

# Cops and Convicts: An Exploratory Field Study of Jurymantering

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## I. INTRODUCTION

Since 1972, scholars have used the term “jurymantering” to describe jury selection procedures that eliminate classes of citizens from the adjudicative process.<sup>1</sup> Today, the most prominent mass exclusion of prospective jurors targets the estimated nineteen million Americans with a felonious criminal history.<sup>2</sup>

Forty-nine states, the federal government, and the District of Columbia restrict convicted felons’ opportunities to serve as jurors.<sup>3</sup> One of the primary justifications for such restrictions is the inherent bias rationale.<sup>4</sup> The inherent bias rationale supposes that convicted felons, if allowed to serve, would threaten the impartiality of the jury because, as a homogeneous group, convicted felons harbor an impermissible pro-defense/anti-prosecution pre-trial bias.<sup>5</sup> Yet, this supposition lacks support. Instead, the only empirical study of the inherent bias rationale suggests that convicted felons’ pre-trial biases are varied, and that the strength of

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<sup>1</sup> See Comment, “Jury-mandering”: *Federal Jury Selection and the Generation Gap*, 59 IOWA L. REV. 401 (1973) (young people); see also Jeff Rosen, *Jurymantering*, NEW REPUBLIC, Nov. 30, 1992, at 15 (race); Nancy J. King, *Racial Jurymantering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707 (1993) (race).

<sup>2</sup> See Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795 (2017).

<sup>3</sup> See James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 L. & POL’Y 1 (2014) [hereinafter Binnall, *Field Study*]; see also James M. Binnall, *Summoning Criminal Desistance: Convicted Felons’ Perspectives on Jury Service*, 43 L. & SOC. INQUIRY 4, 4 (2018) [hereinafter Binnall, *Summoning*].

<sup>4</sup> Brian C. Kalt, *The Exclusion of Felon from Jury Service*, 53 AM. U. L. REV. 65 (2003); see also Binnall, *Field Study*, *supra* note 3, at 20.

<sup>5</sup> See *Rubio v. Super. Ct. of San Joaquin Cty.*, 593 P.2d 595, 600 (Cal. 1979) (“The Legislature could reasonably determine that a person who has suffered the most severe form of condemnation that can be inflicted by the state—a conviction of felony and punishment therefor—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.”); see also *Carle v. United States*, 705 A.2d 682, 686 (D.C. 1998) (“The presumptively ‘shared attitudes’ of convicted felons as they relate to the goal of juror impartiality are a primary reason for the exclusion . . .”).

the group's pro-defense pre-trial bias is statistically indistinguishable from at least one other sub-group of prospective jurors—law students.<sup>6</sup>

Critics of our current jury system argue that jurors are too often swayed by extralegal factors. Some go so far as to describe jurors as “gullible creatures, too often driven by emotion and too easily motivated by prejudice, anger, and pity.”<sup>7</sup> Taking this view, ideal jurors are those who assess litigated issues in a vacuum, without reference to “sources of knowledge not formally admitted into evidence.”<sup>8</sup> Other commentators suggest that the jury system ought to embrace rather than disparage a juror's prior experiences and beliefs. As Jeffrey Abramson has argued, “[t]o eliminate potential jurors on the grounds that they will bring the biases of their group into the jury room is . . . to misunderstand the democratic task of the jury, which is nothing else than to represent accurately the diversity of views held in a heterogeneous society . . . .”<sup>9</sup>

Like Abramson, the Supreme Court has long favored inclusive juries. In a famous excerpt from *Peters v. Kiff*, Justice Thurgood Marshall explained one of the many advantages of diverse jury pools:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience . . . unknown and perhaps unknowable . . . . [E]xclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.<sup>10</sup>

Accordingly, the Court has continually sought to expand juror participation and eliminate discriminatory jury selection practices.<sup>11</sup> Still, the Court has implicitly authorized the exclusion of convicted felons from jury service,<sup>12</sup> and U.S. jurisdictions have overwhelmingly chosen to banish those with felonious criminal pasts from the adjudicative process.<sup>13</sup>

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<sup>6</sup> See Binnall, *Field Study*, *supra* note 3, at 20.

<sup>7</sup> SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, *THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES* 4 (1983).

<sup>8</sup> *Id.* at 7–8.

<sup>9</sup> JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 101 (1994).

<sup>10</sup> *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).

<sup>11</sup> See *Strauder v. West Virginia*, 100 U.S. 303, 308–09 (1879); *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946); *Peters*, 407 U.S. at 500 n.10; *Taylor v. Louisiana*, 419 U.S. 522, 525, 530 (1975); *Duren v. Missouri*, 439 U.S. 357 (1979).

<sup>12</sup> See *Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320, 327 (1970).

<sup>13</sup> See *infra* Figure 1 and Appendix; see also Binnall, *Summoning*, *supra* note 3.

This article questions that policy, suggesting that by excluding convicted felons from jury service, while permitting all other discernable groups of jurors to take part, the vast majority of jurisdictions engage in the destructive practice of viewpoint jurymantering. This article draws on recent empirical findings to support its premise.

Specifically, the present study builds on my own prior research, replicating my 2014 field study with a population of law enforcement personnel. In this study, as I did previously, I use an established measure of pre-trial bias, the Revised Juror Bias Scale (RJBS). I then assess the pre-trial biases of 211 current law enforcement personnel. Two inquiries drive this research. First, do law enforcement personnel harbor pro-prosecution/anti-defense pre-trial biases? Second, how do those biases compare to prior research on the pre-trial biases of convicted felons? The goal of this study is to, for the first time, provide data on the pre-trial biases of law enforcement personnel and to indirectly evaluate the empirical validity of the inherent bias rationale for felon-juror exclusion.

