

# No Fear Here:

## How the Public Views Anticipated Interactions with Jurors Convicted of a Felony

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*In recent years, a handful of states have considered legislation that would permit citizens with a felony conviction to serve as jurors. Though empirical evidence suggests otherwise, opponents of these measures consistently argue that including jurors with a felony conviction would threaten the jury process. This study examines whether the public shares that view. Utilizing originally collected survey data from 815 Californians, we investigate attitudes toward anticipated interactions with jurors convicted of a felony as: 1) fellow jurors and 2) finders of fact. Results reveal that the public does not harbor an overwhelming sense of fear about including those with a felony conviction in the jury process. In addition, we find that views vary considerably across ideological groups, with conservatives being significantly more hesitant than either moderates or liberals to interact with jurors who have a felony conviction. Findings tend to align with prior literature suggesting that current “post-truth” policy debates often devolve into emotional, fear-driven arguments that overlook empirical evidence. By expanding our understanding of public attitudes toward those convicted of a felony criminal offense and their involvement in democratic processes, this study has far-reaching implications for jurisdictions considering easing restrictions on juror eligibility for those with a felonious criminal history.*

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## INTRODUCTION

Roughly two decades ago, the civic marginalization of citizens with a felony conviction gained widespread attention for the first time. On the heels of the contested presidential election in 2000, which was ultimately decided by the Supreme Court,<sup>1</sup> Americans nationwide became aware of “record-based”<sup>2</sup> voter disenfranchisement. Florida, the jurisdiction at the heart of the issue in *Bush v. Gore*, excluded nearly 830,000 voters from the electoral process at the time, simply because they bore the mark of a felony conviction.<sup>3</sup> Researchers later estimated that Florida’s record-based disenfranchisement statute likely swung the

<sup>1</sup> See *Bush v. Gore*, 531 U.S. 98, 98 (2000).

<sup>2</sup> Throughout this article, we use the phrase “record-based” to indicate restrictions on voting or jury service that are imposed because one has a felony criminal conviction.

<sup>3</sup> See Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIO. REV. 777, 797 (2002).

election in favor of George W. Bush.<sup>4</sup>

In 2018, Florida again made news for its approach to voter disenfranchisement. In a referendum, The Voter Restoration Amendment (Amendment 4) passed with bi-partisan support, going into effect the following year (2019) and restoring voting rights to nearly 1.5 million Floridians with a felony criminal conviction.<sup>5</sup> The measure was the most recent legislative effort to alter record-based disenfranchisement laws in the United States. Today, only nine jurisdictions may permanently exclude those with a felony conviction from voting.<sup>6</sup> Along these lines, *Bush v. Gore* seemingly marked the start of our nation's twenty-year trend toward restoring the vote to those with a felony criminal history.

Still, strong versions of participatory democracy demand that citizens do more than cast ballots.<sup>7</sup> They also require that citizens take part in the daily governance of our nation—the governance that occurs between elections and with far less fanfare, such as jury service. The Framers viewed jury service as powerful of a tool as voting in the fight against an overreaching government.<sup>8</sup> As the Federal Farmer noted, “[i]t

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<sup>4</sup> See generally Traci Burch, *Turnout and Party Registration Among Criminal Offenders in the 2008 General Election*, 45 L. & SOC'Y REV. 699 (2011); Traci Burch, *Did Disenfranchisement Laws Help Elect President Bush? New Evidence on the Turnout Rates and Candidate Preference of Florida's Ex-Felons*, 34 POL. BEHAV. 1 (2012); Tilman Klumpp, Hugo M. Mialon, & Michael A. Williams, *The Voting Rights of Ex-Felons and Election Outcomes in the United States*, 59 INT'L REV. L. & ECON. 40 (2019).

<sup>5</sup> Dara Kam, *Amendment to Restore Felons' Voting Rights on Florida November Ballot*, PALM BEACH POST (Jan. 24, 2018, 1:43 PM), <https://www.palmbeachpost.com/news/state—regional-govt—politics/amendment-restore-felons-voting-rights-florida-november-ballot/uXOxe9IET9RE5piKMzZqqK/>.

<sup>6</sup> *State Felon Voting Laws*, PROCON.ORG (Sept. 14, 2020), <https://felonvoting.procon.org/state-felon-voting-laws/> (including Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Tennessee, and Wyoming).

<sup>7</sup> Karen Syma Czapanskiy & Rashida Manjoo, *The Right of Public Participation in the Law-Making Process and the Role of Legislature in the Promotion of This Right*, 19 DUKE J. COMP. & INT'L L. 1, 14-15 (2008) (“In recent years, theoreticians on the subject of participatory democracy have identified two models for citizen engagement in governance between elections: strong democracy and discourse, or dialogic participation. Both stand in contrast to “thin” or purely representative democracy, in which the citizen's role is to elect representatives periodically. Political accountability in a purely representative democracy is achieved at the ballot box: those who fail to satisfy the electorate are not returned to office in the next election. Citizen input between elections is not forbidden, but it is not mandated.”); see also Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577, 634-35 (1997).

<sup>8</sup> See Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose*

is true, the laws are made by the legislature; but the judges and juries, in their interpretations, and in directing the execution of them, have a very extensive influence for preserving or destroying liberty, and for changing the nature of the government.”<sup>9</sup>

Unlike voter disenfranchisement, record-based juror exclusion receives little attention from academics, politicians, and the public.<sup>10</sup> Forty-nine states, the federal government, and the District of Columbia restrict juror eligibility for those convicted of a felony.<sup>11</sup> Lawmakers and courts justify such restrictions by alleging that those with a felony criminal record lack the necessary character to serve, and harbor inherent biases that make them sympathetic to criminal defendants and adversarial toward the prosecution.<sup>12</sup> Nonetheless, the dwindling number of jury trials, combined with the furtive nature of the jury process and the public’s general aversion to service, ensures that exclusion and discrimination in this civic realm largely go unnoticed.<sup>13</sup> As a result, restrictions on juror eligibility have not induced the type of dedicated reform efforts associated with record-based voter disenfranchisement. Still, jury service is no less important.

