



# Jury News

JAMES M. BINNALL

## The Exclusion of Convicted Felons from Jury Service: What Do We Know?

A quiet discussion has been taking place among policymakers concerned about the representativeness of jury pools. In spite of concerted efforts by jury managers to improve the quality of master jury lists, to follow-up on FTA jurors, and to address other problems that make it difficult for many prospective jurors to serve, the jury pool in many jurisdictions still falls short of reflecting a fair cross-section of the community. Some of the more interesting proposals include changing the qualification criteria to allow people who are not currently eligible to serve. The California legislature, for example, approved a bill that would permit noncitizens who are legal residents to serve; the bill was ultimately vetoed by Governor Jerry Brown. New Mexico provides foreign-language interpreters to non-English-speaking jurors. Another proposal—restoring civil rights, including the right to serve on a jury, to persons convicted of crimes—is also getting some attention. Recently, I learned about some research that had been undertaken to examine the likely impact on the justice system. I invited Professor James M. Binnall, California State University, Long Beach, to guest-author the following “Jury News” column and share his findings.

— Paula Hannaford-Agor, *Jury News*

In recent years, the issue of jury representativeness has arisen in a number of high-profile criminal trials. Many commentators and critics of the jury argue that seldom do juries “look like” the population from which they are drawn. Today, an estimated 19.8 million people, roughly 8.6 percent of the adult population and one third of the African-American male adult population, have been convicted of a felony.<sup>1</sup> Importantly, in many jurisdictions, these citizens are forever barred from serving as jurors. Thus, as America imprisons, our jury system loses countless prospective jurors and the unique life experiences that would assuredly diversify any deliberation room.

Felon jury-exclusion statutes divide roughly into two types: those that permanently eliminate a convicted felon’s opportunity to serve as a juror (lifetime ban) and those that allow for the possibility that a convicted felon might, at some point, decide a litigated matter (temporal ban). While 27 states and the federal government bar convicted felons from the jury process permanently, remaining jurisdictions impose less severe, record-based juror eligibility criteria that vary significantly.

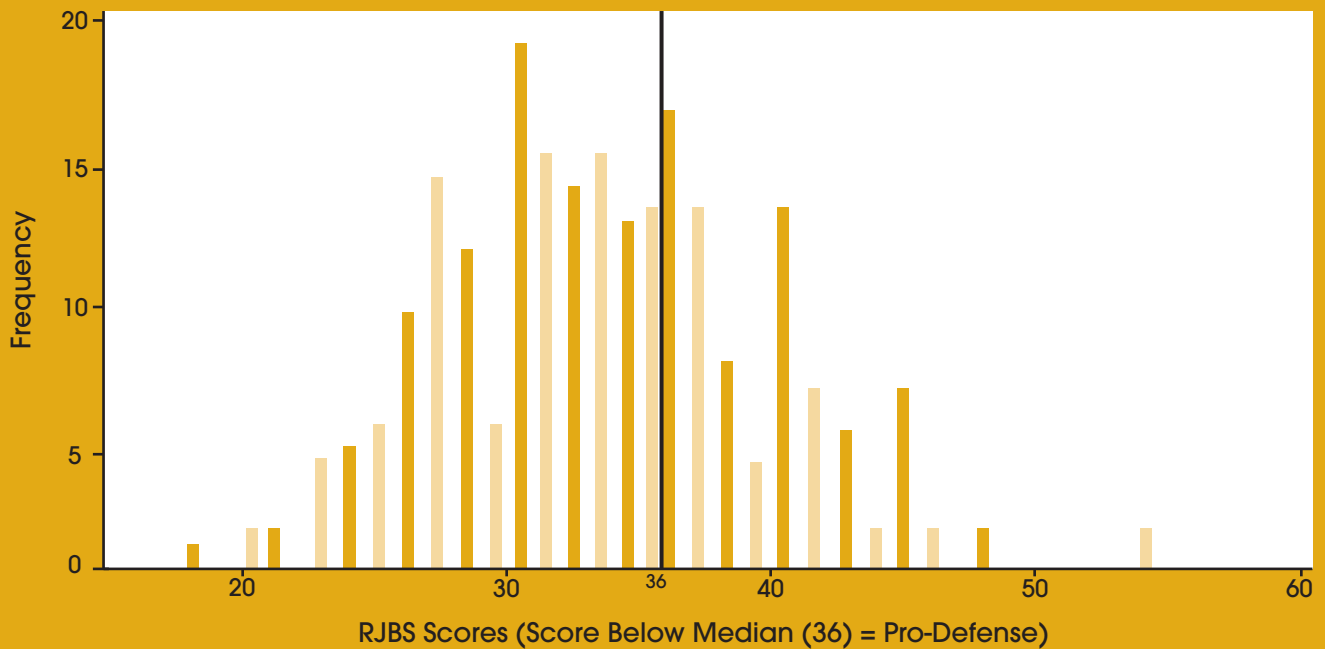
Twelve states bar convicted felons from jury service until the full completion of their sentence, notably disqualifying individuals serving felony parole and felony probation. Seven states enforce hybrid regulations that may incorporate penal status, charge category, type of jury proceeding, or a term of years. For example, the District of Columbia and Colorado adhere to differing hybrid models; the former excludes convicted felons from jury service during any period of supervision and for ten years following the termination of supervision, while the latter excludes convicted felons solely from grand-jury proceedings. And finally, two states recognize lifetime for-cause challenges, permitting a trial judge to dismiss a prospective juror from the venire solely on the basis of a felony conviction. Only Maine places no restrictions on a convicted felon’s opportunity to serve as a juror.

