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Article

Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions

Anna Roberts[†]

INTRODUCTION

In the early 1960s, a teenager named Frank Johnson appeared in a municipal court in Texas, where he was found guilty of theft of less than five dollars.¹ He was thirteen or fourteen, and his punishment was a fifty dollar fine.²

Twenty years later, Mr. Johnson received a summons for jury duty.³ The prosecution asserted that his twenty-year-old conviction disqualified him, and over the objection of the defense the court excused him.⁴ The court did not consider the passage of time, or the smallness of the sum, or anything about Mr. Johnson as an adult.⁵ Under the Texas disqualification statute—then, as now—a conviction of misdemeanor theft precludes jury service for life.⁶

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1. See *Frame v. State*, 615 S.W.2d 766, 768 (Tex. Crim. App. 1981).
2. *Id.*
3. See *id.* at 769.
4. *Id.* at 768.
5. See *id.* at 768–69.
6. See TEX. CODE ANN. § 62.102 (2013) (“A person is disqualified to serve

This Article addresses the exclusion from criminal jury service of those who have a criminal record.⁷ Statutory exclusions are in place in the federal system and in forty-eight states⁸: while the majority of them address felony convictions, thirteen—as in the case of Texas—provide for the disqualification of at least some people with misdemeanor convictions.⁹ Extending beyond statutory disqualifications are several other means by which a conviction can be used to preclude jury service in the absence of any showing of bias: the selective mailing of jury summonses,¹⁰ the exercise of peremptory challenges,¹¹ and the granting of challenges for cause.¹² The combination of the breadth of these exclusions and the thinness of their justifications offers a prime example of, as James Forman puts it, “how casually, almost carelessly, our society ostracizes offenders.”¹³

This Article rejects casual and careless ostracism in favor of a careful analysis of the costs and benefits of this type of civic exclusion. This analysis incorporates three broader policy critiques that are currently being leveled at the criminal justice system but that have not yet been applied to jury exclusion.¹⁴ It shows how they can inform, and be informed by, critiques of this type of jury exclusion.

as a petit juror unless the person . . . (7) has not been convicted of misdemeanor theft or a felony . . .”).

7. Exclusions of those with criminal convictions from *civil* jury service are also prevalent, but beyond the scope of this Article. See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 app. 1 at 168–69 (2003).

8. See *infra* Part I.B.

9. See *infra* notes 39–42.

10. See *infra* Part I.A.

11. See *infra* Part I.D.

12. See *infra* Part I.C. The reach of jury exclusions relating to the criminal justice system extends beyond the scope of this article, to include those who have merely been arrested or charged, Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359, 1375, 1408 (2012) [hereinafter Roberts, *Disparately Seeking Jurors*], and those whose family members have had experience with the criminal justice system, see *id.* at 1375, 1403–04. Exclusions from grand jury service are also beyond the scope of this article. See Kalt, *supra* note 7, at 168–69.

13. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 27 (2012). My thanks to Professor Forman for allowing me to adapt his phrase.

14. This Article leaves to one side constitutional arguments analyzing statutory exclusions in relation to the guarantee of an “impartial jury” and a “fair cross-section”; they are compelling, but have been handled (at least as regards felony convictions) elsewhere. See, e.g., Kalt, *supra* note 7, at 70–100.

First, the sizeable and growing body of research into the characteristics of wrongful conviction cases indicates that jurors have, in many cases, failed to understand central aspects of the criminal justice system.¹⁵ This lack of understanding undermines the unquestioning exclusion of those with firsthand experience of the system. Second, recent scholarship has identified the adjustment of prosecutorial incentives as a key component of criminal justice reform.¹⁶ This Article adds jury exclusion to that literature, critiquing and proposing adjustments to a system in which the state can remove from the jury, without cost to itself, those who are presumed to be embittered against the state. Third, Alexandra Natapoff has highlighted the “silencing of criminal defendants” at various points in the criminal process as an obstacle to reform.¹⁷ This Article extends her critique to the process of jury selection.

Part I compiles the various means by which criminal convictions are used as a basis for jury exclusion. Part II examines the impact of these exclusions, focusing on three of the main harms. Part III investigates whether the justifications that are given for these exclusions outweigh the harms. Part IV recommends the abandonment of automatic exclusions on the basis of criminal convictions: they lack sufficient justification, and permit the state to remove, without cost to itself, those assumed to be embittered against the state.

I. THE EXCLUSIONS

This Part lays out the multiple methods by which potential jurors are excluded on the basis of criminal convictions: selective mailing of jury summonses, statutory disqualifications, challenges for cause, and peremptory challenges. It demon-

15. See Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107, 113 (2006) [hereinafter Natapoff, *Beyond Unreliable*] (“[I]nformants may have an air of ‘inside knowledge’ about the crime that may sway the jury, an air that is not easily dispelled by cautionary instructions. Indeed, the prevalence of wrongful convictions based on snitch testimony demonstrates that juries often believe informants.” (footnote omitted)); *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (including as main contributing causes of wrongful convictions in DNA exonerations “[f]alse [c]onfessions/[a]dmissions,” “[i]nformants or [s]nitches,” and “[g]overnment [m]isconduct”) (last visited Nov. 4, 2013).

16. See *infra* notes 275–82.

17. Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449 (2005) [hereinafter Natapoff, *Speechless*].

strates both their cumulative effect and the wide variety of approaches that different jurisdictions take.

A. JURY SUMMONSES

Lists of potential jurors are compiled largely (and in the federal system often exclusively) from voter registration rolls.¹⁸ In forty-eight states, those with felony convictions face some restriction of their voting rights.¹⁹ Where these restrictions result in erasure from the voting rolls, those with felony convictions will not receive a jury summons.²⁰

B. STATUTORY DISQUALIFICATIONS

Colorado and Maine are the only two states without any statutory provisions permitting the exclusion of potential jurors on the basis of criminal convictions.²¹ Iowa is the only state whose statutory regime merely provides for dismissals for cause on this basis²²: as will be discussed in Part C, this is not

18. Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 970 (1998) (“Federal courts now use voter lists as the primary (often exclusive) source for juror names, despite significant evidence that this method results in the underrepresentation of some groups.”); Alexander E. Preller, Note, *Jury Duty Is a Poll Tax: The Case for Severing the Link Between Voter Registration and Jury Service*, 46 COLUM. J.L. & SOC. PROBS. 1, 2 (2012) (“[F]orty-two out of fifty states use voter registration lists to form jury lists . . .”).

19. See *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUSTICE, NYU, http://www.brennancenter.org/sites/default/files/legacy/d/download_file_48642.pdf (May, 2007) (indicating that only two states, Maine and Vermont, have no restrictions on the basis of criminal convictions). A word about nomenclature. I will follow Margaret Colgate Love in avoiding the word “felon.” Margaret Colgate Love, *What’s in a Name? A Lot, When the Name Is “Felon”*, THE CRIME REPORT (Mar. 13, 2012), <http://www.thecrimereport.org/viewpoints/2012-03-whats-in-a-name-a-lot-when-the-name-is-felon> (describing the term “felon” as an “ugly” and “unhelpful label”).

20. See *United States v. Manbeck*, 514 F. Supp. 141, 146 (D.S.C. 1981).

21. COLO. REV. STAT. § 13-71-105 (2013); ME. REV. STAT. tit. 14, § 1211 (2013); see Kalt, *supra* note 7, at app. 1A (giving a survey of all fifty states’ and federal policies on juror disqualification on the basis of felony convictions). Both states deleted such provisions in the 1980s. See Act of Apr. 28–29, 1982, ch. 705, pt. G, sec. 4, § 1211, 1981 Me. Laws 1263 (deleting language disqualifying those who have lost the vote because of a criminal conviction); *People v. Ellis*, 148 P.3d 205, 209 (Colo. App. 2006) (“Prior to the repeal and reenactment of the Colorado Uniform Jury Selection and Service Act in 1989, a convicted felon was not allowed to serve on a jury, unless his or her right to vote had been restored. The current and applicable version of the act no longer disqualifies convicted felons whose voting rights have not been restored from serving on a jury.”).

22. IOWA R. CRIM. P. § 2.18(5)(a) (2013); see Kalt, *supra* note 7, at app. 1A.

an automatic exclusion, but permits the judge some discretion. The remaining jurisdictions permit certain criminal records to act as a *disqualification*: jurors who are disqualified are automatically deemed unfit, and are not even supposed to reach the jury box.

In forty-seven states and the federal system, disqualification from jury service of those with a felony record is provided for by statute.²³ While in some jurisdictions, this exclusion applies to all felonies and lasts forever,²⁴ many qualify the disqualification in some way. The disqualification may end at the same time as one's imprisonment,²⁵ or sentence,²⁶ or if one is able to obtain an amnesty,²⁷ annulment,²⁸ expunction,²⁹ pardon,³⁰ reversal,³¹ or restoration of civil rights.³² The disqualification may be triggered only by a particular type of felony,³³ by incarceration,³⁴ or only by incarceration for a certain period of time.³⁵ The disqualification may last for only a certain period of years after conviction,³⁶ or after completion of one's sentence.³⁷ Each jurisdiction makes the cut differently.³⁸

23. See Kalt, *supra* note 7, at app. 1A.

24. See, e.g., MICH. COMP. LAWS § 600.1307a(1)(e) (2013).

25. See, e.g., S.D. CODIFIED LAWS § 23A-27-35 (2013).

26. See, e.g., N.M. STAT. ANN. § 38-5-1 (2013).

27. See, e.g., 42 PA. CONS. STAT. § 4502(a)(3) (2013).

28. See, e.g., N.H. REV. STAT. ANN. § 500-A:6 (2013).

29. See, e.g., UTAH CODE ANN. § 78B-1-105(2) (2013).

30. See, e.g., HAW. REV. STAT. § 612-4(b)(2) (2013).

31. See, e.g., OHIO REV. CODE § 2961.01(A)(1) (2013).

32. See, e.g., 28 U.S.C. § 1865(b)(5) (2006). This restoration may happen automatically, see, e.g., N.C. GEN. STAT. § 13-1 (2013), or require an affirmative act by the person seeking the restoration, see, e.g., *United States v. Barlow*, 732 F. Supp. 2d 1, 39 (E.D.N.Y. 2010).

33. See ALA. CONST. art. VIII, § 177 (limiting voting rights of those "convicted of a felony of moral turpitude"); ALA. CODE § 12-16-60(a) (2013) (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").

34. See, e.g., CONN. GEN. STAT. § 51-217(a)(2) (2013) (disqualifying from jury service anyone who is "in the custody of the Commissioner of Correction").

35. See MD. CODE ANN., CTS. & JUD. PROC. § 8-103(b)(4) (West 2012) (disqualifying individuals who have been convicted of a crime "punishable by imprisonment exceeding 6 months and received a sentence of imprisonment for more than 6 months").

36. See, e.g., CONN. GEN. STAT. § 51-217(a)(2) (2013) (seven years); KAN. STAT. ANN. § 43-158(c) (2012) (ten years).

37. See, e.g., OR. REV. STAT. § 10.030(3)(E) (2013) (fifteen years).

38. States are divided, for example, on whether a no contest plea man-

The disqualifications go beyond felony convictions: statutory provisions in thirteen states make those with certain misdemeanor convictions vulnerable to disqualification.³⁹ Those states may limit the disqualification by type of conviction,⁴⁰ by type of sentence,⁴¹ or by whether the person is currently in custody.⁴² Again, each jurisdiction makes the cut differently.

dates exclusion. *Compare* GA. CODE ANN. § 17-7-95(c) (2012) (no), *with* KAN. STAT. ANN. § 43-158(c) (yes).

39. W. VA. CONST. art. IV, § 1; ALA. CODE § 12-16-60(a) (2013); CAL. CIV. PROC. § 203(a)(5) (West 2013); CONN. GEN. STAT. § 51-217(a)(2) (2013); FLA. STAT. § 40.013(1) (2013); 705 ILL. COMP. STAT. 305/2(3) (2007); MD. CODE ANN., CRIM. LAW § 9-202 (LexisNexis 2013); MISS. CODE ANN. § 13-5-1 (2013); MONT. CODE ANN. § 3-15-303(2) (2013); N.J. STAT. ANN. § 2B:20-1(e) (West 2013); OR. REV. STAT. ANN. § 10.030(3)(F) (2012); TENN. CODE ANN. § 22-1-102 (2013); TEX. GOV'T CODE ANN. § 62.102 (2013); W. VA. CODE § 3-1-3 (2011); W. VA. CODE § 52-1-8(b)(5) (2008). In Alabama, a prospective juror must be, among other things, “generally reputed to be honest and intelligent” and “esteemed in the community for integrity, good character and sound judgment.” ALA. CODE § 12-16-60(a) (2013). On appeal, an Alabama court upheld the invocation of this provision to support the exclusion of a juror who had merely been arrested. *See Dobyne v. State*, 672 So. 2d 1319, 1331 (Ala. Crim. App. 1994). This willingness to uphold the exclusion of someone merely arrested (for an unstated offense) supports the argument that the provision is also available to justify the exclusion of someone with a misdemeanor conviction. For the fact that Connecticut’s provision, which disqualifies those in the custody of the Commissioner of Correction, encompasses those who are imprisoned for a misdemeanor conviction, see section 51-217(a)(2) of the General Statutes of Connecticut; E-mail from the Office of Pub. Info., Conn. Dep’t of Corr. to Anna Roberts, Assistant Professor of Law, Seattle Univ. Sch. of Law (Dec. 28, 2012, 05:38 PST) (on file with author) (confirming that those under sentence for a misdemeanor conviction are housed within the Connecticut Department of Correction).

40. *See* CAL. CIV. PROC. § 203(a)(5) (West 2013) (disqualifying those “who have been convicted of malfeasance in office or a felony, and whose civil rights have not been restored”); FLA. STAT. § 40.013(1) (2013) (disqualifying those convicted of “bribery, forgery, perjury, [or] larceny”); MD. CODE ANN., CRIM. LAW § 9-202 (LexisNexis 2013) (disqualifying those convicted of bribing or attempting to bribe a juror); MISS. CODE ANN. § 13-5-1 (2013) (excluding those convicted of “the unlawful sale of intoxicating liquors within a period of five years” and the “common gambler or habitual drunkard”); MONT. CODE ANN. § 3-15-303(2) (2013) (excluding those convicted of “malfeasance in office”); N.J. STAT. ANN. § 2B:20-1(e) (West 2013) (excluding those convicted of “any indictable offense”); OR. REV. STAT. ANN. § 10.030(F) (2012) (excluding those convicted of a “misdemeanor involving violence or dishonesty”); TENN. CODE ANN. § 22-1-102 (2013) (excluding those convicted of “perjury or subornation of perjury”); TEX. GOV'T CODE ANN. § 62.102(7) (2013) (excluding those convicted of “misdemeanor theft”); W. VA. CODE § 52-1-8(b)(6) (2008) (excluding those convicted of perjury or false swearing). Mississippi also requires jurors to be “either a qualified elector, or a resident freeholder of the county for more than one year.” MISS. CODE ANN. § 13-5-1 (2013); *see infra* note 44.

41. *See* MD. CODE ANN., CTS. & JUD. PROC. § 8-103(b)(4)–(5) (LexisNexis 2013) (disqualifying those convicted of “a crime punishable by imprisonment

Aside from statutory provisions that explicitly base disqualifications on convictions, several provisions that make no mention of disqualification on the basis of criminal record can have that effect indirectly. Some states, for example, limit jury service to those who are “qualified elector[s],”⁴³ thus allowing any conviction-based disqualifications from voting to bring about secondary disqualifications from jury service.⁴⁴ Other states make use of vague terms that can encompass criminal convictions. Illinois requires that jurors be “[f]ree from all legal exception, of fair character, of approved integrity, of sound judgment.”⁴⁵ In Alabama, an individual may qualify for jury service only if he or she “is generally reputed to be honest and intelligent and is esteemed in the community for integrity, good character and sound judgment”;⁴⁶ even if this standard is met, a

exceeding 6 months” and who “received a sentence of imprisonment for more than 6 months”).

42. See CONN. GEN. STAT. § 51-217(a)(2) (2013) (excluding those who are “in the custody of the Commissioner of Correction,” a group that includes those imprisoned for misdemeanors). For the fact that Connecticut’s provision encompasses those who are imprisoned for a misdemeanor conviction, see *supra* note 39.

43. MISS. CODE ANN. § 13-5-1 (2013); see, e.g., W. VA. CODE § 52-1-8(b)(5) (2008) (disqualifying anyone who has lost the right to vote because of a criminal conviction).

44. See ALA. CODE § 12-16-60(a) (2013) (qualifying for jury service only one who “[h]as not lost the right to vote by conviction for any offense involving moral turpitude”); N.D. CENT. CODE § 12.1-33-01 (2013) (stating that those “sentenced for a felony to a term of imprisonment, during the term of actual incarceration under such sentence” may not vote); *id.* § 27-09.1-08 (2013) (stating that a prospective juror is disqualified if he or she “[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”). Mississippi requires each juror to be “either a qualified elector, or a resident freeholder of the county for more than one year,” thus connecting jury exclusion to disenfranchisement, which befalls those convicted of “murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy.” MISS. CONST. art. XII, § 241; MISS. CODE ANN. § 13-5-1 (2013).

45. 705 ILL. COMP. STAT. 305/2 (2007). Illinois courts have interpreted this language, variously, as banning all those who have previously been “charged with various crimes,” *People v. Gil*, 608 N.E.2d 197, 206 (Ill. App. Ct. 1992); barring all those with criminal records; and referring only to those with “recent or extensive criminal histories.” See *Kalt*, *supra* note 7, at 152 n.389.