Part II offers an overview of juror eligibility criteria impacting convicted felons and law enforcement personnel. Part III discusses prior empirical research on the benefits of diverse juries. Part IV details the methods of the present study. Part V presents findings, and Part VI situates those findings in a larger discussion of jury diversity, convicted felons, and reentry.

## II. SURVEYING JUROR ELIGIBILITY: CONVICTED FELONS VS. LAW ENFORCEMENT

As noted above, all but one U.S. jurisdiction place restrictions on a convicted felon's juror eligibility.<sup>14</sup> Yet, the severity of those restrictions varies. In twenty-eight jurisdictions, the restriction is permanent, banning convicted felons from jury service for life. Thirteen states bar convicted felons from jury service until the full completion of their sentence, notably disqualifying individuals serving felony-parole and felony-probation. Eight states enforce hybrid regulations that may incorporate penal status, charge category, type of jury proceeding, and/or a term of years.<sup>15</sup> 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.<sup>16</sup> Moreover, in all but four jurisdictions, felon-juror exclusion

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<sup>14</sup> Maine places no restriction on a convicted felon's juror eligibility criteria. See ME. REV. STAT. ANN. tit. 14, § 1211 (2017).

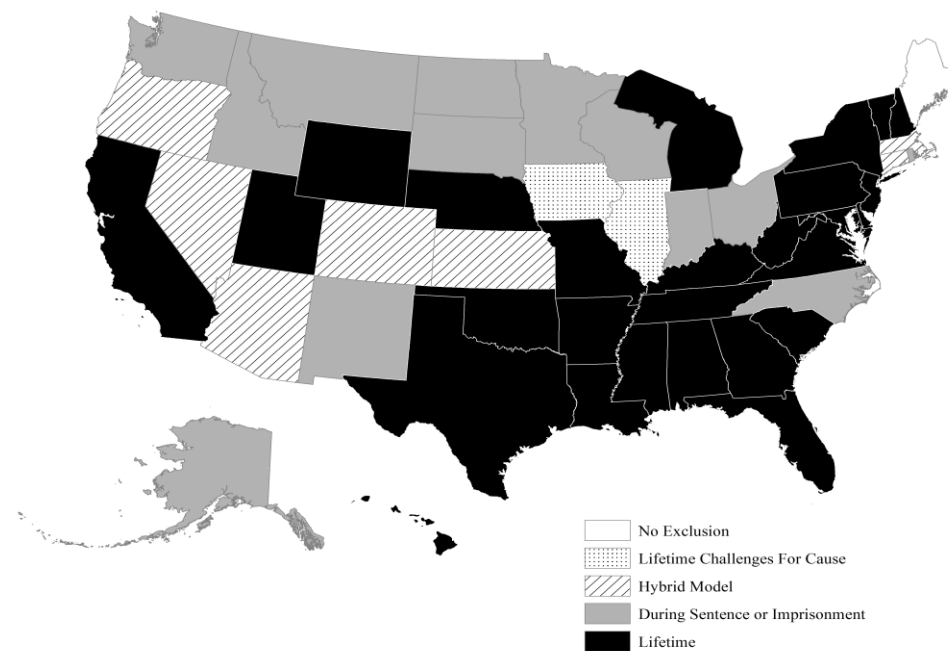
<sup>15</sup> For example, the District of Columbia and Colorado adhere to differing hybrid models; the former excludes convicted felons from jury service during any period of supervision and for ten years following the termination of supervision, while the latter excludes convicted felons solely from grand jury proceedings. See D.C. CODE § 11-1906(b)(2)(B) (1994); see also COLO. REV. STAT. ANN. § 13-71-105(3) (2016).

<sup>16</sup> See *infra* Figure 1 for a jurisdictional breakdown of juror eligibility criteria for convicted felons.

statutes are categorical, barring all convicted felons from serving as jurors in all types of litigation.<sup>17</sup>

Conversely, very few jurisdictions restrict law enforcement personnel's access to the jury process. Only thirteen jurisdictions disqualify law enforcement personnel from the venire, and of those thirteen, two only disqualify in criminal matters.<sup>18</sup> In all remaining thirty-nine jurisdictions, law enforcement personnel can become part of a venire and are permitted to adjudicate both civil and criminal matters.<sup>19</sup>

Figure 1: Felon-juror Exclusion Policies by Jurisdiction

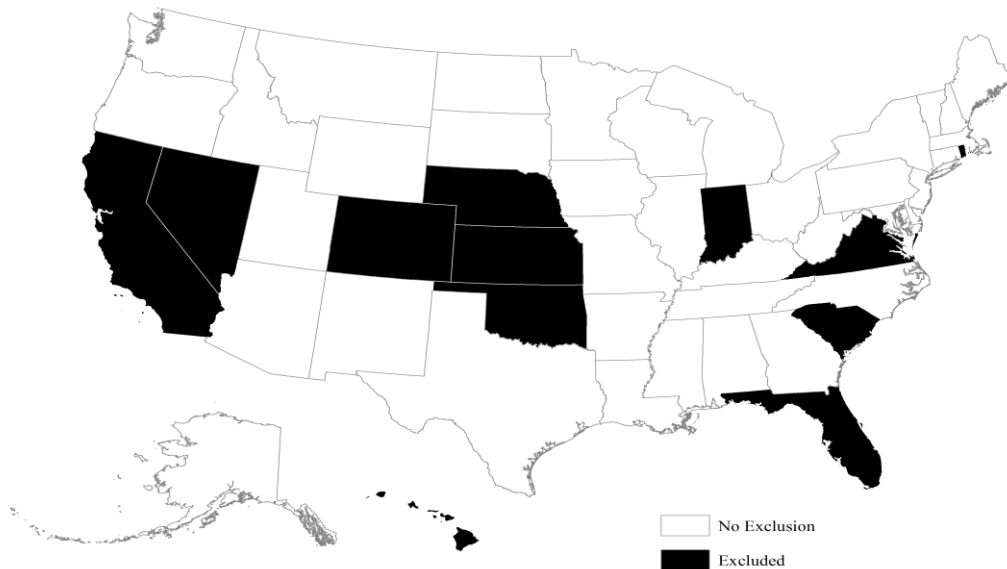


<sup>17</sup> Arizona: distinguishes first time offenders from repeat offenders; Colorado: distinguishes grand juries from petit juries; Nevada: distinguishes violent offenders from non-violent offenders, Oregon: distinguishes civil cases from criminal cases. See ARIZ. REV. STAT. ANN. § 13-912(A) (2004); COLO. REV. STAT. § 13-71-105(3) (2016); NEV. REV. STAT. § 213.157(2) (2005); OR. REV. STAT. ANN. §10.030 (3)(A)(E)–(F) (2009).