Across jurisdictions, the application of felon jury-exclusion statutes is relatively consistent. Only four jurisdictions tailor felon jury-exclusion statutes, distinguishing first-time offenders from repeat offenders (Arizona), violent offenders from nonviolent offenders (Nevada), grand juries from petit juries (Colorado), and civil cases from criminal cases (Oregon). In all remaining jurisdictions, felon jury-exclusion statutes are categorical, applying to *all* prospective jurors with a prior felony conviction in all types of proceedings.<sup>2</sup>

<sup>1</sup> Sarah Shannon et al., Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010, at 12 (paper presented at the 2011 Annual Meeting of the Population Association of America).

<sup>2</sup> Brian Kalt, *The Exclusion of Felons From Jury Service*, 53 Am. U.L. Rev. (2003); Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction (2007); James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 Law & Pol’y 1 (2014).

Figure 1: Revised Juror Bias Scale Scores  
Convicted Felons (N=234)



Legislators and courts cite two practical rationales for felon jury-exclusion statutes. The first is the probity or character rationale.<sup>3</sup> The probity rationale seemingly contends that a convicted felon’s character is forever marred by his or her involvement in criminal activity, to the point that only categorical exclusion from the venire will ensure the purity of the adjudicative process. As the Supreme Court of Arkansas has stated, “[u]nquestionably that exclusion is intended to bar from the jury box the one class of persons least likely to respect and give effect to the criminal laws.”<sup>4</sup>

A second rationale for the exclusion of convicted felons from jury service is the inherent-bias rationale. Unlike the probity rationale, the inherent-bias rationale has spawned considerable precision among courts and lawmakers. The inherent-bias rationale holds that convicted felons harbor biases directly resulting from their experiences with the criminal justice system.<sup>5</sup> Forecasting the direction and strength of such biases, courts have opined that a convicted felon’s “former conviction and imprisonment would ordinarily incline him to

compassion for others accused of crime,”<sup>6</sup> and that convicted felons are “biased against the government.”<sup>7</sup>

While voter-disenfranchisement statutes dominate literature on the civic marginalization of convicted felons, to date little research has focused on the exclusion of convicted felons from the jury process. The first empirical study on the topic revealed that Georgia’s felon jury-exclusion statute (a permanent exclusion) racially homogenizes juries.<sup>8</sup> In particular, felon jury exclusion in Georgia reduces the number of African-American men expected to serve as jurors from 1.65 to 1.17 per jury.<sup>9</sup> In many Georgia counties, this effect is even more pronounced, reducing the expected number of African-American male-jurors to under 1, a significant reduction as prior research suggests that, in capital cases, juries with 1 African-American male are less likely to sentence a defendant to death than juries without an African-American male.

More recent empirical research on felon jury exclusion explores 1) whether the rationales for felon jury exclusion

<sup>3</sup> See, e.g., *United States v. Barry*, 71 F3d 1269 (7th Cir 1995).

<sup>4</sup> *Rector v. State*, 280 Ark. 385, 395 (1983).