46. ALA. CODE § 12-16-60(a) (2013). On appeal, an Alabama court upheld, as not erroneous, the invocation of this provision to support the exclusion of a juror who had merely been arrested. See *Dobyne v. State*, 672 So. 2d 1319, 1331 (Ala. Crim. App. 1994). This willingness to uphold the exclusion of someone merely arrested (for some unstated offense) supports the notion that the

juror may be disqualified from jury service if a conviction for a “crime involving moral turpitude” prevents him or her from voting.⁴⁷

Thus jurisdictions approach this question differently, disagreeing on whether there should be automatic statutory disqualifications at all; whether, if they exist, they should include some or all misdemeanors; whether they should last forever; and what type of conviction or punishment should trigger them. As one federal judge has suggested, these types of differences “make[] the ban seem somewhat arbitrary.”⁴⁸

C. CHALLENGES FOR CAUSE

Once a group of potential jurors makes it into the jury box for questioning by the attorneys, the next possible means of exclusion is the challenge for cause. Challenges for cause are available in unlimited number, provided that the trial judge is persuaded that the jurors in question cannot, for example, “fairly and adequately fulfill [their] responsibilities.”⁴⁹

Challenges for cause offer a variety of ways in which a juror’s criminal record can be a basis for his or her exclusion. First, they may be established by statute as a way of enforcing the statutory disqualifications mentioned above.⁵⁰ Second, they may be established by statute as a way of extending, or replacing, statutory disqualifications. In Alabama, for example, the statutory disqualification applies only to those who have been

provision is also available to justify the exclusion of someone with a conviction. *See also supra* note 39.

47. ALA. CONST. art. VIII, § 182; *see also* ALA. CODE § 12-16-60(a)(4) (2013) (barring from jury service those who have “lost the right to vote by conviction for any offense involving moral turpitude”); *Chapman v. Gooden*, 974 So. 2d 972, 976–77 (Ala. 2007) (discussing which crimes might be felonies involving moral turpitude).

48. *United States v. Boney*, 977 F.2d 624, 642 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part) (“That a felon could be . . . incompetent in a federal court in one state but competent in another, makes the ban seem somewhat arbitrary.”).

49. *See* SENATE FISCAL AGENCY, JUROR COMPENSATION AND QUALIFICATION: SENATE FISCAL AGENCY BILL ANALYSIS: S.B. 1448 & 1452 AND H.B. 4551-4553 ENROLLED ANALYSIS, 91st Leg., 5th Sess., at 5 (Mich. 2003) [hereinafter JUROR COMPENSATION AND QUALIFICATION], available at <http://legislature.mi.gov/documents/2001-2002/billanalysis/Senate/pdf/2001-SFA-1448-E.pdf> (implying that challenges for cause are unlimited but peremptory challenges, by contrast, are limited).

50. *See, e.g.*, MICH. CT. R. 2.511(D) (“It is grounds for a challenge for cause that the person: (1) is not qualified to be a juror . . .”).

convicted of a crime “involving moral turpitude.”⁵¹ Any felony conviction is a good ground for a challenge for cause, however, whether turpitudinous or not.⁵² As mentioned above,⁵³ Iowa has no statutory disqualifications but permits the removal for cause of those with a felony conviction.⁵⁴ Third, they may be granted on the basis of a criminal conviction even where there is no statutory provision establishing this as a basis for a challenge for cause.⁵⁵

A challenge for cause based on a criminal conviction may or may not rely on the judge’s discretion. If a juror “admits partiality” stemming from a criminal conviction, the judge has broad discretion to grant the challenge;⁵⁶ in other instances statute may require the granting of the challenge (even in the absence of any demonstrated bias),⁵⁷ or the granting may be in the judge’s discretion.⁵⁸ North Dakota, on the other hand, has explicitly rejected the idea that a felony conviction in and of itself is grounds for a challenge for cause. Having repealed an earlier legislative provision that made those with felony convictions permanently vulnerable to a cause challenge, the state

51. ALA. CODE § 12-16-60(a) (2013).

52. ALA. CODE § 12-16-150(5) (2013). Similarly, in Oklahoma the statutory disqualification applies only to those who (a) have been convicted of a felony and (b) have not had their civil rights restored. OKLA. STAT. tit. 38, § 28(C)(5) (2013). By contrast, a judge may grant a cause challenge solely on the basis of a felony conviction. *Id.* at tit. 22, § 658 (2013).

53. *See supra* note 2223 and accompanying text.

54. *See* IOWA CT. R. 1.915(6)(a), 2.18(5)(a).

55. *See, e.g.*, LEGISLATIVE FIN. COMM., FISCAL IMPACT REPORT, H.R. 47-531, 2d Sess., at 2 (N.M. 2006), available at <http://www.nmlegis.gov/Sessions/06%20Regular/firs/HB0531.pdf> (noting, in the context of jurors with felony convictions, that “[j]urors may be excluded for cause if the judge agrees the juror cannot serve impartially”).

56. *United States v. Torres*, 128 F.3d 38, 43 (2d Cir. 1997); *see id.* at 43–45.

57. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 35.16(a) (West 2013) (giving, as second ground for a cause challenge, that “the juror has been convicted of misdemeanor theft or a felony”); *id.* (“No juror shall be impaneled when it appears that the juror is subject to the second, third or fourth grounds of challenge for cause set forth above, although both parties may consent.”).

58. In Iowa, for example, where the only statutory conviction-based exclusion is for cause, the court of appeals has held the statutory language to imply “permissive or discretionary action.” *State v. Shimko*, 725 N.W.2d 659, No. 05-17158, 2006 WL 3018467, at *2 (Iowa Ct. App. Oct. 25, 2006); *see supra* notes 53–54 and accompanying text; *see also Shimko*, 725 N.W.2d, 2006 WL 3018467, at *2 (“The test to be applied in ruling on challenges for cause is ‘whether the juror holds such a fixed opinion on the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant.’” (citation omitted)).

now requires that there be “[other] grounds” to justify the removal of someone with a felony conviction.⁵⁹

Thus, again, jurisdictions differ on the question of whether a judge should automatically grant a cause challenge where a potential juror has a criminal conviction, or whether a conviction is insufficient to demonstrate that the juror is unfit.

D. PEREMPTORY CHALLENGES

The final way in which a criminal record can prompt a removal from the jury is through a peremptory challenge exercised by one of the attorneys. Peremptory challenges differ from challenges for cause in two ways: first, they are finite in number,⁶⁰ and second, ordinarily no reason need be given for them.⁶¹ It is only if a *Batson* claim is made—if, in other words, the opposing party makes an allegation that the peremptory challenge was used to effect purposeful discrimination on the basis of race, ethnicity or gender—that a justification need be given.⁶² That justification needs to be “race- [or ethnicity-, or gender-] neutral”⁶³ but does not need to be persuasive, or even plausible.⁶⁴

When met with a *Batson* claim on the grounds of racial or ethnic discrimination, prosecutors frequently offer as a justification the fact that a potential juror has a criminal record, or has been charged with a crime.⁶⁵ Indeed, as Melynda Price found in her survey of capital cases drawn from the Texas Court of Criminal Appeal, a “link to the criminal justice system ranks second only to ambivalent views on the death penalty as

59. *City of Mandan v. Baer*, 578 N.W.2d 559, 563 (N.D. 1998) (indicating that in 1993 North Dakota “eliminate[d] ‘conviction for a felony’ as a specifically enumerated challenge for cause”); *id.* (“A convicted felon may be excused from the venire, but the removal must be based on grounds other than conviction of a felony.”).

60. See Andrew Weis, *Peremptory Challenges: The Last Barrier to Jury Service for People with Disabilities*, 33 WILLAMETTE L. REV. 1, 41 (1997); *supra* note 49 and accompanying text.

61. See Weis, *supra* note 60, at 5; *supra* note 49 and accompanying text.

62. *Batson v. Kentucky*, 476 U.S. 79, 96 (1986); see Weis, *supra* note 60, at 10–11.

63. *Id.* at 11; see *id.* at 10.

64. See *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995) (per curiam).

65. See Roberts, *Disparately Seeking Jurors*, *supra* note 12, at 45.

the most frequently cited reason for using peremptory challenges to remove African American jurors.”⁶⁶

Thus, in each of these four major ways, criminal convictions can lead to removal from jury service. The variation between states is striking, as is the cumulative picture of immense vulnerability to this form of civic exclusion.

II. THE HARMS

This Part addresses three of the primary harms created by the regimes of exclusion laid out in Part I: racial disparity and cover for purposeful discrimination; loss of experience; and tension with reintegrative goals.

A. RACIAL DISPARITY AND COVER FOR PURPOSEFUL DISCRIMINATION

The exclusion of those with criminal records brings the risk of exacerbating racial disparity within the jury system. Because rates of criminalization vary according to race,⁶⁷ jury exclusions relying on criminal records have a disparate impact,⁶⁸ thus offering an illustration of the notion that American criminal justice “systematically excludes racial minorities from its decisionmaking processes while disproportionately imposing its burdens on them.”⁶⁹ The effect is dramatic. In 2003, Brian Kalt estimated that exclusion on the basis of felony convictions reduced the representation of African American men on juries by thirty percent.⁷⁰ Kevin Johnson has pointed out that an analogous disparity exists in the exclusion of Latinas and Latinos

66. Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 84–85, 90 (2009).

67. See J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, CRIM. JUST., Fall 2009, at 42, 43 (“African Americans and Latinos face significantly greater likelihood of being arrested, convicted, and incarcerated than whites.”).

68. See Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 406 (2012) (“[S]kewed enforcement of criminal laws (for example, disproportionate arrests for drug possession crime despite equal rates of drug use) has the collateral consequence of excluding a disproportionate number of black citizens from jury service.”).

69. Note, *Judging the Prosecution: Why Abolishing Peremptory Challenges Limits the Dangers of Prosecutorial Discretion*, 119 HARV. L. REV. 2121, 2121 (2006).

70. Kalt, *supra* note 7, at 113.

from jury service because of felony convictions.⁷¹ Similarly, Alexandra Natapoff has pointed out that an analogous racial disparity exists in the distribution of misdemeanor convictions, which some courts can also use to exclude potential jurors.⁷²

In addition to exacerbating racial disparity, these exclusions may increase the ease with which *purposeful* discrimination can be effected in jury selection. Prosecutors continue to demonstrate a propensity to exercise peremptory challenges against jurors of color,⁷³ and when *Batson* claims from their adversaries require them to justify these peremptory challenges, they often cite as a justification a connection between the challenged juror and the criminal justice system.⁷⁴ Scholars and litigants have claimed that the disparate impact of these justifications is no coincidence, that a connection with the criminal justice system is not race neutral,⁷⁵ and that the asserted justifications are merely a cover for purposeful discrimination on the basis of race or ethnicity.⁷⁶ These claims have not pre-

71. See Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 158 (2005) (mentioning “disqualification of felons” as one of the mechanisms that bars “disproportionate numbers of Latina/os from serving on juries”).

72. See Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. 1313, 1372 (2012) [hereinafter Natapoff, *Misdemeanors*] (“[T]he petty offense machinery has become a way to formally label as ‘criminal’ thousands of vulnerable individuals of color without regard to evidence of their individual culpability.”); *supra* notes 39–42 and accompanying text.

73. See Hiroshi Fukurai & Edgar W. Butler, *Sources of Racial Disenfranchisement in the Jury and Jury Selection System*, 13 NAT’L BLACK L.J. 238, 269 (1994) (“An important observation is that prosecutors are more likely to peremptorily challenge minorities than are defense attorneys.”).

74. See Roberts, *Disparately Seeking Jurors*, *supra* note 12, at 1375 (mentioning prosecutorial justifications for peremptory challenges grounded in jurors’ ties to criminal justice system).

75. See MICHELLE ALEXANDER, *THE NEW JIM CROW* 130 (2010) (“A black kid arrested twice for possession of marijuana may be no more of a repeat offender than a white frat boy who regularly smokes pot in his dorm room. But because of his race and his confinement to a racially segregated ghetto, the black kid has a criminal record, while the white frat boy, because of his race and relative privilege, does not. Thus, when prosecutors throw the book at black repeat offenders or when police stalk ex-offenders and subject them to regular frisks and searches on the grounds that it makes sense to ‘watch criminals closely,’ they are often exacerbating racial disparities created by the discretionary decision to wage the War on Drugs almost exclusively in poor communities of color.”); Price, *supra* note 66, at 95 (“The removal of African Americans for . . . familiarity with the criminal justice system . . . is, most arguably, not race neutral.”).

76. See Roberts, *Disparately Seeking Jurors*, *supra* note 12, at 1375–76 (describing disparate impact arguments against facially “race-neutral” justifications for juror strikes).

vailed⁷⁷: courts continue to find that the reason for a peremptory challenge can be “race-neutral” in the sense required by *Batson* even if it has a disparate impact,⁷⁸ and that purposeful discrimination cannot be established on this ground alone.⁷⁹ Even while legal claims fail, scholarly calls persist for judges to police more carefully the risk that this type of justification masks purposeful discrimination.⁸⁰

The harms brought about by racial disparity the risk of purposeful racial discrimination affect many groups. Those who have historically been disenfranchised may be kept once again from civic participation.⁸¹ Those whose fates are determined by the jury may see their chances of a fair trial decrease since diverse juries outperform all-white juries in a number of key areas.⁸² Effects in this area can spiral, since some studies have shown that the whiter the jury, the more likely it is to convict people of color;⁸³ those convicted may in turn be precluded from future jury service, and so on.⁸⁴

77. See *id.* at 1363, 1374–75 (demonstrating that in published federal cases the prosecutorial justifications most commonly attacked as having a racially or ethnically disparate impact stemming from purposeful discrimination were those relating to the criminal justice system and that those claims of discrimination, when made on behalf of jurors of color, all ultimately failed).

78. *Hernandez v. New York*, 500 U.S. 352, 362 (1991).

79. *Id.* at 362–63.

80. See, e.g., Roberts, *Disparately Seeking Jurors*, *supra* note 12, at 1417 (calling for courts and critics to heed the risks of disparities in applying *Batson*).

81. See *Rubio v. Super. Ct.*, 593 P.2d 595, 605 n.11 (Cal. 1979) (en banc) (Tobriner, J., dissenting) (“Ironically, the 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 . . .”).

82. See *Leipold*, *supra* note 18, at 1007 (“Even in cases in which the only questions were factual, more diverse juries would still enliven the debate, bring different life experiences to the table, and squelch the airing of stereotypes that otherwise could harm the defendant.”); Samuel R. Sommers, *On Racial Diversity and Group Decision-Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 608 (2006) (discussing a study suggesting that diverse groups deliberate longer, make fewer factual errors, are more likely to correct inaccuracies, and are more open-minded than all-white groups).

83. Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL’Y & L. 201, 208 (2001).

84. See *Smith & Sarma*, *supra* note 68, at 363 (pointing out that factors such as discriminatory jury challenges cause “negative feedback loops that inhibit the ability of minority group members to participate meaningfully in the justice system and exact political change”).

Racially disparate exclusions threaten not only individuals and groups, but also the reputation of the jury. As Kevin Johnson puts it, racially skewed juries “undermine the perceived impartiality of the justice system and, at the most fundamental level, the rule of law.”⁸⁵ Thus, the racial inequities brought about by these exclusions jeopardize key values within the jury system: accuracy, impartiality, jury reputation, and the rule of law. As will be seen below, the very same values are cited as justifications for these exclusions, and thus are undermined even as they are purportedly being championed.

B. LOSS OF EXPERIENCE

To exclude from jury service those with criminal convictions is to remove a certain type of experience from the jury; this should not be done lightly. Experience is a key part of the jury’s arsenal: jury instructions tell jurors to bring their experience to the task,⁸⁶ thus appearing to acknowledge the fact that experience shapes interpretation of facts.⁸⁷ Yet it is diversity of experience that shapes interpretation of facts in a way most consonant with our ideals of the jury: the jury’s ability to offer a “collective wisdom and body of experience” is part of what justifies its existence.⁸⁸ Thus, the exclusion of those who have direct experience of the criminal justice system risks creating bias even while being sought in the name of bias-removal.⁸⁹ One state judge declared that “[w]hen any segment of the community . . . is excluded as a matter of law from jury service based on stereotypes and innuendo, the representativeness of the jury is reduced and the jury loses one of a variety of perspectives on

85. Johnson, *supra* note 71, at 158.

86. Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369, 406 (2010); see *People v. Wilson*, 187 P.3d 1041, 1082 (Cal. 2008) (“[W]e expect jurors to use their own life experiences when evaluating the evidence.”).

87. See Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367, 400 (1996) (referencing cognitive theory to support claim that “[o]ne’s interpretation of the facts is influenced by one’s background and experience”); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1264 (2000) (“An individual’s experiences influence her capacity to interpret and evaluate facts and then to make judgments about justice.”).

88. *Grigsby v. Mabry*, 483 F. Supp. 1372, 1377–78 n.6 (E.D. Ark. 1980).

89. See *State v. Haynes*, 514 So. 2d 1206, 1211 (La. Ct. App. 1987) (describing statutory exclusion on the basis of felony conviction as “a reasonable qualification to insure lack of partiality, bias or prejudice in the trial of a criminal case”).

human events.”⁹⁰ She was discussing a proposal that law enforcement officers be automatically excluded,⁹¹ but her critiques of such a proposal—the lack of evidence of bias, and the narrowing of the jury’s experience—also apply to the exclusion of those with criminal convictions.