<sup>18</sup> Those jurisdictions are Oklahoma and Indiana. See Appendix.

<sup>19</sup> See *infra* Figure 2 and Appendix for a jurisdictional breakdown of juror eligibility criteria impacting law enforcement personnel.

Figure 2: Law Enforcement Personnel Juror Eligibility by Jurisdiction



Notably, in a comparison of juror eligibility criteria, twenty jurisdictions exclude prospective felon-jurors for life, while allowing law enforcement personnel to serve without restriction. Another thirteen jurisdictions exclude convicted felons until the full completion of their sentence or impose lifetime challenges for cause based on a felony criminal conviction, while those same jurisdictions place no restriction on law enforcement personnel's opportunity to take part in jury service.<sup>20</sup> In sum, while the vast majority of jurisdictions seemingly view the life experiences of convicted felons as a liability, those same jurisdictions conceive of law enforcement personnel's experiences as an asset.

### III. THE VALUE OF DIVERSE JURIES: PRIOR EMPIRICAL RESEARCH

As courts and commentators have recognized, the benefits of diverse juries are far reaching. In particular, research tends to demonstrate that jury diversity bolsters deliberation quality, promotes broader civic engagement, and legitimizes jury verdicts in the eyes of the general public.<sup>21</sup>

<sup>20</sup> See Appendix.

<sup>21</sup> See Erin York Cornwall & Valerie P. Hans, *Representation through Participation: A Multilevel Analysis of Jury Deliberations*, 45 L. & SOC. REV. 667 (2011).

On measures of deliberation quality, theoretically derived from process-oriented criteria relating to jurors' duties,<sup>22</sup> researchers have compared homogeneous juries to mixed juries. In those studies, focused on race,<sup>23</sup> gender,<sup>24</sup> and view of the death penalty,<sup>25</sup> evidence suggests that jury diversity increases the quality of jury deliberations. In particular, studies tend to show that mixed juries perform better than homogeneous juries in the areas of fact recall and deliberation duration.<sup>26</sup> Jurors on mixed juries also report higher satisfaction with deliberations.<sup>27</sup>

Research also tends to demonstrate that jury service can prompt higher levels of systematic civic engagement.<sup>28</sup> For example, in a series of studies, political scientists have discovered that those who participate in jury service are more likely to vote in subsequent elections (the participation hypothesis).<sup>29</sup> In one study, researchers found that for infrequent voters (voting less than 50% of the time), jury service prompted greater rates of voting.<sup>30</sup> In particular, data suggests that among infrequent voters, jury service increased subsequent voting rates by 4–7%.<sup>31</sup>

Finally, diverse juries likely translate into more positive views of jury verdicts. As compared to those rendered by less diverse juries, verdicts rendered by juries that are perceived to represent an adequate cross section of the community are viewed as more legitimate.<sup>32</sup> Notably, as MacCoun and Tyler

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<sup>22</sup> See Dennis J. Devine et al., *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. EMPIRICAL LEGAL STUD. 273 (2007).

<sup>23</sup> See Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. OF PERSONALITY & SOC. PSYCHOL. 597 (2006).

<sup>24</sup> See Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CAL. L. REV. 659 (2002).

<sup>25</sup> See Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 L. & HUM. BEHAV. 53 (1984).

<sup>26</sup> See *id.*; see also Marder, *supra* note 24, at 664.

<sup>27</sup> See Marder, *supra* note 24, at 664.

<sup>28</sup> John Gastil et al., *Civic Awakening in the Jury Room: A Test of the Connection between Jury Deliberation and Political Participation*, 64 J. OF POL. 585, 592 (2002); John Gastil & Phillip J. Weiser, *Jury Service as an Invitation to Citizenship: Assessing the Civic Value of Institutionalized Deliberation*, 34 POL'Y STUD. J. 605, 615 (2006); JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* (2010).

<sup>29</sup> *Id.*

<sup>30</sup> John Gastil et al., *Jury Service and Electoral Participation: A Test of the Participation Hypothesis*, 70 J. OF POL. 351 (2008).

<sup>31</sup> *Id.* at 359.

<sup>32</sup> See Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033 (2003); see also NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* (2007); Joshua Wilkenfeld, *Newly Compelling:*

discovered, citizens' evaluations of the jury account for far more than cost and accuracy.<sup>33</sup> Similarly, Fukurai and Davies found that in a telephone poll of California residents, 67.3% of respondents felt that a jury verdict rendered by a racially-diverse jury is fairer than one rendered by a single-race jury.<sup>34</sup>

#### IV. METHODS

This exploratory field study explores the pre-trial biases of law enforcement personnel. I hypothesize the law enforcement personnel, as a group, will harbor a pro-prosecution/anti-defense pre-trial bias and that such a bias will present at a strength similar to or exceeding the pro-defense/anti-prosecution pre-trial bias exhibited by convicted felons in a prior field study.