Research demonstrates that jury service often leads to feelings of political efficaciousness and empowerment,<sup>14</sup> prompting greater rates of civic involvement.<sup>15</sup> Despite these benefits, record-based juror exclusion

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*Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 746 (1992); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69 (2006) (arguing that the jury is “the most stunning and successful experiment in direct popular sovereignty in all history”); see also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); Vikram D. Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

<sup>9</sup> Federal Farmer, *Letters from a Federal Farmer XV*, in *THE COMPLETE ANTI-FEDERALIST* 149 (Herbert Storing & Murray Dry eds., University of Chicago Press 1981).

<sup>10</sup> See James M. Binnall & Nick Petersen, *Public Perceptions of Felon-Juror Exclusion: An Exploratory Study*, CRIMINOLOGY & CRIM. JUST. (2020).

<sup>11</sup> JAMES M. BINNALL, *TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY PROCESS* (forthcoming U.C. Press 2021) (providing a jurisdictional breakdown of record-based juror exclusion statutes).

<sup>12</sup> See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 74 nn.29–30, 138 n.330 (2003) (cataloging cases that reference the character and inherent bias rationales respectively).

<sup>13</sup> See Robert J. Conrad Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 163–66 (2018).

<sup>14</sup> See Paula M. Consolini, *Learning by Doing Justice: Private Jury Service and Political Attitudes* 203 (1992) (Ph.D. dissertation, U.C. Berkeley) (ProQuest).

<sup>15</sup> See John Gastil, E. Pierre Deess, Phil J. Weiser & Jordan Meade, *Jury Service and*

has resisted jurisdictional trends toward more inclusive civic policies. Since their inception, statutes banishing those with a felony conviction from jury service remain largely unchanged.<sup>16</sup> Initially promulgated as a device to intentionally prevent racial minorities from serving as jurors,<sup>17</sup> today, while intent may be less obvious, such statutes undeniably have a disparate racial impact.<sup>18</sup> Only recently have jurisdictions begun to consider easing such statutes.<sup>19</sup> Aiding these legislative efforts is the growing empirical literature<sup>20</sup> calling into question the utility of record-based restrictions on juror eligibility. That research undermines the justifications for the practice,<sup>21</sup> suggesting that inclusion benefits jury

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*Electoral Participation: A Test of the Participation Hypothesis*, 70 J. POL. 1, 13–14 (2008); see also John Gastil, E. Pierre Deess, & Phil J. Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberations and Political Participation*, 64 J. POL. 585, 591–92 (2002) (demonstrating that those who serve are 4%–10% more likely to vote in subsequent elections, an effect most pronounced among those less politically engaged prior to their involvement in the jury process).

<sup>16</sup> See Kalt, *supra* note 12 at 101.

<sup>17</sup> See Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 372–73 (1998); see also MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL INEQUALITY* (Oxford University Press 2004).

<sup>18</sup> See Darren Wheelock, *A Jury of One's 'Peer's: Felon Jury Exclusion and Racial Inequality in Georgia Courts*, 32 JUST. SYS. J. 335, 351–54 (2011).

<sup>19</sup> For example, in 2020, California removed restrictions on juror eligibility for those with a felony conviction. See *Governor Newsom Signs Criminal Justice Bills to Support Reentry, Victims of Crime, and Sentencing Reform*, OFFICE OF GOVERNOR NEWSOM (Oct. 8, 2019), <https://www.gov.ca.gov/2019/10/08/governor-newsom-signs-criminal-justice-bills-to-support-reentry-victims-of-crime-and-sentencing-reform/>.

<sup>20</sup> See generally JAMES M. BINNALL, *supra* note 11; James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 L. & POL'Y 1 (2014); James M. Binnall, *Cops and Convicts: An Exploratory Study of Jurymantering*, 16 OHIO ST. J. CRIM. L. 221 (2018); James M. Binnall, *Exorcising Presumptions: Judges and Attorneys Contemplate 'Felon-Juror Inclusion' in Maine*, 39 JUST. SYS. J. 378 (2018); James M. Binnall, *Felon-Jurors in Vacationland: A Field Study of Transformative Civic Engagement in Maine*, 71 ME. L. REV. 71 (2018); James M. Binnall, *Summoning Criminal Desistance: Convicted Felons' Perspectives on Jury Service*, 43 L. & SOC. INQUIRY 4 (2018); James M. Binnall, *Jury Diversity in the Age of Mass Incarceration: An Exploratory Mock Jury Experiment Examining Felon-Jurors' Potential Impacts on Deliberations*, 25 PSYCH., CRIME & L. 345 (2019); James M. Binnall & Nick Petersen, *Building Biased Jurors: Exposing the Circularity of the Inherent Bias Rationale for Felon-Juror Exclusion*, 27 PSYCHIATRY, PSYCH. & L. 110 (2020); Binnall & Petersen, *supra* note 10; James M. Binnall & Nick Petersen, *They're Just Different: The Bifurcation of Public Attitudes Toward Felon-Jurors Convicted of Violent Offenses*, CRIME, L. & SOC. CHANGE (2020).

<sup>21</sup> See BINNALL, *supra* note 11, U.C. Press (2021); Binnall, *supra* note 20, 36 L. & POL'Y 1 (2014); Binnall, *supra* note 20, 16 OHIO STATE J. CRIM. L. 221 (2018); Binnall, *supra*

systems and those with a felony criminal history.<sup>22</sup>

In response to these legislative efforts, opposition has been fierce. Though varied, arguments for record-based juror exclusion typically share two common features: ignorance of empirical evidence and some measure of fearmongering.<sup>23</sup> Proponents of record-based juror exclusion rarely cite evidence-based contentions in support of their position. Instead, they rely on arguments replete with assumptions and emotional pleas designed to conjure panic.<sup>24</sup> This tactic is somewhat unsurprising in our “post-truth”<sup>25</sup> era of policy debate.<sup>26</sup> When empiricism undermines the justifications for other record-based restrictions on access to democratic processes, similar arguments arise.<sup>27</sup> For example, in the context of voter disenfranchisement statutes, those in favor of exclusion warn of widespread voter fraud spawned by voters with a felony conviction, while wholly ignoring a lack of evidence indicating any appreciable level of voter misconduct over the past several decades.<sup>28</sup>

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note 20, 39 JUST. SYS. J. 378 (2018); Binnall, *supra* note 20, 71 ME. L. REV. 74 (2018); Binnall, *supra* note 20, 43 L. & SOC. INQUIRY 4 (2018); Binnall, *supra* note 20, 25 PSYCH., CRIME & L. 345 (2019); Binnall and Petersen, *supra* note 20, 27 PSYCHIATRY, PSYCH. & L. 110 (2020).

