a jury if an error is made, even though errors are common and rarely corrected.[431] On the other extreme, no felon will serve on a jury unless both parties accede; even with no law mandating exclusion, either party can still use a peremptory strike.

The remaining states fall somewhere in between. Ten states simply exclude felons during the time that they are under sentence, under the supervision of the criminal justice system, or in prison.[432] The other five jurisdictions provide hybrids of various severity, either providing different rules for different situations, or using a rule combining penal status and some term of years.[433]

B. Distinctions

The law of felon exclusion touches on several factors. A jurisdiction must determine what crimes to include; how to treat convictions from other jurisdictions; how to treat pardons; whether to correct erroneous application of the standard; how to treat pending charges; and whether to distinguish between civil juries, grand juries, and criminal petit juries. Most of the litigation over felon exclusion has centered on these technical details rather than on the validity of felon exclusion itself.[434]

1. Felonies and misdemeanors

Although the focus of this Article is the exclusion of felons from jury service, some states also exclude some misdemeanants.[435] The common law traditionally included some misdemeanors in the

currently under criminal supervision).

428. *See supra* notes 381 (Colorado; petit juries) and 395 (Maine).

429. *See supra* notes 389 (Illinois), 391 (Iowa), and 397 (Massachusetts).

430. *See supra* Part II.E and accompanying text (listing common errors made in jury selection and subsequent jury decisions).

431. *See id.*

432. *See supra* notes 377 (Alaska), 388 (Idaho), 390 (Indiana), 399 (Minnesota), 409 (North Carolina), 410 (North Dakota), 415 (Rhode Island), 417 (South Dakota), 423 (Washington), and 425 (Wisconsin).

433. *See supra* notes 378 (Arizona), 382 (Connecticut), 384 (District of Columbia), 392 (Kansas), and 413 (Oregon).

434. *See* Grant et al., *supra* note 3, at 1058 (describing felon exclusion litigation).

435. *See supra* notes 376 (Alabama), 380 (California), 390 (Indiana), 396 (Maryland), 402 (Montana), 413 (Oregon), 418 (Tennessee), and 419 (Texas).

category of "infamous crimes" or "moral turpitude," whose violators were deemed unfit for jury service.[436] Some states followed suit,[437] though most do not, or else simply equate infamous crimes with felonies.[438]

Some states exclude those who have committed "*crimen falsi*"—crimes involving deception, such as fraud or perjury—and maintain that exclusion even if the crimes in question were misdemeanors.[439] Others specify that particular misdemeanors, such as those involving violence, theft, or official misconduct, are disqualifying alongside felonies.[440]

Another ambiguity of the generic term "felon" is that a felony convict may not be sentenced to any imprisonment (indeed, most are not) yet will still be considered a felon.[441] The typical rule excludes those convicted of a crime for which the *possible* sentence included imprisonment for at least one year.[442] A young adult might plead guilty to a minor felony, be sentenced only to probation, and nevertheless be excluded for life from jury service, which is the most extreme result of the majority approach.[443]

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436. *See* Beasley v. State, 96 So. 2d 693, 697 (Ala. App. 1957) (discussing the common-law history in a decision treating misdemeanor adultery as a disqualifying crime of moral turpitude).

437. *See, e.g.*, *supra* notes 376 (Alabama) and 396 (Maryland); State *ex rel.* Hannon v. Ryan, 312 N.Y.S.2d 706, 712 (N.Y. App. Div. 1970) (describing and approving systematic exclusion of "individuals convicted of misdemeanors involving moral turpitude").

438. *See supra* notes 400 (Mississippi), 404 (Nevada), 418 (Tennessee), and 424 (West Virginia); *see also* Green v. United States, 356 U.S. 165, 183 (1958) (defining a Fifth Amendment "infamous crime" as one punishable by more than a year in prison). This reflects a trend that began in the Supreme Court in the late nineteenth century. *See* Mackin v. United States, 117 U.S. 348, 351-52 (1886) (holding that any crime punishable by imprisonment is infamous); *Ex Parte* Wilson, 114 U.S. 417, 429 (1885) (ruling that an infamous crime is one punishable by imprisonment); Grant et al., *supra* note 3, at 958 (describing the *Mackin* and *Wilson* shift from defining infamy based on crime to defining it based on punishment).

439. *See supra* notes 385 (Florida), 396 (Maryland), 418 (Tennessee), 424 (West Virginia).

440. *See supra* notes 380 (California), 396 (Maryland), 402 (Montana), 413 (Oregon), 418 (Tennessee), 419 (Texas). Some states mention treason distinctly from felonies, though treason is certainly not a misdemeanor. *See supra* notes 376 (Alabama), 396 (Maryland), 404 (Nevada), 422 (Virginia).

441. *See supra* note 322.

442. *See, e.g.*, *supra* notes 375 (federal), 376 (Alabama), 403 (Nebraska), 414 (Pennsylvania), 416 (South Carolina). *But see supra* notes 403 (Nebraska), 421 (Vermont) (disqualifying, in some cases, only those actually imprisoned).

443. *See* Mauer, *supra* note 5, at 248 (referencing a felon's loss of the right to vote even if the felon was never incarcerated for the crime). Consider that in some cases, however, probation may be a more troublesome sanction than prison. *See generally* Joan Petersilia, *When Probation Becomes More Dreaded than Prison*, 54 FED. PROBATION 23 (1990) (noting that prison sentences can be much shorter than intensive supervision programs).

2. Convictions from other jurisdictions

Generally, states that disqualify felons after release do so regardless of whether the conviction occurred in that state, another state, or federal court.[444] This policy creates two difficulties. One such difficulty, the issue of undoing the effects in one jurisdiction of a conviction from another, is discussed in Appendix 1.B.3.

The other difficulty occurs when the would-be juror's crime is a felony in one jurisdiction, but not in the other. The forum state can either exclude those convicted of a crime that the convicting jurisdiction considered a felony, or it can exclude those whose crime would have been a felony if committed in the forum state. Although the latter practice is not unknown, it is rare.[445]

For a state to exclude someone that it would not have branded a felon seemingly conflicts with the notion that felon exclusion is supposed to protect juries rather than punish or degrade felons.[446] This can be explained, however, by the fact that reciprocal treatment is easier to administer and causes fewer errors. Obtaining proper answers from prospective jurors to the question "have you ever been convicted of a felony?" is difficult enough when they *know* the correct answer; if a criminal remembers only what the sentencing court called his crime, or if he lacks a detailed knowledge of the felony/misdemeanor distinctions in his new state, it is doubly difficult.[447]

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444. Some states explicitly provide in their statutes that foreign convictions are considered. *See, e.g.*, *supra* notes 375 (federal), 386 (Georgia), 387 (Hawaii), 392 (Kansas), 398 (Michigan), 403 (Nebraska), 406 (New Jersey), and 411 (Ohio). Others implicitly do because of their requirement of a presidential pardon before considering a federal felon restored to eligibility. *See* DEP'T OF JUSTICE SURVEY, *supra* note 328, at 2 n.3 (listing fourteen such states); *see also* Grant et al., *supra* note 3, at 961-64 (describing this as the majority approach for civil disabilities). The explicit exceptions are either outdated or limited in scope. *See, e.g.*, Clark v. State, 338 S.E.2d 269, 271 (Ga. 1986) (holding a person convicted in another state not barred from grand jury service); *supra* note 385 (providing that foreign convictions are used in Florida only if the offense would be a felony in Florida). *Compare* Wagers v. State, 370 P.2d 567, 570 (Okla. Crim. App. 1962) (stating a broad rule against applying foreign convictions), *with* Gann v. State, 397 P.2d 686, 692-93 (Okla. Crim. App. 1964) (refusing to distinguish between foreign and local convictions for jury qualification).

445. *See supra* note 385 (Florida); *see also* State v. Davis, 1896 WL 1598, at *1 (Ohio Ct. Com. Pl. 1896) (holding that a man guilty of a felony in Indiana for stealing twenty-five dollars could serve on a jury in Ohio, which has a thirty-five dollar threshold for felonies).

446. *See supra* note 330 and accompanying text (discussing state interest and public policy in excluding felons from juries).

447. *See supra* Part II.E (noting reasons why felons do not disclose criminal history).

3. Restoration of rights

As one pair of commentators declared, "[t]he right to sit on a jury is perhaps the hardest right to regain."[448] Processes for restoring rights vary greatly from state to state in terms of their criteria and their liberality.[449] Restoration can be more or less routine. Some states that purport to exclude all felons from jury service for life simply restore rights automatically upon the completion of a sentence.[450] Most states, however, require an individual application for a pardon, and grant them very sparingly.[451] Some have excluded felons even when their rights purportedly have been restored.[452]

The thorniest issue concerning restoration of rights stems from the complicated treatment of convictions from foreign jurisdictions. Some states maintain that their clemency power does not extend to foreign convictions, which means only a pardon from the convicting jurisdiction can restore the right to serve on a jury.[453] Most states

448. Ellis & Scherr, *supra* note 328, at 43.

449. *See* DEP'T OF JUSTICE SURVEY, *supra* note 328, app. A (describing each state's restoration process).

450. *See, e.g.*, *supra* notes 377 (Alaska), 399 (Minnesota), 409 (North Carolina), and 425 (Wisconsin); *see also supra* note 378 (Arizona) (restoring rights automatically to first-time offenders).

451. The states listed as lifetime excluders in Appendix 1.A, *supra*, fit into this category. A few examples of the rarity of pardons are illustrative. Florida apparently rejects over eighty percent of applications for restoration of civil rights. *See* 2001-02 FLA. PAROLE COMM'N ANN. REP. 11 (noting the disposition of 36,047 applications in fiscal year 2001-02); Letter from Janet H. Keels, Coordinator, Florida Office of Executive Clemency, to Jane Edwards, Research Librarian, Michigan State University-DCL College of Law (May 5, 2003) (on file with the American University Law Review) (stating that Florida restored civil rights to 1,394 felons in 2001 and 6,486 in 2002). Georgia restored the rights of only 289 people in 2002. Telephone Interview by Jeff Jocks with Tanya Cooper, Georgia State Board of Pardons (Mar. 10, 2003). In Virginia, 404 pardons were granted in 1996-97 out of a population of over 200,000 felons who had completed their sentences. *See* Demleitner, *Continuing Payment*, *supra* note 5, at 769-70 (citing Human Rights Watch estimates); *see also* PETERSILIA, *supra* note 307, at 217 ("For all practical purposes, pardons are irrelevant for most inmates coming out of prison today."); Demleitner, *Preventing Internal Exile*, *supra* note 5, at 155 (discussing typically "limited number" of pardons); Itzkowitz & Oldak, *supra* note 5, at 727 (characterizing the prerequisites for a pardon as "perseverance, financial resources and perhaps political contacts").

452. *See, e.g.*, Jackson v. State, 964 P.2d 875, 884 (Okla. Crim. App. 1998) (holding that the trial court did not err in removing a juror who had committed a felony in another state, but whose civil rights had since been restored); Anderson v. State, 120 So. 2d 397, 404 (Ala. App. 1960) (stating that a pardon does not excuse prior felons from juror challenges), *rev'd on other grounds*, 366 U.S. 208 (1961). This practice, while not widespread, has a venerable pedigree. *See* 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 750 (London, Strahan, 1807) ("[I]nfamy is a good cause of challenge to a juror . . . [and] such exceptions are not solved by a pardon.").

453. Sixteen states are listed in DEP'T OF JUSTICE SURVEY, *supra* note 328, as limiting the use of clemency to undo foreign convictions. *See id.* at 30 (California), 37 (Delaware), 48 (Hawaii), 65 (Louisiana), 83 (Missouri), 86 (Montana), 89 (Nebraska), 90-91 (Nevada; federal convictions), 95 (New Jersey; federal convictions), 97 (New Mexico), 111 (Oklahoma), 116 (Pennsylvania; federal

maintain the opposite, and hold that their own clemency power can restore the right to serve on their own juries, regardless of whether the convicting jurisdiction has pardoned the felon.[454]

4. Error resolution

Some felons who, under the law, should be barred from jury service are not excluded, and some non-felons who should be allowed to serve are not permitted. Many courts are surprisingly ambivalent about rectifying these sorts of errors, allowing verdicts that "illicit" juries rendered to stand despite supposed concerns about felons' inherent bias or the threat they pose to jury probity.[455]

Disqualified felons commonly end up on juries by simply failing to disclose their criminal history when asked.[456] Jurisdictions take several different approaches to resolving such failures.[457] Most require some sort of showing of prejudice, because "[a] trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean," in the absence of true harm.[458] Showing prejudice may be difficult, though, given that the evidence of a particular juror's disposition in

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convictions), 120 (South Carolina; federal convictions), 130 (Utah), 132 (Vermont; federal convictions issue "not . . . settled"), and 139 (West Virginia; federal convictions).