The judging of criminal cases may suffer from the absence of those with direct experience of the criminal justice system, since its workings are often not intuitive. Jurors are instructed to bring their “common sense” to their task,⁹² but laypersons’ common sense is often inadequate in the criminal justice arena.⁹³ If a layperson tries to imagine him- or herself in a suspect’s position, for example, it might defy common sense to imagine that a suspect would “confess” in the absence of guilt.⁹⁴ Yet interrogation techniques are often *designed* to defy common sense, by making it appear as if giving a statement would be in the suspect’s best interest.⁹⁵ Unique pressures act upon those caught up in the criminal justice system—not only to give a

90. *State v. Louis*, 457 N.W.2d 484, 491 (Wis. 1990) (Abrahamson, J., concurring); *id.* at 482 (majority opinion) (finding the assumption that law enforcement officials are implicitly biased against defendants “unfounded”).

91. *Id.* at 491 (Abrahamson, J., concurring). For another example of law enforcement officers escaping a presumption that they harbor a bias, see *State v. Sharrow*, 949 A.2d 428, 436 (Vt. 2008) (“[I]nferring bias to a seasoned police-academy teacher on the basis of this status alone would effectively disqualify him from jury service for any case involving police-officer witnesses. It is simply not necessary to do so in order to preserve the right to trial by impartial jury where a defendant has an opportunity show actual bias.”).

92. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (“The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.”); Howard, *supra* note 86, at 406 (“[J]urors are instructed by the judge to draw on their life experiences and common sense in deciding the case.”).

93. See Lisa Dufraimont, *Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?*, 33 *QUEEN’S L.J.* 261, 265 (“Because jurors are untrained and generally unfamiliar with the justice system, they often lack the experience and knowledge required to evaluate the prosecution’s evidence.”).

94. Nadia Soree, *When the Innocent Speak: False Confessions, Constitutional Safeguards, and the Role of Expert Testimony*, 32 *AM. J. CRIM. L.* 191, 196 (2005) (“[C]ommon sense tells us that innocent suspects do not confess to crimes they have not committed.”).

95. See Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 *DENV. U. L. REV.* 979, 990 (1997) (“Once a suspect fully appreciates his dismal situation, the investigator can influence him to admit guilt if he is led to believe that making an admission will improve his position.”).

“confession,”⁹⁶ but also to take a plea,⁹⁷ and to cooperate.⁹⁸ Those who have been through the criminal justice system as defendants may be able to understand those pressures in a way inaccessible to others. In addition, the common sense of the uninitiated may suggest that those sworn to uphold the law—prosecutors and police—can be relied upon to act with integrity, and indeed laypersons generally place tremendous confidence in the integrity of prosecutors and police.⁹⁹ Research into prosecutorial and police misconduct indicates that such confidence is often misplaced.¹⁰⁰

The growing body of data on wrongful convictions, particularly with respect to three of the leading characteristics of wrongful convictions cases, heightens the importance of skepticism regarding the easy exclusion of those with direct experience of the criminal justice system. The National Registry of Exonerations has documented 1215 exonerations,¹⁰¹ and this figure is likely to be only a tiny fraction of the cases where ex-

96. See *The Causes of Wrongful Conviction*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/> (last visited Nov. 4, 2013) (including “False Confessions / Admissions” as one of the four leading causes of wrongful convictions in the first 225 DNA exonerations).

97. The uninitiated may assume, in assessing defendant testimony, that a defendant would not have garnered a prior conviction, by plea or after a trial, if he or she were not morally culpable, as well as indubitably guilty. These assumptions can be misguided. 9.6% of those in the national exoneration registry pled guilty. *Exoneration Detail List*, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx> (last visited Nov. 4, 2013).

98. See *The Causes of Wrongful Conviction*, *supra* note 96 (identifying “informants” as one of the four leading causes of wrongful convictions). *Informants*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (Nov. 4, 2013) (pointing out that “[i]n more than 15% of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial”).

99. See Nancy Gertner, *Is the Jury Worth Saving?*, 75 B.U. L. REV. 923, 931 (1995) (reviewing STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* (1994)) (“The public, with few exceptions, has enormous faith in the skill and integrity of police and prosecutors.”).

100. See Michelle Alexander, Op-Ed., *Why Police Lie Under Oath*, N.Y. TIMES, Feb. 2, 2013, <http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html> (pointing out the incentives for police officers to testify falsely, and claiming that “[i]n this era of mass incarceration, the police shouldn’t be trusted any more than any other witness, perhaps less so”); Michael L. Volkov & Allyson Miller, *Prosecutorial Misconduct: An Increasing Problem or Overblown Hysteria?*, PROSECUTION NOTES (Ctr. on the Admin. of Criminal Law, New York, N.Y.), 2010, at 7 (“[R]ecent studies show that prosecutorial misconduct is a systemic reality, at least at the state and local levels of the criminal justice system.”).

101. *Exoneration Detail List*, *supra* note 97.

operation is merited.¹⁰² The hundreds of jury trials within this group of cases indicate that juries have been making mistakes.¹⁰³ More specifically, three of the most common characteristics of wrongful conviction cases correlate with areas where laypersons' common sense might be inadequate.¹⁰⁴ False confessions, for example, are a leading characteristic of wrongful conviction cases;¹⁰⁵ their falsity may be hard to detect if one cannot imagine why someone would admit to something that never occurred,¹⁰⁶ and indeed jurors do fail to understand the phenomenon of false confessions.¹⁰⁷ Informant testimony is another leading characteristic of wrongful conviction cases.¹⁰⁸ One may fully credit it if one is unaware of the kinds of pressures that might

102. See SAMUEL R. GROSS & MICHAEL SHAFFER, NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 3 (2012) (“The most important conclusion of this Report is that there are far more false convictions than exonerations. That should come as no surprise. The essential fact about false convictions is that they are generally invisible: if we could spot them, they’d never happen in the first place. Why would anyone suppose that the small number of miscarriages of justice that we learn about years later—like the handful of fossils of early hominids that we have discovered—is anything more than an insignificant fraction of the total?”).

103. Only 118 of the 1238 cases listed in the National Registry of Exonerations were resolved by guilty plea. *Exoneration Detail List*, *supra* note 97.

104. See Keith A. Findley, *Innocence Protection in the Appellate Process*, 93 MARQ. L. REV. 591, 624 (2009) (explaining that laypersons' common sense can be unreliable in the areas of eyewitness evidence, false confessions, informant testimony, and forensic science evidence).

105. *False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Nov. 4, 2013) (“In about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty.”).

106. See Findley, *supra* note 104, at 628 (“[C]ommon sense about false confessions can be quite wrong. Simply put, it is counterintuitive to believe that a person would confess to a crime, especially a serious crime, that she did not commit.”).

107. See *id.* (“[T]he empirical evidence is there: people do confess falsely and to the most heinous of crimes. Research confirms that jurors do not understand this reality about confessions.”); Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1280 (2005) (“[A] confession is given tremendous weight by a jury, resulting in defendants being convicted on the basis of a confession even in the absence of evidence corroborating the confession.”).

108. Informant testimony is “the leading cause of wrongful convictions in capital cases.” CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM (2004–05), *available at* <http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf> (describing fifty-one wrongful convictions that involved perjured informant testimony that the jurors credited); ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 3 (2009) [hereinafter NATAPOFF, SNITCHING] (stating that the use of criminal informants is “clandestine and unregulated,” and invites inaccuracy).

impair its accuracy,¹⁰⁹ and indeed jurors typically credit informant testimony.¹¹⁰ Government misconduct, a third leading characteristic of wrongful conviction cases,¹¹¹ might go undetected if one has never had anything but positive experiences at the hands of law enforcement.

To explore the benefits of lay participation by those who know something of the pressures and fractures of the criminal justice system is not to urge that jurors with convictions act as experts. It is, rather, to agree with Akhil Reed Amar that “a juror should have an open mind but not an empty mind.”¹¹² In other contexts, policymakers have started to realize that fair jurors do not need to be ignorant of the system.¹¹³ In New York, for example, the former Chief Judge of the Court of Appeals, Judith Kaye, proudly announced the expansion of jury service

109. See Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 854 (2007) (“Prosecutors . . . commonly use the testimony of some offenders as a means to facilitate prosecution of others, granting the testifying criminal reduced punishment (by way of sentencing departures for ‘substantial assistance’ and the like) or no punishment (by way of a ‘cooperation agreement’ or a grant of witness immunity) as an inducement.”).

110. See NATAPOFF, SNITCHING, *supra* note 108, at 77 (“[N]umerous exonerations reveal just how often juries believe lying criminal informants, even when juries know that the informant is being compensated and has the incentive to lie.”).

111. See *The Causes of Wrongful Conviction*, *supra* note 96 (listing “government misconduct” as one of the seven most common causes of wrongful convictions); *Government Misconduct*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Nov. 4, 2013) (“The cases of wrongful convictions uncovered by DNA testing are filled with evidence of negligence, fraud or misconduct by prosecutors or police departments.”).

112. Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1180, 1182 (1995); *id.* at 1182 (“The jury—and not just the venire—should be as cross-sectional of the entire community of the whole people as possible.”); see also *Grigsby v. Mabry*, 483 F. Supp. 1372, 1378 n.7 (E.D. Ark. 1980) (“If all members of a religious group which believed in polygamy were excluded for cause in a bigamy trial simply because they were members of that religion, this would deprive the defendant of a ‘representative’ jury.”); Smith & Sarma, *supra* note 68, at 405 (“[P]rosecutors successfully eliminate many people of color through discriminatory jury selection even though many live in the areas where the crimes are committed, understand the police conduct in those areas, and live with the situational pressures and constraints that define such locations.”).

113. See Michael B. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. & POL’Y REV. 239, 251 n.54 (2007) (citing a 2001 report on the New York changes stating that “members of the legal profession who are no longer exempt from service find jury service particularly valuable, as it offers a view of the legal system from a juror’s seat and provides new perspective”).

eligibility to include lawyers and others, and emphasized an effort to accumulate diverse experience:

We do not require jurors to check their life experiences at the courtroom door, nor could we. In fact, one of the goals of New York's jury reform was to eliminate all automatic exemptions from service, bringing to the jury room a wide array of individuals with specialized knowledge and training.¹¹⁴

This reform did not address the continuing exclusion of those with felony records.¹¹⁵ Indeed, New York's juror orientation video ignores the very existence of this group of people in announcing that "[t]oday our jury pools represent the entire community, in all its diversity."¹¹⁶ True reform will not occur until the exclusion of those with criminal convictions, and the assumptions on which that exclusion is based, are acknowledged, and addressed.

C. TENSION WITH REINTEGRATIVE GOALS

These exclusions are also in tension with ideals of reentry, which is "the process by which individuals return to communities from prison or jail custody,"¹¹⁷ and reintegration, which can be thought of as "the ultimate goal."¹¹⁸ The tension lies in both the removal of an opportunity for civic inclusion and the message about the unfitness of those with criminal convictions that is sent both to those excluded and to those included.¹¹⁹

114. *People v. Arnold*, 753 N.E. 846, 854 (N.Y. 2001) (footnote omitted).

115. Paula Z. Segal, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York*, 13 N.Y. CITY L. REV. 313, 332 (2010) ("Despite the recognized need to expand the jury pool in New York, felon jury inclusion was conspicuously absent from Justice Kaye's admirable reforms.")

116. See Videotape: *Your Turn* (Ted Steed Productions, Inc. 1997), available at http://nyjuror.gov/JO_VideoScripts.shtml (Petit Jury Orientation).

117. ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* 1 (2008).

118. Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1084 n.71 (2004) ("The terms 'reentry' and 'reintegration' tend to be used interchangeably in this context. However, some have observed these to be distinct concepts. For instance, one commentator observes that reentry is the process by which an ex-offender leaves confinement and returns to his or her community, while reintegration is the ultimate goal." (citing Jeremy Travis, Address at the University of Maryland School of Law (Sept. 8, 2003))).

119. See Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 160 (1999) ("Many collateral consequences, therefore, seem to 'fit more appropriately with the discarded idea that an offender should be eliminated or banished from society.' That goal, however, makes reintegration and member-

Reentry has gained recent prominence as a focus in criminal justice policy.¹²⁰ One of the types of activity that has been found to aid the possibility of reentry is civic participation. Some judges, legislators, and commentators have recognized the potential of voting, for example, to aid the reintegration of those with felony convictions.¹²¹ The potential seems stronger with jury service, which, unlike voting, requires serious and extended “civic interchange,”¹²² and which increases the likelihood of participation in future forms of civic engagement.¹²³ Thus, one judge has applied the voting precedent to the jury context, urging that the same potential be recognized.¹²⁴ Other judges have noted the tension between jury exclusion and reintegra-

ship in society elusive.” (quoting Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 423 (1967)).

120. See Pinard, *supra* note 118, at 1083–84 (“Very recently, advocates, scholars, social scientists, policy analysts, politicians, media, and numerous grassroots organizations have begun to focus on various issues relating to ex-offender reentry.”); *id.* at 1085–87 (giving examples of federal and state ex-offender reentry initiatives).

121. See *Richardson v. Ramirez*, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting) (denying 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” (quoting Memorandum of the Secretary of State of California in Opposition to Certiorari, *Class of Cnty. Clerks & Registrars v. Ramirez*, 418 U.S. 904 (1974) (No. 72-324))); DEMOS, RESTORING VOTING RIGHTS TO CITIZENS WITH FELONY CONVICTIONS (2003–04) (“If we want former felons to become good citizens, we must give them rights as well as responsibilities, and there is no greater responsibility than voting.” (quoting U.S. Rep. John Conyers, Jr.); Op-Ed., *Disenfranchised Felons*, N.Y. TIMES, July 15, 2012, <http://www.nytimes.com/2012/07/16/opinion/disenfranchised-felons.html> (“Former offenders who are allowed to vote are less likely to return to prison and more likely to become reintegrated into their communities.”).

122. Kalt, *supra* note 7, at 128; see Demleitner, *supra* note 119, at 161 (pointing out that a rationale for restrictions that separates those with criminal convictions from others leads “to societal fragmentation and thwarts possible rehabilitation”); Judge Paul J. Garotto, Speech Before the Omaha Bar Association (Sept. 24, 1964), in *Jury Service—A Citizen’s Duty*, 13 NEB. ST. B. J. 111, 112 (1964) (“Jury service is a duty that most citizens apparently seek to avoid, or wish they could. It is the kind of basic common experience that all citizens, *bar none*, should have at least once. . . . [S]itting through a trial as a member of the jury, and then seeking with the other eleven jurors to reach a just and fair and unanimous verdict is a very enlightening and enriching experience.” (emphasis added)); *id.* at 113 (“What else do we have that can teach, exercise, and strengthen so much political, social, moral and religious virtue as does serving on a jury?”).

123. See Valerie P. Hans & Neil Vidmar, *The Verdict on Juries*, 91 JUDICATURE 226, 226–27, 230 (2008) (“[J]ury service can increase other forms of civic participation such as voting.”).

124. See *Rubio v. Super. Ct.*, 593 P.2d 595, 604–05 (Cal. 1979) (en banc) (Tobriner, J., dissenting).

tion.¹²⁵ Most notably, a Colorado appeals court found that because of the reintegrative benefits of jury service, the legislature acted rationally in lifting the automatic exclusion of those with felony convictions, and that the resulting statute:

serves the legitimate government objective of providing convicted felons with the opportunity to participate in the American judicial process once their sentences have been served. Thus, [the Colorado statute] is rationally related to the legitimate legislative purpose of rehabilitating convicted felons and reintegrating them into society once their punishment is complete.¹²⁶

In addition to removing the opportunity to participate in an inclusionary activity, automatic exclusions have expressive power.¹²⁷ They send to convicted individuals a message of “you do not belong”—and in many instances “you will *never* belong”¹²⁸—that is at odds with the demand that one “reenter.” The labeling and stigmatizing involved in this kind of exclusion interferes with efforts at reentry.¹²⁹ In addition, it sends a message to the broader community that reinforces, instead of challenging, perceptions of those with convictions as “other,” and indeed as a dangerous other. As Dorothy Roberts has written, “[b]y denying felons the opportunity to participate in legal processes such as voting, jury service, and holding public office . . . mass incarceration reinforces internal social norms that treat these processes as illegitimate as well as the external perception of

125. See, e.g., *Froede v. Holland Ladder & Mfg. Co.*, 523 N.W.2d 849, 852 (Mich. Ct. App. 1994) (drawing connection between the lifting of automatic bans and reintegration, at least in the context of civil jury service).

126. *People v. Ellis*, 148 P. 3d 205, 211 (Colo. App. 2006), *cert. denied*, 2006 WL 3393584 (Colo. 2006) (affirming guilty verdict reached by a jury containing a juror with a felony conviction, in relation to whom the trial judge had rejected a cause challenge).

127. See Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1032–33 (2004) (“These punishments point to one way of imagining the criminal offender. Not only does the criminal offender betray her immoral character but that character is permanent. The criminal’s bad character places her into an inferior class of citizens. The offender is to be permanently locked away if possible. Her vote is taken away permanently, her claim to political equality denied. The criminal is barred from sitting on a jury, participating in government, sharing in social and welfare rights and taking full part in her economic wellbeing. A class system based on permanent moral inferiority makes the criminal a permanent lesser citizen.”).

128. See *supra* Part I.B for a discussion of lifetime bans and other repercussions faced by those with convictions.

129. See Demleitner, *supra* note 119, at 161 (“If [collateral consequences] are not discontinued within a reasonable period of time, they will interfere with the ex-offender’s rehabilitative efforts by continuing to stigmatize and label him.”).

these communities as outside the national polity.”¹³⁰ Thus, legislation in this area plays a part in confirming anti-reintegrative stereotypes¹³¹ rather than seizing the opportunity to shift prejudices by showing people in a new role¹³²: that of civic participant.

The assumption conveyed by these exclusions—that those with a criminal record are civically unfit—may help reveal why concrete commitments to reentry goals have often appeared halting.¹³³ If reentry goals remain desirable, then these exclusions, and other aspects of the criminal justice system,¹³⁴ may have to be rethought.¹³⁵ George Fletcher has explored this notion in the context of voting, arguing that “[o]nce we acknowledge the necessity of reintegration, we could hardly maintain the practice of disenfranchising felons.”¹³⁶ He held

130. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1293 (2004) [hereinafter Roberts, *Cost of Mass Incarceration*].