<sup>22</sup> See BINNALL, *supra* note 11, U.C. Press (2021); Binnall, *supra* note 20, 71 ME. L. REV. 74, 74–76 (2018); Binnall, *supra* note 20, 25 PSYCH., CRIME & L. 345, 358–59 (2019); Binnall, *supra* note 20, 43 L. & SOC. INQUIRY 4, 20–24 (2018).

<sup>23</sup> See *infra* part II (detailing arguments against legislation that would ease restrictions on jurors with a felony criminal history).

<sup>24</sup> *Id.*

<sup>25</sup> Steven Tesich, *A Government of Lies*, NATION, January 6, 1992, at 13 (first to be credited with using the phrase “post truth.”).

<sup>26</sup> See MATTHEW D’ANCONA, POST-TRUTH: THE NEW WAR ON TRUTH AND HOW TO FIGHT BACK (2017); JENNIFER KAVANAGH & MICHAEL D. RICH, RAND CORPORATION, TRUTH DECAY: AN INITIAL EXPLORATION OF THE DIMINISHING ROLE OF FACTS AND ANALYSIS IN AMERICAN PUBLIC LIFE, x–xi (2018), [https://www.rand.org/pubs/research\\_reports/RR2314.html](https://www.rand.org/pubs/research_reports/RR2314.html) (noting that four trends characterize truth decay: “1) increasing disagreement about facts and analytical interpretations of facts and data; 2) a blurring of the line between opinion and fact; 3) the increasing relative volume and resulting influence of opinion and personal experience over fact; and 4) declining trust in formerly respected sources of facts.”); see also *infra* Section IV.

<sup>27</sup> See STEPHEN FARRALL, JONATHAN JACKSON, & EMILY GRAY, SOCIAL ORDER AND THE FEAR OF CRIME IN CONTEMPORARY TIMES 23–28 (2009); see also ALEC. C. EWALD, SENTENCING PROJECT, A “CRAZY-QUILT” OF TINY PIECES: STATE AND LOCAL ADMINISTRATION OF AMERICAN CRIMINAL DISENFRANCHISEMENT LAW 1–2 (2005), <https://perma.cc/Y9PV-B4RB>.

<sup>28</sup> See JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2008); see also Note, *The*

For those with a felony conviction, exclusion from jury service stands at the forefront of a struggle to access democracy. As noted, that struggle pits empirical evidence weighing in favor of inclusion against emotive arguments for banishment based in the “criminology of the other.”<sup>29</sup> While this process of “othering” has been fairly universal, people of color have borne the brunt of the tactic through the racialization of crime stereotypes.<sup>30</sup> Promoting fear and presuming that those who have committed criminal offenses are threatening and “simply wicked,”<sup>31</sup> these arguments have arisen in response to empirical research demonstrating the invalidity of the justifications for, and impacts of, record-based juror exclusion.<sup>32</sup>

Though policymakers endorse fear-centric arguments against inclusion, suggesting that prospective felon-jurors pose a threat to fellow jurors and litigants, it is unclear whether those arguments accurately represent public sentiment. While few public opinion surveys focus on record-based juror exclusion, those that do reveal little consensus on the issue, instead pointing to a significant partisan divide. Polls demonstrate that the public is split on whether those with a felony criminal history ought to be included in the jury pool,<sup>33</sup> and on the justifications for exclusion, the public is again almost evenly divided.<sup>34</sup> Moreover, these results tend to track political ideology, with self-reported conservatives far less likely to support inclusion generally and far more likely to endorse the rationales for record-based exclusion.<sup>35</sup>

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*Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the ‘Purity of the Ballot Box.’* 102 HARV. L. REV. 1300, 1303 (1989); KATHERINE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA SECOND EDITION: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES 127 (2nd ed. 2013).

<sup>29</sup> David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRITISH J. CRIMINOLOGY 445, 461–63 (1996).

<sup>30</sup> KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA (2003).

<sup>31</sup> DAVID GARLAND, THE CULTURE OF CONTROL 184 (2001).

<sup>32</sup> See BINNALL, *supra* note 11 (presenting the first comprehensive empirical case against record-based juror exclusion statutes).

<sup>33</sup> See Binnall & Petersen, *supra* note 20, CRIME, L. & SOC. CHANGE, at 7 (finding that 49% of respondents supported the inclusion of jurors with a felony conviction);

<sup>34</sup> Binnall & Petersen, *supra* note 20, CRIME, L. & SOC. CHANGE, at 12 (finding that 54% of respondents believe those with a felony conviction have the character to serve, while 49% believe that those with a felony conviction can approach criminal cases without bias).

<sup>35</sup> Binnall & Petersen, *supra* note 10, CRIMINOLOGY & CRIM. JUST. at 15 (finding that among respondents, self-reported conservatives, support for inclusion stood at 36% compared to 61% for self-reported liberals. On the rationales for exclusion, results reveal

Along those lines, this article explores public opinion toward anticipated interactions with a juror who has a felony criminal history. Lawmakers ostensibly allege that those with a felony conviction pose a threat to their fellow citizens—this article uses empirical methods to examine how citizens assess such a claim. Part II provides background on the practice of excluding those with a felony conviction from jury service, noting the petrification of the practice and the emotion-laden responses to recent legislation aimed at rolling back record-based juror exclusion statutes. Part III describes the “punitive turn” in U.S. criminal justice policy, highlighting the media’s dehumanization of those with a criminal history and policymakers’ use of fear and racism as a legislative tool. Part IV turns to our study, outlining the methods and results of a public opinion survey, which explores how citizens view their anticipated interactions with jurors who have a criminal record both as fellow jurors and as individual triers of fact. Part V then situates those results in a broader discussion of policymaking, arguing that while lawmakers have largely ignored public opinion on record-based juror exclusion policies—perhaps understandable in our current political climate where many politicians and members of the public decry traditional sources of information as “fake news”—they do so at their peril, as our results suggest that in this context, the public does not share such antiquated views of those who had committed a felony criminal offense.

### I. RECORD-BASED JUROR EXCLUSION: A STORY OF FEAR AND PETRIFICATION

Record-based juror exclusion is an ancient practice. Greeks branded those convicted of a criminal offense “infamous,” excluding them from civic life,<sup>36</sup> while Romans, through a series of statutes, also banished convicted criminals from democratic processes.<sup>37</sup> Later, after the fall of the Roman Empire, Germanic tribes exercised civic exclusion

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that self-reported conservatives were less likely to characterize those with a felony conviction as having sufficient character to serve (40%) and being impartial (30%), than self-reported liberals (69% and 64% respectively)).