454. *See* Hoffman v. State, 922 S.W.2d 663, 666 (Tex. App. 1996) (listing jurisdictions that do not recognize pardons issued by other states).

455. *See, e.g.*, State v. Neal, 550 So. 2d 740 (La. Ct. App. 1990) (holding that a juror's failure to disclose a prior felony conviction was not cause for a new trial).

456. *See supra* Part II.E (detailing reasons why felons often do not disclose criminal history).

457. *See generally* Robert G. Loewy, Note, *When Jurors Lie: Differing Standards for New Trials*, 22 AM. J. CRIM. L. 733 (1995) (surveying all American jurisdictions). The federal standard is sketchy. The leading case, *McDonough Power Equip. v. Greenwood*, 464 U.S. 548 (1984), purports to require a showing that "a juror failed to answer honestly a material question on *voir dire*," and "that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 548. The dishonesty requirement is not exclusive, though, as noted in two concurring opinions representing five justices. *See id.* at 556-57 (Blackmun, J., concurring) (arguing that trial courts should search for bias "regardless of whether a juror's answer is honest or dishonest"); *id.* at 558-59 (Brennan, J., concurring) ("I . . . cannot agree . . . that a new trial is not warranted whenever a prospective juror provides an honest answer to the question posed."). The circuits have tended to agree, allowing other ways of showing bias besides *McDonough*'s distorting dishonesty in voir dire. *See* Jones v. Cooper, 311 F.3d 306, 310 (4th Cir. 2003) (holding that a showing of actual bias may suffice to warrant a new trial regardless of the *McDonough* test); *see also* Zerka v. Green, 49 F.3d 1181, 1186 & n.7 (6th Cir. 1995) (noting that *McDonough* does not foreclose the use of the "pre-existing rule requiring proof of actual juror bias"). Given that the federal exclusion law will make it very easy to satisfy the second prong of *McDonough*, a party in federal court who can show that a juror knowingly lied about his criminal record should be able to obtain a new trial automatically. Failing that, a showing of actual bias, while hard to muster, should suffice.

458. *McDonough*, 464 U.S. at 555.

deliberations or his effect on others is often inadmissible or unknowable.[459]

Despite the difficulty of showing prejudice, some jurisdictions nevertheless require a direct showing of actual bias by the offending juror to establish the requisite level of harm.[460] Others will infer prejudice from a showing of "juror misconduct," such as a false or negligent answer to a material question (e.g., "are you a convicted felon?").[461] Several jurisdictions require a showing of both misconduct and bias.[462] On the other extreme, a handful of sticklers require neither, on the theory that even innocent misrepresentations interfere with a party's rightful exercise of peremptory strikes.[463]

One reason for courts to tolerate the presence of supposedly unfit jurors is the risk of strategic behavior. If a party knows that a juror is not qualified but thinks that the juror might be sympathetic, the party has an incentive to withhold protest unless and until the jury comes back with an adverse verdict.[464] The threshold requirement

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459. *See, e.g.*, FED. R. EVID. 606(b) (limiting testimony by jurors to evidence of exposure of jury to "extraneous prejudicial information" or external pressure); *see also* United States v. Boney, 977 F.2d 624, 640 (D.C. Cir. 1992) (Randolph, J., dissenting) (discussing fruitlessness of inquiry as to "prejudicial effect of the felon-juror's presence"); Commonwealth v. Kelly, 609 A.2d 175, 177 (Pa. Super. Ct. 1992) ("[W]e believe that it would be virtually impossible for a criminal defendant to prove that a juror's prior conviction prejudiced his trial."). One court took this "see no evil" approach to an extreme, ruling that a juror who failed to disclose his felony conviction did not prejudice the result in a criminal case because the verdict was unanimous and only ten of twelve jurors needed to vote to convict. State v. Neal, 550 So. 2d 740, 744-45 (La. Ct. App. 1990). Such a vision of atomized jurors completely ignores the importance of jury deliberation.

460. *See, e.g.*, Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1059 (9th Cir. 1997) (affirming verdict where no actual bias could be shown); Loewy, *supra* note 457, at 751-53 (listing twenty-two such states); *cf. Boney*, 977 F.2d at 634 (holding that a dishonest answer regarding criminal history in voir dire does not constitute a showing of bias, but warrants an evidentiary hearing on that question).

461. *See* Loewy, *supra* note 457, at 749-51 (describing eleven such states); *see, e.g.*, State v. Read, 965 S.W.2d 74, 77-78 (Tex. App. 1998) (detailing when trial court must grant new trial as a result of juror misconduct); Fleming v. State, 687 So. 2d 146, 148 (Miss. 1997) (holding that failure of juror to respond truthfully in voir dire caused prejudice). Some states say that a showing of misconduct is a substitute or a presumptive basis for a finding of bias; others do not tie the analysis to bias at all. *See Boney*, 977 F.2d at 641 (Randolph, J., dissenting) (discussing distinction between challenges for "cause," which should not require additional showing of bias, from challenges for "favor," which should require it).

462. *See* Loewy, *supra* note 457, at 754-55 (describing seventeen such states).

463. *See id.* at 748 (describing four such states and their reasoning).

464. *See, e.g.*, Strang v. United States, 45 F.2d 1006, 1007 (5th Cir. 1930) (holding that the appellant could not withhold information about a juror's prior conviction as a strategy to challenge the jury's decision); Turley v. State, 104 N.W. 934, 936 (Neb. 1905) (ruling that an objection to a juror should be made upon impanelment and not withheld in hopes of acquittal); TEXAS HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. S.B. 46, 73d Leg., R.S. (1993) (listing as an argument in favor of harmless error legislation that "criminal defense lawyers purposely neglect to challenge prospective jurors they suspect of felony convictions because they want to ensure a sympathetic

that actual bias be shown is one way to undercut such behavior, but in many states, the fact that a juror has lied about his criminal history suffices to prove bias.[465] More important, then, is the requirement of due diligence by the complaining party:

> [A]ll states require that defendants and their lawyers exercise "due diligence." Essentially, this means that defendants will not be allowed to raise on appeal any error that could have been corrected at the trial level. The rule has two main applications in practice. First, the lawyer must ask specific questions during voir dire designed to elicit the concealed information from the prospective juror. Second, defendants and their lawyers must immediately notify the court of any evidence they have, or should have, concerning the validity of the juror's responses.[466]

Some states take this requirement extremely seriously, even in the face of a showing of clear prejudice.[467] Mississippi, for example, specifies by statute that seating a felon on a jury "shall not . . . vitiate an indictment or verdict."[468] Texas had long granted a new trial automatically if a felon made it onto the jury.[469] It changed its statute, though, to require that a conviction by a felon-ridden jury be affirmed unless the defendant objected before the verdict was

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ear on the jury and at the same time have a sure bet for reversal in case the verdict is unfavorable for their client").

465. *See supra* note 461 (detailing circumstances where courts will find that a juror is biased).

466. Loewy, *supra* note 457, at 744 (footnote omitted); *see, e.g.*, 28 U.S.C. § 1867 (2000) (defining similar timeliness requirements that apply to objections about the members of a grand jury); United States v. Gale, 109 U.S. 65, 69 (1883) (finding a threat to criminal proceedings if the defendant knew a grand juror was a felon, yet did not object until after the verdict); United States v. Humphreys, 982 F.2d 254, 261 (8th Cir. 1992) (emphasizing that a defendant must question and challenge the status of a felon juror before a verdict is rendered).

467. *See, e.g.*, State v. Bongalis, 378 S.E.2d 449, 455-56 (W. Va. 1989) (finding waiver despite the fact that three jurors changed their vote to guilty when it was discovered that the other juror they were voting with was a felon); Lollar v. State, 422 So. 2d 809, 811-12 (Ala. Crim. App. 1982) (noting that even though one juror failed to answer in the affirmative questions relating to whether she had been convicted of a crime, the burden was on the defendant, who had knowledge of the juror's criminal record, to notify his counsel). The federal government places a time limit on objections to illegally constituted juries. *See* 28 U.S.C. § 1867 (2000) (listing this time limit as before the voir dire examination begins or within seven days after the defendant could have discovered the problem). This probably does not apply, however, to problems stemming from individual jurors, especially those whose criminal histories were concealed. *See* United States v. Boney, 977 F.2d 624, 633 (D.C. Cir. 1992) (finding that 28 U.S.C. §§ 1865-1867 relate only to the district court procedures for administering the selection of a jury and do not apply when a juror fails to reveal that he was a felon on the jury qualification form).

468. MISS. CODE ANN. § 13-5-1 (Lexis 2002).

469. Two of the earliest such "hard line" cases in Texas are *Amaya v. State*, 220 S.W. 98, 99-100 (Tex. Crim. App. 1920) (setting aside verdict where a juror was a convicted thief) and *Rice v. State*, 107 S.W. 832, 833 (Tex. Crim. App. 1908) (reversing conviction where a juror was found to be a convicted perjurer).

rendered, or could show both that he was prejudiced and that he had no way of timely knowing about the juror's criminal record.[470] Texas's automatic reversal standard had always placed it in the minority;[471] when it abandoned it, Texas joined the majority of states that are interested more in preserving verdicts and preventing abuse than in rooting out supposedly unfit jurors.

Another wrinkle in the prejudice requirement is the use of peremptory challenges. If a would-be juror is challenged for cause as being unqualified and the challenge is unjustly denied, the objecting party is forced to use a peremptory challenge to remove the juror. That party can complain that it was effectively deprived of its full number of peremptory challenges (assuming it used all of its other ones).[472] In response, though, courts have stated that the use of the peremptory eliminates any prejudice, and many courts have so held, requiring a showing that a biased juror sat before reversing a verdict.[473]

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470. TEX. CODE CRIM. PROC. ANN. art. 44.46 (Vernon Supp. 2003). *See* Thomas v. State, 796 S.W.2d 196, 197-99 (Tex. Crim. App. 1990) (en banc) (remanding for a new capital murder trial after it was revealed that one of the jurors in the first trial had lied about her criminal history); Perez v. State, 973 S.W.2d 759, 761 (Tex. Ct. App. 1998) ("In 1993, in an apparent response to *Thomas*, the legislature enacted article 44.46 of the code of criminal procedure."), *rev'd*, 11 S.W.3d 218 (Tex. Crim. App. 2000); *New Law Upholds Trial Verdicts Even If Juror Later Is Disqualified*, DALLAS MORNING NEWS, June 9, 1993, at 31A ("The law will help avoid future reversals of convictions in criminal trials, such as the one that occurred in the so-called 'cheerleader hitman' case in Houston.").

471. *See, e.g.*, Queenan v. Territory, 71 P. 218, 220 (Okla. 1901) (citing alien disqualification case, *Kohl v. Lehlback*, 160 U.S. 293 (1895), as well as various state cases, and declaring that allowing waiver "has been upheld by the supreme court of the United States, and by nearly every state in the Union"), *aff'd sub nom.* Queenan v. Oklahoma, 190 U.S. 548 (1903); Commonwealth v. Wong Chung, 71 N.E. 292, 294 (Mass. 1904) (citing cases and listing states on both sides of the question); Garrett v. Weinberg, 31 S.E. 341, 344 (S.C. 1898) (overturning verdict rendered by a jury that included a thief who should have been disqualified because of South Carolina's clear constitutional language that "[t]he petit jury of the circuit courts shall consist of twelve men, all of whom must agree to a verdict," that "[e]ach juror must be a qualified elector," and that "persons convicted of . . . larceny" were disqualified from voting). South Carolina has never overruled *Garrett* in a felon juror case, but it almost immediately backed away from this absolutist approach. *See* Mew v. Charleston S. Ry. Co., 32 S.E. 828, 830 (S.C. 1899) (requiring a defendant to exercise due diligence and consult public books of registration to determine whether a juror was registered in the county).

472. *See, e.g.*, State v. Ramos, 564 N.W.2d 328 (Wis. 1997) (using extra peremptory theory to automatically grant new trial), *overruled by* State v. Lindell, 629 N.W.2d 223, 236-46 & n.14 (Wis. 2001) (noting systemic problems with *Ramos*, and providing a list of cases from additional states in which reversal is automatic in such situations, and stating that "there is no clear majority rule").

473. *See, e.g.*, United States v. Martinez-Salazar, 528 U.S. 304, 315 (2000) (finding that defendant had a choice whether to use one of his eleven peremptory challenges to remove the felon juror or to allow the juror to remain and initiate a Sixth Amendment challenge on appeal if convicted); *Lindell*, 629 N.W.2d at 245-46 n.14 (furnishing a list of cases from thirteen other states that reached similar results).