##### A. Participants

The present study is comprised of 211 current law enforcement personnel. I recruited participants from California's Peace Officer's Standards and Training (POST) training classes over the course of 12 months in 2016–2017. As part of their continued training, California Law Enforcement agencies require that officers regularly complete POST trainings.<sup>35</sup> At those meetings, I solicited the participation of law enforcement personnel. To ensure that I did not condition participants, my solicitation included only a brief overview of the study. Because this study took place in California, California's juror eligibility served as the exclusionary criteria.<sup>36</sup>

Using these recruitment methods, I was able to secure a diverse sample. Of the 211 participants, 27 (13%) are women and 184 (87%) are men. Participants' ages ranged considerably from 24 to 64 with an average age of 43 (SD = 7.61).

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*Reexamining Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 COLUM. L. REV. 2291 (2004); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 L. & HUM. BEHAV. 333 (1988).

<sup>33</sup> See MacCoun & Tyler, *supra* note 32, at 349.

<sup>34</sup> See Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury De Medietate Linguae*, 4 VA. J. OF SOC. POL'Y & L. 645 (1997).

<sup>35</sup> State of California, POST COMMISSION ON PEACE OFFICERS STANDARDS AND TRAININGS, <https://www.post.ca.gov/training> (last updated Oct. 10, 2018, 2:39 PM).

<sup>36</sup> The criteria requires that a prospective juror 1) must be a citizen of the United States, 2) must be 18 years of age, 3) must be domiciliaries of the State of California, 4) must be residents of the jurisdiction they are summoned to serve, 5) must not have been convicted of malfeasance in office or a felony, 6) must possess sufficient knowledge of the English language (sufficient to understand court proceedings), 7) must not be already serving as grand or trial jurors in any court in the State, and 8) must not be the subject of a conservatorship. CAL. CIV. PROC. CODE § 203(a) (Deering 1994).

Years in their current occupation—law enforcement—ranged from 1 to 39, with an average of 17.5 years of service (SD = 7.76). Of the 211 participants who took part in the study, 55 percent self-identified as “white,” 25 percent as “Latino/a,” 6 percent as “Asian-American,” 6 percent as “African-American,” and 8 percent as some other ethnicity. All were native English speakers.

The participant pool also had varied responses to inquiries relating to the jury system and crime generally. Only 23 percent of participants indicated prior jury service. Twenty-six percent of respondents stated that, if called, they would attempt to avoid jury service. Prior service and avoidances notwithstanding, an overwhelming majority of participants—83 percent—indicated that they believed they would be excellent jurors. On views of crime, 27 percent reported having been the victim of a violent crime. Eighty-eight percent support or strongly support the death penalty, and 55 percent reported a political perspective of very conservative or conservative.

### B. Measures

To assess the potential pre-trial biases of law enforcement personnel, I used an established scale of pre-trial bias, the Revised Juror Bias Scale (RJBS).<sup>37</sup> The scale, developed by Myers and Lecci, measures the pre-trial biases of prospective jurors.<sup>38</sup> Based on two underlying constructs, probability of commission (PC), and reasonable doubt (RD), the RJBS consists of twelve questions that assess a juror’s pre-trial propensity to favor either the defense or the prosecution. Scored on a standard five-category Likert scale (strongly disagree, disagree, no opinion, agree, strongly agree), the RJBS produces total scores that range from 12 to 60, with a median scale score of 36.<sup>39</sup> Scores below the median indicate a pro-defense pre-trial bias, while scores above the median indicate a pro-prosecution pre-trial bias.<sup>40</sup> In prior studies, the RJBS has proven to be a robust predictor of pre-trial biases.<sup>41</sup>

Along with RJBS scores, I also collected data on other participant characteristics shown to impact pre-trial biases. Those variables include: age, gender, race, native language, occupational status, religion, socioeconomic status,

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<sup>37</sup> See Saul M. Kassir & Lawrence Wrightsman, *The Construction and Validation of a Juror Bias Scale*, 17 J. OF RES. IN PERSONALITY 423 (1983) (The RJBS is a revised, more robust version of the original Juror Bias Scale (JBS) developed by Kassir and Wrightsman).

<sup>38</sup> Bryan Myers & Len Lecci, *Revising the Factor Structure of the Juror Bias Scale: A Method for the Empirical Validation of Theoretical Constructs*, 22 L. & HUM. BEHAV. 239 (1998).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> See DENNIS J. DEVINE, *JURY DECISION MAKING: THE STATE OF SCIENCE*, 106–07 (2012); see also Len Lecci & Bryan Myers, *Examining the Construct Validity of the Original and Revised JBS: A Cross-Validation of Sample and Method*, 26 L. & HUM. BEHAV. 455 (2002).



level of education, history of victimization, political affiliation, and view of the death penalty.<sup>42</sup>

## V. RESULTS

### A. *The Pre-Trial Biases of Law Enforcement Personnel*

To assess the group-level pre-trial biases of law enforcement personnel, I first examined the dispersion of participants' scores on the RJBS. On the RJBS, participants' scores ranged from 24 to 54. These results suggest that the pre-trial biases of law enforcement personnel are not homogeneous, but instead vary substantially. A frequency distribution of scores on the RJBS reveals that, of the 211 participants, 144 scored at or above the scale median (36), suggesting that 68% of participants possessed a pro-prosecution pre-trial bias.

As a group, data also demonstrate that participants harbor a pro-prosecution/anti-defense pre-trial bias. On the RJBS, law enforcement personnel's mean score (38.86) landed above the scale median (36). This result tends to demonstrate that law enforcement personnel, as a group, harbor pro-prosecution/anti-defense pre-trial biases. Figure 1 illustrates the distribution of law enforcement personnel's scores on the RJBS.