<sup>36</sup> Mirjan Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE 347, 351 (1968); see also Howard Itzkowitz & Lauren Oldak, *Restoring the Ex-Offender’s Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721 (1973).

<sup>37</sup> Walter Matthews Grant, John LeCornu, John A. Pickens, Dean H. Rivkin, & Roger C. Vinson, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 939, 942 (1970).



using the “outlawry” process.<sup>38</sup> As English law evolved, citizens convicted of serious felonies suffered “civil death,” forfeiting all civil rights and access to civic activities. One such activity was jury service.<sup>39</sup>

From its inception, the United States has recognized the concept of civil death. As early as 1799, a number of jurisdictions excluded those with criminal histories from all aspects of civic life.<sup>40</sup> Civil death statutes were not the subject of lengthy legislative debate or measured action, but instead resulted from inaction. As one scholar notes, “[i]t is likely . . . that civil disabilities in America were actually the result of the unquestioning adoption of the English penal system by our colonial forefathers . . . .”<sup>41</sup> Over time, the blind acceptance of the practice has ostensibly allowed record-based juror exclusion to escape critical analysis.

As of September 2020, nearly every jurisdiction in the United States restricts those with a felony criminal history from juror eligibility.<sup>42</sup> In the vast majority of U.S. jurisdictions—twenty-six states and the federal system—those with a felony conviction are permanently barred from the jury process.<sup>43</sup> Restrictions are less severe in the remaining jurisdictions. Thirteen jurisdictions make those with a felony conviction ineligible for service until the completion of their sentence.<sup>44</sup> Seven states enforce hybrid regulations that may incorporate penal status, charge category, type of jury proceeding, and/or a term of years, while two jurisdictions allow for lifetime challenges for cause.<sup>45</sup> Only Maine allows those with a felony conviction to serve without restriction.<sup>46</sup>

Unlike record-based voter disenfranchisement, record-based juror exclusion statutes have undergone few changes in recent years. Since 2003, when law professor Brian Kalt first cataloged juror exclusion policies by jurisdiction,<sup>47</sup> only one state has altered its policy to be more inclusive.<sup>48</sup> Discussing this rigidity of record-based juror exclusion

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<sup>38</sup> *See id.*

<sup>39</sup> *See id.* at 943.

<sup>40</sup> *See id.*

<sup>41</sup> *Id.* at 950.

<sup>42</sup> *See* Binnall, *supra* note 11 app. A; *see also* Kalt, *supra* note 12; Binnall, *supra* note 20, 36 L. & POL’Y 1 (2014).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See* Kalt, *supra* note 12.

<sup>48</sup> In 2019, California amended its record-based juror exclusion statute to include most Californians with a felony criminal history. *See* California Legislative Counsel’s Digest,

states, Kalt noted, “[t]he practice of excluding felons from jury service has both a rich pedigree and a sturdy presence in current law . . . it has become firmly entrenched and has avoided the general trend of expanded jury participation.”<sup>49</sup>

Still, in recent years, jurisdictions have increasingly begun questioning the wisdom of their record-based juror exclusion policies. In November 2018, New York State Senator Brian Benjamin (D) introduced Bill S221A which would restore juror eligibility to those with a felony criminal history.<sup>50</sup> The measure passed the Senate in May 2019 and was referred to the Assembly Judiciary Committee in January 2019.<sup>51</sup> Ultimately, S221A died in committee.<sup>52</sup>

Louisiana has also explored measures to ease record-based juror exclusion restrictions. In March 2018, Louisiana State Representative Ted James (D) introduced House Bill 65, which would have made roughly 36,000 Louisianans with a felony conviction eligible for jury service.<sup>53</sup> House Bill 65 passed the Louisiana House Criminal Justice Committee by a vote of 9-6,<sup>54</sup> but was later voted down by the full House 62-26.<sup>55</sup>

In New York and Louisiana, where reform efforts failed, critics of the inclusive legislation had championed inflammatory arguments in their campaigns to vote down the bills. For example, in New York, State Senator John Flanagan (R) drew on the example of a recently-paroled inmate who in 1981 had been convicted of killing multiple victims during

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S.B. 310, Jury Service (2019).

<sup>49</sup> Kalt, *supra* note 12, at 189.

<sup>50</sup> Kenneth Lovett, *Harlem State Senator’s Bill Would Allow Felons to Serve on Juries After Completing their Sentences*, DAILY NEWS (2018), <https://www.nydailynews.com/news/politics/ny-pol-benjamin-parole-felons-juries-20181121-story.html>.

<sup>51</sup> See Bill Mahoney, *Senate Passes Bill to Let Felons Serve on Juries*, POLITICO (2019), <https://www.politico.com/>; New York State Senate, Senate Bill S221A, 2019-2020 Legislative Session (2020), <https://www.nysenate.gov/legislation/bills/2019/s221>.

<sup>52</sup> See *id.*

<sup>53</sup> Julia O’Donoghue, *Felons with New Voting Rights Should also get to Serve on Juries: Lawmaker Says*, NOLA.COM/ TIMES PICAYUNE (March 17, 2019), [https://www.nola.com/news/article\\_f1ec81f7-5b33-5258-b019-ff4c448684fd.html](https://www.nola.com/news/article_f1ec81f7-5b33-5258-b019-ff4c448684fd.html).

<sup>54</sup> Julia O’Donoghue, *Bill to Allow Former Felons on Juries Advances to Louisiana House*, NOLA.COM/ TIMES PICAYUNE (May 1, 2019), [https://www.nola.com/news/article\\_66561c26-d5ef-5674-aef0-ec573f4b8eb2.html](https://www.nola.com/news/article_66561c26-d5ef-5674-aef0-ec573f4b8eb2.html).