Improper inclusion of a felon juror is not the only possible error; non-felons might be improperly excluded as well. If a party incorrectly but successfully objected to a juror's presence for cause, the other party can argue that this amounted to giving the objecting party an extra peremptory strike.[474] This argument has been rejected almost unanimously, thereby limiting a party's rights to the ability to use one's own peremptories and to the requirement "that the jurors who do serve be qualified."[475]

Understandably, courts that do not perceive evidence of actual unfairness will not be particularly anxious to throw away a perfectly good verdict just because a felon served on the jury. But this belies the concerns that supposedly justify felon exclusion in the first place. If a felon's service on a jury is a real threat to its probity, it is a threat regardless of whether there is any evidence of prejudice. If felons are unfit because they are inherently biased, then prejudice should be presumed regardless of whether the felon bumbled or lied his way onto the jury.[476]

Perhaps, though, this contradiction between the ideals and reality of felon exclusion just means that states value efficiency higher than felon exclusion. A total ban on felons might be the best way to achieve a goal of *minimizing* the number of felon jurors rather than wholly eliminating them, especially given that truly willful violators are still likely to spur the reversal of a verdict.

States that wish to minimize the number of felons on juries, however, would do well not to rely on self-reporting of criminal histories. States that are so willing to shrug off the presence of illegal

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474. *See, e.g.*, Day v. State, 784 S.W.2d 955, 958 (Tex. App. 1990) (finding the trial court erred in allowing the state's motion to excuse a felon juror for cause after he qualified as a juror, in effect giving the state an extra peremptory challenge); Walker v. State, 645 S.W.2d 294, 295 (Tex. Crim. App. 1983) (holding that a qualified juror was improperly excused by the court without the state utilizing a challenge); *cf.* Dodys v. State, 37 S.E.2d 173, 175 (Ga. Ct. App. 1946) (characterizing jury requirements as such in a case where a juror was properly excluded).

475. State v. Mendoza, 596 N.W.2d 736, 747-48 (Wis. 1999); Jones v. State, 982 S.W.2d 386, 392-94 (Tex. Crim. App. 1998) (noting unanimity of other jurisdictions); *accord* United States v. Mendoza, 157 F.3d 730, 734 (9th Cir. 1998) (noting that although the district court excused two potential jurors without additional questions, over the defense's objections, their release did not result in affording the government two extra peremptory strikes or create a biased jury); State v. McCulley, 782 S.W.2d 733, 737 (Mo. Ct. App. 1990) (advocating erring on side of exclusion). The state of Texas law is not clear. The Court of Criminal Appeals in *Jones* did not address its earlier decision in *Walker*. *See* 43 GEORGE E. DIX & ROBERT O. DAWSON, TEXAS PRACTICE SERIES, CRIMINAL PRACTICE & PROCEDURE § 35.57 (2d ed. 2001) (discussing and criticizing Texas case law).

476. *Cf.* United States v. Humphrey, 982 F.2d 254, 261 (8th Cir. 1992) (holding that the mere presence of a felon on a jury is not prejudicial, given that statutory disqualification does not make a felon "necessarily . . . fundamentally unfit to serve").

jurors should question whether their commitment to probity or their belief in felons' inherent bias is misplaced. States that tolerate the presence of some felons on juries—the ones who are not informed enough to realize that they are felons, or are not honest enough to admit it—should contemplate how helpful or worthwhile it is to try to exclude all of the other smarter, more honest ones. Most of all, states that rely on the voir dire process to screen every other juror should consider why they lack confidence in that process when the would-be juror is a felon.[477]

5. Pending Charges

Several jurisdictions explicitly ban people charged with felonies from serving on juries.[478] One rationale is that individuals awaiting trial may be beholden to the state; a vote to convict in an important case might lead to lenient treatment in one's own case.[479] This sort of disqualification is categorically different from felon exclusion, at least for felons who have completed probation or parole.

Surprisingly, though, the more commonly expressed (if contested) rationale for pending-charge exclusion is the *same* as that for felon exclusion.[480] The Eighth Circuit, for example, has held that barring indicted criminals awaiting trial is appropriate because such individuals have character questionable enough to threaten the probity of the jury, and conviction rates are so high that this is a permissible inference.[481] The court rejected the obvious opposing argument on which other authorities have relied—that this is "offensive to the presumption of innocence given to criminal

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477. *See* Singer, *supra* note 3, at 245 (suggesting that disclosure of a would-be juror's criminal history is preferable to an outright ban); ABA CRIMINAL JUSTICE, *supra* note 427, std. 23-8.5 & cmt. ("Persons convicted of any offense should be entitled to . . . serve on juries except while actually confined or while on probation or parole . . . [because] peremptory challenges and challenges for cause can remove individuals who cannot, in fact, be fair and impartial."); TASK FORCE ON CORRECTIONS, *supra* note 346, at 91 (footnote omitted) (calling for an individualized assessment of felon jurors' qualifications).

478. *See, e.g.*, *supra* notes 375 (federal), 382 (Connecticut), 394 (Louisiana), 397 (Massachusetts), and 419 (Texas); *cf.* Tellier, *supra* note 12, at 518-21 (collecting then-current case law on jurors with pending criminal charges).

479. *See, e.g.*, Thompson v. State, 300 So. 2d 301, 303 (Fla. Dist. Ct. App. 1974).

480. *See, e.g.*, United States v. Greene, 995 F.2d 793, 795-96 (8th Cir. 1993) (citing probity and inherent bias rationales for excluding jurors charged with a felony); United States v. Foxworth, 599 F.2d 1, 4 (1st Cir. 1979) (citing probity rationale); United States v. Test, 550 F.2d 577, 594 (10th Cir. 1976) (en banc) (citing probity rationale); United States v. Arnett, 342 F. Supp. 1255, 1261 (D. Mass. 1970) (citing probity rationale); Dobyne v. State, 672 So. 2d 1319, 1331 (Ala. Crim. App. 1994) (affirming exclusion of a juror who had been arrested, in a state requiring "integrity [and] good character").

481. *Greene*, 995 F.2d at 795-96.

defendants."[482] The Seventh Circuit has agreed, noting that pending charges indicate that there is probable cause to believe the person committed a crime, which is enough to warrant exclusion.[483]

Admittedly, any unfairness represented by this overinclusiveness is substantially mitigated by its temporary nature. Similarly, excluding individuals with pending charges from juries seems trivial when compared with the jail time or bail payment that they face, even though some will be proven not guilty.

6. Civil or criminal, petit or grand

Further undercutting the "inherent bias" rationale, only two states distinguish between criminal and civil juries in their felon exclusion laws.[484] Felons might have an ax to grind when judging a prosecutor's case, but it is hard to see how a felony conviction would prejudice them in a civil case.[485]

Maintaining separate jury pools for civil versus criminal trials might simply represent an unacceptable administrative burden.[486] On the other hand, increasing the number of potential jurors, even if only in

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482. *Id.* *But see* Turnipseed v. State, 185 S.E. 403, 410 (Ga. Ct. App. 1936) (refusing to vacate a verdict where a juror was convicted of a felony but had not gone to jail and had an appeal pending); ABA JUROR USE, *supra* note 427, std. 4(e) cmt. (rejecting the exclusion of those with pending charges because of the inconsistency with the presumption of innocence); People v. Astle, 503 N.Y.S.2d 175, 177 (N.Y. App. Div. 1986) (approving of the presence of a juror who was an unknowing target of a grand jury, and who was later indicted and convicted).

483. United States v. Barry, 71 F.3d 1269, 1273 (7th Cir. 1995); *see* Jenkins v. State, 42 S.W. 263, 264 (Tenn. 1897) (describing an interesting twist on this issue in which a potential juror was excluded because he was guilty of illegal activity). The juror in *Jenkins* had never been charged, and the determination was made after the trial judge, "from the testimony of witnesses, based on general rumor, became satisfied" of his criminality. *Id.*

484. *See supra* notes 413 (Oregon) and 419 (Texas); *see also* Cantu v. State, 842 S.W.2d 667, 685 n.13 (Tex. Crim. App. 1992) (en banc) (discussing Texas law). Case law in a third state suggests differential treatment, but with less strict standards for criminal trials than civil trials. *See* Proudfoot v. Dan's Marine Serv., 558 S.E.2d 298, 305-06 (W. Va. 2002) (Starcher, J., concurring) (criticizing majority rule of granting an automatic reversal when a juror is a felon in a civil case, in light of the less strict standard used in a prior, criminal case). Michigan recently changed its law and abolished its distinction. *See supra* note 398.

485. *See* Froede v. Holland Ladder & Mfg., 523 N.W.2d 849, 852 (Mich. Ct. App. 1994) ("[T]he existence of potential biases or prejudices of a juror with a prior felony conviction is substantially lessened in a civil case as opposed to a criminal case."); *cf. Developments in the Law*, *supra* note 251, at 1436 ("If the legal system has sufficient faith in the ability of citizen-jurors to make reasoned moral judgments to entrust them with such extensive responsibility in the criminal context, then it should similarly trust and respect jurors in the civil context.").

486. *See* COMM. ON SELECTION OF JURORS, JUDICIAL CONF. OF THE U.S., REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON SELECTION OF JURORS 42 (1942) (making administrative burden argument).

civil cases, would reduce the burdens of jury service faced by non-felons.

On the criminal side, only two states distinguish between grand and petit jury service.[487] One might argue that grand jurors wield more power and are not subject to the possibility of strikes by the parties, and should be selected with greater care. On the other hand, grand juries are larger and do not require unanimity, reducing the imperative for those who distrust felons to achieve perfect moral cleansing. In any case, the administrative burdens of maintaining separate selection tracks again seems significant; in the absence of a stronger rationale, the general failure to treat grand juries differently is unremarkable.

APPENDIX 2: THE STATISTICS OF FELON EXCLUSION

This Appendix will discuss the magnitude of felon exclusion. Though the available data are spotty, felon exclusion undoubtedly excises a significant share of the citizenry, especially black men, from the jury pool. While felon exclusion is an old tradition, the enormity of its effects is a very recent development, resulting from tougher sentencing and the War on Drugs.[488] Incarceration rates have skyrocketed. After staying around 0.1% of the population from the 1920s to the early 1970s, they nearly quintupled by 2000.[489] The percentage of felons in the population as a whole probably more than doubled during the same period.[490]

Precisely quantifying the reach of felon exclusion is difficult. While jurisdictions maintain careful count of prison inmates, parolees, and probationers, they are less circumspect about tallying felons once they have completed their terms of supervision.[491] Like any other

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487. *See supra* notes 381 (Colorado) and 419 (Texas). This distinction, while uncommon, has deep roots. *See* GA. CODE ANN. §§ 811, 851 (Hopkins et al., 1896) (requiring grand jurors to be "*most* experienced, intelligent and upright men," and traverse jurors only to be "intelligent and upright men") (emphasis added); Stephen K. Roberts, *Juries and the Middling Sort: Recruitment and Performance at Devon Quarter Sessions, 1649-1670, in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200-1800, at 182, 185 (J.S. Cockburn & Thomas A. Green eds., 1988) [hereinafter TWELVE GOOD MEN AND TRUE] (showing that seventeenth-century English "[t]rial jurors were a separate and lower caste" than grand jurors).

488. *See* RAFTER & STANLEY, *supra* note 149, at 1, 15-19 (discussing the recent and rapid growth of prison facilities).

489. BUREAU OF JUSTICE STATISTICS, *supra* note 178, at 494 tbl. 6.23.

490. *See, e.g.*, Uggen et al., *supra* note 178, at 17 (estimating that felons were 3% of the adult population in 1968, and 6.5% in 2000).

491. For example, the federal "Megan's Law" requires states to keep track of sex offenders after release, but these efforts often falter. *See* Andrew Murr & Rebecca Sinderbrand, *Holes in the Safety Net*, NEWSWEEK, Feb. 24, 2003, at 40 ("As many as one quarter . . . of the nation's paroled sex offenders are currently unaccounted

citizen, a felon may be subsequently imprisoned, move to another state, or die, all of which make it difficult to count the ex-convicts who live in our midst. Counting the felon population precisely by race is even more problematic. While exact figures are hard to pin down, however, there is no question that black and Hispanic Americans are more likely than white Americans to be convicted felons.[492]

There are ways, moreover, to attempt to answer these questions. The Bureau of Justice Statistics in the Department of Justice compiles statistics on crimes, convictions, releases, and recidivism, at both the state and federal level, and in many cases broken down by race.[493] Some states keep track of the number of people whose rights have been restored.[494] All keep track of their current supervised population.[495]

A significant attempt to cobble these data into an estimate of the felon population appears in a 2000 paper by Christopher Uggen, Melissa Thompson, and Jeff Manza.[496] The authors consider each year's cohort of released felons, subtract the estimated number of recidivists (to prevent double counting) and deaths, and aggregate the cohorts into a grand total.[497] They conclude that in 2000, four million felons were currently under supervision and another eight or nine million felons' supervision had expired.[498] Of these thirteen million Americans (6.5% of the adult population), they estimate that four or five million are black, that 16% to 21% of the adult black population are felons, and that between 29% and 37% of the adult black male population are felons.[499]

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for . . . .").

492. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, *supra* note 178, at 498 tbl. 6.28 (describing incarceration rates by race, age, and gender); *cf.* United States v. Barry, 71 F.3d 1269, 1271 & n.1 (7th Cir. 1995) (noting in a case challenging felon exclusion on grounds of its racial disparities that a party's argument that the disproportion was "on the order of eight- to thirteenfold," was "for the most part undisputed").

493. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, *supra* note 178, at 477-537 (detailing population under criminal supervision); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1998, at 8 (2001) (detailing criminal history statistics for felony defendants); BUREAU OF JUSTICE STATISTICS 1994, *supra* note 360 (providing recidivism statistics).

494. *See, e.g.*, *supra* note 451.

495. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 178, app. 4, at 568-69 (describing federal collection and use of state data).

496. Uggen et al., *supra* note 178.

497. *Id.* at 2-4.

498. *Id.* at 17; *cf.* BUREAU OF JUSTICE STATISTICS, *supra* note 178, at 487 tbl. 6.1 (estimating the total population in jail, prison, on parole, or on probation—a count that includes misdemeanants—in 2001 at 6.6 million).

499. Uggen et al., *supra* note 178, at 17. The lower bound is based on using a

The Uggen paper has several limitations as applied to felon exclusion—as would anything short of a perfect enumeration. First, it does not take into account any restoration of rights, which is a fairly automatic process in some states.[500] Second, it is based on outdated recidivism numbers.[501] Third, it does not consider the higher mortality rate for black Americans than for white Americans.[502] Taking factors like these into account, the percentage of black men who are convicted felons may be different, and lower, than reported in the Uggen paper. Still, the lower end of the 29 to 37% range is consistent with other estimates in other contexts.[503]

These national figures are relevant to federal juries; federal law excludes for life any felon whose rights have not been restored.[504] This means that felon exclusion likely excises about 6.5% of the federal jury pool, including at least 30% of adult black males. (Though, to be sure, some of these people would be excluded anyway, because of lack of citizenship or residency, illiteracy, disability, or other disqualifications.) Even excluding only those felons still under supervision takes a large and racially disparate toll: almost 2% of adults, 7% of black adults, and more than 12% of black men.[505]

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higher recidivism number for black felons. *Id.* at 5-6.

500. *See supra* notes 378 (Arizona), 388 (Idaho), 399 (Minnesota), 409 (North Carolina), 417 (South Dakota), 423 (Washington), and 425 (Wisconsin). An estimate that is not adjusted to exclude those whose rights have been restored overstates the number of felons.

501. The Uggen paper uses the federal recidivism study from 1989 that was updated in 2002. Uggen et al., *supra* note 178, at 2; *see* BUREAU OF JUSTICE STATISTICS 1994, *supra* note 360, at 11 (comparing studies). Uggen, Thompson, and Manza are in the process of updating their work to reflect the new recidivism figures.

502. *See* Uggen et al., *supra* note 178, at 3 (discussing the use of the black mortality rate for both black and white criminals). This overstates the percentage of black felons.

503. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 2 (1997) (estimating future imprisonment odds for black men at 15.9% by age 25, 26.6% by age 40, and 28.5% over a lifetime). Including felony convictions that do not result in imprisonment might push these numbers into the 29 to 37% range at the median adult age. Of the eight states that permanently disenfranchise felons, *see infra* note 588, Fellner and Mauer have data for six. *See* FELLNER & MAUER, *supra* note 122, at 7 n.21 (describing data problems with Kentucky and Nevada). Their estimates of the disenfranchisement rate of black men in those states ranges from 25.0% to 31.5%. *Id.* at 9 (estimating Alabama at 31.5%, Florida at 31.2%, Iowa at 26.5%, Mississippi at 28.6%, Virginia at 25.0%, and Wyoming at 27.7%).

504. 28 U.S.C. § 1865(b)(5) (2000).

505. Uggen et al., *supra* note 178, at 17; *see* BUREAU OF JUSTICE STATISTICS, *supra* note 178, at 478 tbl. 6.2 (estimating the totals—including misdemeanants—in 1997 at 2.8% of adults and 9.0% of black adults of both genders).

APPENDIX 3: HISTORY

The history of felon exclusion does not compel any one legal or policy conclusion, but it does provide important perspective. For example, felon exclusion has an old pedigree, but so do exceptions and changes to the institution. The Anglo-American jury system has gone full circle from excluding felons as felons, to excluding "bad people," and back to excluding felons as felons. Another lesson is that some American felon exclusion laws were born out of explicit racial animus, a fact that should give us pause when we contemplate the racial disparities they present today.

The Greek, Roman, and Germanic origins of the practices of "infamy" and "outlawry," which exclude criminals from public life, have been much discussed and disputed.[506] This Appendix will focus on more recent practice, from English law through the colonial, antebellum, Jim Crow, and modern eras in America.

A. English Practice

The question of who served on early English juries has been the basis of a great deal of study.[507] English juries were supposed to comprise high-ranking and honorable people, but early English jury practice reflected a paradoxical divide between those ideals and reality.

Much of the tension over jury membership in pre-modern and early modern England centered on class rather than criminality. Early trial juries were drawn "from a broad band in the middle classes of society."[508] Legislative attempts to restrict membership to knights and others of high station failed in practice because there were not enough such people to go around. Their place was taken by those with "legal and administrative experience and social standing," more of whom were "yeomen and prosperous husbandmen" than gentlemen.[509] In certain eras, the difficulty in filling trial juries was so

506. *See generally* 9 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 191 (1926) (noting "roots both in Roman and Germanic law" of excluding criminals from jury service); Damaska, *supra* note 323, at 350-51 (outlining development of civil disabilities to provide reference for current disabilities); Itzkowitz & Oldak, *supra* note 5, at 721-24 (analyzing the roots of disenfranchisement and other civil disabilities); Grant et al., *supra* note 3, at 941-42 (detailing the history of civil disabilities).

507. *See, e.g.*, TWELVE GOOD MEN AND TRUE, *supra* note 487 (collecting eleven historical works on English juries).

508. J.B. Post, *Jury Lists and Juries in the Late Fourteenth Century*, *in* TWELVE GOOD MEN AND TRUE, *supra* note 487, at 65, 68 (describing late-fourteenth-century jurors).

509. *See id.* at 78, 83, 88-89, 95-96 (describing the composition of early-fifteenth-century Midland juries).

severe that "talesmen" (i.e., whoever happened to be standing about the court) were commonly pressed into service even if they were a "poor and simpler sort."[510] Administrative changes around 1650 relieved this pressure, however, and restored elite control over the trial jury.[511] Even if the jury drew consistently from a select stratum of society, though, it was still by far the broadest and most democratic governing institution in the country.[512]

Felons were excluded from early English juries more successfully than were common folk. Nevertheless, some still found their way onto juries. The ideals of felon exclusion were expressed in such sources as the twelfth-century Assize of Clarendon, which established grand juries composed of a selection of the "more lawful men" of the hundred and the vill.[513] In a more specific act in 1314, those convicted of conspiracy were barred from jury service.[514] Despite these earlier provisions, a 1410 statute of Henry IV noted the presence of outlaws on a particular grand jury; the King annulled its indictments and declared that "henceforth no Indictment be made by any such Persons, but by Inquests of the King's lawful liege People, in the Manner as was used in the Time of his noble Progenitors."[515] In the ensuing centuries, this ideal was extended to trial juries in both civil and criminal cases.[516]

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510. P.G. Lawson, *Lawless Juries? The Composition and Behavior of Hertfordshire Juries, 1573-1624*, *in* TWELVE GOOD MEN AND TRUE, *supra* note 487, at 117, 117-25 (quoting 1584 statute, 27 Eliz. 1, c. 6); *see* J.S. Cockburn, *Twelve Silly Men? The Trial Jury at Assizes, 1560-1670*, *in* TWELVE GOOD MEN AND TRUE, *supra* note 487, at 158, 160-61 (discussing sixteenth- and seventeenth-century trial juries).

511. *See* Cockburn, *supra* note 510, at 165-67 (describing the successful plan of using jurors for multiple cases).

512. *See* Douglas Hay, *The Class Composition of the Palladium of Liberty: Trial Jurors in the Eighteenth Century*, *in* TWELVE GOOD MEN AND TRUE, *supra* note 487, at 305, 349 (describing the democratic breadth of seventeenth-century English governing institutions); *see also* Roberts, *supra* note 487, at 182 (recognizing that the seventeenth-century jury system was "the most representative institution available to the English people").

513. Assize of Clarendon (1166), *available at* http://www.constitution.org/eng/assizcla.htm (on file with the American University Law Review). The hundred and the vill were feudal subdivisions of counties.

514. 1 ROTULI PARLIAMENTORUM [Parliamentary Rolls] 289 (London 1767-77) (on file with the American University Law Review) ("Ordinatum est per Consilium . . . quod nullus, quicumq[ue] fuerit, de Conspiracone prius convictus ponautr in Assis, Jurat' seu Recogniconibus aliquibus infra Com' vel extra . . . ." [It has been ordained by the Council, that no one, no matter who he be, who has earlier been convicted of conspiracy, be appointed to the Assizes, to jury service, or any inquests within the counties or without.]). Thanks to Dr. Anna Graham for this translation.

515. 11 Hen. 4, c. 8 (1410).

516. *See, e.g.*, SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIAE 59-63 (S.B. Chrimes ed., Cambridge Univ. Press 1942) (c. 1468-71) (describing contemporary civil jury as "[t]welve good and lawful men" and "sound in repute"); SIR THOMAS SMITH, DE REPUBLICA ANGLIE 113 (Mary Dewar ed., 1982) (c. 1565) (describing

These restrictions on felon jurors paralleled similar exclusions for felon witnesses; indeed, jury exclusion probably evolved from witness exclusion, owing to the ancient overlap between jurors and witnesses.[517] The two have long since diverged—felon testimony is much more common than felon jury service, perhaps because jurors are more fungible than witnesses.

By the early 1600s, the common law had settled the matter decisively enough that Coke could declare that those "attainted or convicted of treason, or felony, or for any offence to life or member, or in attaint for a false verdict, or for perjury as a witnesse" were "not *legalis homo*," and could be challenged as jurors "*propter delictum*" (because of crime).[518] A century and a half later, Blackstone adopted Coke's construction and expressed it thus:

> Challenges *propter delictum*, are for some crime or misdemesnor that affects the juror's credit, and renders him infamous. As for a conviction of treason, felony, perjury, or conspiracy; or if for some infamous offence he hath received judgment of the pillory, tumbrel, or the like; or to be branded, whipt, or stigmatized; or if he be outlawed or excommunicated, or hath been attainted of false verdict, *praemunire*, or forgery . . . .[519]

To be precise, English practice cannot be simply labeled "felon exclusion," as several other categories of offense are listed.

Considering that virtually all felonies in early modern England were capital offenses, one would think that felon exclusion would

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contemporary jury selection process, with jurors who are "substantial yeoman, that dwell about the place, . . . acquainted with daily labour and travaile, and not with such idle menne, as be readie to doe such mischiefes" being declared "good men and true").

517. The linkage to restrictions on felon testimony is explored further at Part II.H, *supra*. *See also* Moore v. State, 67 So. 789, 790 (Ala. Ct. App. 1915) (deciding that a jury can consider a witness's prior felony conviction in determining the validity of his testimony); 9 HOLDSWORTH, *supra* note 506, at 185-86 (asserting that in the twelfth and thirteenth centuries certain people were deemed "incompetent to be witnesses"); Grant et al., *supra* note 3, at 1051 (stating that the rule of felon exclusion "developed from the common law disqualification of criminal offenders as witnesses in judicial proceedings"); Harrison, *supra* note 3, at 255 n.1 (citing 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 186, 191 (1938)).

518. 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 234, at 158e (London, E. & R. Brooke 1794) (1628); *see also id.* at 155d (explaining that only one "accounted in law *liber et legalis homo*" should be "suffered to be sworn"). The practice had been noted centuries before Coke. *See* 9 HOLDSWORTH, *supra* note 506, at 186 (noting the attention paid to felon exclusion by Glanvil, Bracton, and others in the twelfth and thirteenth centuries); *see also* JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 308-09 (Brookfield, E. Merriam & Co. 1832) (expounding upon the exclusion of criminals from grand juries); KERPER & KERPER, *supra* note 389, at 33 ("Exclusion from jury service of convicted persons has its origin in the common law.").