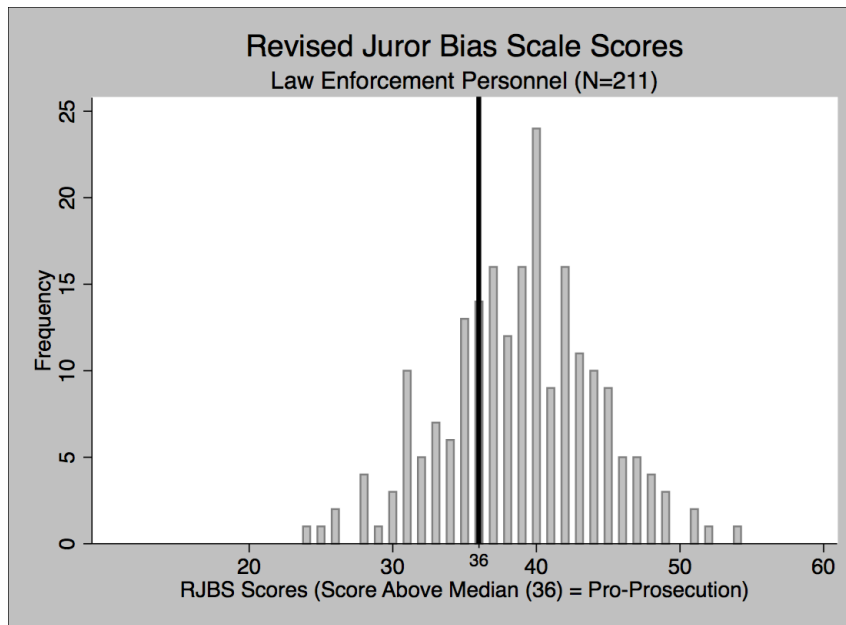
### B. *Law Enforcement Personnel vs. Convicted Felons*

In my prior field study of pre-trial biases, I compared the pre-trial biases of convicted felons to two other groups of eligible jurors. In that study, I found that on the RJBS, the otherwise eligible felon-jurors' mean score (33.29) fell below the scale median (36), suggesting that convicted felons, as a group, harbored a pro-defense/anti-prosecution pre-trial bias.

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<sup>42</sup> See Binnall, *Field Study*, *supra* note 3, at 11 (describing the theoretical bases for the demographic variables chosen).

Figure 3:



In the same study, I compared the pre-trial biases of convicted felons to those of eligible jurors generally and eligible jurors enrolled in law school. I found that while convicted felons harbored a stronger pro-defense/anti-prosecution pre-trial bias than did eligible jurors generally, convicted felons' pre-trial biases were not statistically distinguishable from those of law students ( $p = .291$ ).<sup>43</sup>

In the present study, law enforcement's mean score on the RJBS (38.86) was 2.86 units above the scale median. In my 2014 study, convicted felons' mean score (33.29) was 2.71 units below the scale median, a statistically significant difference ( $p = .218$ ). This result seemingly suggests that on a scale of pre-trial biases, convicted felons are as pro-defense/anti-prosecution as law enforcement personnel are anti-defense/pro-prosecution. Nonetheless, the law statutorily excludes only one group of prospective jurors from the jury process.

<sup>43</sup> See Binnall, *Field Study*, *supra* note 3, at 14.

Table: Revised Juror Bias Scale Scores by Group—Descriptive Statistics

|                | Convicted Felons | Law Enforcement |
|----------------|------------------|-----------------|
| N              | 234              | 211             |
| Mean           | 33.29            | 38.86           |
| Median (36)    | 33               | 39              |
| Std. Deviation | 6.08             | 5.39            |
| Range (12–60)  | 17–55            | 24–54           |

Note: Parentheses indicate the scale properties. The RJBS's median score is 36 and its possible range is 12–60.

### C. Study Limitations

The results of this exploratory study are limited. First, to sample law enforcement personnel, I relied on volunteer participants from California's POST trainings. This recruitment method likely introduced a measure of selection bias. Second, to make comparisons between convicted felons and law enforcement personnel, I used data from a prior field study of eligible jurors with a felony criminal conviction. Though I replicated the study, the elapsed time since data collection in the prior field study, three years, likely introduces unknown and unknowable temporal issues. For these reasons, the results of the present study are suggestive only. However, they do shed light on an important issue relating to felon-juror exclusion and the possible legislative biasing of jury pools through exclusionary statutes.

## VI. DISCUSSION

The United States incarcerates more of its citizens than any other country in the world.<sup>44</sup> Today, over 2.3 million Americans are behind bars.<sup>45</sup> Research estimates that 3 percent of adults have been to prison, and 8 percent of adults, 19 million American citizens, have been convicted of a felony.<sup>46</sup>

<sup>44</sup> See Peter Wagner & Alison Walsh, *States of Incarceration: The Global Context 2016*, THE PRISON POLICY INITIATIVE (June 16, 2016), <https://www.prisonpolicy.org/global/2016.html>.

<sup>45</sup> See Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, THE PRISON POLICY INITIATIVE (March 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>; see also Paul Guerino, Paige M. Harrison & William J. Sabol, *Prisoners in 2010*, BUREAU OF JUST. STAT. BULL., Dec. 2011, at 1.

<sup>46</sup> See Shannon et al., *supra* note 2, at 1795.

This disturbing normalization of a felony criminal record is the direct result of the United States' experiment with mass incarceration, an experiment that has disproportionately impacted the African-American community.<sup>47</sup> While 8 percent of all adults bear the mark of a felony conviction, almost triple that many African-American adults (23 percent) have been convicted of a felony in the United States.<sup>48</sup> For African-American adult men, the outlook is even bleaker. Roughly one-third of all African-American adult males are also convicted felons.<sup>49</sup>

Though the drivers of mass incarceration are critically worthy topics, they are far beyond the scope of this article. Instead, this article suggests that, like it or not, the United States' has now cultivated a distinct and sizable population of citizens who have had direct contact with the criminal justice system. Alleging that their resulting perspectives make them unfit for jury service feels tautological.