131. See Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERK. J. CRIM. L. 259, 265–67 (2011) [hereinafter Dolovich, *Exclusion and Control*] (pointing out the dehumanization of those whom the state incarcerates, and arguing that “a political strategy emphasizing the financial costs of incarceration is bound to fail unless it also generates an ideological reorientation towards recognizing the people the state incarcerates as fellow human beings and fellow citizens, entitled to respect and consideration as such”).

132. See CLAUDE M. STEELE, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 6–7 (2011).

133. See David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 32 (2011) (“Funding for [reentry and reintegration] programs remains manifestly insufficient, so much so that Loïc Wacquant has dismissed reentry as ‘myth and ceremony.’” (quoting Loïc Wacquant, *Prisoner Reentry as Myth and Ceremony*, 34 DIALECT. ANTHROPOL. 605 (2010))); Love, *supra* note 19 (“Social liberals and fiscal conservatives alike pay lip service to the supposed American ideal of second chances. But our language, like our law, points in the opposite direction.”). The funding appropriated for reentry programs pursuant to the Second Chance Act, which was signed into law by George W. Bush in 2007, “has been far less than is needed to create meaningful possibilities for successful reintegration.” Dolovich, *Exclusion and Control*, *supra* note 131, at 337 n.251.

134. See George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 U.C.L.A. L. REV. 1895, 1907 (1999).

135. Note that critics such as Michelle Alexander would require much more in order to regard the use of the phrase “reentry” as making any sense. See Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 9 (2011) (alluding to the absurdity of the concept of people “re-entering” a society “that never seemed to have much use for them in the first place”).

136. Fletcher, *supra* note 134, at 1907 (“The challenge of recognizing that we implicitly endorse a caste system in criminal law is to reformulate our theories of punishment. The emphasis on reintegration into society should come front and center. Once we acknowledge the necessity of reintegration, we could

back from extending his critique to exclusions of those with felony convictions from jury service—calling such exclusion “almost reasonable”¹³⁷—and yet the same critique applies.

III. THE JUSTIFICATIONS

In Part III, this Article turns from the harms of jury exclusion, laid out in Part II, to their justifications. This Part describes and critiques four of the most commonly asserted justifications¹³⁸: public perception, juror character, the “purity” of the jury, and embitterment against the system.

A. PUBLIC PERCEPTION

One common justification for these exclusions is that the reputation of the jury would be compromised by the inclusion of those with criminal—especially felony—convictions. Judges endorse the rationale that exclusion of those with felony convictions is related to efforts to achieve a “reputable and reliable jury . . . whose judgment society can respect,”¹³⁹ and invoke the

hardly maintain the practice of disenfranchising felons. On the contrary, we should be encouraging inmates to begin thinking of themselves as useful members of society with all the attendant responsibilities. Having the responsibility to vote should be the minimum condition for inculcating the sense that felons too are citizens.”).

137. *Id.* at 1906.

138. Note that courts are often reluctant to offer any justifications. *See, e.g., State v. Folkerts*, 629 P.2d 173, 177 (Kan. 1981) (stating that those with a felony conviction would be unfit “for obvious reasons”). This Article adopts the position that assumptions upon which components of the criminal justice system rest *should* be spelled out, and that only those that are convincing should be adopted.

139. *United States v. Best*, 214 F. Supp. 2d 897, 905 (N.D. Ind. 2002) (holding that the rationale especially applies to the bar on jury service by convicted felons); *see United States v. Boney*, 977 F.2d 624, 642 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part) (“If [a juror with a felony conviction is summoned for jury duty and] is discovered before trial, presumably he is excluded without further ado . . . not because of an inference, arising out of the identities of the parties and other circumstances of a particular case, that he will be biased for one side or against the other, but rather because Congress determined that he ought not sit on *any* jury, determine the fate of *any* party, under *any* circumstances, in *any* case. That judgment reflects concern about maintaining the integrity of the jury . . . and with it, public confidence in verdicts. As Justice Kennedy recently put it, ‘the purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of acquittal is given in accordance with the law *by persons who are fair.*’ Congress, I believe, adopted what is no doubt the traditional view—reflected elsewhere in our law—that felons are generally less trustworthy and responsible than others, and that they just cannot be counted on to be ‘fair.’” (quoting *Powers v. Ohio*, 499 U.S. 400, 413 (1991))).

importance of “maintaining the integrity of the jury . . . and with it, public confidence in verdicts.”¹⁴⁰

As with the other primary justifications, no empirical support is given for the idea that the public would realize, care about, or despair at the presence of someone with a criminal conviction on the jury. Word has not yet arrived, for example, of a jury crisis in Colorado and Maine, the two states that have no conviction-based exclusions from jury service.¹⁴¹ Yet it may be that these exclusions provide their own rationale, since the easiest way to ensure that those with felony convictions are seen as inappropriate civic participants is to enforce and endorse their exclusion. Those bringing about these exclusions, in other words, should consider the power of the law either to reinforce or to challenge stereotypes.

The public perception rationale not only lacks support, but also runs up against three countervailing public perception concerns. First, any exclusion that removes a sector of the community risks damaging public perception, since, as the Supreme Court stated in *Taylor v. Louisiana*, community participation is “critical to public confidence in the fairness of the criminal justice system.”¹⁴² Even as courts and legislatures trumpet “integrity,” in the sense of “probity,”¹⁴³ these exclusions jeopardize the value of “integrity,” in the sense of “wholeness.” Perhaps most damaging to public perception of community representation on juries has been the history of racial disparity and discrimination in jury selection.¹⁴⁴ As stated above, these exclusions risk exacerbating both.¹⁴⁵

A second countervailing concern is that in other spheres of decisionmaking about alleged law-breakers, participation as judges by those who have been through the system is lauded rather than shunned. Youth courts, for example, in which those

140. *Boney*, 977 F.2d at 642; see also *Hoffman v. State*, 922 S.W.2d 663, 667 (Tex. App. 1996) (mentioning “the wish of the state of Texas to preserve the integrity of its jury system by precluding convicted felons from sitting on juries”).

141. See *supra* Part I.B.

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

143. *Boney*, 977 F.2d at 642; see also MO. REV. STAT. § 561.026 cmt. to 1973 proposed code (2012) (“Many states permit persons with felony records to serve on juries. However, the Committee decided to exclude all convicted felons from jury service (unless pardoned) in order to help maintain the integrity of the jury system.”).

144. See *Leipold*, *supra* note 18, at 986 (noting harm to “public perception of trial fairness” when lawyers remove all African American jurors).

145. See *supra* Part II.A.

who have been held accountable for adjudicated transgressions return to the system in order to determine the fate of someone in their former position, have been widely adopted.¹⁴⁶ Admittedly, the fact that an activity engaged in by young people receives acclaim does not guarantee the same for an adult analog, but the success of this model, under which experience operates as a boon rather than a bar, undermines the assumption that those who have been found guilty are destroyed as fair decisionmakers.

A final countervailing concern relates to the limited conception of the “public” that this reliance on “public perception” seems to adopt. Those with criminal convictions—and those who care about their fate—are members of the public. Indeed, they are a significant portion of the public: in America, one in four adults has a criminal record.¹⁴⁷ Thus, if courts and legislatures care about “public confidence” in verdicts, they must care not only about possible concerns relating to inclusion on juries, but also possible concerns relating to exclusion. Exclusionary policies risk creating a sense of alienation from the law.¹⁴⁸ Policymakers have started to address that sort of risk, through programs such as community policing,¹⁴⁹ and community prosecution.¹⁵⁰ They must also address it as they evaluate policies of jury exclusion.¹⁵¹

146. See THE URBAN INSTITUTE, THE IMPACT OF TEEN COURT ON YOUNG OFFENDERS 2 (2002), available at <http://www.urban.org/UploadedPDF/410457.pdf> (describing youth courts as “very popular,” and estimating their number at more than 800).

147. BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS 15 (2008), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf>.

148. See Johnson, *supra* note 71, at 193 (“Attention should be given to whether barring felons from jury service continues to make sense in light of what we suspect about unequal operation of the modern criminal justice system. The racially skewed impacts of the criminal justice system have ripple effects on jury service and tends to diminish Latina/o representation on civil and criminal juries, thus undermining the legitimacy of the judicial system in the eyes of the Latina/o community.”).

149. Community policing emphasizes partnership with the community, in order to achieve goals such as “crime prevention [and] order maintenance.” Matthew J. Parlow, *The Great Recession and Its Implications for Community Policing*, 28 GA. ST. U. L. REV. 1193, 1197 (2012).

150. Community prosecution expands the goals of community policing into the prosecution context, emphasizing the importance of “increased community input.” Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 368 (2004).

151. See Leipold, *supra* note 18, at 1007 (“The proper working of the criminal process depends on broad societal support for its goals and methods; these

B. JUROR CHARACTER

Exclusions of those with criminal convictions are often justified on the basis that certain character flaws are revealed by a criminal conviction and are inconsistent with jury service.¹⁵² Indeed, one of the purported benefits of a statutory system of exclusions was that it marked a move away from the earlier method of discretionary “good character” determinations by jury commissioners and toward objectivity¹⁵³: the statutory system held out the promise of a clear and objective divide between those who had convictions and were therefore unfit and those who had none and were therefore fit.

Thus, on the basis of criminal convictions, courts make a variety of assumptions about the nature of potential jurors’ character and their resultant unfitness. One character trait that is commonly said to be missing in those with felony convictions, and is therefore used to justify jury exclusion, is “probity.”¹⁵⁴ In addition, according to one court, those with felony con-

can be best understood by those who have listened, deliberated, and pronounced a verdict on a fellow citizen.”); Tom Tyler & Jonathan Jackson, *Future Challenges in the Study of Legitimacy and Criminal Justice* 17 (Yale Law Sch., Public Law Working Paper No. 264, 2013), available at <http://ssrn.com/abstract=2141322> (noting the great importance of “moral alignment—the belief that the police, the courts and the law enforce shared community values that reflect the person’s sense of what is right”).

152. See, e.g., New Mexico Fiscal Impact Report, H.B. 0531, available at <http://nmlegis.gov/Sessions/06%20Regular/firs/HB0531.pdf> (2006) (“[The Office of the Attorney General] asserts that restricting felons from juries would assist in ensuring that juries consist of law-abiding citizens of approved integrity, good character, and sound judgment who are most likely to perform their jury service with the proper respect for the law.”).

153. See *Anderson v. State*, 542 So. 2d 292, 302 (Ala. Crim. App. 1987) (“It is obvious that the [relevant federal statutes] seek to limit disqualification to a few objective factors that most would agree are disabling. The effect should be to eliminate subjectivity in the selection process and increase the representativeness of the panel.” (quoting *HALE STARR & MARK MCCORMICK, JURY SELECTION* 35 (1985))).

154. See *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) (excluding those with felony convictions is rationally related to the legitimate interest in protecting the probity of juries); *United States v. Foxworth*, 599 F.2d 1, 4 (1st Cir. 1979) (the disqualification laid out by the federal statute “is intended to assure the ‘probity’ of the jury” (quoting H.R. REP. No.90-1076, at 1796)); *State v. Madoil*, 12 Fla. 151, 163 (1867) (noting that if a juror had been convicted of an infamous crime, it would be the duty of the appellate court to award a new trial, “for juries must be ‘probi et legales homines’”); H. R. REP. No. 90-1076, at 1796 (“The bill . . . contains some guarantee of ‘probity’ at least to the extent that persons are disqualified who have charges pending against them for, or have been convicted of, a crime punishable by imprisonment for more than one year.”).

victions “are generally less trustworthy and responsible than others,” and cannot be counted on to be “fair.”¹⁵⁵ Some courts center their concern on *moral* character, as in Texas, where there is said to be a “great interest in protecting against the “pollution of [the state’s] jury system” by excluding from jury service those “persons whose moral status has been judicially established as criminal.”¹⁵⁶

In the criminal justice system as currently configured, this criterion fails to justify automatic exclusion: it fails with sufficient accuracy to sort those who have violated the law from those who have not, and it fails to supply an adequate proxy for a character unfit for jury service.

First, the label of “criminal conviction” fails with sufficient accuracy to sort those who have violated the law from those who have not.¹⁵⁷ The increasingly prominent phenomenon of the wrongful conviction provides one obvious illustration.¹⁵⁸ The risk of wrongful convictions may be particularly high with alleged misdemeanors, since the means of determining guilt are particularly blunt, or nonexistent, in those cases.¹⁵⁹ Yet common to both felony and misdemeanor charges is the overwhelming pressure to take a plea,¹⁶⁰ and the limited judicial oversight

155. *United States v. Boney*, 977 F.2d 624, 642 (D.C. Cir. 1992) (Randolph, J., dissenting in part and concurring in part); see *United States v. Evans*, 192 F.3d 698, 701 (7th Cir. 1999) (holding that “grand theft” is a “serious crime,” which could have provoked a peremptory challenge “based on concerns about [the previously convicted juror’s] truthfulness, her commitment to following the law or her attitude towards the criminal justice system”); *State v. Prince*, 250 P.3d 1145, 1159 (Ariz. 2011) (en banc) (“Section 21–201 [disqualifying those with felony convictions] sets forth general qualifications for jury service and reflects the policy that jurors should be ‘citizens who uphold and obey the law.’” (quoting *State v. Bojorquez*, 535 P.2d 6, 12 (Ariz. 1975))).

156. *Amaya v. State*, 220 S.W. 98, 99 (Tex. Crim. App. 1920).

157. See Symposium, *Preliminary Report on Race and Washington’s Criminal Justice System*, 35 SEATTLE U. L. REV. 623, 637 (2012) (“Conviction rates are not a valid proxy for commission rates.”); cf. *Bojorquez*, 535 P.2d at 12 (“Requiring jurors to be electors attempts to insure that citizens who uphold and obey the law will be selected as jurors to discharge the responsibility of jury service.”).

158. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 570 (2001) [hereinafter Stuntz, *Pathological Politics*] (“[T]he criminal process as it is currently constructed tends to narrow the gap between the odds of convicting the guilty and the odds of convicting the innocent.”).

159. Natapoff, *Misdemeanors*, *supra* note 72, at 1370 (“[T]he misdemeanor process widely confers criminal records . . . on potentially innocent people without checking whether they are actually guilty or not.”).

160. See Cahill, *supra* note 109, at 853 (“Well over ninety percent of cases

of the plea bargaining process.¹⁶¹ Nor are the vulnerabilities of this sorting device limited to the final stages of a case. The criminal justice system is made up of a series of discretionary decisions that help determine who ends up with a conviction, and who does not¹⁶²: whether an alleged crime is reported;¹⁶³ where, whom, and how to police;¹⁶⁴ whether to arrest;¹⁶⁵ whether and how to charge;¹⁶⁶ whether to dismiss,¹⁶⁷ divert,¹⁶⁸ or par-

are resolved with guilty pleas, almost all of which involve plea bargains, trading off a lesser amount of punishment in return for a certain conviction. The federal sentencing guidelines make the 'plea discount' explicit by reducing an offender's guideline sentence if he 'clearly demonstrates acceptance of responsibility,' which generally requires a plea of guilty." (quoting U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2006)); Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 84–86 (asserting that "it is clear that plea-bargaining has an innocence problem," and surveying estimates).

161. See Cahill, *supra* note 109, at 817 (stating that in the area of plea bargaining, federal prosecutors engage in "unguided and unreviewable exercises of prosecutorial discretion in individual cases").

162. See Douglas Husak, *Is the Criminal Law Important?*, 1 OHIO ST. J. CRIM. L. 261, 268–69 (2003); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) [hereinafter Stuntz, *Uneasy Relationship*] ("[T]he criminal justice system is characterized by extraordinary discretion—over the definition of crimes (legislatures can criminalize as much as they wish), over enforcement (police and prosecutors can arrest and charge whom they wish), and over funding (legislatures can allocate resources as they wish).").

163. See DEPT OF JUST., BUREAU OF JUST. STAT'S, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992–2000 at 3 (2002) (suggesting that 54% of alleged rapes are not reported to the police).

164. Jeffrey Fagan, *Legitimacy and Criminal Justice*, 6 OHIO ST. J. CRIM. L. 123, 125 (2008) ("The search for drugs has animated policing practices that increase racial disparities in encounters with the police, and also disparities in the ratings and outcomes of those encounters."); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 784 (2006) (local police and prosecutors "focus too much attention on the crimes of the poor and too little on the crimes of the middle class").

165. See Stuntz, *Pathological Politics*, *supra* note 158, at 506 ("[T]he law does not by itself determine who is and isn't punished. Some criminals evade detection, police and prosecutors frequently decline to arrest or charge, and juries sometimes refuse to convict.>").

166. Husak, *supra* note 162, at 269 (stating that "relevantly similar" people who are prosecuted may be charged with different crimes).

167. See BESIKI KUTATELADZE ET AL., DO RACE AND ETHNICITY MATTER IN PROSECUTION? A REVIEW OF EMPIRICAL STUDIES, VERA INSTITUTE OF JUSTICE (2012) (identifying six prosecutorial discretion points: initial screening, pre-trial release and bail procedure, dismissal, charge reduction, guilty plea, and sentencing).

