

Introduction

There is no more valuable work that the average citizen can perform in support of our Government than the full and honest discharge of jury duty.

—*Handbook for Federal Trial Jurors*

EXCLUSION IN CONTEXT

In May 1999, at age twenty-three, I made the decision to drive after drinking. That night, I caused a car accident that claimed the life of my best friend, the passenger in my vehicle. For that tragic decision, I spent over four years in a maximum-security prison in Pennsylvania. In October 2001, I took my Law School Admissions Test from my prison cell and subsequently applied to a number of law schools while still incarcerated. Though I was accepted to several, only Thomas Jefferson School of Law would allow me to begin my legal studies while an active parolee. I enrolled in January 2005.

I finished my law degree and parole in May 2007. In the fall of that year, I began an LL.M. at the Georgetown University Law Center. In May 2008, LL.M. in hand, I returned to California to take the bar exam and to finish the Moral Character and Fitness Determination process to prove that I was fit to become a member of the State Bar of California. For me, a convicted felon who had spent time in prison, the process was a lengthy one that I had begun nearly two years prior as a first-year law student. In November 2008, I was informed that I had passed both the bar exam and the Moral Character and Fitness Determination. I was sworn in as an attorney and a member of the State Bar of California in December 2008.

Immediately after my swearing in, I began to practice law. Initially, I was a contract attorney for several prominent criminal defense attorneys in San Diego. As part of that work, I regularly assisted on criminal trials in both state and federal court. Sitting “second chair” meant that I interacted with clients, opposing counsel, and often judges. All seemingly accepted me as just another attorney. I rarely disclosed my criminal past, and for those who knew my history, it was ostensibly a nonissue. Only the quality of my work was scrutinized. To a point, I felt as though I had transcended my past.

A year after becoming a member of the State Bar of California, I was summoned to jury service for the first time. Though the summons meant a day of boredom spent waiting at the courthouse, I was eager to serve. Finally, I was “any other citizen,” called to perform my civic duty as a juror. As a convicted felon and a practicing attorney, my experiences are diverse and important. Assuredly my insights would enrich any deliberation.

When I arrived at the courthouse on my day of service, I passed through security using the entrance designated “attorneys only,” feeling a strange sense of pride and privilege. Soon after this, courthouse personnel ushered a group of about a hundred prospective jurors into the juror lounge. Once we were inside, a courtroom official charged with overseeing jury selection gave a five-minute speech expressing thanks on behalf of the State of California and San Diego County, all the while emphasizing the importance of our service. He then started a video, narrated by actor Rob Lowe (this is Southern California, mind you), exalting the jury as one of the fundamental pillars of democracy and, again, thanking us for our service.

When the movie ended, we were instructed to complete a juror affidavit questionnaire. On that questionnaire was an inquiry regarding criminal convictions. Question five read: “I have been convicted of a felony or malfeasance in office and my civil rights have not been restored.” I checked the box, answering in the affirmative. Moments after I turned in this questionnaire, the same man who moments before had thanked us for answering our summons, instructed us to stand and proceed to the back of the jury lounge if we had answered “yes” to question five. I stood, mortified that my criminal record was now on display for all to see. I made my way to the rear of the jury lounge, where court personnel informed me that I was ineligible for jury service because of my prior felony conviction. They called it a “permanent excuse” and assured me that I would never be summoned again.

I protested mildly, explaining that I was an attorney—had used the special attorneys-only entrance—and was looking forward to serving. I explained

that it seemed illogical that I was permitted to represent clients in the very courthouse from which I was now being expelled. How could I be “fit” to counsel those facing years in prison or death, but “unfit” to adjudicate even a minor civil matter? Not persuaded by my argument, the clerk told me that I should “write my congressman” if I was unhappy about California’s juror eligibility requirements. I was shocked and disheartened. I had not considered that even as a member of the bar I would still be unable to serve as a juror because of my criminal past. Notably, my situation is far more common than one might suspect. Twenty-four states and the federal government permit a convicted felon to practice law, but banish from jury service for life that same convicted felon.¹

In response to my degrading experience with felon-juror exclusion, I chose not to write to my representatives. Instead, I spent the next ten years researching the statutory exclusion of convicted felons from jury service. The goal of that endeavor was to call attention to felon-juror exclusion and to build a body of empirical research on the topic. In particular, I sought to interrogate two questions. First, does research support the justifications for excluding convicted felons from jury service? And second, what are the consequences of excluding millions of Americans from the jury process—a crucial democratic institution? With these inquiries in mind, I generated original quantitative and qualitative data through a series of interrelated studies. Some focused explicitly on the rationales for felon-juror exclusion, measuring the pretrial attitudes of otherwise eligible jurors with a felony conviction and then comparing those results to those of other groups of potential jurors. Along these lines, I also conducted the first mock-jury experiment, comprised of felon-jurors and non-felon-jurors, evaluating how those with a felony criminal conviction might engage in jury service. My research also focused on the potential ramifications of exclusion, interviewing felon-jurors and courtroom personnel in Maine, the only U.S. jurisdiction that per se allows felon-jurors to serve. Relatedly, I have also surveyed public opinion about the exclusion of convicted felons from jury service.