519. BLACKSTONE, *supra* note 173, at *363-64.

have gone without saying; put simply, a convicted felon would be too dead to serve on a jury.[520] But not all individuals who committed felonies were executed or even rendered "civilly" dead.[521] Juries that felt the death penalty was too harsh for the crime committed (say, stealing a shilling's worth of food) could convict of a lesser charge if they did not acquit the defendant outright.[522] Moreover, pardons "were surprisingly frequent."[523] Even some unpardoned convicts emerged relatively unscathed.[524] The doctrine of "benefit of clergy" allowed in some cases for any clergymen, and then any literate man, and eventually anyone at all, to escape the death penalty for a first offense.[525] Some convicts were "transported" to America or Australia instead of being killed, though this obviously left them unavailable for jury service in Britain.[526] In any case, enough convicted criminals were in the jury pool to require the adoption of a disqualifying rule, such as that described by Coke and Blackstone.

Indeed, it appears that reality fell somewhat short of the ideals of felon exclusion. The best evidence is English case law that mitigated the mandatory nullification rule from the 1410 statute, by requiring

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520. Convicted English criminals essentially were either dead or "civilly dead," in either case surrendering property and all civil rights. *See* Tennessee v. Garner, 471 U.S. 1, 13 n.11 (1985) ("The roots of the concept of a 'felony' lie not in capital punishment but in forfeiture. Not all felonies were always punishable by death. Nonetheless, the link was profound.") (citations omitted); Fletcher, *supra* note 4, at 1899 ("I suppose that at the time when all felons were in principle subject to capital punishment, it probably did not do much harm to treat felons who were not executed as civilly dead."); Grant et al., *supra* note 3, at 942-43 (describing the nature and practice of civil death).

521. *See* SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA 21-23 (1998) (describing the gap between the law and the practice of capital punishment in seventeenth- and eighteenth-century Britain).

522. *See* JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME 40 (1977).

523. *Id.*

524. *See* CHRISTIANSON, *supra* note 521, at 22 (explaining that judges frequently declined to sentence convicts to deaths).

525. *See* Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2151 (1985) (explaining that "clerical felons" could use the "benefit of clergy" a single time; when this occurred, they were usually branded on the thumb to indicate their felon status). The doctrine ebbed and flowed and was generally allowed only for minor offenses, a category that shrank along with the doctrine. *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 37-41 (1983) (indicating that felons could not claim the "benefit of clergy" after crimes such as burglary were declared "nonclergyable"); Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 516-19 (2002) (noting that judges narrowly interpreted statutes that prevented the use of the "benefit of clergy" to protect criminals from the death penalty).

526. *See* CHRISTIANSON, *supra* note 521, at 20-25 (discussing how individuals convicted for petty larceny were shipped to the United States for seven-year terms of servitude); LANGBEIN, *supra* note 522, at 39-43 (detailing the transportation of nearly 4,500 convicts from England between 1661 and 1700). The Australian experience with felon jurors is similarly interesting. *See infra* note 532.

that "objection to the constitution of the grand jury must be taken before trial."[527] In other words, felons were getting onto grand juries. If grand juries had this problem, it is easily conceivable that the more lowly petit juries had it as well.[528]

The tensions underlying the English practice of felon exclusion—elitism struggling against a short supply of elites—do not resonate with the tensions, detailed below in Appendix 3.C, that underlie modern American practice—democratic sentiment struggling against punitive sensibilities. Nevertheless, the deep common-law roots of felon exclusion may be asserted as a justification for its continued presence, emphasizing the importance of appreciating the true nature of those roots.[529]

B. Early American Practice

Early American practice, both before and after the Founding, reflected the same tensions as English practice.[530] Like their English predecessors, state and local governments in the United States wanted to restrict jury service to "appropriate" members of the community.[531]

Also paralleling the English experience, the realities of scraping together a full jury sometimes meant seating "inappropriate" jurors.[532] As St. George Tucker described in his 1803 annotated edition of

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527. United States v. Gale, 109 U.S. 65, 67-69 (1883) (reviewing the English doctrine as described by Chitty, Bacon, Hawkins, and Hale).

528. *Cf.* Roberts, *supra* note 487, at 205 (relating results from the author's data sample showing that some seventeenth-century English jurors "strayed into crime" or "came from families not above theft or delinquency").

529. *See supra* Part II.A.

530. There is a relative paucity of information on early American juries. *See* David J. Bodenhamer, *The Democratic Impulse and Legal Change in the Age of Jackson: The Example of Criminal Juries in Antebellum Indiana*, 45 HISTORIAN 206, 206 (1983) (describing scholarship).

531. *See* Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 57 (describing eighteenth-century American juries as being "expected to embody the elevated moral judgment of the community"); *cf.* Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796-1996*, 94 MICH. L. REV. 2673, 2684-90 (1996) (describing wealthy citizens' traditional evasion of jury service).

532. *See* Bodenhamer, *supra* note 530, at 215 (citing contemporary description of bystanders as "idle and dissolute persons"); King, *supra* note 531, at 2682-83, 2691 (describing the use of bystanders "whom many considered to be inferior specimens for the jury"). *But see* Bodenhamer, *supra* note 530, at 216, 218-19 (citing contemporary defenses of bystanders and finding no evidence of a general lack of qualification).

The Australian experience puts the felon juror question in sharp relief. Given the demographics of early Australia, the only way to have a functioning jury system was to allow felons to participate. *See* David Brown, *Prisoners as Citizens*, *in* PRISONERS AS CITIZENS: HUMAN RIGHTS IN AUSTRALIAN PRISONS 308, 314 (David Brown & Meredith Wilkie eds., 2002). In 1893, this solicitude was ended legislatively, though the Australian jury system had survived well enough in the mean time. *Id.* at 315.

Blackstone, civil juries in "country places" were often "composed . . . of idle loiterer[]s about the court, who contrive to get themselves summoned as jurors, that they may have their expences borne: and are in every other point of view, the most unfit persons to decide upon the controversies of the suitors."[533] Tucker continues with the most striking (if not typical) example of such use of talesmen as jurors, and one that gives lie to the notion that criminals could not be jurors:

> Some years ago eleven or twelve persons were indicted in a district court for a riot, it happened that at the same time when their trial was expected to come on, a man was sent from the same county to be tried for horse-stealing; the *venire* summoned was composed chiefly, if not wholly, of the defendants for the riot . . . .[534]

There is, of course, a difference between alleged criminals and convicted ones.[535] Still, Tucker's tale suggests that in the early United States, the high standards for jurors imported from Blackstone could lose out to the realities of low population density.

More directly relevant for felon jurors was the new trend of using incarceration as a routine punishment for crimes.[536] The prison movement began in earnest in the early nineteenth century, and was rooted in notions of penitence (hence the "penitentiary") and salvation, as distinct from the notions of retribution and deterrence in the preceding age of death penalties both actual and civil.[537]

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533. 4 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA app. 64 (photo. reprint 1969) (Philadelphia, Birch & Small 1803). This and other similarly colorful sentiments about the quality of the people serving on juries can be found in Alschuler & Deiss, *supra* note 237, at 880-82 & n.83.

534. 4 TUCKER, *supra* note 533, app. at 66 n*.

535. *See supra* Appendix 1.B.5 (noting that pending charges do not necessarily warrant exclusion from jury service).

536. *See* Stephen D. Sowle, *A Regime of Social Death: Criminal Punishment in the Age of Prisons*, 21 N.Y.U. REV. L. & SOC. CHANGE 497, 522, 527-35 (1995) (describing the philosophy that led to the creation of prisons); *see also* Grant et al., *supra* note 3, at 949 (stating that imprisonment replaced more severe methods of punishment, such as death or forfeiture of property and civil rights). To be precise, prisons had existed in early colonial times to punish convicts, but they were not the principal form of punishment. *See, e.g.*, CHRISTIANSON, *supra* note 521, at 39-41, 59-63 (describing Massachusetts Bay Colony provision for prison "for the punishment of . . . offenders" among others, but also describing more typical punishments).

537. *See* Grant et al., *supra* note 3, at 949 (explaining that the implementation of "the penitentiary . . . was based on reformative principles" that sought to replace harsher penal sanctions). Civil death—by which the convict was stripped of all rights, deprived of property, and automatically divorced—persisted until very recently. *See id.* at 950-51 (finding that civil death provisions existed in thirteen state statutes in 1970); Olivares et al., *supra* note 326, at 13-14, 16 n.1 (stating that civil death provisions existed in four states in 1996). Only two states appear to maintain civil death today, and both apply it only to prisoners with life sentences. *See* N.Y. CIV.

Despite the fact that imprisonment was designed to replace these earlier, harsher penalties, civil disabilities, such as exclusion from juries, remained.[538] As one source describes this persistence:

> [T]here is no legislative history to explain the enactment of these disabilities . . . . It is likely, however, that civil disabilities in America were actually the result of the unquestioning adoption of the English penal system by our colonial forefathers and the succeeding generations who continued existing practices without evaluation.[539]

This unthinking consistency has continued ever since.

Perhaps the most significant development in the history of felon jurors is the evolution from subjective to objective determinations of juror qualification. On one hand, the increasing application of objective criteria like criminal history has reduced the potential for abusive and arbitrary exclusion of social and racial minorities. On the other hand, it has entrenched those exclusions that remain, such as literacy and criminal history, making it difficult to broaden participation further. This is not to say that literacy and criminal history cannot be relevant to one's ability to serve on a jury. The point, rather, is that the use of objective criteria makes it too easy to accept such exclusions blithely rather than tailor them carefully. If a statute subjectively excludes from juries anyone who is not "sober and judicious" or "of good demeanor," and it is used to keep control of juries in the hands of elites, it will be subject to democratic pressure. If it objectively excludes criminals and illiterates, it will be subject to much less pressure, even if illiteracy and criminality are defined more broadly than is necessary.

At around 1800, statutory limits on jury service by felons per se were rare.[540] It seems fairly certain, though, that service by felons was rare too. First, the common-law restriction on felon jurors would

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RIGHTS LAW § 79-a (McKinney 1992) ("Except as provided in subdivisions 2 & 3, a person sentenced to imprisonment for life is thereafter deemed civilly dead."); R.I. GEN. LAWS § 13-6-1 (2001) ("Every person imprisoned in the adult correctional institutions for life shall, with respect to all rights of property, to the bond of matrimony and to all civil rights and relations of any nature whatsoever, be deemed to be dead in all respects . . . .").

538. *See* Grant et al., *supra* note 3, at 949 (describing the transformation to imprisonment).

539. *Id.* at 950.

540. *But see* Act of Feb. 28, 1803, § 1, *reprinted in* 4 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 104 (Boston, Thomas & Andrews 1807) ("And if any person, whose name shall be put into either [jury] box, shall be convicted of any scandalous crime, or be guilty of any gross immorality, his name shall be withdrawn from the [jury] box by the Selectmen of his town.").

likely have been followed, if not perfectly.[541] Second, jury service was commonly limited to a subset of the population—male property holders[542]—that excluded not just the bulk of the population in general,[543] but convicted felons sentenced to "civil death" in particular. Third, most states required that jurors be "judicious" or "of fair character," or exhibit some other criterion of moral quality,[544] which would have made it harder for felons to serve.[545] For these reasons, felon exclusion was likely the rule, rather than the exception.

By around 1850, after the Jacksonian expansion of democratic institutions to include new swathes of the population, many property qualifications for jurors were gone.[546] With broader participation it

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541. *See supra* notes 518-19 and accompanying text (discussing the exclusion of felons from grand juries in early England).

542. *See, e.g.*, CONN. PUB. STAT. LAWS tit. XCVI, ch. 1, § 1 (1808) (freehold); LAWS OF THE STATE OF DELAWARE ch. 158, §§ 2, 7, at 445, 449 (Dover, Wootten & Allee 1806) (freehold); Act of Dec. 17, 1796, §§ 51-52, *reprinted in* LAWS OF KENTUCKY 201 (Lexington, Bradford 1799) (twenty pound estate, or ten pound estate for quarter session); Act of Feb. 28, 1803, § 1, *reprinted in* 4 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 540, at 104 (restricting jury service to voters); ALEXANDER KEYSSAR, THE RIGHT TO VOTE tbl. A.1 (2000) (listing Massachusetts property requirement for voters); Act of Feb. 8, 1791, *reprinted in* CONSTITUTION AND LAWS OF THE STATE OF NEW-HAMPSHIRE 104 (Dover, Bragg 1805) ("Estate of fifty pounds" for grand juries); Act of June 17, 1785, *reprinted in* CONSTITUTION AND LAWS OF THE STATE OF NEW-HAMPSHIRE, *supra*, at 107 (fifty pounds or freehold for petit juries); Act of Nov. 10, 1797, *reprinted in* LAWS OF THE STATE OF NEW JERSEY 259 (William Paterson ed., Newark, Day 1800) (freehold); N.Y. REV. STAT. pt. III, ch. VI, § 13 (1829) ($250 or freehold); A MANUAL OF THE LAWS OF NORTH CAROLINA ch. 6, § 2, at 279 (John Haywood ed., Raleigh, Gales 1814) (freehold; 1779 law); VT. LAWS ch. III, §§ 58-59, 63 (1798) (freehold); VA. REV. CODE ch. 75, §§ 1, 2, 12 (1819) (freehold and visible estate of $150 or $300).