168. See *Willacy v. State*, 640 So. 2d 1079, 1082 (Fla. 1994) (holding that a juror was not statutorily disqualified under a state statute disqualifying, *inter alia*, those "under prosecution for any crime," since the juror was enrolled in

don;¹⁶⁹ whether to offer something in return for a plea bargain,¹⁷⁰ or for cooperation,¹⁷¹ and if so what; whether the jurors—or, in some states, most of the jurors¹⁷²—make the subjective decision to convict;¹⁷³ whether defense attorneys have the wherewithal to bring a successful defense or appeal.¹⁷⁴ Where there is discretion there is the risk of disparity,¹⁷⁵ and indeed racial and/or ethnic disparities have been found at each of the main points of prosecutorial discretion.¹⁷⁶ Where there is discre-

“pretrial intervention program,” and “[p]retrial intervention is merely an alternative to prosecution” (quoting *Cleveland v. State*, 417 So. 2d 653, 654 (Fla. 1982) (holding that “[t]he pretrial intervention program is merely an alternative to prosecution and should remain in the prosecutor’s discretion”))).

169. See Dafna Linzer & Jennifer LaFleur, *Presidential Pardons Heavily Favor Whites*, PRO PUBLICA (Dec. 3, 2011, 11:00PM), <http://www.propublica.org/article/shades-of-mercy-presidential-forgiveness-heavily-favors-whites>.

170. See Cahill, *supra* note 109, at 817.

171. See Stephanos Bibas, *The Feeney Amendment and the Continuing Rise of Prosecutorial Power to Plea Bargain*, 94 J. CRIM. L. & CRIMINOLOGY 295, 299 (2004) (describing the “inequality and disparities” involved in the awarding of “substantial-assistance departures”); Cahill, *supra* note 109, at 854.

172. See Taylor-Thompson, *supra* note 87, at 1263 (describing the “emerging acceptance of non-unanimous verdicts in criminal cases, in which ten or sometimes nine of twelve jurors are permitted to issue the verdict”).

173. See Gary T. Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 942 (1978) (“[A] trier of fact is free to ignore the evidence in acquitting the defendant.”); Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 144 (1996) (“[C]riminal verdicts are not just findings of historical fact, but expressions of an inescapably subjective consensus reached among jurors who bring discrete viewpoints and perspectives to their deliberations.”).

174. See Stuntz, *Pathological Politics*, *supra* note 158, at 570 n.242 (“Legislatures . . . fund appointed defense counsel at levels that require an enormous amount of selectivity—counsel can contest only a very small fraction of the cases on their dockets, and can investigate only a small fraction of the claims their clients might have . . . The consequence is to steer criminal litigation away from the facts, and toward more cheaply raised constitutional claims. Those claims tend not to correlate with innocence; or, if they do, the correlation may be perverse.”).

175. See Johnson, *supra* note 71, at 193 (“[T]he racial overlay to the criminal justice system in the United States strongly suggests that the criminal laws are unevenly enforced. Race-based law enforcement has plagued the nation for centuries and continues to do so.” (citations omitted)).

176. See KUTATELADZE ET AL., *supra* note 167, at 7–16 (citing empirical research showing racial and/or ethnic disparities at each of six prosecutorial discretion points); M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Charging and Its Sentencing Consequences* 7–16 (Program in Law & Econ., Working Paper No. 12-002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1985377 (demonstrating charging disparity in federal district court).

tion there is also the risk of bias,¹⁷⁷ and indeed indications of implicit, or unconscious, bias, have been found in key criminal justice decisionmakers: police officers,¹⁷⁸ judges,¹⁷⁹ defense attorneys,¹⁸⁰ prosecutors,¹⁸¹ and juries.¹⁸² Caseload pressures affecting these decisionmakers increase the risk of arbitrariness.¹⁸³

Second, the label of “criminal conviction” fails to supply an adequate proxy for a character unfit for jury service.¹⁸⁴ Both the law and those alleged to have violated it complicate the purported connection. With regard to the law, convictions can oc-

177. See Stuntz, *Uneasy Relationship*, *supra* note 162, at 5 (“In a system so dominated by discretionary decisions, discrimination is easy.”).

178. See Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1317–18 (2002).

179. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1196–97 (2009).

180. See Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1555 (2004).

181. See Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 884 (2009) (“[E]ven after controlling for legally relevant factors, race and gender affect charging and sentencing decisions.”).

182. See Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 207–08 (2010). The case of presidential pardons is also worth considering. A recent study indicated that African Americans are four times less likely to succeed in their pardon applications than Whites. Linzer & LaFleur, *supra* note 169 (noting that a Justice Department official was unable to offer an explanation).

183. See Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 601–02 (2005) (“Extreme docket pressure characterizes DAs’ offices Local police, on whom district attorneys must depend, also labor under severe resource constraints.”); Stuntz, *Pathological Politics*, *supra* note 158, at 570 n.242 (“[L]egislatures . . . fund appointed defense counsel at levels that require an enormous amount of selectivity—counsel can contest only a very small fraction of the cases on their dockets, and can investigate only a small fraction of the claims their clients might have.”).

184. Unfairness, after all, is not a crime. See Yankah, *supra* note 127, at 1037 (“[C]riminal punishment is an ill-conceived proxy for punishing character.”). One Texas court appeared to acknowledge that at least some convictions may stem from something other than malignant character—even while holding fast to such a connection in other contexts. *Loredo v. State*, 47 S.W.3d 55, 58 (Tex. Ct. App. 2001) (“While certainly not wanting to condone or trivialize the effects of petty theft, it must be noted that such theft is frequently the result of spur-of-the-moment impulses or compulsions or even of pranks or dares. It certainly does not require or evidence the kind of planning, the dishonesty, the moral turpitude, or the disdain for our laws and institutions intrinsic to bribery, perjury, and forgery, and even higher levels of theft.”).

cur in the absence of any culpable mental state,¹⁸⁵ and in the absence of any understanding that the law is being broken.¹⁸⁶ As Doug Husak writes, “[it] is hard to believe that many of us have not committed countless state and federal offenses.”¹⁸⁷ With regard to those alleged to have violated the law, the prevalence of social disadvantage among those who are convicted complicates the notion that it is character flaws that are responsible for criminal convictions.¹⁸⁸

Even with regard to felony convictions, the same types of objections exist. First, the distinction between felony and misdemeanor convictions is a less than solid basis on which to rest this civic exclusion. Far from having a fixed referent, the label of “felon” has been applied increasingly broadly,¹⁸⁹ as the number of felonies has expanded,¹⁹⁰ and the number of people with

185. See *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000) (finding that felony driving while intoxicated does not require a culpable mental state); Jeffrey A. Meyer, *Authentically Innocent: Juries and Federal Regulatory Crimes*, 59 HASTINGS L.J. 137, 137 (2007) (“For a wide range of the most commonly charged federal crimes, judges routinely instruct juries to convict defendants *regardless of their moral culpability*—that is, even if there is no proof or finding that the defendant knew she was doing something wrong.”).

186. See Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 739–40 (2012) (suggesting that mistake of law doctrine should be reconsidered in light of the fact that with over 300,000 ways of violating the federal criminal law one can no longer be presumed to know the law).

187. Husak, *supra* note 162, at 268; *id.* at 268–69 (adding that “relatively few of us have actually been punished,” and that “we have been spared through exercises of discretion”).

188. See DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 336 (Erwin Chemerinsky et al. eds., 6th ed. 2008) (explaining that juror qualifications such as “no prior felony convictions” are “standards rather easily met by the middle-class but which easily ensnare the poor”); Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L. L. REV. 1, 11 (2011) (“[L]aw, alone among major disciplines, proceeds . . . as though two individuals raised under radically different circumstances have equal chances to conform their behavior to society’s dictates.”); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 371 (2004) [hereinafter Dolovich, *Legitimate Punishment*]; *id.* at 319 (explaining that an “unjust distribution of society’s goods” means that “citizens will differ dramatically in terms of both the pressures and temptations they face to offend against others, and the economic and moral resources with which they are equipped to resist such pressures and temptations”).

189. See Kalt, *supra* note 7, at 101 (“[T]he fact remains that ostracism means something very different now than it did in the 1970s, when the proportion of felons in the population was less than one-half of what it is today.”).

190. See Johnson, *supra* note 71, at 191 (mentioning the “dramatic expansion of the crimes that constitute felonies”).

felony convictions has grown to more than twenty million.¹⁹¹ At common law, felonies were a narrow group of offenses,¹⁹² all punishable by death,¹⁹³ and all deemed to be “inherently morally wrong.”¹⁹⁴ Now, however, there are “numerous felonies, but not all are serious, or *mala in se*, or life-endangering.”¹⁹⁵ Indeed, Harvey Silverglate estimates that each of us unwittingly commits three felonies a day.¹⁹⁶ The distinction between felony and misdemeanor now seems, as the Supreme Court has put it, “increasingly technical,”¹⁹⁷ and may be detached from measures of relative threat,¹⁹⁸ or of factual guilt.¹⁹⁹ It can be one’s prior record, for example, rather than any difference in the instant offense, that makes that offense a felony rather than a misdemeanor.²⁰⁰ The distinction is not only technical but also discre-

191. Love, *supra* note 19.

192. See Elizabeth Kelly, State v. Fields: *Felony Murder and Psychological Use of a Deadly Weapon*, 65 N.C. L. REV. 1220, 1220 n.1 (1987) (“The common-law felonies, other than murder, were rape, sodomy, robbery, burglary, arson, mayhem, and larceny.”).

193. James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces That Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1445–46 (1994).

194. *Id.*

195. *Id.* at 1447.

196. L. Gordon Crovitz, *You Commit Three Felonies a Day*, WALL ST. J. Sept. 28, 2009, <http://online.wsj.com/article/SB10001424052748704471504574438900830760842.html>.

197. Tennessee v. Garner, 471 U.S. 1, 14 (1985) (“[W]hile in earlier times the gulf between the felonies and the minor offences was broad and deep, today the distinction is minor and often arbitrary. Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies. These changes have . . . made the assumption that a ‘felon’ is more dangerous than a misdemeanor untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies.”); *id.* at 16 n.12 (“White collar crime, for example, poses a less significant physical threat than, say, drunken driving.”).

198. *Id.*

199. See Ted Chiricos et al., *The Labeling of Convicted Felons and Its Consequences for Recidivism*, 45 CRIMINOLOGY 547, 548 (2007) (“The state of Florida has a law [FLA. STAT. § 948.01 (2013)] that allows individuals who have been found guilty of a felony, either by a judge, jury, or plea, to literally avoid the label of convicted felon. Judges have the option of ‘withholding adjudication’ of guilt for convicted felons who are being sentenced to probation. The consequence of this unique labeling event is that offenders who are equivalent in terms of factual guilt can either be labeled a convicted felon or not.”).

200. See, e.g., Smith & Sarma, *supra* note 68, at 405 (“In Louisiana, possession of marijuana is a misdemeanor offense. However, if a person is arrested for marijuana possession, second offense, the district attorney possesses the discretion to choose whether to charge the crime again as a ‘first offense,’ resulting only in a misdemeanor conviction, or the prosecutor can choose to charge the same possession as a marijuana ‘second offense’”); see also

tionary, since the difference between a felony and a misdemeanor conviction can rest on a decision about what to charge;²⁰¹ or what to offer in return for a plea bargain or for cooperation.²⁰² The reality is thus quite different from the assertion, made breezily by one court in upholding the state's exclusions, that "[t]hose who are convicted of felonies freely chose to commit felonies."²⁰³

Second, the label of "felony conviction" fails to supply an adequate proxy for a character unfit for jury service. Felony convictions have expanded beyond the realm of *mala in se* offenses, and can now be attached to *mala prohibita*;²⁰⁴ some felonies are strict liability offenses.²⁰⁵ Regimes of jury exclusion have not kept pace with these changes in the criminal law.²⁰⁶

Methods of determining juror fitness before the current regime of statutory exclusions were flawed: the discretion enjoyed by jury commissioners permitted bias.²⁰⁷ Yet, in the move toward a purportedly objective standard the discretion and bias have not been shed. Rather, they persist, sprinkled throughout the criminal justice system, and undermine the validity of automatic exclusions based on criminal convictions.

ARK. CODE ANN. § 5-65-111 (LexisNexis 2012) (determining which driving while intoxicated offenses constitute felonies based on prior record).

201. See Smith & Sarma, *supra* note 68, at 405 (explaining that "second offense" marijuana possession is a felony that carries a maximum of five years imprisonment).

202. See Montré D. Carodine, *Keeping It Real: Reforming the "Untried Conviction" Impeachment Rule*, 69 MD. L. REV. 501, 547 (2010) ("In the prosecutor's decision whether to charge and then offer a plea deal, the strength of the case against a defendant in reality might not factor at all.").

203. State v. Crocker, 982 P.2d 45, 48 (Or. Ct. App. 1999).

204. See Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 657 (2006).

205. See, e.g., Perez v. State, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000) (felony driving while intoxicated does not require a culpable mental state).

206. See Morissette v. United States, 342 U.S. 246, 250 n.4 (1952) ("Historically, our substantive criminal law is based on a theory of punishing the [vicious] will. It postulates a free agent confronted with a choice between doing right and doing wrong, and choosing freely to do wrong.").

207. See Kalt, *supra* note 7, at 178.

C. THE “PURITY” OF THE JURY

The exclusion of those with criminal records is often justified as necessary to maintaining jury “purity.”²⁰⁸ In the view of one court, for example:

[i]t cannot be said that [the ‘purity and efficiency’ guaranteed to the Texas jury system by the state constitution] 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.²⁰⁹

Another court criticized a Texas statute on the grounds that it “allow[ed] juries to be empaneled with persons who have been ‘convicted of bribery, perjury, forgery or other high crimes,’ thereby destroying the jury’s purity.”²¹⁰

These invocations of purity rest, when they occur in Texas, on a misunderstanding. The misunderstanding concerns what the supposedly “pure” entity is. The Texas constitution has, since 1867, contained a provision that “[t]he right to trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.”²¹¹ Texas courts have differed about what the meaning of “its” is. As shown above, some lower courts have interpreted this provision as forbidding the service of those who would pollute the otherwise pure *jury*.²¹² A judge on the Court of Criminal Appeals had to point out that “purity” refers not to jury composition, but rather to the *right*:

The words “purity and efficiency” relate to the right to a trial by jury, not to the jury itself. The purity of the right is maintained by providing the right in all cases for all issues that the jury is required to decide (assuming the right has not been waived).²¹³

208. See, e.g., *Firestone v. Freiling*, 188 N.E.2d 91, 96 (Ohio Com. Pl. 1963) (“It is . . . the duty of a court to preserve the purity of trials by jury.”).

209. *R.R.E. v. Glenn*, 884 S.W.2d 189, 193 (Tex. App. 1994) (rejecting the argument that a state statute could constitutionally permit a judge to restore jury rights of those who have felony convictions and have been successful under community supervision).

210. *Perez v. State*, 973 S.W.2d 759, 761–62 (Tex. App. 1998) (discussing statutory requirement that any motion to reverse a conviction because of a post-verdict discovery of a juror’s lack of qualification be accompanied by a “showing of significant harm by the service of the disqualified juror,” and stating that this “offensive” requirement “does not effect the constitution’s purpose to maintain the purity of the jury’s composition of qualified persons”).

211. TEX. CONST. art. I, § 15.

212. See, e.g., *Perez*, 973 S.W.2d at 762.

213. *Perez v. State*, 11 S.W.3d 218, 222 (Tex. Crim. App. 2000) (Keller, J., concurring).

Yet other jurisdictions invoke “purity” also,²¹⁴ as well as related concepts. Whether the word used is “taint,”²¹⁵ “pollution,”²¹⁶ or “incompetence,”²¹⁷ the language adopted to justify jury exclusion often suggests dehumanization, and a racial subtext.²¹⁸ The notion of the “purity of the jury,” for example, evokes the racialized vision of the “purity of the ballot box,”²¹⁹ a frequent justification for jury exclusion’s closest cousin: disenfranchise-

214. See, e.g., *Firestone v. Freiling*, 188 N.E.2d 91, 96 (Ohio Com. Pl. 1963).

215. See JUROR COMPENSATION AND QUALIFICATION, *supra* note 49 (“A person who has been convicted of a felony might have a tainted view of the criminal justice system and sympathize with a criminal defendant.”).

216. See *Amaya v. State*, 220 S.W. 98, 99 (Tex. Crim. App. 1920) (“[T]he object of the Legislature appears to be . . . the protection of society against the pollution of the jury system by committing its execution to persons whose moral status has been judicially established as criminal.”); Matthew Benjamin, *Possessing Pollution*, 31 N.Y.U. REV. L. & SOC. CHANGE 733, 767 n.276 (2007) (stating that “pollution anxieties have been exploited to justify . . . legal restrictions that continue to have profoundly inequitable consequences, including felon disenfranchisement,” commonly justified on the basis of trying to preserve the “purity of the ballot box”).

217. Jury exclusion is frequently based on the idea of “incompetence.” Tennessee’s statute is entitled “Incompetent Persons.” TENN. CODE ANN. § 22-1-102 (2013); see also MISS. CODE ANN. § 13-5-1 (2013) (defining “competent juror”); UTAH CODE ANN. § 78B-1-105(2) (2013) (“A person who has been convicted of a felony which has not been expunged is not competent to serve as a juror.”); James M. Binnall, *A Felon Deliberates: Policy Implications of the Michigan Supreme Court’s Holding in People v. Miller*, 87 U. DET. MERCY L. REV. 59, 68 (2010) (“While lawmakers once employed the ‘neo-contractarian’ justification for subjecting those with a felony criminal record to civic restrictions, the more contemporary view is that *all* felons are somehow incompetent and unable to fulfill the requisite duties of civic life.”).