The inherent bias rationale for felon-juror exclusion, while ostensibly the codification of logic, instead rests on irrational presumptions about convicted felons and the threat of their pre-trial biases.<sup>50</sup> Data from this field study suggests that law enforcement personnel are as pro-prosecution as convicted felons are pro-defense. As interpreted by courts and lawmakers, the inherent bias rationale therefore demands that pre-trial biases, in either direction, warrant exclusion from the venire. Under that view, law enforcement personnel merit banishment. Yet, such an approach, like felon-juror exclusion statutes themselves, contradicts over a century of Supreme Court precedent weighing in favor of broad participation in the jury process. Rather than exclude law enforcement personnel, jurisdictions ought to embrace their distinctive perspectives, along with those of their convicted counterparts.

Precedent aside, narrowing jury pools by excluding convicted felons also impacts the diversity of juries. In the first empirical study of felon-juror exclusion, Wheelock found that in several Georgia counties, felon-juror exclusion served to racially homogenize juries, reducing the number of African-American males who serve.<sup>51</sup> The prevalence of criminal justice contact among the African-American community makes the impact of felon-juror exclusion statutes racially disparate. Importantly, research demonstrates that diverse juries outperform homogeneous

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<sup>47</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); see also DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007).

<sup>48</sup> See Shannon et al., *supra* note 2, at 1807.

<sup>49</sup> *Id.*

<sup>50</sup> See Binnall, *Summoning*, *supra* note 3, at 6.

<sup>51</sup> Darren Wheelock, *A Jury of One's "Peers": Felon Jury Exclusion and Racial Inequality in Georgia Courts*, 32 JUST. SYS. J. 335 (2012).

juries on several measures of deliberation quality.<sup>52</sup> Thus, felon-juror exclusion statutes, rather than protecting deliberations, may undermine them.<sup>53</sup>

Restricting convicted felons' access to jury pools also deprives inclusion to those arguably most in need of inclusion. Research suggests that the success of strengths-based models of reentry, those that seek to identify and exploit the positive attributes of former offenders, turns on a reconceptualization of community engagement.<sup>54</sup> Rather than conceiving community engagement as an outcome variable, advocates of strengths-based approaches view community engagement as a necessary precursor to successful reintegration and criminal desistance.<sup>55</sup> By excluding convicted felons from arguably the most direct form of civic participation, jurisdictions foreclose a significant pro-social opportunity for former offenders to re-engage the community.<sup>56</sup>

Finally, by excluding convicted felons from jury service, a majority of U.S. jurisdictions risk delegitimizing verdicts. Research demonstrates that traditionally marginalized populations question the legitimacy of verdicts when a jury appears unrepresentative of their community.<sup>57</sup> As statistics indicate, in the African-American community, a felony conviction is no longer an unusual occurrence.<sup>58</sup> Moreover, recent high profile cases involving African-Americans and use of deadly force by law enforcement have led many to question the legitimacy of policing policy.<sup>59</sup> Couple these tragic events with juror eligibility statutes that

<sup>52</sup> See Sommers, *supra* note 23; see also Marder, *supra* note 24; Cowan et al., *supra* note 25.

<sup>53</sup> James M. Binnall, *Jury Diversity in the Age of Mass Incarceration: An Exploratory Mock Jury Experiment Examining Felon-Jurors' Potential Impacts on Deliberation Quality*, PSYCHOL. CRIME & L. (2018).

<sup>54</sup> See Shadd Maruna & Thomas P. LeBel, *Welcome Home? Examining the "Reentry Court" Concept from a Strengths-Based Perspective*, 4 W. CRIMINOLOGY REV. 91, 97 (2003); see also Bronwyn A. Hunter et al., *A Strengths-Based Approach to Prisoner Reentry: The Fresh Start Prisoner Reentry Program*, 60 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 1298 (2016); Gordon Bazemore & Rachel Boba, *"Doing Good" to "Making Good": Community Theory for Practice in a Restorative Justice Civic Engagement Reentry Model*, 46 J. OF OFFENDER REHABILITATION 25 (2007).

<sup>55</sup> See Kathryn J. Fox, *Theorizing Community Integration as Desistance Promotion*, 42(1) CRIM. JUST. & BEHAV. 82, 83 (2015).

<sup>56</sup> James M. Binnall, *Felon-Jurors in Vacationland: A Field Study of Transformative Civic Engagement in Maine*, 71 ME. L. REV. 71 (2019).

<sup>57</sup> See Wilkenfeld, *supra* note 32; see also MacCoun & Tyler, *supra* note 32.

<sup>58</sup> See Shannon et al., *supra* note 2, at 1795; see also ALEXANDER, *supra* note 47.

<sup>59</sup> Alison V. Hall, Erika V. Hall & Jamie L. Perry, *Black and Blue: Exploring Racial Bias and Law Enforcement in the Killing of Unarmed Black Male Civilians*, 71 A. PSYCHOLOGIST 175 (2016); Scott E. Culhane, John H. Boman IV & Kimberly Schweitzer, *Public Perceptions of the Justifiability of Police Shootings: The Role of Body Cameras in a Pre- and Post-Ferguson Experiment*, 19 POLICE Q. 251, 252 (2016).

banish convicted felons while welcoming law enforcement personnel, despite each harboring pre-trial biases of similar strength, and the legitimacy of the jury process rightfully comes under scrutiny.

## VII. CONCLUSION

In 2012, a jury of six women—five Caucasian and one Latina—acquitted George Zimmerman of the shooting death of Trayvon Martin, an unarmed seventeen-year-old African-American.<sup>60</sup> The trial and subsequent verdict reignited debates about the representativeness of juries in the United States. Many commentators argued that the racial composition of the jury made a guilty verdict unlikely and made the rendered verdict illegitimate.<sup>61</sup> Still, felon-juror exclusion escaped critical analysis. Unfortunately, felon-juror exclusion statutes, based on flawed presumptions and targeting the already marginalized, threaten to make homogenous juries the norm rather than the exception.