543. To be sure, these qualifications probably did not exclude most white men. *Cf.* KEYSSAR, *supra* note 542, at 24 (citing estimates that property requirements allowed "roughly 60 to 70 percent of adult white men" to vote).

544. *See, e.g.*, CONN. PUB. STAT. LAWS tit. XCVI, ch. 1, § 3 (1808) ("judicious and lawful"); LAWS OF THE STATE OF DELAWARE, *supra* note 542, ch. 158, §§ 2, 7, at 445, 449 ("judicious," and "lawful men of fair characters"); Act of Dec. 17, 1796, § 52, *reprinted in* LAWS OF KENTUCKY, *supra* note 542, at 201 ("good demeanor"); 1 THE GENERAL PUBLIC STATUTORY LAW AND PUBLIC LOCAL LAW OF THE STATE OF MARYLAND ch. 87, § 2, at 349 (Clement Dorsey ed., Baltimore, Toy 1840) (1797 law requiring sheriffs' and coroners' oath to select "judicious" jurors "of good reputation"); Act of Feb. 28, 1803, § 1, *reprinted in* 4 THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS, *supra* note 540, at 104 ("good moral character"); N.Y. REV. STAT. pt. III, ch. VI, § 13 (1829) ("of fair character, of approved integrity, of sound judgment"); PA. LAWS ch. 2577 (1806) ("sober and judicious"); VT. LAWS ch. III, §§ 58-59, 63 (1798) ("judicious").

545. *Cf.* Ewald, *supra* note 5, at 1063 (describing the use of similar character standards in early years of the Republic to disenfranchise felons).

546. *Cf.* KEYSSAR, *supra* note 542, at 29, 33-38, 51 (describing the decline in property qualifications for voting between the 1790s and 1850s). Some of the states with property requirements around 1800, *see supra* note 542, that had dropped them around 1850, are Delaware, Maryland, Massachusetts, and New Jersey. *See* DEL. REV. STAT. ch. 109, § 1 (1852) (all electors qualified); DEL. CONST. of 1831, art. IV, § 1

became more important, and thus more common, for states to rely on detailed statutory specifications of who was exempted or disqualified from jury service. Jury qualification often began with being an elector,[547] followed by other hurdles. Some criteria, such as possessing "judicious" or "esteemed" character (presumably excluding felons), were similar to those from fifty years earlier.[548]

(providing voter qualification standard without property requirement); MD. CODE art. 50, § 5 (1860) ("No property qualification shall be required in any juror."); MASS. GEN. STAT. ch. 132, § 1 (1860) (stating that all voters are qualified); MASS. CONST. amend. art. III (1821) (providing voting qualification standard without property requirement) (amended 1891); Act of Feb. 28, 1851, § 2, *reprinted in* A DIGEST OF THE LAWS OF NEW JERSEY 386 (Lucius Q.C. Elmer ed., Philadelphia, Lippincott 1855) (eliminating the freeholder requirement). *Compare* VA. CODE tit. 49, ch. 162, § 1 (1849) (disqualifying those without $100 in real or personal property), *with* VA. REV. CODE ch. 75, §§ 1, 2, 12 (1819) (requiring a freehold and visible estate of $150 or $300). Some states did, however, maintain their freeholder requirements. *See, e.g.*, A DIGEST OF THE STATUTES OF ARKANSAS ch. 98, § 5, at 641 (Josiah Gould ed., Little Rock, Johnson & Yerkes 1858) ("Every grand juror shall be . . . a householder or a freeholder . . . ."); N.C. REV. CODE ch. 31, cl. 25 (1855) (stating that the jury list is to consist of freeholders, identified by their tax returns); VT. COMP. STAT. ch. 35, § 1 (1851) (requiring county officials to summon "freeholders" for the venire); *cf.* KEYSSAR, *supra* note 542, at 130-36 (discussing the persistence of property qualifications for voting after 1850).

547. *See, e.g.*, DIGEST OF THE LAWS OF CALIFORNIA art. 2699, at 510 (William H.R. Wood ed., San Francisco, Valentine, 1857) ("A person shall not be competent to act as juror unless he be . . . [an] elector of the county in which he is returned."); CONN. REV. STAT. § 106 (1849) (providing that jurors must be "able and judicious electors"); DEL. REV. STAT. ch. 109, § 1 (1852) ("All persons qualified to vote . . . shall be liable to serve as jurors."); A CODIFICATION OF THE STATUTE LAW OF GEORGIA art. III, § 1, at 578 (William A. Hotchkiss ed., Augusta, Grenville 1848) (stating that a juror must be qualified to vote to be a member of a jury for the trial of "treason, felony, breach of peace, or any other cause of a criminal nature"); IOWA CODE ch. 96, § 1630 (1851) (establishing that eligible jurors are those qualified electors of good character who do not have seeing or hearing impairments); THE REVISED STATUTES OF LOUISIANA 293 (U.B. Phillips ed., New Orleans, Claiborne 1856) (stating that the juror must be "a duly qualified voter of the State of Louisiana"); ME. REV. STAT. tit. IX, ch. 106, § 2 (1857) (mandating that jurors must be "qualified . . . to vote"); MASS. GEN. STAT. ch. 132, § 1 (1860) (stating that "[a]ll persons who are qualified to vote" can serve as jurors); MICH. COMP. LAWS ch. 128, § 9 (1857) (stating that persons must qualify as electors to serve as jurors); OHIO STAT. ch. 62, § 1 (1854) (providing that 108 electors shall be selected to serve as jurors in a given year); R.I. REV. STAT. tit. XXV, ch. 172, § 1 (1857) (indicating that eligible jurors are those who can vote on propositions to tax or expend money); Act of Mar. 10, 1871 (No. 419), § 1, *reprinted in* 14 STATUTES AT LARGE OF SOUTH CAROLINA 690 (Columbia, Republican Print Co. 1873) (providing that, aside from a list of exemptions, "persons who are qualified to vote in the choice of Representatives in the General Assembly shall be liable to be drawn and serve as jurors"); WIS. REV. STAT. ch. 118, § 1 (1858) (stating that jurors shall be selected from the pool of United States citizens who are electors of Wisconsin).

548. *See, e.g.*, ALA. CODE § 3438 (1852) (limiting jury pool to those "esteemed in the community for their integrity, fair character and sound judgment"); A DIGEST OF THE STATUTES OF ARKANSAS, *supra* note 546, ch. 98, § 28, at 644 (directing officers to avoid selecting as jurors "persons of ill-fame"); CONN. REV. STAT. § 106 (1849) ("judicious"); IOWA CODE § 1630 (1851) ("good moral character [and] sound judgment"); ME. REV. STAT. tit. IX, ch. 106, § 2 (1857) ("good moral character"); MICH. COMP. LAWS ch. 128, § 9 (1857) ("of fair character, of approved integrity, of sound judgment"); MO. REV. STAT. ch. 88, § 3 (1856) ("sober and judicious, of good

Other statutory criteria were newly prominent, such as being white,[549] and, in a significant minority of states, not being a criminal.[550] Per se exclusion based on crimes ranged from felonies,[551] to crimes that were infamous or involved moral turpitude,[552] to various combinations thereof.[553] The common law probably also continued

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reputation"); OHIO STAT. ch. 62, § 1 (1854) ("judicious"); Act of Apr. 14, 1834, pt. LXXXV, *reprinted in* THE GENERAL LAWS OF PENNSYLVANIA 622 (James Dunlop ed., Philadelphia, Johnson, 1849) ("sober, intelligent and judicious") (footnote omitted); *see also* DE TOCQUEVILLE, *supra* note 266, at 225 (describing New England jury selection practice of selecting jurors with upstanding reputations and voting rights).

549. *See, e.g.*, CONN. CONST. of 1818, art. VI, § 2 (limiting franchise, hence jury service, to white men); DEL. CONST. of 1831, art. IV, § 1 (limiting franchise, hence jury service, to white men); A CODIFICATION OF THE STATUTE LAW OF GEORGIA, *supra* note 547, art. III, § 1, at 578 ("free male white citizens"); A COMPILATION OF THE STATUTES OF THE STATE OF ILLINOIS ch. LVIII, § 1, at 654 (N.H. Purple ed., Chicago, Keen & Lee 1856) ("free white male taxable inhabitants"); LA. CONST. of 1852, art. 10 (limiting vote, hence jury service, to white men); MO. REV. STAT. ch. 88, § 3 (1856) ("free white citizen[s]"); OHIO STAT. ch. 62, § 2 (1854) ("white male inhabitants"); OHIO CONST. art. V, § 1 (1851) (limiting franchise, hence jury service, to "white male citizen[s]") (amended 1923); TENN. CODE § 4002 (1858) ("white male citizen[s]"). *See also* Klarman, *supra* note 137, at 370 (stating that antebellum state laws barred black men from juries in all of the southern states and most of the states in the north).

550. *Cf.* KEYSSAR, *supra* note 542, at 62-63 (describing the origin and rise of felon disenfranchisement in early nineteenth century).

551. *See, e.g.*, DIGEST OF THE LAWS OF CALIFORNIA, *supra* note 547, arts. 2122, 2124, at 376 (disqualifying from voting, hence from jury service, those convicted of "any infamous crime," which includes crimes "punishable by death or imprisonment in state prison"); DEL. CONST. of 1831, art. IV, § 1 (disqualifying from voting, hence from jury service, any person convicted of felony).

552. *See, e.g.*, DIGEST OF THE LAWS OF CALIFORNIA, *supra* note 547, art. 2699, at 510 ("felony, or misdemeanor, involving moral turpitude"); IOWA CONST. of 1846, art. 2, cl. 5 (disqualifying from voting, hence from jury service, those convicted of any "infamous crime"); THE REVISED CODE OF THE STATUTE LAWS OF THE STATE OF MISSISSIPPI 497 (Jackson, Barksdale 1857) ("infamous crime"); R.I. CONST. of 1842, art. II, § 4 (disqualifying from voting, hence from jury service, those convicted of "crime deemed infamous at common law"); Act of Mar. 10, 1871 (No. 419), § 7, *reprinted in* 14 STATUTES AT LARGE OF SOUTH CAROLINA, *supra* note 547, at 691 ("convicted of any scandalous crime," or "guilty of any gross immorality"); TENN. CODE § 4004 (1858) ("convicted of certain infamous offences specially designated in this Code"); *see also* WIS. REV. STAT. ch. 188, § 2 (1858) ("exempt[ing]" those convicted of infamous crimes from jury service).

553. *See, e.g.*, CONN. CONST. of 1818, art. VI, § 3 (disqualifying from voting, hence from jury service, those convicted of "bribery, forgery, perjury, duelling, fraudulent bankruptcy, theft, or other offence for which an infamous punishment is inflicted"); A MANUAL OR DIGEST OF THE STATUTE LAW OF THE STATE OF FLORIDA ch. IV, § 1, cl. 4, at 344 (Leslie A. Thompson ed., Boston, Little & Brown 1847) ("convicted, by the verdict of a jury, of any crime or misdemeanor, the punishment of which extended to life or limb, or to cropping, branding, whipping, standing in the pillory, or confinement in a penitentiary"); A COMPILATION OF THE STATUTES OF THE STATE OF ILLINOIS, *supra* note 549, ch. LVIII, § 1, at 654 ("cases where legal disabilities may be imposed for the commission of some criminal offense"); THE REVISED STATUTES OF LOUISIANA, *supra* note 547, at 213 ("bribery, perjury, forgery, and other high crimes or misdemeanors, punishable by imprisonment with hard labor in the penitentiary"); OHIO CONST. art. V, § 4 (1851) (giving the General Assembly the right to disenfranchise, hence disqualify from jury service, "any person convicted of bribery, perjury, or other infamous crime") (amended 1923); Act of Apr. 16, 1849, pt. X,

to exclude many felons from juries in states that did not have statutes specifying felon exclusion.[554]

After the Civil War, discretionary qualification laws and felon exclusion were used to keep black men off of juries. At first, southern and border states simply continued to exclude black men per se.[555] Because federal juries were selected (from 1789 to 1948) according to state qualification requirements, there was no way for black defendants in these states to avoid having an all-white jury, even in a federal trial.[556] The federal response to this problem was to bar racial discrimination in jury selection.[557] In the Civil Rights Act of 1875, Congress mandated that "[n]o citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude . . . ."[558] The spirit of this law was bolstered when the Supreme Court held that racist state jury qualification laws were unconstitutional anyway.[559]

Once southern states were rendered unable to exclude black men *qua* black men, they successfully exploited the federal law's "other qualifications" loophole. The Supreme Court permitted the discriminatory application of facially color-blind standards, and by 1910 the exclusion of black men from southern juries was "virtually total."[560]

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reprinted in THE GENERAL LAWS OF PENNSYLVANIA, *supra* note 548, at 1198-99 (including juror disqualification as punishment for arson).