218. For racial subtext of “incompetence,” see Cynthia K.Y. Lee, *Race and the Victim: An Examination of Capital Sentencing and Guilt Attribution Studies*, 73 CHI.-KENT L. REV. 533, 534 (1998) (“Racial stereotypes about Blacks being less intelligent and less competent than non-Blacks constituted the subtext underlying much of the criticism of the [O.J. Simpson] verdict and subsequent cries for reform of the jury system.”); Lee, *supra* note 87, at 413 (mentioning “oft-unstated assumption” that “blacks are not necessarily granted a presumption of innocence, competence, or even complete humanity”).

219. See Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 312 (2004) (“Unfortunately, as the Supreme Court held in *Hunter v. Underwood*, Alabama’s felon disenfranchisement provision was designed to maintain white supremacy; the ballot box purity was of the racial variety.”); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and ‘The Purity of the Ballot Box’*, 102 HARV. L. REV. 1300, 1313 (1989) (“The image [of the ‘purity of the ballot box’] suggests not only that former offenders are impure, but also that their impurity may be contagious. It reflects a belief that clear boundaries must be maintained between the attainted criminal and the virtuous citizenry, lest contamination occur.”).

ment. Both types of exclusion have served racially discriminatory ends,²²⁰ and bring continuing racial disparity.²²¹

Even if one were to put racial overtones aside, and consider the notion of a “pure” jury, such a goal seems illusory—and certainly not obtainable through exclusion of one portion of the citizenry. Jury service is a messy business. Jurors are not angelic;²²² juries are not sacrosanct.²²³ Rather, jurors are humans, and they misbehave.²²⁴ For example, the electronic age has given them boundless opportunities to Google or tweet their way into disgrace.²²⁵ In addition, study after study indicates that ju-

220. For disenfranchisement, see *Shaw v. Reno*, 509 U.S. 630, 639 (1993) (noting that “good character” provisos were devised to deprive black voters of the franchise”); *Hunter v. Underwood*, 471 U.S. 222, 227, 229 (1985) (holding that Alabama constitutional provision limiting the franchise based on certain convictions “was enacted with the intent of disenfranchising blacks,” and violated the Fourteenth Amendment); *Louisiana v. United States*, 380 U.S. 145, 153 (1965) (finding that provisions of the Louisiana Constitution and statutes limiting the franchise violated constitutional protection against discrimination in voting). For jury service, see Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 116 (1990) (“During the era of slavery in this country, blacks were viewed as intellectually and morally inferior to whites, and incapable of rendering judgments against them.”); Grant H. Morris, *The Greatest Legal Movie of All Time: Proclaiming the Real Winner*, 47 SAN DIEGO L. REV. 533, 538–39 (2010) (“Jim Crow laws were . . . used to discourage African Americans from registering to vote. Because jurors were selected from voter registration lists, Jim Crow laws prevented African Americans from serving on juries.”).

221. For voting, see Tanya Dugree-Pearson, *Disenfranchisement—A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLIN J. PUB. L. & POL’Y 359, 375–77 (2002). For jury service, see *supra* Part II.A.

222. *United States v. Ippolito*, 10 F. Supp. 2d 1305, 1312 (M.D. Fla. 1998) (“Neither the government nor the defendant is entitled as a matter of right to an angelic and perfectly discerning jury . . .”).

223. See James M. Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73 ALB. L. REV. 1379, 1408–09 (2010) (“[W]hile stopping well short of conceding that the jury system is an ineffective method of administering justice, one can conservatively dismiss the notion that the jury is the type of sacrosanct institution many felon jury exclusion proponents claim necessitates the outright eviction of those who have perhaps committed but one legal indiscretion.”).

224. See *Owens-Corning Fiberglass Corp. v. Mayor of Balt.*, 670 A.2d 986, 1001 (Md. Ct. Spec. App. 1996) (“To be qualified as a juror, one need not have lived a blameless life, nor must a juror be ‘good.’”).

225. See Amanda McGee, Note, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 301–02 (2010); Suzi Parker, *Arkansas Death Row Inmate Gets New Trial Because of Tweets*, REUTERS (Dec. 6, 2011), <http://www.reuters.com/article/2011/12/08/us-crime-twitter-arkansas-idUSTRE7B72C220>

rors assume guilt,²²⁶ often in racialized ways,²²⁷ and put unjustified stock in the credibility of governmental employees.²²⁸ Perhaps the best that can be hoped is that if enough different biases and backgrounds are thrown together, the biases of the various jurors will “cancel each other out,”²²⁹ and that diversity will “beget[] impartiality.”²³⁰ Whereas members of one legislature speculated that the view of the criminal justice system held by someone who has been through it might be “tainted,”²³¹ it might, rather, be a necessary shade in a spectrum of views. The pureness of the vision of the jury is hampered, rather than enhanced, by the exclusion of one portion of human experience, and the concomitant insistence on ignorance.

111208 (reporting that juror tweets were responsible for new murder trial); John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping up*, N.Y. TIMES, Mar. 17, 2009, http://www.nytimes.com/2009/03/18/us/18juries.html?_r=0 (reporting that jurors violated judicial instructions not to conduct independent research).

226. Gertner, *supra* note 99, at 931 (“Studies regularly suggest that juries believe that because someone is accused, they are likely to be guilty.”); *see, e.g.*, Mitchell J. Frank & Dawn Broschard, *The Silent Criminal Defendant and the Presumption of Innocence: In the Hands of Real Jurors, Is Either of Them Safe?*, 10 LEWIS & CLARK L. REV. 237, 248–49 (2006).

227. *See, e.g.*, Levinson et al., *supra* note 182, at 190 (demonstrating that mock jurors “held strong associations between Black and Guilty, relative to White and Guilty, and [that] implicit associations predicted the way mock jurors evaluated ambiguous evidence”).

228. *See supra* Part II.B (discussing how jurors assume prosecutors and police act with integrity even though evidence shows this is not always true).

229. *People v. Wheeler*, 583 P.2d 748, 754–55 (Cal. 1978) (“The rationale of these [Supreme Court cross-section cases], often unstated, is that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out.”). Juror education on the topic of bias may also be effective. *See, e.g.*, Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 868–69 (2012) [hereinafter Roberts, *(Re)forming the Jury*].

230. *State v. LaMere*, 2 P.3d 204, 219 (Mont. 2000) (“American jurisprudence [believes] that a jury constituted of individuals with diverse perspectives, coming from the various classes of society, is greater than the sum of its respective parts and can better arrive at a common sense judgment about a set of facts than can any individual In short, it is believed that diversity begets impartiality.”).

231. *See JUROR COMPENSATION AND QUALIFICATION, supra* note 49.

D. EMBITTERMENT AGAINST THE SYSTEM

Another common justification for the exclusion of those with criminal records from jury service is that those who have been through the system can be assumed to be so embittered by it that they cannot be relied upon to be fair: that voir dire or no voir dire, oath or no oath, instructions or no instructions, they would be too hostile to the state. Thus, for example, one court noted that:

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.²³²

Another state based its exclusion statute on the notion that “[a] person who has been convicted of a felony might have a tainted view of the criminal justice system and sympathize with a criminal defendant,” and that “[s]uch a situation is blatantly unfair to the prosecution and the crime victim.”²³³

The concern about blatant unfairness is undermined by the fact that courts offer no more support for this justification than they do for the others. In one recent case, the Michigan Supreme Court cited a few articles in support of its assertion that “[h]aving been previously convicted of similar offenses, the juror, if anything, likely would have been sympathetic towards defendant.”²³⁴ One of those articles describes such a rationale as a “gross” and “needless” overgeneralization;²³⁵ another describes it as a rationale “without foundation.”²³⁶ The implications and consequences of the “embitterment” rationale are too important to allow the rationale to go uninvestigated. If the assumption of “embitterment” is false, then the grave consequence of civic exclusion should not be allowed to rest on it. If the assumption is true, a deeper response than exclusion of jurors is needed. Investigation is therefore required into whether

232. *Rubio v. Super. Ct.*, 593 P.2d 595, 600 (Cal. 1979) (en banc).

233. JUROR COMPENSATION AND QUALIFICATION, *supra* note 49.

234. *People v. Miller*, 759 N.W.2d 850, 860 & n.19 (Mich. 2008).

235. Kalt, *supra* note 7.

236. See Note, *A Jury of One's Peers: Virginia's Restoration of Rights Process and Its Disproportionate Effect on the African American Community*, 46 WM. & MARY L. REV. 2109, 2137 (2005) (“Disallowing convicted felons to serve as jury members may be unnecessary, as any jury member who is biased may be struck for cause by the judge or by use of a peremptory strike.”).

the criminal justice system can indeed be assumed to embitter beyond fairness those who pass through it.

There are reasons why the assumption that a criminal conviction leads to embitterment against the state might be false.²³⁷ After all, the assumption appears to ignore the fact that many defendants frequently have more complex relationships than purely oppositional ones with the state: many will have cooperated with the state,²³⁸ most will have reached a bargain with the state,²³⁹ and a great many will have been alleged victims of criminal offenses and thus potentially championed by the state.²⁴⁰

On the other hand, there are a host of reasons why the assumption might be accurate. The criminal justice system is suffused with disparities,²⁴¹ is vulnerable to error,²⁴² and is often detached from community notions of justice.²⁴³ Potential causes

237. One federal judge proposed two hypotheses to explain why a juror with a felony conviction might be biased in favor of a guilty verdict. *United States v. Boney*, 977 F.2d 624, 642 (D.C. Cir. 1992) (Randolph, J., dissenting in part, concurring in part). First, the juror “may have developed a callous cynicism about protestations of innocence, having no doubt heard many such laments while incarcerated.” *Id.* Second, the juror’s “desire to show others—and himself—that he is now a good citizen might lead him to display an excess of rectitude, both in his deliberations and in his vote.” *Id.*

238. See Bibas, *supra* note 171, at 299 (“[S]ubstantial-assistance departures . . . occur in more than one-sixth of all [federal] sentences.”).

239. See *Federal Criminal Case Processing Statistics*, BUREAU OF JUST. STAT., <http://bjs.gov/fjsrc/> (follow “Offenders sentenced: tables” hyperlink; then select year “2009”; then select “Case disposition”; then select “All values”; then select “Frequencies” and “Percents”; then select “HTML”) (showing that roughly 96% of those sentenced resolved their cases by guilty plea).

240. Bernard E. Harcourt, *An Institutionalization Effect: The Impact of Mental Hospitalization and Imprisonment on Homicide in the United States, 1934–2001*, 40 J. LEGAL STUD. 39, 44 (2011).

241. See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 322 (2013) [hereinafter Barkow, *Prosecutorial Administration*] (“[A]s mass incarceration stays with us, its glaring racial disparities continue . . .”); Roberts, *Cost of Mass Incarceration*, *supra* note 130, at 1295 (“Residents have good reason to distrust a criminal justice system that has treated them with disrespect, bias, and brutality.”); Michael Rocque, *Racial Disparities in the Criminal Justice System and Perceptions of Legitimacy*, 1 RACE & JUST. 292, 293 (2011) (advancing a theoretical linkage between racial disparity in criminal justice and an individual’s perception of the legitimacy of the law).

242. See GROSS & SHAFFER, *supra* note 102, at 3.

243. See Fagan, *supra* note 164, at 123 (“Surveys of public opinion over four decades consistently show that Americans have little confidence in the fairness or effectiveness of the criminal justice system and criminal law more generally.”); Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1107 (2010) (“One

of embitterment exist throughout the stages of a criminal proceeding. With regard to policing, the methods used may provoke resentment.²⁴⁴ With regard to the court system, having a voice in the system is a crucial aspect of perceived fairness of that system,²⁴⁵ and yet a fear of impeachment and sentencing enhancement often deters defendants from making their voice heard on the witness stand.²⁴⁶ With regard to sentencing, prison terms are often nasty, brutish, and long.²⁴⁷ Conditions of confinement are frequently “gratuitous[ly] inhumane,”²⁴⁸ and leave

may well ask how well current American criminal law matches the community’s intuitions of justice. The short answer is: not well. Modern crime-control programs, such as three strikes, high drug-offense penalties, adult prosecution of juveniles, narrowing the insanity defense, strict liability offenses, and the felony-murder rule, all distribute criminal liability and punishment in ways that seriously conflict with lay persons’ intuitions of justice.”)

244. See Stephen J. Schulhofer et al., *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 351 (2011) (“[I]ntensive law enforcement and a readiness to arrest for low-level offenses is far more likely to arouse resentment, weaken police legitimacy, and undermine voluntary compliance with the law.”).

245. See Tom R. Tyler et al., *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629, 646 (1989) [hereinafter Tyler et al., *Maintaining Allegiance*] (“[S]tudies of the meaning of fair procedure suggest that defendants are very interested in having the opportunity to present their views to decision makers prior to having decisions made about their case.”).

246. For fear of impeachment, see John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 477 (2008) (explaining that defense counsel, in a sample of cases where defendants were convicted despite factual innocence, gave fear of impeachment by prior conviction as the primary reason that their clients did not take the stand). For fear of sentencing enhancement, see Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 877–78 (2008).

247. See Dolovich, *Exclusion and Control*, *supra* note 131, at 265 (noting that sentences are often “grossly disproportionate to the offense”); Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 128 (2009) (explaining that proportionality of punishment is a concern that many prosecutors “routinely ignore”). I borrow the phrase from Thomas Hobbes. THOMAS HOBBS, *LEVIATHAN* 89 (Richard Tuck, ed., Cambridge University Press rev. student ed. 1996) (1651) (“[A]nd the life of man . . . nasty, brutish, and short.”).

248. Dolovich, *Legitimate Punishment*, *supra* note 188, at 437 (“[C]onsider, in light of the state’s obligation to avoid gratuitous inhumane punishments, the conditions of confinement facing inmates at prisons and jails across the country, which strongly suggest that this requirement is routinely being violated. The widespread incidence of rape and sexual assault in prisons and jails and the ongoing threat of such abuse, which is a permanent aspect of incarceration at many prisons, would alone serve to prove the point.”); *see also id.* at 439 (describing prison overcrowding that not only exacerbates the risk of sexual and other violence and coercion but also “depriv[es] inmates of the min-

enduring effects.²⁴⁹ To say that long and tedious periods of incarceration are tantamount to “warehousing” is to be overly generous: warehouses are, at least, supposed to keep items in a stable condition.²⁵⁰ Human beings, however, are not items; they decline.²⁵¹

If the assumption is well-founded, exclusion from jury service as a result is an inapt response. It is an amputation of one portion of the body politic in lieu of treatment, or even diagnosis, or even investigation, of the underlying condition. Automatic, cost-free exclusions on the basis of assumed embitterment permit the state to avoid the consequences of something potentially very wrong with the state.

The criminal justice system is not supposed to embitter those who pass through it to such an extent that they cannot be fair. Theories of punishment do not advocate such an arrangement,²⁵² and theories of procedural justice run directly counter

imum physical space humans need to preserve a sense of self”); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 113 (2007) (“American punishment has become degrading, indecent, and undeservedly harsher despite a Constitution designed to protect people from infliction of excessive punishment The indecency of punishment is compounded when individuals are sentenced to live in institutions where they suffer substantial physical and psychological harm.”).

249. See Craig Haney, *Counting Casualties in the War on Prisoners*, 43 U.S.F. L. REV. 87, 107 (2008) (“[P]eople who are subjected to extreme forms of imprisonment can be psychologically harmed—sometimes irreparably so—by the experience. Moreover, most prisoners cannot leave the psychic scars of these experiences miraculously behind them upon release, just as most people cannot simply choose to set aside the aftereffects of damaging, traumatic events.”).

250. See Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 72–73 (2003) (“If not provided with mental stimulation and human interaction, [humans] tend to deteriorate; if not given an opportunity to practice acquired skills, those skills that they possess become impaired, thereby reducing the person’s economic value to himself and to society. Thus, even a good warehouse would provide prisoners with many of the programmatic features we identify as rehabilitative, and a good prison would certainly include those features.”).

251. See *id.* at 72.

252. Note that one of the stated requisites of a federal sentence is “to promote respect for the law.” 18 U.S.C. § 3553(a)(2)(A) (2012); see also Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 342 (2007) (“The point of punishment is not to ostracize criminals into a permanent underclass, embittered and tempted to revictimize a society that shuns them.”). Many scholars note the apparent abandonment of traditional theories of punishment in a penal system that represents a “war on prisoners.” See, e.g., Craig Haney, *Politicizing Crime and Punishment: Redefining “Justice” to Fight the “War on Prisoners”*, 114 W. VA. L. REV. 373, 376 (2012); Robert Weis-

to the unquestioning acceptance of the “embitterment” rationale.²⁵³ For example, Tom Tyler and his colleagues’ work demonstrates that those who have been through the criminal justice system—even those who have incurred felony convictions²⁵⁴—do not necessarily view the criminal justice system as unfair,²⁵⁵ and that this is a precious thing, since perceived fairness helps bring about compliance with legal regimes.²⁵⁶ The functioning of the criminal justice system relies on acceptance from those affected by it; it cannot run on embitterment.²⁵⁷

berg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1207 (2012) (“[O]ur standard litany of punishment theories is simply irrelevant to the reality we confront It is a system that, deliberately or not, reinforces the economics and demographics of diminished social status, and does so in reckless disregard of its measurable consequences.”); *see also* Dolovich, *Exclusion and Control*, *supra* note 131, at 261 (“[T]he more familiar way[] of construing the penal system [is] as the means to achieve retribution or to ensure public safety by deterring or otherwise preventing the commission of crime. But a close look at the way the system actually operates makes clear the poor fit between these more conventional explanations and the realities of American penal practice.”).

253. *See* Schulhofer et al., *supra* note 244, at 345–46 (“The procedural justice concept captures the fairness of the process used to make and apply rules and the quality of the personal treatment people receive from authorities.”).

254. Indeed, the more serious the case, the more study participants placed weight on perceived procedural fairness in evaluating their experiences. Tyler et al., *Maintaining Allegiance*, *supra* note 245, at 641 n.6.