<sup>55</sup> Bryn Stole, *Louisiana Lawmakers Shoot Down Bill to Allow Those with Past Felony Convictions to Serve on Juries*, ADVOCATE (2019), [https://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_b8d2b852-75d6-11e9-8f82-bb347152d718.html](https://www.theadvocate.com/baton_rouge/news/politics/legislature/article_b8d2b852-75d6-11e9-8f82-bb347152d718.html)

a robbery:

How could Democrats believe that Judith Clark, a terrorist who killed two police officers and a security guard, would be an impartial juror? Where is the common sense and the respect for those who lost their lives and the families who still grieve? . . . This is justice denied to all law abiding citizens and the Senate Republican conference will continue to fight for common sense proposals to maintain balance in our system.<sup>56</sup>

Senator Flanagan’s “Straw Man” argument follows a familiar pattern. He cites a salacious case nearly four decades old that involves the killing of several citizens. But most felony convictions do not involve injury or death. In 2019, non-violent felonies totaled 1.2 million, as compared to the nearly 7 million non-violent property crimes committed.<sup>57</sup> Senator Flanagan also implies that allowing those with a felony conviction to serve somehow denigrates crime victims and will lead to partial deliberations. Evidence cuts against these claims.<sup>58</sup>

In Louisiana, State Representative Tony Bacala (R) similarly noted, “murderers could be on juries for murder trials potentially, rapists for rape trials, burglars for burglary trials. You’d open all that up within this bill.”<sup>59</sup> Again, an opponent of inclusion stokes fear by suggesting that a prospective juror with a felony conviction will somehow make her way onto a jury in a crime very similar to her own. The argument also intimates that such similarity will give rise to leniency. But Bacala’s argument is suspect. It overlooks voir dire, where potential jurors are questioned extensively in an effort to root out bias and preconceived attitudes that might compromise a jury’s integrity. Surely, one with a felony conviction who has some familiarity with or similarity to the case at bar—like a potential non-felon juror who is being considered for a case involving drug misuse or abuse who also has a family member with

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<sup>56</sup> Denis Slattery, *Dems Draw Republican Ire Over Bill Allowing New Yorkers with Felony Convictions to Serve Jury Duty*, DAILY NEWS (2019), <https://www.nydailynews.com/news/politics/ny-felons-jury-duty-20190508-phjqa5rm3fewjjdaymifza3auq-story.html>.

<sup>57</sup> UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIMINAL JUSTICE INFORMATION SERVICES DIVISION, CRIME IN THE UNITED STATES (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/downloads/download-printable-files>.

<sup>58</sup> See *supra* note 22.

<sup>59</sup> Wallis Watkins, *Louisiana House Defeats Proposal Allowing Convicted Felons to Serve on Juries*, NEW ORLEANS PUB. RADIO (2019), <https://www.wno.org/post/louisiana-house-defeats-proposal-allowing-convicted-felons-serve-juries>.

addiction issues—will be summarily excluded for cause or peremptorily through normal jury selection processes. Moreover, no evidence suggests that such similarities are dispositive of leniency.<sup>60</sup>

The only successful recent effort to restore juror eligibility to those with a felony criminal conviction occurred in California in 2019.<sup>61</sup> Senate Bill 310, introduced by State Senator Nancy Skinner (D), eliminated California's permanent record-based juror exclusion statute.<sup>62</sup> The measure removed the jury service disqualification for all prospective jurors with a felony criminal history unless (1) they currently are on some form of state supervision (probation or parole), or (2) have committed a registered sexual offense (for this population the permanent exclusion remains).<sup>63</sup>

The opposition to Senate Bill 310 in California was equally vociferous. Many in the law enforcement community questioned the wisdom of allowing those who had violated the law to decide the fate of one of their fellow citizens accused of the same. As Jim Blankenship stated in opposition to the Bill:

Are we really going to have a guy wearing an ankle bracelet sitting in a jury box? Additionally, similar to the reinstatement of voting to ex-felons, should the right to participate in a jury and the ability to make decisions affecting society be afforded to those who have obviously made poor decisions at major junctures in their lives? I think not.<sup>64</sup>

Blankenship's statement suggests that crime is solely the product of poor decisions. The statement fails to consider situational and contextual factors that influence the occurrence of crime. Structural racism, socioeconomic disadvantage, a lack of readily accessible mental health services, and overcriminalization all impact the frequency and severity of criminal activity. To discount these factors is to define crime in a way that absolves society of its failings that contribute to the production of

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<sup>60</sup> See Binnall, *supra* note 20, 36 L. & POL'Y 1 (2014).

<sup>61</sup> See California Legislative Counsel's Digest, *supra* note 48.

<sup>62</sup> See Erik Ortiz, *Most Former Felons in California are Now Eligible for a New Role: Jury Duty*, NBC NEWS (2020), <https://www.nbcnews.com/news/us-news/most-former-felons-california-are-now-eligible-new-role-jury-n1108726>.

<sup>63</sup> See California Legislative Counsel's Digest, *supra* note 48.

<sup>64</sup> Jim Blankenship, *SB310: More Fun and Games for California's Convicted Felons*, LOS ANGELES COUNTY PROFESSIONAL PEACE OFFICERS ASSOCIATION (2019), <https://ppoa.com/issue-article/sb-310-more-fun-and-games-for-californias-convicted-felons/>.

crime.<sup>65</sup>

Other criticisms cited additional security concerns posed by allowing those with a felony criminal conviction into a courthouse and the notion that so-called “good, law-abiding folks” should not have to interact with and serve alongside a citizen with a felony criminal history. Consider the comments of a representative of the Riverside Sheriffs’ Association: “[N]one of the other jurors are going to know that they are sitting there spending weeks and possibly months next to someone who may have been convicted of a serious crime of violence. They’re not going to be aware of any of that.”<sup>66</sup> Similarly, a member of the California District Attorneys Association noted:

[P]roper court security requires constant monitoring of the accused, the witnesses, the employees, and all visitors. Members of the Riverside Sheriff’s Association have sworn to protect and serve all who come to court. SB 310 will make our members’ job much more difficult by mixing violent felons on parole with dutiful citizens who have willingly chosen to participate in our judicial system.<sup>67</sup>

In California, arguments against Senate Bill 310 make tenuous presumptions. First, such arguments presume that contact with someone who has been convicted of a felony is an infrequent occurrence. Such arguments also seem to presume that those with a felony conviction—as a group—categorically pose some danger to those without a felony conviction. Evidence does not support either presumption. Rather, statistics suggest that interactions with those who have been convicted of a felony are common.<sup>68</sup> Unbeknownst to those without a felony conviction, many of their daily contacts likely include a person who has been

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<sup>65</sup> *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “The Purity of the Ballot Box”*, 102 HARV. L. REV. 1300, 1310 (1989) (quoting W. ROOT, JR., A PSYCHOLOGICAL AND EDUCATIONAL SURVEY OF 1916 PRISONERS IN THE WESTERN PENITENTIARY OF PENNSYLVANIA 10 (1927)) (“None is so repentant a sinner as to share the blame with the criminal. If we can localize the blame in the individual we can exact vengeance with precision and satisfaction. The more we can make it appear that all the causes for delinquency have their origin within the individual victim the more we may feel self-elation, the less danger there is of negative self-feeling.”).