The present study demonstrates the flaws underlying the inherent bias rationale, calling into question the true purpose of felon-juror exclusion statutes. This study also raises more fundamental questions about how we conceive juries, what steps we are willing to take to ensure representativeness, and how we reestablish the jury as “the most stunning and successful experiment in direct popular sovereignty in all history.”<sup>62</sup>

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<sup>60</sup> See Tamara F. Lawson, *A Fresh Cut in an Old Wound—A Critical Analysis of the Trayvon Martin Killing: The Public Outcry, the Prosecutors’ Discretion, and the Stand Your Ground Law*, 23 U. FLA. J. L. & PUB. POL’Y 271, 279 (2012); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013); Mark S. Brodin, *The Murder of Black Males in a World of Non-Accountability: The Surreal Trial of George Zimmerman for the Killing of Trayvon Martin*, 59 HOW. L. J. 765, 766 (2016).

<sup>61</sup> See Lawson, *supra* note 60.

<sup>62</sup> William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006).

JUROR ELIGIBILITY BY JURISDICTION:  
CONVICTED FELONS AND LAW ENFORCEMENT PERSONNEL

| JURISDICTION         | CONVICTED FELONS<br>(EXCLUSION TYPE) <sup>63</sup> | LAW ENFORCEMENT<br>(DISQUALIFIED) |
|----------------------|--|-----------------------------------|
| Federal              | Life   | Yes <sup>64</sup>                 |
| Alabama              | Life   | No <sup>65</sup>                  |
| Alaska               | During Sentence                                    | No <sup>66</sup>                  |
| Arizona              | Hybrid   | No <sup>67</sup>                  |
| Arkansas             | Life   | No <sup>68</sup>                  |
| California           | Life   | Yes <sup>69</sup>                 |
| Colorado             | Hybrid   | Yes <sup>70</sup>                 |
| Connecticut          | Hybrid   | No <sup>71</sup>                  |
| Delaware             | Life   | No <sup>72</sup>                  |
| District of Colombia | Hybrid   | No <sup>73</sup>                  |

<sup>63</sup> See Binnall, *Field Study*, *supra* note 3 (Listing each jurisdiction's statutory approach to felon-juror exclusion).

<sup>64</sup> See 28 U.S.C. § 1863(b)(6) (2000).

<sup>65</sup> ALA. CODE § 12-16-150 (2016).

<sup>66</sup> ALASKA STAT. § 09.20.020 (2002).

<sup>67</sup> ARIZ. REV. STAT. ANN. § 21-211 (2018).

<sup>68</sup> ARK. CODE ANN. § 16-31-101 (2016).

<sup>69</sup> CAL. CIV. P. CODE § 219(b)(1).

<sup>70</sup> COLO. REV. STAT. § 13-71-104(4) (2017).

<sup>71</sup> CONN. GEN. STAT. ANN. § 51-217(a) (7) (2015).

<sup>72</sup> DEL. CODE ANN. TIT. 10, § 4509(b)(6) (2018).

<sup>73</sup> D.C. CODE § 11-1906(b)(2)(B)(3) (2018).

|           |                    |                                   |
|-----------|--------------------|-----------------------------------|
| Florida   | Life               | Yes <sup>74</sup>                 |
| Georgia   | Life               | No <sup>75</sup>                  |
| Hawaii    | Life               | Yes <sup>76</sup>                 |
| Idaho     | During Sentence    | No <sup>77</sup>                  |
| Illinois  | Lifetime For Cause | No <sup>78</sup>                  |
| Indiana   | During Sentence    | Yes (Criminal Only) <sup>79</sup> |
| Iowa      | Lifetime For Cause | No <sup>80</sup>                  |
| Kansas    | Hybrid             | Yes <sup>81</sup>                 |
| Kentucky  | Life               | No <sup>82</sup>                  |
| Louisiana | Life               | No <sup>83</sup>                  |
| Maine     | None               | No <sup>84</sup>                  |
| Maryland  | Life               | No <sup>85</sup>                  |

<sup>74</sup> FLA. STAT. § 40.013(2)(b) (2017).

<sup>75</sup> GA. CODE ANN. § 15-12-1.1(a)(1) (2016).

<sup>76</sup> HAW. REV. STAT. § 612-6 (2017).

<sup>77</sup> IDAHO CODE § 2-212 (2017).

<sup>78</sup> 705 ILL. COMP. STAT. 305/2(a) (2018).

<sup>79</sup> IND. CODE § 34-5(h), IND. CODE ANN. tit. 34, Jury R. 5.

<sup>80</sup> IOWA CODE ANN. § 607A.5.

<sup>81</sup> KAN. STAT. ANN. § 43-159(b). *See also* KAN. STAT. ANN. § 43-158(c).

<sup>82</sup> KY. REV. STAT. ANN. § 29A.090. *See also* Reid v. Commonwealth, 659 S.W.2d 217 (Ky. Ct. App. 1983); KY. REV. STAT. ANN. § 29A.080.

<sup>83</sup> LA. CODE CRIM. PROC. ANN. art. 401(A)-(B).

<sup>84</sup> ME. REV. STAT. ANN. tit. 14, § 1211.