255. *See* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 53 (2002) (noting that in one survey over 70% of participants “felt that the authorities with whom they dealt used fair procedures and that they treated people fairly”); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC’Y REV. 483, 494 (1988) (finding that procedural justice made a “significant and independent contribution” to three separate measures of litigant satisfaction, even for litigants facing felony charges and punitive outcomes); Tom R. Tyler, *The Psychology of Procedural Justice: A Test of the Group-Value Model*, 57 J. PERSONALITY & SOC. PSYCHOL. 830, 837 (1989) (finding that a sense of fair treatment rather than outcome is a better predictor of satisfaction with treatment by legal authorities); Tyler et al., *Maintaining Allegiance*, *supra* note 245, at 645 (“[T]he government can influence the impact of negative outcomes on allegiance by delivering those outcomes through procedures that citizens will view as fair.”).

256. *See* Schulhofer et al., *supra* note 244, at 338; Tyler et al., *Maintaining Allegiance*, *supra* note 245, at 631 (viewing the law as a “positive and benevolent force that is fairly and equally applied across citizens” increases behavioral obedience to the law); *id.* at 645 (“[T]he manner in which citizens are treated is a key factor in the impact of their experiences on views about law and government.”).

257. Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 1995–96 (2010) (“[E]ffective operation of the criminal justice system depends upon the cooperation, or at least the acquiescence, of those involved in it—offenders, judges, jurors, witnesses, prosecutors, police, and others. To the

Thus, if there is concern about the criminal justice system causing embitterment, the answer is not automatic exclusion, but careful investigation; if necessary, as discussed in the next Part, incentives should be adjusted so that such investigation is more likely to occur.

IV. THE PROPOSAL

This Part puts forth a proposal in response to two conclusions: first, that the justifications given for automatic exclusions do not outweigh the harms that these exclusions cause, and second, that the state should not be permitted to invoke the “embittered against the state” assumption without litigation cost. It then explains the proposal’s scholarly context, before discussing necessary corollaries, and possible objections, to the proposal.

This Article’s proposal is that automatic exclusions based solely on a potential juror’s criminal record—whether effected through mailing of summonses only to those on the voting rolls, statutory disqualifications, or automatic granting of challenges for cause—should be abandoned. Discretionary granting of challenges for cause where jurors have a demonstrated bias should remain available. Where there is no demonstrated bias, the peremptory challenge should be the only means by which attorneys can remove jurors with criminal convictions. This combination of discretionary challenges for cause and peremptory challenges has been deemed a sufficient screening mechanism in the case of complaining witnesses,²⁵⁸ and in the case of

extent that people see the system as unjust—as in conflict with their intuitions about justice—acquiescence and cooperation are likely to fade and be replaced with subversion and resistance.”).

258. In the case of Texas, for example, where a misdemeanor theft conviction or any felony conviction mean exclusion for life, as do pending charges for the same offenses, parallel exclusions have been rejected for complaining witnesses. See *Rubio v. Super. Ct.*, 593 P.2d 595, 609 (Cal. 1979) (en banc) (Tobriner, J., dissenting) (“[J]ust as pro-defendant bias is presumed of ex-felons by the exclusionary scheme, the converse corollary presumption of prosecution bias on the part of victims of crimes would dictate their automatic exclusion as well. I fail to see how the state can reasonably differentiate between these groups in its effort to assure jury impartiality.”); *Janecka v. State*, 739 S.W.2d 813, 834–35 (Tex. Crim. App. 1987) (rejecting the constitutional claim that automatic exclusion of those under indictment for a theft or any felony should be paired with an automatic exclusion of those who are complaining witnesses in pending cases, and noting that where those in the latter group can be shown not to be impartial, they “can of course be excluded for cause”).

law enforcement.²⁵⁹ It has been deemed a sufficient screening mechanism in the case of those who, while lacking a criminal record, share the same character traits used to justify these automatic exclusions: unreliability, lack of integrity, dishonesty, bias, and so on.²⁶⁰ In the absence of any reliable data to the contrary, it should be deemed a sufficient screening mechanism in the case of those with criminal convictions. In addition, this proposal would add a litigation cost to those exclusions that are made on the basis of an assumed embitterment against the state, since the party that invokes this justification most often—the prosecution²⁶¹—would use up one of a finite number of peremptory challenges each time it did so.²⁶² If those who pass through the criminal justice system are embittered against the state, this proposal aims to incentivize the prosecution to reflect upon its role in a system assumed to be embittering, and upon its ability to investigate and address possible causes of embitterment. Thus, this proposal joins recent scholarly proposals that have suggested adjustments to prosecutorial incentives elsewhere in the criminal justice system. It asserts, as do those other recent proposals, that in the criminal justice system as currently configured there are few incentives for the state to address the status quo hinted at in the “embitterment” rationale: a system so damaging as to preclude fair judgment by its alumni.²⁶³

259. See *State v. Ballard*, 747 So. 2d 1077, 1080 (La. 1999) (rejecting automatic disqualification of law enforcement officers in favor of discretionary ruling on cause challenge, and emphasizing the deference owed to the trial judge, “who is in the most favorable position to determine whether a prospective juror can serve impartially”).

260. As Dolovich puts it, we are all “human beings, with all the qualities of impulsiveness, bad judgment, proneness to error, and other limitations this status entails.” Dolovich, *Legitimate Punishment*, *supra* note 188, at 319; *id.* at 368 (“[H]uman beings are not infallible. We make mistakes. We make bad judgments. We act on impulse, and in haste. And often, when we do so, we do wrong to others.”).

261. See, e.g., Lance Salyers, Note, *Invaluable Tool v. Unfair Use of Private Information: Examining Prosecutors’ Use of Jurors’ Criminal History Records in Voir Dire*, 56 WASH. & LEE L. REV. 1079, 1088 (1999) (explaining that Virginia prosecutors argued they should be able to use prospective jurors’ criminal history records as a means of detecting bias against the state (citation omitted)).

262. For an exploration of the influence of litigation costs on prosecutorial behavior, see Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 646–47 (1972).

263. See Smith & Sarma, *supra* note 68, at 406 (“[W]ith a felony record, offenders cannot participate to effectuate change by sitting in judgment of an-

Few incentives exist at any level of government to address such a status quo.²⁶⁴ There are few incentives at the legislative level, because neither those with criminal convictions,²⁶⁵ nor those who have been in prison,²⁶⁶ nor excluded jurors,²⁶⁷ have a powerful lobbying voice,²⁶⁸ let alone those who may fall into all three groups.²⁶⁹ What power they may once have had, in the form of the vote, may be gone.²⁷⁰ There are also few incentives at the prosecutorial level, due to a lack of prosecutorial ac-

other defendant on a criminal jury. Discrimination by design has contributed to self-sustaining structural inequality.”).

264. See Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 717 (1996) (“[N]o one is currently held accountable for the successes or failures of the criminal justice system.”).

265. See Demleitner, *supra* note 119, at 158–59.

266. See Roberts, *Cost of Mass Incarceration*, *supra* note 130, at 1292 (“Neighborhoods with large percentages of current and former inmates lack the political clout to influence policies and demand services.”); *id.* at 1295 (“The critical insight from sociological theory is that prison policy destroys the social networks and resources necessary for communities to have a say in the political process and to organize local institutions to contest unjust policies. This concrete interference with political capacity creates and reinforces social norms that question the effectiveness of collective efforts to produce social change. Mass imprisonment impairs community structures and norms that would channel resistance to systemic injustice in productive directions.”).

267. Leipold, *supra* note 18, at 987.

268. See Rubin, *supra* note 250, at 59 (“Ever since the first George Bush struck a devastating political blow to his opponent with the Willie Horton case, elected politicians have been terrified to recommend anything less than increased severity for criminals.”).

269. See Natapoff, *Speechless*, *supra* note 17, at 1490 (“The democratic decisional process that creates criminal laws, mandatory minimum sentences, sentencing guidelines, felon disenfranchisement laws, and registration requirements—in other words, all the punishments and burdens imposed on criminal defendants—takes place without hearing from defendants who are in the process of being subjected to those very laws. Once convicted and incarcerated, defendants continue their exclusion from the public debate. Their silence begins in prison, and continues upon release, not least because of felony disenfranchisement laws and defendants’ inability to hold public office. Defendants do not even have good proxy speakers: Their actual representatives—their attorneys—are constrained by the exigencies of litigation and sworn to secrecy. Moreover, there are very few interest groups who speak for defendants within the political process. Since First Amendment self-governance theory holds that the political process derives its legitimacy from the opportunity for expressive participation, defendants’ lack of parliamentary floor time renders their treatment by the criminal system deeply suspect.”).

270. See Barkow, *Prosecutorial Administration*, *supra* note 241, at 314 (“With the exception of white collar defendants facing certain regulatory and corporate crimes, generally most criminal defendants are dispersed, disorganized, poor, and in many instances, barred from voting. . . . Other groups that may share an interest in criminal defendants’ rights are similarly powerless, particularly as compared to law enforcement.”).

countability,²⁷¹ the dominance of the pressure to convict,²⁷² and the externalization of many of the costs of prosecution.²⁷³ Indeed, prosecutorial incentives tend to point toward harshness of the consequences of conviction, so that bargaining leverage may be maximized.²⁷⁴

Recent scholarly proposals have highlighted various components of the criminal justice system in which prosecutorial incentives might be altered with the aim of bringing about reform, or at least awareness.²⁷⁵ Thus, Robert Smith and Justin Levinson have proposed that prosecutors could be encouraged, “perhaps with housing or tax incentives,”²⁷⁶ “to live in neighborhoods “disproportionately impacted by the charging decisions made by the district attorney’s office.”²⁷⁷ Adam Gershowitz has urged that state officials send monthly bulle-

271. Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1365 (1987) (“[F]ew operate in a vacuum so devoid of externally enforceable constraints.”).

272. See Rachel E. Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 CARDOZO L. REV. 2089, 2091 (2010) (“[C]onvictions are the lodestar by which prosecutors tend to be judged.”).

273. See Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 105 (2011) (pointing out that prosecutors externalize, and thus fail to take into account, the costs of incarceration and public defense, and proposing that prosecutors be required to reveal to voters the costs that they are incurring or anticipate incurring, so that the costs can be internalized and can shape decisions about whether to charge, what to charge, and what sentences to recommend); Misner, *supra* note 264, at 719 (“The current flaw in the evolving power of the prosecutor is the failure to force her to face the full cost of prosecutorial decisions.”); *id.* at 720 (explaining that because incarceration driven by local prosecutors is paid for by the state, “the prosecutor has little incentive to create prosecutorial guidelines, to become an active participant in crime prevention programs, or to find less costly means of punishment”).

274. See Barkow, *Prosecutorial Administration*, *supra* note 241, at 312 (“[N]ot only do [prosecutors] have an interest in longer sentences and mandatory punishments, they also have an interest in opposing corrections reforms that make the conditions of confinement more relaxed or that result in earlier release times. Anything that makes the threat of a sentence after trial less severe limits their bargaining power to some extent.”).

275. See Gold, *supra* note 273, at 73 (outlining a proposal to ensure that prosecutors consider “previously overlooked costs” created by prosecutorial decisions).

276. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 826 (2012).

277. *Id.* Similarly, Eric Miller argues that “former felons” should be included in the grand jury, since “[l]ocalism and community participation may be even more beneficial if . . . those communities that feel threatened by drug policy are given the means of resisting and redirecting it.” Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL’Y REV. 417, 457 n.244 (2009).

tins to prosecutors, detailing state incarceration rates and prison overcrowding, in the hope that they bear this information in mind when they choose plea offers.²⁷⁸ Robert Misner has suggested that county prosecutors, who drive incarceration in state prisons, and yet do not have to pay for it, should be allocated an imprisonment budget, and should be billed if they splurge beyond it.²⁷⁹

Thus, scholars are asking how one might force open eyes that currently are allowed to remain shut,²⁸⁰ and how one might bring to bear on a costly system some of the costs that it is producing.²⁸¹ They seek ways in which prosecutors might be moved from their comfort zones in terms of neighborhood, or in terms of freedom to resolve cases through imprisonment. They seek ways to end what Robert Weisberg calls the “reckless disregard of [the] measurable consequences” of the penal system.²⁸²

Having laid out the proposal and its scholarly context, this Part now addresses some of the corollaries that it would require, and some of the objections that it might inspire.

A. THE NEED TO POLICE PEREMPTORY CHALLENGES

The first corollary relates to the proposal that attorneys wanting to challenge people with criminal records would have to do so in the peremptory phase, absent a showing of individu-

278. Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 65 (2008). The proposal is based on a sense that prosecutors are insufficiently informed of, or constrained by, the resource deficiency in the rest of the criminal justice system. *Id.* at 49.

279. See Misner, *supra* note 264, at 720 (stating that the “thrust of [his] article is to attempt to find a mechanism for tying the exercise of prosecutorial discretion to the availability of prison resources”).

280. See Gershowitz, *supra* note 278, at 49 (“On a day to day basis, most prosecutors are probably not cognizant of the lack of resources held by the rest of the criminal justice system. It is safe to assume that when prosecutors walk into court, they do not ask themselves whether there is sufficient funding to provide lawyers for all indicted defendants or whether there are enough prison or jail beds for everyone who will be convicted.”); Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 506 (1998) (“If a case cannot stand examination by twelve jurors who fairly represent the community, it *should* fail. . . . And if race relations are so bad in a jurisdiction that adherence to [a set of ethical standards proposed by Professor Johnson in the *Batson* context] produces more than a few wrongful acquittals, it is time for everyone to know about it.”).

281. See Gold, *supra* note 273, at 105.

282. Weisberg, *supra* note 252, at 1207; *id.* at 1218 (“The incarcerated are invisible and therefore we do not observe the powerful engine of future economic misery [that prison] operates.”).

al bias. If exclusions are to be funneled into the peremptory phase, it is particularly important to police the use of criminal convictions as a pretext for purposeful discrimination at that stage. The peremptory phase is already widely viewed, despite the *Batson* protections, as a hotbed of purposeful discrimination masked by ostensibly “race-neutral” reasons for challenges.²⁸³ Particular concern centers on the fact that connection to the criminal justice system is one of the primary justifications that prosecutors give in response to *Batson* claims alleging racial or ethnic discrimination.²⁸⁴ Thus, the use of peremptory challenges must be more closely policed, in order to minimize the risk that they are used to effect purposeful racial or ethnic discrimination. This increase in policing needs to occur regardless of whether any changes are made to existing jury selection procedures.²⁸⁵

B. THE NEED TO MAKE JURY SERVICE ACCESSIBLE

The second corollary of this proposal is that increased efforts need to be made to ensure that jury service is accessible to all. Whatever expressive benefit may come from the lifting of exclusions, its practical benefit would be limited if jury service remains untenable for those at the sizeable intersection between criminal convictions and low socioeconomic status.²⁸⁶ Thus, states must guarantee adequate stipends,²⁸⁷ dependent care,²⁸⁸ and job protection.²⁸⁹ Like the previous corollary, this reform needs to occur regardless of whether any changes are made to existing jury selection procedures.

283. See Roberts, *(Re)forming the Jury*, *supra* note 229, at 843.

284. See Roberts, *Disparately Seeking Jurors*, *supra* note 12, at 1375.

285. See Price, *supra* note 66, at 85 (referring, in the *Batson* context, to the “miniscule amount of time spent reviewing constitutional issues in lower courts”).

286. See Smyth, Jr., *supra* note 67, at 43 (“The disparate impact of the criminal justice system on communities of poverty and of color is well documented and undeniable.”).

287. See Amar, *supra* note 112, at 1184–85 (“To decline to compensate citizens for their sacrifice—or to pay them \$5 per day as is done in many California courts—is in effect to impose a functionally regressive poll tax that penalizes the working poor who want to serve and vote on juries, but who cannot afford the loss of a week’s pay.”).

288. See Mary Rose, *A Voir Dire of Voir Dire: Listening to Jurors’ Views Regarding the Peremptory Challenge*, 78 CHI.-KENT L. REV. 1061, 1071 (2003).

289. See David V. Wilson II, *American Bar Association Principles for Juries and Jury Trials*, HOUS. LAW., Sept./Oct. 2005, at 48 (describing American Bar Association principles aimed at job protection for jurors).

C. WHERE LEVERAGE SHOULD BE APPLIED

One objection that might be raised to this proposal is that it exacts a cost only on the prosecution, in an effort to stir investigation of wrongs that may have occurred in any one of the three branches of government, in any one or more jurisdictions, state or federal. Thus, it may be argued that leverage is being applied bluntly, and possibly in the wrong place.

One response is that proponents of automatic exclusions *also* engage in treatment of “the state” as a monolithic entity; according to the “embitterment” justification, someone who has been through the criminal justice system can be assumed, whatever the particular geographic or institutional source of his or her hardship, to have a blind resentment of the prosecution being carried out in the particular jurisdiction where the jury has been summoned—even though that person is unlikely ever to have been a defendant in a jury trial anywhere.²⁹⁰

A deeper response is that it is not unrealistic to think that pressure on prosecutors could lead to results from police and legislatures, given the power dynamics within the criminal justice system. Prosecutors wield enormous power in the system as currently configured.²⁹¹ They are “the criminal justice system’s real lawmakers,”²⁹² and hold powerful roles in relation to police and legislators.²⁹³ In some instances, they provide train-

290. Of the 81,372 defendants in federal criminal court who reached adjudication in 2009, 78,283 pled guilty; 2798, or 3.4%, faced a jury trial. *Federal Criminal Case Processing Statistics*, *supra* note 239, available at <http://bjs.ojp.usdoj.gov/fjsrc> (follow “Offenders sentenced: tables” hyperlink; then select year “2009”; then select “Case disposition”; then select “All values”; then select “Frequencies” and “Percents”; then select “HTML”).