<sup>66</sup> Larry Morris, *Media Archives*, CALIFORNIA STATE ASSEMBLY, at 3:14:40–3:19:41 (June 25, 2019).

<sup>67</sup> Ryan Sherman, *Media Archives*, CALIFORNIA STATE ASSEMBLY, at 3:14:40–3:19:41 (June 25, 2019).

<sup>68</sup> See Sarah Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States*, 54 DEMOGRAPHY 1795 (2017).

convicted of a serious criminal offense and rarely do those interactions result in crime or victimization.

Taken together, opposition to inclusive legislation relies on a strategy which involves painting those with a felony conviction as dangerous, particularly to their fellow citizens. In the realm of criminal justice policy, such an approach has been a chosen tactic for decades, perfected in the 1980s.<sup>69</sup> Despite their concerted effort, Senate Bill 310 was implemented on January 1, 2020.<sup>70</sup>

## II. THE PUNITIVE TURN AND PERCEPTIONS OF THE CONVICTED

Beginning in the late 1970s, criminal justice policies in the United States began to shift.<sup>71</sup> Skeptics of rehabilitation declared that the approach doesn't work,<sup>72</sup> while policymakers did away with discretionary parole, imposed mandatory minimums, and instituted truth in sentencing laws and habitual offender enhancements.<sup>73</sup> This shift, seemingly a rejection of the rehabilitative ideal, resulted in the exponential growth of America's correctional population and a fundamental change in the portrayal of those who commit criminal offenses.<sup>74</sup>

In the early 1970s, the incarcerated population in the United States started to grow at a rapid rate.<sup>75</sup> In 1973, 161 out of every 100,000 Americans were behind bars. By 2007, that number had increased five-

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<sup>69</sup> DAVID C. ANDERSON, *CRIME & THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE* (1995).

<sup>70</sup> Though SB 310 was implemented on January 1, 2020, there have been a number of issues regarding how California counties have notified prospective newly eligible jurors with a felony criminal history. See James M. Binnall & Lauren Davis, *Californians with a Felony Conviction are Now Eligible for Jury Service: How Would They Know?*, 32 STAN. L. & POL'Y REV. ONLINE (2020).

<sup>71</sup> See Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality In U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33 (2011).

<sup>72</sup> See Robert Martinson, *What Works? – Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974).

<sup>73</sup> See MICHAEL TONRY, *SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975–2025* (2016); MONA LYNCH, *HARD BARGAINS: THE COERCIVE POWER OF DRUG LAWS IN FEDERAL COURT* (2016); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

<sup>74</sup> See NATASHA FROST, *THE PUNITIVE STATE: CRIME, PUNISHMENT, AND IMPRISONMENT ACROSS THE UNITED STATES* (2006); STEVEN RAPHAEL, *WHY ARE SO MANY AMERICANS IN PRISON?* (2013).

<sup>75</sup> See Katherine Beckett, *Mass Incarceration and Its Discontents*, 47 CONTEMP. SOCIO. 11 (2018).

fold to 767 out of every 100,000 citizens.<sup>76</sup> Though incarceration rates have since steadied and at times decreased slightly, the U.S. still incarcerates more of its citizens than any other country in the world. Today, nearly 2.2 million Americans are behind bars,<sup>77</sup> with an additional 19 million bearing the mark of a felony conviction.<sup>78</sup> Of these 19 million people, a disproportionate number are people of color, speaking to historical racial inequalities in criminal justice.<sup>79</sup>

Along with the rapid expansion of the U.S. prison system came fundamental changes in how criminal defendants and incarcerated citizens were portrayed and perceived. No longer were those who committed criminal offenses considered “sick” or victims of unfortunate circumstances. Instead, they were seen as “evil” and immutable, implicating what noted law professor and sociologist David W. Garland has termed the “criminology of the other.”<sup>80</sup> Such a portrayal professedly focuses on the “upholding of law and order, the assertion of absolute moral standards, [and] the affirmation of tradition and commonsense.”<sup>81</sup> Yet, at its core, the criminology of the other presumes that those who have committed criminal offenses are fundamentally different from those without a criminal record.<sup>82</sup> In this way, criminal offenses define those who commit them such that a criminal conviction becomes one’s overriding master status (i.e., a social status that fundamentally shapes their lives),<sup>83</sup> making them not quite human.<sup>84</sup>

Contributing to the “othering” of those who commit criminal offenses was the media’s coverage of criminal justice issues in the 1980s

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<sup>76</sup> NAT’L RSCH. COUNCIL, NAT’L ACADS., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (Jeremy Travis, Bruce Western & F. Stevens Redburn eds., 2014).

<sup>77</sup> Danielle Kaebler & Mary Cowhig, *Correctional Populations in the United States, 2016*, U.S. DEP’T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT. (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>.

<sup>78</sup> Shannon et al., *supra* note 68.

<sup>79</sup> See Laura T. Fishman, *Images of Crime and Punishment: The Black Bogeyman and White Self-Righteousness*, in *IMAGES OF COLOR, IMAGES OF CRIME* 109, 109 (Coramae Richey Mann & Marjorie Zatz eds., 1998); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

<sup>80</sup> Garland, *supra* note 29, at 446.

<sup>81</sup> GARLAND, *supra* note 31, at 184.

<sup>82</sup> See *Id.*

<sup>83</sup> See HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963).