554. *See, e.g.*, A DIGEST OF THE STATUTES OF ARKANSAS, *supra* note 546, ch. 98, § 22, at 644 (requiring petit juror to be "not otherwise disqualified"); MICH. COMP. LAWS ch. 128, § 9 (1857) (requiring juror to be "free from all legal exceptions").

555. *See* Klarman, *supra* note 137, at 370-71 (describing racist resistance by southern and border states in the immediate aftermath of the Civil War). All southern and most northern states excluded black men from jury service in the antebellum period. *See id.* at 370 (describing racial jury laws before the Civil War).

556. *See* Judiciary Act of 1789, § 29, 1 Stat. 73, 88 (1789) (requiring that "jurors shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens"); Act of July 20, 1840, ch. 47, 5 Stat. 367, 394 (1840) (equivalent provision); REV. STAT. tit. 13, § 800, 18 Stat. 89, 150 (1873) (equivalent provision); Act of March 3, 1911, Pub. L. No. 61-475, § 275, 36 Stat. 1087, 1164 (1911) (equivalent provision).

557. *See* Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 335, 336 (1875) (current version at 18 U.S.C. § 243 (2000)) (preventing disqualification of jurors based on race, color, or previous condition of servitude).

558. *Id.*; *see also* 28 U.S.C. § 1862 (2000) ("No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status.").

559. *See* Strauder v. West Virginia, 100 U.S. 303, 310 (1880) (holding that a West Virginia law, which allowed only white males to serve as jurors, violated the equal protection rights of "colored" men on trial).

560. Schmidt, *supra* note 7, at 1407; s*ee also* Klarman, *supra* note 137, at 376

The simplest route was through discriminatory application of subjective requirements, such as "fair character,"[561] but southern states may also have used felon and misdemeanant exclusion, often in combination with disenfranchisement.[562] One example was Mississippi, which decided in 1890 to exclude from voting and jury service those convicted of "[b]ribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy," but not of violent crimes like murder.[563] As the Mississippi Supreme Court explained approvingly at the time, in a voting case, this was designed to exclude black men, who were seen as "given rather to furtive offenses than to the robust crimes of the whites."[564] The United States Supreme Court approved this provision in the context of grand jury service, reasoning that:

> [T]he operation of the constitution and laws is not limited by their language or effects to one race. They reach weak and vicious white men as well as weak and vicious black men, and whatever is sinister in their intention, if anything, can be prevented by both races by the exertion of that duty which voluntarily pays taxes and refrains from crime.[565]

(describing near "nullifi[cation] [of] *Strauder*" by courts refusing to recognize disenfranchisement challenges); Shapiro, *supra* note 5, at 538 (giving statistical information in the parallel context of voting).

561. *See* Klarman, *supra* note 137, at 376 (describing racist use of such discretion). This technique required general white control of local government, which was achieved through disenfranchisement. *Id.* at 371.

562. As one commentator described the process:

> In Georgia in 1877 and in Alabama in 1901, state constitutions barred the vote forever to anyone convicted of a crime of "moral turpitude," whether or not conviction for that crime carried any prison sentence at all. In Alabama, many misdemeanors were effectively included under the "moral turpitude" catchall phrase, because between the lines was the intent and expectation that the phrase would be used in a discriminatory manner.

Ewald, *supra* note 5, at 1094 (footnotes omitted). *See also* Hench, *supra* note 5, at 738-43 (discussing Jim Crow uses of felon disenfranchisement); Klarman, *supra* note 561, at 352-53 (commenting that lawmakers drafted criminal disenfranchisement laws to reflect whites' stereotypes of blacks); Shapiro, *supra* note 5, at 538-41 (discussing the historical details of criminal disenfranchisement).

563. Ratliff v. Beale, 20 So. 865, 867 (Miss. 1896) (quoting MISS. CONST. of 1890, § 241); *see also* S.C. CIV. CODE § 200 (Michie 1912) (disenfranchising those convicted of "burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, housebreaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation and larceny, or crimes against the election laws" but not murder or rape), § 4017 (requiring jurors to be qualified voters).

564. *Ratliff*, 20 So. at 868.

565. Williams v. Mississippi, 170 U.S. 213, 222 (1898). The *Williams* Court overlooked evidence of discriminatory application of the criminal law that is, to modern eyes, quite obvious even from an appellate opinion. *See id.* at 225 (commenting that although the Mississippi statute allowed for "evil" administration, it does not render the statute unconstitutional). The Court also ignored the fact that

It should give one pause that this is the same rationale given today, albeit in better faith, to justify felon exclusion in the face of its substantial racial disparities.

By around 1900 many states used statutes to specifically exclude felons as felons.[566] Some provided character requirements—some in

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Mississippi probably excluded all felons from jury service, not just "furtive" ones. *See* MISS. PUB. STAT. LAWS § 2684 (1906) (excluding those convicted of "infamous crime").

566. *See, e.g.*, CAL. CIV. PROC. CODE § 199 (Bender-Moss 1909) ("malfeasance in office, or any felony or other high crime"); COLO. REV. STAT. § 3668 (1908) ("felony"); DEL. REV. STAT. ch. 109, § 1 (1893) (deeming qualified voters "liable to serve as jurors"), ch. 38, § 1 (disenfranchising felons); FLA. GEN. STAT. § 1570 (1906) ("bribery, forgery, perjury, larceny, or high or infamous crime"); IDAHO REV. CODE § 3942 (1908) ("felony or misdemeanor involving moral turpitude"); KAN. GEN. STAT. § 3976 (Dassler 1905) (requiring jurors to be qualified electors); KAN. CONST. art. V, § 2 (disenfranchising felons); KY. STAT. § 2248 (Carroll 1903) (disqualifying felons from grand jury service); 2 LA. REV. LAWS art. 159 (Wolff 1904) ("treason, perjury, forgery, bribery, or other crime punishable by imprisonment in the penitentiary"); MONT. REV. CODE § 6338 (1907) ("malfeasance in office, or any felony or other high crime"); NEB. COMP. STAT. tit. XIX, § 657 (1901) ("criminal offense, punishable by imprisonment in the penitentiary" or "by special provision of law"); NEV. COMP. LAWS § 3867 (1900) ("treason, felony, or other infamous crime"); N.D. REV. CODE § 514 (1905) ("criminal offense, punishable by imprisonment in the penitentiary" or "by special provision of law"); OHIO REV. STAT. ANN. § 6797 (Anderson 1903) ("felony"); OR. CODE § 965 (1902) ("felony, or a misdemeanor involving moral turpitude"); S.D. STAT. § 699 (Parsons 1901) ("criminal offense, punishable by imprisonment in the penitentiary" or "by special provision of law"); TEX. CIV. STAT. ANN. art. 3139(6) (Sayles 1897) ("felony"); UTAH COMP. LAWS § 1298 (1907) ("malfeasance in office or any felony or other high crime"); VA. CODE ANN. § 3139 (West 1904) ("bribery, perjury, embezzlement of public funds, treason, felony, or petit larceny"); WASH. CODE § 5939 (Pierce 1905) ("felony"); WIS. STAT. § 2524 (1898) (deeming qualified electors eligible for jury service); WIS. CONST. art. III, § 2 (1848) (disenfranchising "any person convicted of treason or felony") (amended 1986); WYO. REV. STAT. § 3341 (1899) ("malfeasance in office, or any felony or other high crime").

Other states specified that a conviction for an infamous crime would suffice. This category may or may not have been coterminous with felonies. *See supra* note 436; *see, e.g.*, MINN. GEN. STAT. §§ 5599, 7173 (West 1894); MISS. PUB. STAT. LAWS § 2684 (1906) ("infamous crime"); R.I. GEN. LAWS ch. 279, § 1 (1909) (requiring jurors to be qualified to vote); R.I. CONST. of 1842, art. II, § 4 (disqualifying from voting, hence from jury service, those convicted of "crime deemed infamous at common law"); TENN. CODE ANN. § 5815 (Marshall & Bruce 1896) ("certain infamous offenses, specially designated in this Code").

Still other states had incomplete standards that did not necessarily rise to the level of felon exclusion. *See, e.g.*, ARK. STAT. § 4490 (1904) (requiring grand jurors to be electors), § 2767 (disenfranchising those who "for the commission of some felony [are] deprived of the right to vote by law"); ILL. REV. STAT. § 279 (Hurd 1901) ("Every person convicted of the crime of murder, rape, kidnaping, willful and corrupt perjury or subornation of perjury, arson, burglary, robbery, sodomy or other crime against nature, incest, larceny, forgery, counterfeiting or bigamy, shall be deemed infamous, and shall forever be rendered incapable of . . . serving as a juror . . . ."); IND. REV. STAT. § 1393 (Lawyers' Co-op 1901) (requiring jurors to be voters), § 89 (empowering the legislature to disenfranchise those convicted of infamous crimes); ME. REV. STAT. ch. 108, § 5 (1904) (mandating removal from jury box if "convicted of any scandalous crime, or guilty of any gross immorality"); MASS. REV. LAWS ch. 176, § 5 (1902) (allowing convicted criminals to be kept off a jury list at discretion of town board), § 8 (mandating removal from jury box if "convicted of

addition to felon exclusion,[567] and others instead of it.[568] The common law was still a factor,[569] but because so many states provided for felon exclusion in statutes, the failure to have such a statute could now indicate that the state specifically meant to take a more forgiving approach than the old common law. In 1904, the Supreme Judicial Court of Massachusetts explained its moderate standard:

> [I]n this commonwealth it is not the law that persons convicted of crime shall be permanently deprived of their civil rights. Our legislation, more humane and charitable than the law of early times, recognizes the possibility of repentance and reformation. . . . [T]here is nothing to prevent the board from putting upon the jury list the name of a former criminal, if they find him to be of good moral character and otherwise suitable.[570]

Even Massachusetts had its limits, however. The next year the court affirmed a trial judge's grant of a new trial after it was discovered that one of the jurors had been prosecuted thirty-six times, and had been convicted in most of them.[571]

To summarize, felon exclusion was widespread in eighteenth- and nineteenth-century America. It evolved from a common-law doctrine

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any scandalous crime, or guilty of any gross immorality"); MO. STAT. ANN. §§ 1870, 1991, 2031, 2083 (West 1906) (disqualifying those convicted of various specific crimes); S.C. CIV. CODE § 4017 (Michie 1912) (requiring jurors to be qualified voters), § 4036 (mandating removal from jury box if "convicted of any scandalous crime, or guilty of any gross immorality"), § 200 (disenfranchising those convicted of "burglary, arson, obtaining goods or money under false pretences, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, housebreaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assault with intent to ravish, miscegenation and larceny, or crimes against the election laws" but not murder or rape).

567. *See, e.g.*, DEL. REV. STAT. ch. 109, § 2 (1893) ("sober and judicious"); GA. CODE §§ 811, 851 (Hopkins et al. 1896) ("upright persons"); KAN. GEN. STAT. § 3976 (Dassler 1905) ("fair character and approved integrity"); KY. STAT. § 2248 (Carroll 1903) ("discreet and of good demeanor" petit jurors); OHIO REV. STAT. ANN. § 5164 (Anderson 1903) ("judicious and discreet").

568. *See, e.g.*, ALA. CODE § 7239 (1907) ("esteemed in the community for their integrity, good character, and sound judgment"); CONN. GEN. STAT. § 656 ("esteemed in their community as men of good character, approved integrity, sound judgment"); IOWA CODE ANN. § 332 (1897) ("good moral character"); ME. REV. STAT. ch. 108, § 2 (1904) ("good moral character, of approved integrity, of sound judgment"); MASS. REV. LAWS ch. 176, § 4 (1902) ("of good moral character, of sound judgment"); N.Y. CIV. PROC. CODE § 1027(5) (Parsons 1899) ("of fair character; of approved integrity; of sound judgment"); N.C. REVISAL § 1957 (1908) ("good moral character"); S.C. CIV. CODE § 4017 (Michie 1912) ("sound judgment"); VT. PUB. STAT. § 1464 (1907) ("judicious" grand jurors).