291. See Price, *supra* note 66, at 85 (describing prosecutors, in the context of the death penalty, as “the street-level agents of the state”).

292. Stuntz, *Pathological Politics*, *supra* note 158, at 506–07 (“Anyone who reads criminal codes in search of a picture of what conduct leads to a prison term, or who reads sentencing rules in order to discover how severely different sorts of crimes are punished, will be seriously misled.”); Barkow, *Prosecutorial Administration*, *supra* note 241, at 273–74 (“[W]e are living in a time of ‘prosecutorial administration,’ with prosecutors at the helm of every major federal criminal justice matter.”).

293. See Barkow, *Prosecutorial Administration*, *supra* note 241, at 272–73 (“[P]rosecutors have often been a driving force in the political arena for mandatory minimum sentences and new federal criminal laws.”); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003) (describing the mutual reliance between prosecutors and police).

ing for police,²⁹⁴ and in virtually all instances they have the ability to influence police conduct.²⁹⁵ As for their relationships with the legislative branch, Stuntz offers an analysis of the structural arrangements that give prosecutors so much inter-branch influence:

Advancing police and prosecutors' goals usually means advancing legislators' goals as well. Thus, legislators have good reason to listen when prosecutors urge some statutory change. This point is worth emphasizing, for it may be the single most important feature of the existing system for defining criminal law. Lawmaking and law enforcement are given to different institutions, in part to diffuse power, but the institutions are usually seeking the same ends. Since the institutions can also communicate—prosecutors can tell legislatures what legislation they need—the separation of crime definition and enforcement is less important, and less substantial, than one would think.²⁹⁶

Stuntz's proposition that "[l]egislators are better off when prosecutors are better off,"²⁹⁷ and of the resultant influence that prosecutors have over legislators, supports the idea that adjustment of prosecutorial incentives could have effects beyond the prosecutorial branch.

D. WHETHER LEVERAGE COULD BE APPLIED

Even if applying leverage to the prosecutorial branch makes sense, one must still ask whether and how the legislature could be persuaded to apply the leverage by abandoning automatic exclusions.

294. See Ben David, *Community-Based Prosecution in North Carolina: An Inside-Out Approach to Public Service at the Courthouse, on the Street, and in the Classroom*, 47 WAKE FOREST L. REV. 373, 385 (2012) (discussing district attorney participation in law enforcement training in the Fifth District of North Carolina); Marc L. Miller & Samantha Caplinger, *Prosecution in Arizona: Practical Problems, Prosecutorial Accountability, and Local Solutions*, 41 CRIME & JUST. 265, 297 (2012) (discussing training provided by the Pinal County Attorney's Office to all local police officers).

295. See Whitney Tymas, Director, Prosecution and Racial Justice, Vera Inst. of Justice, Address at the Center on the Administration of Criminal Law Fourth Annual Conference: New Frontiers in Race & Criminal Justice (Apr. 17, 2012), available at <http://www.law.nyu.edu/centers/adminofcriminallaw/events/newfrontiers> ("Prosecutors need to understand the real leadership they can exercise when it comes to not endorsing all police action. . . . It's really OK to tell the police officer, 'I'm not prosecuting this case.' . . . Prosecutors can say no, and not just be case processors—really be leaders.").

296. Stuntz, *Pathological Politics*, *supra* note 158, at 534–35.

297. *Id.* at 510 (adding that "judges cannot separate these natural allies"); see Barkow, *Prosecutorial Administration*, *supra* note 241, at 315 ("Politicians want to keep the powerful interests and the public happy, and that means giving the Department [of Justice] what it wants.").

As stated above, those with criminal convictions hold little sway with the legislature.²⁹⁸ Yet this proposal does not lie at the “soft on crime” core of legislative anxiety.²⁹⁹ It is less likely to provoke legislative reluctance than the other ways in which the harms caused by these exclusions could be lessened: fewer felonies, for examples, or crimes, or prosecutions,³⁰⁰ or the expunction of criminal convictions after a certain period of time.³⁰¹ In addition, the proposal dovetails with the goal of reentry, which is supported by federal and state legislation,³⁰² and by economic imperatives.³⁰³

The surest indication that abandonment of automatic exclusions is possible is that several states have done it. Both Colorado and Maine have abandoned their statutory disqualifi-

298. See *supra* note 265 and accompanying text.

299. See Gershowitz, *supra* note 278, at 47 (defending the viability of his proposal that prosecutors be regularly informed about jail and prison overcrowding, on the ground that “because legislatures would simply be instructing that prosecutors be advised of the scale of imprisonment, and not specifically advocating lower sentences, there would be no danger of legislators appearing ‘soft on crime’”); *id.* at 80 (“[L]egislators are not averse to criminal justice reforms that will not carry the soft on crime label.”).

300. See Stuntz, *Pathological Politics*, *supra* note 158, at 566 (“Over the course of the past century the number of criminal charges filed has increased very substantially . . .”).

301. See Demleitner, *supra* note 119, at 162 (“To prevent such negative collateral consequences for ex-offenders, a more comprehensive solution, adopted in some states, is needed: the expungement of criminal records after a certain period of time following the end of a sentence.”).

302. For federal legislation, see Second Chance Act of 2007: Community Safety Through Recidivism Prevention, Pub. L. No. 110-99, 122 Stat. 657, 658 (2008) (listing among the stated purposes “to provide offenders in prisons, jails or juvenile facilities with educational, literacy, vocational, and job placement services to facilitate re-entry into the community,” and “to encourage the development and support of, and to expand the availability of, evidence-based programs that enhance public safety and reduce recidivism, such as substance abuse treatment, alternatives to incarceration, and comprehensive reentry services”); Cole, *supra* note 133, at 32 (discussing passage of federal Second Chance Act). For state legislation, see, for example, the recent addition of a reentry and reintegration component to the purposes of New York’s Penal Law, which include “[i]nsur[ing] the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection.” N.Y. PENAL LAW § 1.05 (McKinney 2006) (emphasis added).

303. See JOHN ROMAN & AARON CHALFIN, URBAN INSTITUTE, DOES IT PAY TO INVEST IN REENTRY PROGRAMS FOR JAIL INMATES? JAIL REENTRY ROUNDTABLE INITIATIVE 19–23 (2006), available at http://www.urban.org/projects/reentry-roundtable/upload/roman_chalfin.pdf.

cation provisions.³⁰⁴ North Dakota, whose statutory disqualification provision applies only to those who are in prison,³⁰⁵ has abandoned criminal convictions as an automatic basis for exclusions for cause, and now requires that any court granting a challenge for cause find “[other] grounds.”³⁰⁶ Iowa has also rejected automatic exclusions, relying instead on challenges for cause that permit the judge to make an individualized determination about fitness.³⁰⁷

E. IF LEVERAGE FAILS

Adopting this proposal may have only a modest effect, either as regards leveraging investigation or reform, or as regards permitting a broader segment of the community to serve on juries. Even a modest effect in this area would be worthwhile.³⁰⁸ In addition, whether or not it leverages investigation or reform, and whether or not it permits a broader segment of the community to serve, the abandonment of automatic exclusions would bring benefits. First, with regard to the expressive power of the law, the message of automatic unfitness—and the tension that it creates with messages of reintegration—would be gone. Second, the requirement that an attorney should be able to challenge a juror for cause only if that juror has demonstrated an individual bias would make it more likely that those present in the courtroom at the time of jury selection would hear an individual account of the experience of passing through the criminal justice system. The lawyers and the judge would ask and hear about what that experience was, and whether indeed it was embittering. Such an account is largely absent from the criminal courtroom;³⁰⁹ provided that ways can be found to protect the privacy of potential jurors,³¹⁰ its addition would be valuable.

304. See *supra* Part I.B.

305. N.D. CENT. CODE §§ 12.1-33-01(1)(a), 27-09.1-08 (2013).

306. See *supra* note 59.

307. See *supra* note 58.

308. See Gershowitz, *supra* note 278, at 67 (“[W]hile additional information [about incarceration rates and prison crowding] will not foster drastic behavioral changes, it is quite possible that it could change behavior at the margins . . .”).

309. See Natapoff, *Speechless*, *supra* note 17, at 1452.

310. One method would be *in camera* questioning in the presence of only the parties and the judge, should the potential juror request it.

The current lack of investigation into the questions that these jurors would answer during voir dire is problematic.³¹¹ Sharon Dolovich has written powerfully about the idea that our penal policies should be shaped by those acting as if behind a veil—unaware of whether they will end up with the keys or in the cell, but aware of the circumstances affecting everyone involved.³¹² Under that view, both judges and attorneys—each of whom plays a part in shaping the criminal justice system—should have a way of learning how things are in the cell. Making social realities understood is a step toward their reform.³¹³ Even putting the veil to one side, there is good reason to listen to first-hand accounts. As noted above, procedural justice is concerned with how the person who passed through the criminal justice system views the procedures to which he or she was exposed.³¹⁴ Thus, those who oversee the system and its procedures should heed the thoughts and views of those who have been subject to them. Particular facets of the role of both judge and prosecutor make the voice of the potential juror especially vital.

In the case of judges, Jack Weinstein has written of the risk that they become too remote from those whose lives they shape.³¹⁵ This risk of remoteness is magnified by the silencing

311. See Roberts, *Cost of Mass Incarceration*, *supra* note 130, at 1300 (arguing that policymaking about incarceration has “yet to grasp the monumental devastation of prison growth on people’s lives”).

312. Dolovich, *Legitimate Punishment*, *supra* note 188, at 315–16.

313. See *United States v. Alexander*, 471 F.2d 923, 965 (D.C. Cir. 1973) (Bazelon, C.J., dissenting) (“[W]e sacrifice a great deal by discouraging the [defendant’s ‘rotten social background’] defense. If we could remove the practical impediments to the free flow of information we might begin to learn something about the causes of crime. We might discover, for example, that there is a significant causal relationship between violent criminal behavior and a ‘rotten social background.’ That realization would require us to consider, for example, whether income redistribution and social reconstruction are indispensable first steps toward solving the problem of violent crime.”); Gershowitz, *supra* note 278, at 67–72 (drawing on social psychology research on the influence of information on behavior in support of his proposal that prosecutors be educated about prison and jail overcrowding).

314. See *supra* Part III.D.

315. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 25–26 (2008) (“Judges often deal with people living ‘lives of silent desperation,’ who look to us for understanding. A judge’s experiences in and out of court—aided by that of jurors—is critical to this vital rapport factor. . . . As judges, successful and with friends from affluent classes, we are too often out of touch emotionally with the people before us.”); *id.* at 26 (“[I]t is difficult to find the

of criminal defendants and the assumptions (and stereotypes) about criminal defendants and the criminal justice system that are likely to spring up to fill the silence;³¹⁶ conversation could reduce remoteness, and replace assumptions and stereotypes with knowledge.³¹⁷ Judges are vulnerable to implicit, or unconscious, bias, which is liable to affect the decisions that they make about defendants;³¹⁸ one possible antidote to the type of stereotyping encompassed within implicit bias is individuating information.³¹⁹

In the case of prosecutors, the opportunity to learn individuating information about former criminal defendants would also be valuable, given prosecutorial vulnerability to implicit bias.³²⁰ In addition, learning about the experiences of those exposed to a criminal justice system in which prosecutors play such a powerful role seems central to a prosecutor's duties. Prosecutors have a duty to see that procedural justice is pro-

time or opportunity to recharge our batteries of compassion by meeting and helping people in our deprived communities.”).

316. See *Rubio v. Super. Ct.*, 593 P.2d 595, 606 (Cal. 1979) (en banc) (Tobriner, J., dissenting) (criticizing the majority for making unsupported assumptions about those with felony convictions); *id.* at 611–12 (Newman, J., dissenting) (same).

317. See Natapoff, *Speechless*, *supra* note 17, at 1500–01 (“[D]efendant silence means that there is little empathetic or education impetus for change in the perceptions and predispositions of these institutional decisionmakers. . . . [This] silence is a recipe for continued institutional hostility.”).

318. See Darrell A. H. Miller, Iqbal & *Empathy*, 78 UMKC L. REV. 999, 1008 (2010).

319. See Dolovich, *Exclusion and Control*, *supra* note 131, at 266–67 (arguing that “a political strategy emphasizing the financial costs of incarceration is bound to fail unless it also generates an ideological reorientation towards recognizing the people the state incarcerates as fellow human beings and fellow citizens, entitled to respect and consideration as such”); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1114 (2006) (“[S]tereotype effects recede as people learn more about each other as individuals, with individuating information often overwhelming stereotype information.”); Natapoff, *Speechless*, *supra* note 17, at 1503 (mentioning the challenge “to reconceptualize defendants as speakers rather than objects of litigation, to turn them from abstract ‘juridical subject[s]’ into thinking, feeling human beings from whom, as a society, we need to hear”).

320. See ALEXANDER, *supra* note 75, at 115 (“Numerous studies have shown that prosecutors interpret and respond to identical criminal activity differently based on the race of the offender.”); Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 617 (2009) (citing research indicating that implicit bias among prosecutors may lead to racial disparities in capital cases, and that unconscious bias may affect prosecutors even more than others).

vided to every defendant;³²¹ and, more broadly, to see that justice is served,³²² to reform the system;³²³ and to represent “the People.” It is hard to imagine how they can meet any of those duties without hearing from that portion of the people that has been convicted, particularly without hearing how they view the criminal justice system and their experience within it.³²⁴ The inability of this group to be heard by prosecutors is a striking facet of the lack of prosecutorial accountability.³²⁵

In the case of both judges and prosecutors, the failure to receive feedback from those who experience the convictions and punishments that they help bring about hinders the prospects of reform. Natapoff has described the fact that judges and prosecutors “almost never” hear from defendants as a “process failure,”³²⁶ and a “systemic dysfunction that impedes progress within the criminal system.”³²⁷ Her detailed recitation of the harms to judges and prosecutors, and to society more generally, caused by the silencing of defendants during the progression of

321. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2013).

322. For rules emphasizing that the prosecution's duty is to do justice, rather than obtain convictions, see *id.*; AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 4 (Standard 3-1.2) (3d ed. 1992); *id.* at 9; MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (1980).

323. See AM. BAR ASS'N, *supra* note 322, at 4 (Standard 3-1.2(d)) (stating prosecutors' duty to “seek to reform and improve the administration of criminal justice”); *id.* (stating that a prosecutor is duty-bound to try to correct substantive and procedural inadequacies and injustices).

324. See Howard, *supra* note 86, at 418 (prosecutors should “embrace the diversity of opinion that a community cross-section brings to a venire, and, ultimately, the jury”).

325. See *supra* note 271.

326. Natapoff, *Speechless*, *supra* note 17, at 1452 (“Since defendants speak for themselves so infrequently, judges, prosecutors, and lawmakers almost never hear from them, and the democratic processes that generate our justice system proceed without those voices. This process failure reinforces the social and psychological gaps between defendants and those who adjudicate them.”); *id.* at 1457 (mentioning “the institutional loss of information about defendant perceptions and experiences that might enable the judicial and political spheres to respond better to those who populate the criminal justice system”); *id.* at 1487 (“Criminal defendants are excluded from the ‘marketplace of ideas’ that shapes the criminal justice system. Spoken for and about by lawyers, criminologists, legislators, and law enforcement, defendants rarely share their own views on the criminal process: Is it fair? Does it deter? Does it seem cruel or lenient? Legitimate or overbearing? Rational or random? At no point during the criminal process can defendants safely share their thoughts on these matters, and afterwards, in prison or on release, the opportunities to speak are even more scarce.”).

327. *Id.* at 1503.

their cases—all the lost opportunities for learning and reform—applies with full force to the failure of judges and prosecutors to hear from those who are kept from jury service by their convictions.³²⁸ As things stand, “[i]f the system was intended to keep society substantially clueless about the people it incarcerates, it could not have been better designed.”³²⁹ In addition, regardless of anything that potential jurors may say about their experience in the criminal justice system, merely by being present in the jury box, these jurors will speak through their numerosity about the breadth of criminalization, sending a message that may be silenced by automatic exclusions, and that may prompt reform, or at least reflection.³³⁰

CONCLUSION

Automatic jury exclusions of those with criminal records should be abandoned. They are not needed to ensure fairness; the challenge for cause exists for cases of demonstrated bias. Indeed, they increase unfairness, by enhancing racial disparities, impeding reentry, and insisting that only those who lack a particular type of knowledge of the criminal justice system can scrutinize it. Limiting cost-free jury removals to those instances where bias can be shown would require attorneys and judges to hear and address what potential jurors say about their criminal justice experience. Imposing a litigation cost for all other removals would require prosecutors to internalize the cost of the embitterment that they assume. Let the cost of a criminal justice system so embittering as to preclude its fair consideration be borne by those who create and perpetuate it.

328. *See id.* at 1498–1501. For example, the system would “obtain more information about law enforcement and how police behave, in ways that suppression hearings rarely permit because defendants face incrimination if they take the stand. Every aspect of criminal justice . . . could be evaluated in light of its actual effects on its intended targets.” *Id.* at 1499; *see also id.* at 1501–02 (“Defendant silence . . . reinforces legal norms of punitiveness, hostility, and incomprehension. . . . Because it eliminates the primary voices that might be raised against harsh practices including long sentences, inhumane prison conditions, and deprivations of rights upon conviction, defendant silence helps to validate such practices.”).

329. *Id.* at 1499. Besides not hearing about individual experiences, judges and prosecutors never hear the “full story” about “the functioning of the justice system itself.” *Id.*

330. Compare this proposal to Gershowitz’s suggestion that prosecutors be told of prison and jail crowding, in the hope, backed by social psychology research, that these figures have some effect on prosecutorial behavior. Gershowitz, *supra* note 278, at 67.