<sup>5</sup> *People v. Miller*, 759 NW2d 850 (2008).

<sup>6</sup> *State v. Baxter*, 357 So.2d 271, 275 (La.1978).

<sup>7</sup> *United States v. Greene*, 995 F2d 793, 796 (8th Cir 1993).

<sup>8</sup> Darren Wheelock, *A Jury of One’s “Peers”: The Racial Impact of Felon Jury Exclusion in Georgia*, 32 JUST. SYS. J., 335 (2011).

<sup>9</sup> *Id.* at 352

are empirically viable and 2) how exclusion may impact the reintegration of convicted felons. A study conducted in southern California examines the inherent-bias rationale by comparing the pretrial biases of convicted felons to those of non-felon jurors and non-felon jurors currently enrolled in law school. Results reveal that on a measure of pretrial bias, convicted felons take on a near normal distribution, such that nearly one-third of convicted felons harbor a neutral or pro-prosecution pretrial bias (see Figure 1). Additionally, while convicted felons and law students are more likely to favor the defense than are eligible jurors, the pretrial biases of convicted felons and law students do not differ statistically. Hence, it is as likely that a law student would harbor a pro-defense bias as strong as that of a convicted felon. These results tend to suggest that categorical felon jury-exclusion statutes are both over- and under-inclusive, eliminating nonthreatening jurors and doing little to insulate the jury pool from at least one group of prospective jurors that may harbor “unacceptable” pro-defense biases.<sup>10</sup>

A related pilot study examining the character rationale for felon jury exclusion assesses how convicted felons may deliberate. Using a mock-jury design, the study compares homogenous juries (comprising only non-felon eligible jurors) to mixed juries (comprising non-felon eligible jurors and otherwise eligible jurors with a felony conviction). Participants viewed an edited version of a criminal trial, heard applicable jury instructions, and then deliberated. While the character rationale for felon jury-exclusion suggests that convicted felons would somehow diminish the quality of deliberations, findings suggest that convicted felons have no negative impact on the process and may, in fact, enhance deliberations. Compared on several measures of deliberation quality, homogenous juries did not outperform mixed juries. Additionally, at the juror level, time spoken as a percentage of total deliberation time was higher for felon jurors. Felon jurors also raised more novel case facts than did their non-felon counterparts. Though this pilot study was hampered by the small size of its sample, its results, while not conclusive, do suggest that convicted felons would not taint the deliberation process in the manner the character rationale presumes.<sup>11</sup>

Apart from empirical research on the rationales for felon jury exclusion, another recent study explores the impacts of exclusion on the reintegration of convicted felons. That study reveals that eligibility for jury service “matters” to

those with a criminal record. In a series of in-depth semi-structured interviews in Maine, the only jurisdiction that places no restriction on convicted felons’ opportunities to serve, convicted felons generally held the jury and the jury process in high regard. Moreover, they viewed their eligibility as a measure of trust, placed in them by the state. In turn, they reported a desire to “live up to” that trust, suggesting that their eligibility enhanced their own views of themselves and the criminal justice system. Such evidence suggests that inclusion may serve to facilitate successful reentry.<sup>12</sup>

A vestige of the notion of “civil death,” the history of felon jury exclusion is rather unremarkable. The blind adoption of traditional practices makes felon jury exclusion the most pervasive and severe form of civic marginalization in the United States. Yet, unlike other forms of civic marginalization, felon jury exclusion is understudied. Still, while scant, recent empirical research on felon jury exclusion tends to show that the threat convicted felons pose to the jury may be overstated. Moreover, some evidence seemingly demonstrates that convicted felons benefit from eligibility and eventually service, and that their inclusion in the process may have the potential to alter their concepts of self and ease their reintegration. In sum, though further research is needed, existing research calls into question the wisdom of continuing to exclude some of our most marginalized citizens from arguably our most direct form of democratic participation.

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<sup>10</sup> Binnall, *supra* n. 2.

<sup>11</sup> James M. Binnall, *Convicted Felons Deliberate: A Mock Jury Experiment* (Ph.D. dissertation, University of California, Irvine, 2015).

<sup>12</sup> James M. Binnall, *Summoning Criminal Desistance: Convicted Felons’ Perspectives on Jury Service*, *LAW & SOC. INQUIRY* (forthcoming, 2016).