What I found was that data strongly suggest that the professed purposes for felon-juror exclusion lack empirical support. Moreover, the consequences of such exclusions may be significant, robbing the justice system of jurors who can improve the adjudicative process, while negatively impacting convicted felons’ abilities to successfully reenter society. In this way, from a utilitarian perspective, felon-juror exclusion makes little sense, as the costs associated with exclusion certainly exceed the benefits of eliminating the negligible

threat convicted felons pose to the jury. Normatively, felon-juror exclusion is also inappropriate and undesirable. The practice discounts rehabilitation and redemption in favor of perpetual ostracism, cutting against principles of participatory democracy and shared sovereignty.

THE ELEPHANTS IN THE ROOM

Preliminarily, this book must confront two global criticisms. First, given the waning use of jury trials in the United States and the exponential reliance on plea bargains and settlements to dispose of litigation, why study the jury at all? Second, given the multitude of legal and regulatory obstacles facing those convicted of a felony, why study a restriction that has little to nothing to do with the practical aspects of reentry and arguably confers a benefit to convicted felons? Those with a felony conviction face a host of other concerns (e.g., housing and employment); serving on a jury is assuredly not their top priority or even something that they wish to experience.

The Case for the American Jury

The jury is a uniquely American institution. Nearly all civil jury trials and over 90 percent of criminal jury trials in the world occur in the United States.² Still, in recent decades, the number of American jury trials has dwindled significantly.³ From 1989 to 1999, civil jury trials decreased by 26 percent, while the number of criminal jury trials dropped by 21 percent.⁴ And this trend has continued. From 2006 to 2016, federal criminal cases disposed of by jury trial dropped by 47 percent, leading some scholars to contend that, “jury trials are on the verge of extinction.”⁵

Today, most civil litigation ends with summary judgment or a settlement. Similarly, most criminal defendants take plea bargains, in large part to avoid abhorrent conditions of pretrial confinement and/or the “trial tax.”⁶ As one former federal judge explains, “Today, our federal criminal justice system is all about plea bargaining. Trials—and thus, juries—are largely extraneous. An accused individual who requests a trial may, as a functional matter (though we obstinately deny it), be punished severely for requesting what was once a constitutional right.”⁷ Mandatory minimum sentences and the Federal Sentencing Guidelines have also served to accelerate the decline of the jury trial.⁸

The demise of the jury should concern all citizens. Though the jury is a useful arbiter of justice, its influence extends far beyond rendered verdicts.⁹ The jury stands as the only mandatory civic endeavor that brings citizens together to work collectively on a complex task that could have far-reaching social implications. Such cooperative deliberation has the potential to strengthen community bonds, in part by spawning future civic engagement.¹⁰ Those who serve as jurors are more likely to engage in subsequent civic activities.¹¹ For instance, studies reveal a 4 to 10 percent increase in voting rates among former jurors,¹² and a positive correlation between jury service and higher levels of involvement in civic and political activities.¹³ Notably, this “deliberative effect,” as it has been called,¹⁴ is most prominent for citizens who—like many convicted felons—were less civically or politically engaged prior to jury service.¹⁵

In his influential book, sociologist Robert Putnam suggests that Americans have disengaged.¹⁶ Relaying harrowing statistics of our nation’s level of apathy he warns that, “like battlefield casualties dryly reported from someone else’s distant war, these unadorned numbers scarcely convey the decimation of American community life they represent.”¹⁷ Pointing to a waning desire to be a part of the American social fabric, Putnam concludes that Americans have been dropping out in droves, not merely from politics, but from organized community life more generally.¹⁸

If the jury becomes a relic, a footnote in the history of our legal system, we will lose our only official deliberative forum. Such an event would assuredly exacerbate the reclusion and isolation many Americans now practice. Sure, we are all electronically tethered to one another, but how often do we engage with our fellow citizens in person, in an exercise that requires attentiveness, empathy, and active participation? Presenting an empirically informed argument for the inclusion of convicted felons in the jury pool, this book indirectly advocates for the preservation of our jury system, suggesting that the jury has value that is yet untapped.