569. *See* Queenan v. Territory, 71 P. 218, 220 (Okla. 1901) (explaining that statutes allowing for disqualifications of jurors, including those excluding felons, are merely "declaratory of the common law"), *aff'd sub nom.* Queenan v. Oklahoma, 190 U.S. 548 (1903).

570. Commonwealth v. Wong Chung, 71 N.E. 292, 293 (Mass. 1904).

571. Manning v. Boston Elevated Ry. Co., 73 N.E. 645, 645-46 (Mass. 1905).

to a statutory one, which allowed states wishing to include felons from jury service to do so more directly. While the specification of felon exclusion in statutes increased during this time, other qualifications declined, and jury service began a general shift from being the province of a select few "judicious and temperate" citizens to being a more objectively defined domain of virtually any literate citizen lacking a criminal past. The next century saw the trend accelerate.

C. Recent American Practice

Current felon exclusion law reflects recent shifts in jury participation, which have made felon exclusion less arbitrary, but more pervasive. As previously, in the 1940s almost all states excluded felons from juries in one way or another; most excluded felons as felons, and most required "good moral character," which is a standard that felons would find hard to meet.[572] Many—or at least more than today—disqualified those convicted of some misdemeanors.[573]

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572. A 1942 report indicated that thirty-three states (plus D.C.) excluded people with criminal records from jury service. The states were: Alabama, Arizona, California, Colorado, the District of Columbia, Florida, Idaho, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See* COMM. ON SELECTION OF JURORS, *supra* note 486, at 35 (footnote omitted).

This list appears to be over- and underinclusive. *See, e.g.*, KY. REV. STAT. § 29.020(2) (1948) (not excluding felons *qua* felons from petit juries); MO. REV. STAT. § 697 (1939) (not excluding felons *qua* felons); S.C. CODE § 38-52 (Michie 1952) (requiring jurors to be free from legal exceptions and qualified electors); S.C. CONST. art. 2, § 6 (disenfranchising only those convicted of enumerated sex crimes, property crimes, and *crimen falsi*, but not violent crimes) (amended 1971); ARK. STAT. § 3-101 (Bobbs-Merrill 1947) (disenfranchising felons), § 39-101 (requiring grand jurors to be electors); CONN. GEN. STAT. § 7906 (1949) (requiring jurors to be qualified electors); CONN. CONST. of 1818, art. VI, § 3 (disenfranchising those sentenced to "infamous punishment[s]"); DEL. CODE ANN. § 4504 (West 1953) (requiring jurors to be qualified electors); DEL. CONST. art. V, § 2 (disenfranchising felons); ME. REV. STAT. ch. 103, § 2 (1944) (excluding those convicted of "scandalous crime or gross immorality").

Ten more states—Arkansas, Connecticut, Georgia, Illinois, Iowa, Maine, Michigan, North Carolina, Ohio, and Rhode Island—are listed as requiring jurors to have "good moral character." *See* COMM. ON SELECTION OF JURORS, *supra* note 486, at 34 (footnote omitted) (listing twenty-five states and D.C. as requiring jurors to have "good moral character"). Fifteen states (plus D.C.)—Alabama, Arizona, the District of Columbia, Florida, Kansas, Kentucky, Louisiana, Missouri, New York, Oklahoma, South Carolina, Tennessee, Texas, Vermont, Virginia, and Wisconsin—are listed as requiring both a clear criminal record and "good moral character." *See id.* at 34-35 (footnote omitted) (providing separate lists of states requiring "good moral character," and states precluding those with a criminal record from jury service).

573. *Compare* ALA. CODE tit. 20, § 21 (Michie Supp. 1955) ("offense involving moral turpitude"), CAL. CIV. PROC. CODE § 199 (West 1954) (including malfeasance in office and high crimes along with felonies), FLA. STAT. § 40.01 (1951) ("bribery,

The 1940s were also, however, an era when a new ideal began to take hold: inclusion on juries of as many capable citizens as possible. The "moral character" standards were extremely vague.[574] The persistence of subjective standards reflected not just a desire to keep juries in the hands of a vaguely "better sort of person," but also the practice of according wide discretion to local officials.[575] In many states, the subjectivity of the system was also manifested in the "key man" approach to selecting juries, in which upstanding members of the community were responsible for selecting the jury venire, a practice that undoubtedly dampened felon participation as well.[576] The problem with these imprecise formulations was not just that they were underinclusive, overinclusive, or imprecise, but also that the whim of local officials was relatively unconstrained.[577] If the jury system was supposed to include as many capable citizens as possible, it could not allow exclusion to turn upon the arbitrary caprice of a potentially biased jury commissioner.

As a result of this new ideology, general participation on juries has broadened since the 1940s. In that decade, the Supreme Court began its attempts to guarantee that jury venires comprise fair cross-sections of their communities.[578] A new federal statute in 1948 provided a set of minimum, objective qualifications for federal jurors, though more stringent state laws continued to be applied and elitist

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forgery, perjury, or larceny"), IDAHO CODE § 2-202 (Bobbs-Merrill 1948) (excluding those convicted of a felony or misdemeanor involving moral turpitude), MONT. REV. CODE ANN. § 93-1303 (Smith 1947) (malfeasance in office and high crimes), N.Y. JUD. LAW ANN. § 504 (McKinney 1955) ("misdemeanor involving moral turpitude"), N.C. GEN. STAT. § 9-1 (Michie 1953) ("any crime involving moral turpitude"), OR. COMP. LAWS ANN. § 14-107 (Bancroft-Whitney 1940) (stating that those convicted of any felony, or a misdemeanor involving moral turpitude, are not competent for jury service), UTAH CODE ANN. § 48-0-9 (1943) (malfeasance in office and high crimes), VA. CODE ANN. § 8-175 (Michie 1950) (bribery, perjury, public embezzlement, or petit larceny), and WYO. CODE CIV. PROC. § 1-78 (Michie 1957) (malfeasance in office and high crimes), *with supra* notes 439-40 (listing eight states that currently exclude some misdemeanants).

574. *See* H.R. REP. NO. 90-1076 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1792, 1803 & n.1 (promoting jury service restrictions that are more objective than previous standards); *Jury Selection: A Critique*, *supra* note 4, at 1080 n.57 (discussing diversity of state approaches, and noting that state standards "have in common the vice of vagueness") (quoting Note, *Psychological Tests and Standards of Competence for Selecting Jurors*, 65 YALE L.J. 531 (1956)).

575. On efforts to discourage service by the lower and working classes in the 1920s, 30s, and 40s, see Miller, *supra* note 286.

576. *See Jury Selection: A Critique*, *supra* note 4, at 1078-80 (explaining how the "key man" approach allowed nonjudicial officers to create their own subjective standards, and to exclude whatever groups they wished).

577. *See id.* at 1078 (providing evidence that some commissioners had requirements that went beyond those stated in the statutes).

578. *See supra* Part I.B.3.a.

practices for drawing up jury lists were maintained.[579] In 1957, Congress stopped federal courts from applying state juror qualification standards that were stricter than the federal minimum (such as being male).[580] In 1968, the goal of obtaining a broad cross-section of the community was written into statute, and voter rolls and drivers' registries replaced commissioners' fiat as the source of federal jury lists.[581] Most state systems reflect a similar transformation and broadening; jurisdictions using indefinite formulations gradually turned toward more objective regimes, and today, only Alabama, Arkansas, and Illinois retain subjective bans on the 'wrong sort' of person.[582] The jury now represents "nearly the whole vicinage come to judge,"[583] with felon exclusion as a notable exception.[584]

Felon exclusion also represents an exception to general trends of liberalization concerning civil disabilities.[585] As discussed above, the

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579. Act of June 25, 1948, Pub. L. No. 80-773, ch. 646, 62 Stat. 869, 951-52; *see* Miller, *supra* note 286, at 990-93 (describing elitist origins of impetus behind 1948 law); *see also* COMM. ON SELECTION OF JURORS, *supra* note 486, at 44 (explaining an early version of the proposal for uniform federal standards, which included felon exclusion); JAMES WILLIAM MOORE, MOORE'S JUDICIAL CODE 371-81 (1949) (describing, contemporaneously, "radical" changes in the law). The remainder of the Commission on Selection of Jurors report is a good source on the thinking underlying the 1948 legislation.

580. Civil Rights Act of 1957, Pub. L. No. 85-315, § 152, 71 Stat. 634, 638 (codified as amended at 28 U.S.C. § 1861 (2000)).

581. *See* Federal Jury Selection and Service Act of 1968, Pub. L. No. 90-274, § 101, 82 Stat. 53, 54 (codified at 28 U.S.C. § 1861 (2000)) (stating that juries should be selected from a "fair cross section of the community"). The 1968 law also excluded those with pending criminal charges from jury service. *Id.* at 58 (codified at 28 U.S.C. § 1865(b)(5) (2000)).

582. The transformation appears to have been gradual, from more than thirty states in the 1940s, *see supra* note 572, to twenty-three in 1970, *see* Carter v. Jury Comm'n, 396 U.S. 320, 333-34 n.31 (1970) (listing states that had subjective limitations for jury service like "good character," "approved integrity," having "vicious habits," or being "unfit persons"), to the current three, *see supra* notes 376 (Alabama), 379 (Arkansas), and 389 (Illinois). *See also* CAL. PENAL CODE § 893(2) (West 2000) (providing character requirement for grand juries). *See generally* Fukurai & Butler, *supra* note 229 (providing a good summary of roughly current law that also illuminates remaining sources of subjectivity and underrepresentation).

583. Carrington, *supra* note 531, at 58 (describing federal juries).

584. *Cf.* Demleitner, *Continuing Payment*, *supra* note 5, at 787 (arguing that felon disenfranchisement makes less sense in an age of an otherwise broad franchise).

585. *See* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT, *supra* note 328, at 15, 18-25 (detailing trends in recent decades in the use of civil disabilities). To be precise, Travis describes "a surge of popularity beginning in the mid-1980s" ending an earlier period of liberalization. *Id.* at 18. The closest analog to felon exclusion—felon disenfranchisement—has steadily declined. *See infra* note 588 and accompanying text.

The ABA, caught in the middle of this trend, promulgated two contradictory standards on felon exclusion in 1983. *Compare* ABA JUROR USE, *supra* note 427, std. 4(e) (barring felons whose civil rights have not been restored from jury service), *with* ABA CRIMINAL JUSTICE, *supra* note 427, std. 23-8.5 (barring jury service only by those currently under criminal supervision).

lifetime exclusion of felons from juries has stayed steady and remained the majority rule throughout the twentieth century. Most recently, state laws have changed in both directions, with some momentum in favor of exclusion.[586] By contrast, felon disenfranchisement has rapidly faded: Only eight states now disenfranchise felons for life, compared to fifteen in the late 1980s[587] and the more than forty states that had anti-felon voting provisions in the late 1960s.[588]

D. Conclusion

The practice of excluding felons from jury service has both a rich pedigree and a sturdy presence in current law. Felon exclusion has evolved from being a product of subjective juror qualifications or anti-criminal common-law rules into being a product of objective statutes. In the process, it has become firmly entrenched and has avoided the general trend of expanded jury participation.

586. Between 1986 and 1996, four jurisdictions tightened restrictions while two or three loosened them. *See* City of Mandan v. Baer, 578 N.W.2d 559, 563 (N.D. 1998) (describing North Dakota as loosening standards); Olivares et al., *supra* note 326, at 12 (describing Indiana and D.C. as the only jurisdictions loosening standards). Since 1996, a few other states have tightened their standards, including Michigan, Nebraska, and New Hampshire. *See supra* notes 398, 403, and 405.

587. *The Purity of the Ballot Box*, *supra* note 5, at 1300.

588. *See* KEYSSAR, *supra* note 542, at 302 (describing this shift); *see also* Green v. Bd. of Elections, 380 F.2d 445, 450 (2d Cir. 1967) (stating that forty-two states had constitutions that "prohibited or authorized the legislature to prohibit exercise of the franchise by convicted felons"); Terry Carter, *Cell Block to Voting Bloc?*, A.B.A. J., Oct. 2002, at 16, 17 (listing Alabama, Florida, Iowa, Kentucky, Mississippi, Nevada, Virginia, and Wyoming as the only states that disenfranchise felons for life); *One Person, No Vote*, *supra* note 5, at 1943-49 (describing recent liberalization, and classifying state laws as either permanently disenfranchising, or practicing a modified version of permanent disenfranchisement); *The Purity of the Ballot Box*, *supra* note 5, at 1300 (stating in 1989 that fifteen states disenfranchised felons for life).