<sup>84</sup> See IRVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

and 1990s.<sup>85</sup> By focusing on rare, incendiary types of crime, such as the Willie Horton incident or the Central Park Five attack, the media depicted criminal offenders as random ‘sociopaths’ targeting innocent victims.<sup>86</sup> “If it bleeds it leads” has long been a rallying cry of reporters who sought to sensationalize crime.<sup>87</sup> Yet, in the 1980s and 1990s, portrayals of crime focused increasingly on certain types of events and on “who was bleeding.”<sup>88</sup> In particular, the media focused on crimes committed against white middle-class victims by racial minorities with a history of involvement in the criminal justice system,<sup>89</sup> often exaggerating the incidence of “stranger-based crimes.”<sup>90</sup> This approach gave way to overtly stereotypical depictions of crime and those who commit criminal offenses,<sup>91</sup> in part reinforcing race as a proxy for criminality, such that the “black boogeyman” and the “criminal” often became one and the same.<sup>92</sup> The dehumanization and criminalization of people of color, a tactic common in the South during Jim Crow,<sup>93</sup> was repopularized in the 1980s

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<sup>85</sup> See Melissa Hickman Barlow, *Race and the Problem of Crime in “Time” and “Newsweek” Cover Stories, 1946 to 1995*, 25 SOC. JUST. 149 (1998); Katherine Beckett, *Setting the Public Agenda: “Street Crime” and Drug Use in American Politics*, 41 SOC. PROBS. 425 (1994).

<sup>86</sup> Justin Baer & William J. Chambliss, *Generating Fear: The Politics of Crime Reporting*, 27 CRIME, LAW & SOC. CHANGE 87, 87–101 (1997); see also *id.*

<sup>87</sup> ANDERSON, *supra* note 69; Grant Duwe, *Body-Count Journalism: The Presentation of Mass Murder in the News Media*, 4 HOMICIDE STUDS. 364 (2000); Nick Petersen, *Neighborhood Context and Media Constructions of Murder: A Multi-Level Analysis of Homicide Newspaper Coverage in Los Angeles County*, 20 HOMICIDE STUDS. 25 (2016).

<sup>88</sup> Kenneth Dowler, *Dual Realities? Criminality, Victimization, and the Presentation of Race on Local Television News*, 27 J. OF CRIME AND JUST. 79, 94 (2004).

<sup>89</sup> See ANDERSON, *supra* note 69.

<sup>90</sup> William S. Lofquist, *Constructing “Crime”: Media Coverage of Individual and Organizational Wrongdoing*, 14 JUST. Q. 243, 243 (1997); see also Steven M. Chermak, *Body Count News: How Crime is Presented in the News Media*, 11 JUST. Q. 561 (1994); VICTOR E. KAPPELER, MARK BLUMBERG, & GARY W. POTTER, *THE MYTHOLOGY OF CRIME AND CRIMINAL JUSTICE* (2nd ed. 1996).

<sup>91</sup> Kenneth Dowler, Tomas Fleming, & Stephen L. Muzatti, *Constructing Crime: Media, Crime, and Popular Culture*, 48 CANADIAN J. CRIMINOLOGY AND CRIM. JUST. 837, 837–50 (2006); KATHRYN R. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MACROAGGRESSIONS* (1st ed. 1998).

<sup>92</sup> Laura T. Fishman, *Images of Crime and Punishment: The Black Bogeyman and White Self-Righteousness* in IMAGES OF COLOR IMAGES OF CRIME 109 (C.R. Mann and M.S. Zatz eds., Oxford University Press 1998); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

<sup>93</sup> *Id.*



and 1990s and persists to this day.<sup>94</sup>

Political actors, primarily conservatives, have also historically embraced and promoted stereotypical images of criminal offenders.<sup>95</sup> Beginning with Goldwater's 1964 presidential campaign and continuing into the 1980s with Ronald Reagan's "war on drugs," conservatives have tended to politicize criminality, calling for an end to "street crime."<sup>96</sup> Yet, as Dr. Katherine Beckett notes, "[s]treet crime' is not a legal category, and . . . was generally used to refer to crimes of violence committed by strangers."<sup>97</sup> Focused on rare, exceedingly lurid forms of criminal behavior committed by the criminal "other," this "tough on street crime" stance seemingly allowed policymakers "to express commitment to the security of the people while avoiding debate on the difficult questions of how to manage the major forms of modern public security (pensions, insurance, public education)."<sup>98</sup> Such an approach also reinforced the notion that those who commit criminal offenses are somehow fundamentally distinct from those who do not. On this point, Beckett notes:

Since the 1960s, conservatives have paid an unprecedented amount of attention to the problem of "street crime," ridiculed the notion that criminal behavior has socioeconomic causes, and promoted the alternative view that crime is the consequence of "insufficient curbs on the appetites or impulses that naturally impel individuals towards criminal activities" . . . . The conservative view that the causes of crime lie in the human "propensity to evil," rests on a pessimistic view of human nature,

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<sup>94</sup> Amber Phillips, *They're Rapists. President Trump's Campaign Launch Speech 2 Years Later, Annotated*, WASHINGTON POST (Jun. 16, 2017) ("When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists."), <https://www.washingtonpost.com/news/the-fix/wp/2017/06/16/theyre-rapists-presidents-trump-campaign-launch-speech-two-years-later-annotated/>.

<sup>95</sup> JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME CHANGED DEMOCRACY AND CREATED FEAR (2007); Vesla M. Weaver, *Frontlash: Race and Development of Punitive Crime Policy*, 21 STUDS. AM. POL. DEV. 230 (2007).

<sup>96</sup> David Downes, *Comparative Criminology, Globalization, and the "Punitive Turn"*, in COMPARATIVE CRIMINAL JUSTICE AND GLOBALIZATION (David Nelken ed.) 27, 37–57 (2016).

<sup>97</sup> See Beckett, *supra* note 82, at 426.

<sup>98</sup> Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 L. & SOC. INQUIRY 1111, 1121 (2000).

one that clearly calls for the expansion of the social control apparatus.<sup>99</sup>

Still, the politicization of crime is not solely a conservative tactic. In the 1990s, Democratic President Bill Clinton capitalized on the “tough on crime” platform,<sup>100</sup> seemingly seeking to avoid his own Willie Horton moment.<sup>101</sup> As a presidential candidate, Clinton left New Hampshire, the site of the Presidential primary to oversee the execution of a mentally disabled man in Arkansas. As president, Clinton signed the 1994 Crime Bill which drastically increased the number of federal capital offenses and ensured that those convicted of felony offenses serve eighty-five percent of their sentence.<sup>102</sup> Appropriately characterizing his approach to criminal justice issues, Clinton remarked, “I can be nicked on a lot, but no one can say I’m soft on crime.”<sup>103</sup>

Importantly, a wealth of political science research suggests that policymakers and the media helped shape the public’s views and agenda.<sup>104</sup> In particular, a long line of studies demonstrates that “agenda-

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<sup>99</sup> KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN AMERICAN CONTEMPORARY POLITICS 10 (1999).