Evidence tends to demonstrate that felon-juror inclusion likely softens perceptions about those with a felony criminal record (chapter 7), while at the same time influencing convicted felons in prosocial ways, possibly triggering criminal desistance mechanisms (chapter 6). The loss of the jury would preemptively eradicate these potential benefits of inclusion and would amount to the shuttering of what Tocqueville called “the most effective means of popular education at society’s disposal.”¹⁹

We Have Bigger Worries

For nearly every reentering citizen, finding gainful employment and a stable home are their primary concerns postconviction or postrelease.²⁰ Unfortunately, for those with a felony criminal conviction, finding either can prove incredibly difficult. Statutory and regulatory occupational restrictions forbid convicted felons from working in many fields.²¹ Additionally, the stigma of a criminal conviction can also influence hiring decisions.²² Couple these disadvantages with the racial prejudices that many former offenders must also endure, and the job prospects of reentering individuals are bleak.²³

Housing also poses a challenge for those with a criminal record. Once again, regulatory and statutory restrictions hamstringing convicted felons.²⁴ For those in need of public housing, authorities may consider criminal backgrounds when allocating scarce housing resources. Moreover, since 1988, a series of federal legislative measures have made public housing difficult to attain for those with a criminal record.²⁵ For those who do not need public housing, challenges still exist. Landlords have also begun to conduct criminal record checks when deciding on private rental transactions, as changes in housing liability law have encouraged them to avoid renting to “problem” or “nuisance” tenants.²⁶

Employment and housing are also made more difficult for convicted felons because of a loss of social capital. For most individuals with a criminal record, years away from their family, friends, and community have taken a toll on their social network. Often, a period of incarceration is not planned, and at the end of even a short prison sentence, connections to family and friends are lost, curtailing an individual’s employment and housing options. For example, in Jennifer Gonnerman’s remarkable story of Elaine Bartlett’s transition from prison to society, she notes how the loss of social capital impacted her search for employment: “Elaine wanted to find a job, so she did what most people do: she asked everyone she knew if they had heard of any openings. While this strategy works for many people, Elaine was at a huge disadvantage. She didn’t know a lot of people in the city anymore, and those that she did know were unemployed.”²⁷

Admittedly, convicted felons’ reentry concerns have little if anything to do with their opportunity to take part in jury service. Rather, given common views of jury service, some might argue that felon-juror exclusion confers a benefit on convicted felons. But this is a privileged perspective. For those from whom this opportunity is withheld, exclusion from jury service stands

for more than merely the chance to decide a litigated matter. For those of us who are denied access to this vital democratic process, jury service represents yet another instance, another restriction that reminds us that we are inferior and threatening to our fellow citizens.

Still, community reintegration is crucial to reentry success or failure. While reintegration used to be conceived of as an outcome, reintegration is now most often conceptualized as a necessary component of successful reentry.²⁸ Partly attributable to the recognition that building or rebuilding social capital is an essential part of reintegration,²⁹ this shift has included efforts to facilitate successful reentry. In a number of jurisdictions, housing and occupational licensing restrictions have been eased,³⁰ while reentry programs attending to these needs have been established. For instance, in 2016, the U.S. Department of Housing and Urban Development instituted a housing-first model that targets housing for at-risk populations, including individuals experiencing reentry.³¹ Additionally, restrictions on public assistance for those with a criminal history have also been relaxed in recent years.³²

Felon-juror exclusion matters because it limits convicted felons' ability to amass social capital through community reintegration. True, by itself felon-juror exclusion likely does little to diminish overall levels of community engagement. Nonetheless, all contacts with members of the community are consequential, such that withholding any opportunity for prosocial engagement from those with a serious criminal history necessarily disadvantages those individuals.³³ In this way, felon-juror exclusion is worth studying, as it is part of a much larger network of collateral sanctions that can impede a convicted felon's ability to secure social capital and successfully reenter society.

WHAT ARE WE TALKING ABOUT? A JURY SELECTION PRIMER

There are generally two stages of the jury selection process: (1) the formation of the venire, and (2) the empanelment of a seated jury.³⁴ To form the venire, jurisdictions first construct the master jury list using a combination of voter registration lists, driver's license records, and/or voluntary registration. Once the master list has been established, those on the list may be summoned for service. As part of this process, summoned jurors must complete (via mail or in person) a juror eligibility questionnaire ensuring that they meet the basic