<sup>85</sup> MD. CODE ANN., CTS. & JUD. PROC. §8-306.



|               |                 |                   |
|---------------|-----------------|-------------------|
| Massachusetts | Hybrid          | No <sup>86</sup>  |
|               |                 |                   |
| Michigan      | Life            | No <sup>87</sup>  |
|               |                 |                   |
| Minnesota     | During Sentence | No <sup>88</sup>  |
|               |                 |                   |
| Mississippi   | Life            | No <sup>89</sup>  |
|               |                 |                   |
| Missouri      | Life            | No <sup>90</sup>  |
|               |                 |                   |
| Montana       | During Sentence | No <sup>91</sup>  |
|               |                 |                   |
| Nebraska      | Life            | Yes <sup>92</sup> |
|               |                 |                   |
| Nevada        | Hybrid          | Yes <sup>93</sup> |
|               |                 |                   |
| New Hampshire | Life            | No <sup>94</sup>  |
|               |                 |                   |
| New Jersey    | Life            | No <sup>95</sup>  |
|               |                 |                   |
| New Mexico    | During Sentence | No <sup>96</sup>  |
|               |                 |                   |
| New York      | Life            | No <sup>97</sup>  |
|               |                 |                   |

<sup>86</sup> MASS. GEN. LAWS. ch. 234A, § 4. *See also* Com v. Silva 918 N.E.2d 65 (Mass. 2009).

<sup>87</sup> MICH. COMP. LAWS ANN. § 600.1307(a).

<sup>88</sup> MINN. STAT. ANN. § 808(b). *See also* MINN. STAT. ANN. § 810.

<sup>89</sup> MISS. CODE ANN. § 13-5-1.

<sup>90</sup> MO. REV. STAT. § 494.425. *See also* State v. Cole 71 S.W.3d 163 (Mo. 2002).

<sup>91</sup> MONT. CODE ANN. § 3-15-301. *See also* MONT. CODE ANN. § 3-15-303.

<sup>92</sup> NEB. REV. STAT. ANN. § 25-1601(1)(c)-(d).

<sup>93</sup> NEV. REV. STAT. ANN. § 6.020. *See also* NEV. REV. STAT. ANN. § 617.135.

<sup>94</sup> N.H. REV. STAT. ANN. § 500-A:7-a.

<sup>95</sup> N. J. STAT. ANN. § 2B:20-1. *See also* State v. Reynolds, 592 A.2d 194 (N.J. 1991).

<sup>96</sup> N.M. STAT. ANN. § 38-5-1(B).

<sup>97</sup> N.Y. JUD. LAW § 510 (McKinney 2018). *See also* People v. Noakes, 869 N.Y.S.2d 424 (N.Y. App. Div. 2008).

|                |                 |                                    |
|----------------|-----------------|------------------------------------|
| North Carolina | During Sentence | No <sup>98</sup>                   |
|                |                 |                                    |
| North Dakota   | During Sentence | No <sup>99</sup>                   |
|                |                 |                                    |
| Ohio           | During Sentence | No <sup>100</sup>                  |
|                |                 |                                    |
| Oklahoma       | Life            | Yes (Criminal Only) <sup>101</sup> |
|                |                 |                                    |
| Oregon         | Hybrid          | No <sup>102</sup>                  |
|                |                 |                                    |
| Pennsylvania   | Life            | No <sup>103</sup>                  |
|                |                 |                                    |
| Rhode Island   | During Sentence | Yes <sup>104</sup>                 |
|                |                 |                                    |
| South Carolina | Life            | Yes <sup>105</sup>                 |
|                |                 |                                    |
| South Dakota   | During Sentence | No <sup>106</sup>                  |
|                |                 |                                    |
| Tennessee      | Life            | No <sup>107</sup>                  |
|                |                 |                                    |
| Texas          | Life            | No <sup>108</sup>                  |
|                |                 |                                    |
| Utah           | Life            | No <sup>109</sup>                  |
|                |                 |                                    |
| Vermont        | Life            | No <sup>110</sup>                  |

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<sup>98</sup> N.C. GEN. STAT. ANN § 9-3.

<sup>99</sup> N.D. CENT. CODE ANN. § 27-09.1-08(2).

<sup>100</sup> OHIO REV. CODE ANN. § 2313.17(B).

<sup>101</sup> OKLA. STAT. ANN. tit. 38 § 28(C)(3), (D). *See also* OKLA. STAT. ANN. tit. 38 § 28(D).

<sup>102</sup> OR. REV. STAT. ANN § 10.030(2).

<sup>103</sup> 42 PA. STAT. AND CONS. STAT. ANN. § 4502(a).

<sup>104</sup> 1029 R.I. GEN. LAWS ANN. § 9-9-3. *See also* 9 R.I. GEN. LAWS ANN. § 9-9-1.1(c).

<sup>105</sup> S.C. CODE ANN. § 14-7-820.

<sup>106</sup> S.D. CODIFIED LAWS § 16-13-10.

<sup>107</sup> TENN. CODE ANN. § 22-1-101.

<sup>108</sup> TEX. GOV'T CODE ANN. § 62.102.

<sup>109</sup> UTAH CODE ANN. § 78B-1-105. *See also* UTAH CODE ANN. § 78B-1-108.

|               |                 |                                  |
|---------------|-----------------|----------------------------------|
|               |                 |                                  |
| Virginia      | Life            | Yes <sup>111</sup>               |
|               |                 |                                  |
| Washington    | During Sentence | No <sup>112</sup>                |
|               |                 |                                  |
| West Virginia | Life            | No <sup>113</sup>                |
|               |                 |                                  |
| Wisconsin     | During Sentence | No <sup>114</sup>                |
|               |                 |                                  |
| Wyoming       | Life            | No (Exempted) <sup>115 116</sup> |

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<sup>110</sup> VT. STAT. ANN. tit. 4, § 962.

<sup>111</sup> VA. CODE ANN. § 8.01-341(7).

<sup>112</sup> WASH. REV. CODE ANN. § 2.36.070.

<sup>113</sup> W. VA. CODE ANN. § 52-1-8(a).

<sup>114</sup> WIS. STAT. ANN. § 756.02.

<sup>115</sup> WYO. STAT. ANN. § 1-11-103. *See also* WYO. STAT. ANN. § 1-11-102.

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