<sup>100</sup> See NORMAN SOLOMON, FALSE HOPE: THE POLITICS OF ILLUSION IN THE CLINTON ERA (1994).

<sup>101</sup> In 1984, Willie Horton, an inmate serving a life sentence, walked out of a Massachusetts state prison after receiving a furlough. Now a well-known cautionary tale of progressive correctional initiatives, Horton jumped his furlough, traveled to Maryland, and assaulted a young married couple in their own home. What followed altered a presidential election and forever changed criminal justice policies in the United States. George H. Bush, then the Republican Vice President and presidential candidate, pounced on the Horton story, using it as fodder against his Democratic opponent, Massachusetts’ Governor Michael Dukakis, who had supported the state’s furlough program. A now famous campaign advertisement displayed a mugshot of a disheveled Horton, an African-American male, only hours after his arrest. The ad then cut away to a dark figure entering and leaving state prison by way of a turnstile. The Horton story became a racialized proxy for perceived leniency in the criminal justice system and has since shaped popular conceptualizations of those who commit criminal offenses. See Ronald C. Kramer & Raymond J. Michalowski, *The Iron Fist and the Velvet Tongue: Crime Control Policies in the Clinton Administration*, 22 SOC. JUST. 87 (1995); see also Marc Mauer, *Why are Tough on Crime Policies so Popular?* 11 STAN. L. & POL’Y REV. 9 (1999).

<sup>102</sup> See Jonathan Simon, *Fear and Loathing in Late Modernity: Reflections on the Cultural Sources of Mass Imprisonment in the United States*, 3(1) PUNISHMENT & SOC’Y 21, 30 (2001).

<sup>103</sup> See Michael Kramer, *Frying Them Isn’t the Answer*. TIME (Mar. 14, 1994), <http://content.time.com/time/magazine/article/0,9171,980318,00.html>.

<sup>104</sup> See Maxwell McCombs & Donald Shaw, *The Agenda-Setting Function of Mass Media*, 36 PUB. OP. Q. 176, 176–87 (1972); DAVID L. PROTSS & MAXWELL E. MCCOMBS, AGENDA SETTING: READINGS ON MEDIA, PUBLIC OPINION, AND

setting” occurs through a series of complex feedback loops comprised of direct and indirect input from the press, policymakers, and the public.<sup>105</sup> Often, issues first find their way into the national consciousness as the result of “focusing events” or “triggering devices.”<sup>106</sup> Media outlets and politicians then frame those issues, thereby shaping public perceptions.<sup>107</sup> With respect to the public’s view of crime, Wolfe et al. explain:

[M]edia attention and policymaking activities can become intertwined in complex feedback systems, as apparently happened in the burst of policy activity surrounding crime and justice issues in the mid-1980s. With a rise in crime came greater media and public attention to the issue, which led to more policymaking activities. This, in turn, led to more media and public attention, in a cycle that continued even after the crime rate had ceased to increase.<sup>108</sup>

Though we are now roughly four decades removed from the peak of the punitive turn and crime rates have since stabilized, public attitudes toward those convicted of criminal offenses have generally not softened.<sup>109</sup> Still, recent studies reveal that the public’s view of those with criminal histories is nuanced, with their punitive sentiment often coexisting alongside an endorsement of more progressive rehabilitative

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POLICYMAKING (1991); Maxwell E. McCombs, *A Look at Agenda-Setting: Past, Present, and Future*, 6 JOURNALISM STUD. 543, 557 (2005); Maxwell E. McCombs, Donald Shaw, & David Weaver, *New Directions in Agenda-Setting Theory and Research*, 17 MASS COMM’N & SOC’Y 781, 802 (2014).

<sup>105</sup> See Dietram Scheufele, *Agenda-Setting, Priming, and Framing Revisited: Another Look at Cognitive Effects of Political Communication*, 3 MASS COMM’N & SOC’Y 297, 316 (2000).

<sup>106</sup> See Thomas Birkland, *Focusing Events, Mobilization, and Agenda-Setting*, 18(1) J. PUB. POL’Y 53, 74 (1998); Thomas Birkland, *The World Changed Today: Agenda-Setting and Policy Change in the Wake of the September 11 Terrorist Attacks*, 21 REV. POL’Y RSCH. 179, 200 (2004).

<sup>107</sup> Robert M. Entman, *How the Media Affect What People Think: An Information Processing Approach*, 51 J. POL. 347, 347–70 (1989).

<sup>108</sup> Michelle Wolfe, Byron D. Jones, & Frank R. Baumgartner, *Failure to Communicate: Agenda Setting in Media and Policy Studies*, 30 POL. COMM’N 175, 179 (2013).

<sup>109</sup> See Timothy J. Flanagan, *Reform or Punish: Americans’ Views of the Correctional System*, in AMERICANS VIEW CRIME AND JUSTICE: A NATIONAL PUBLIC OPINION SURVEY 75, 92 (Timothy James Flanagan & Dennis R. Longmire eds., 1996); Brett Garland, Eric Wodahl, & Lisa Cota, *Measuring Public Support for Prisoner Reentry Options*, 60 INT’L J. OF OFFENDER THERAPY AND COMPAR. CRIMINOLOGY 1406, 1424 (2016); Shadd Maruna & Anna King, *Public Opinion and Community Penalties*, in ALTERNATIVES TO PRISON: ALTERNATIVES FOR AN INSECURE SOCIETY 83, 112 (A.E. Bottoms, Sue Rex, & Greg Robinson eds., 2004).

efforts.<sup>110</sup> Research also makes clear that such views may be shaped by a host of factors, including respondents' political ideology.<sup>111</sup> Given these confounding factors, accurate gauging of public opinion on criminal justice issues and those convicted of a felony requires direct polling.

On this front, few surveys have examined public views toward record-based juror exclusion. As noted, the few studies which have been conducted revealed that the public is evenly divided on the issue and that attitudes toward felon-juror exclusion were split with a significant influence from their political ideology.<sup>112</sup> The present study builds on these prior findings, exploring for the first time how the public feels about anticipated interactions with those convicted of a felony, thereby indirectly evaluating emotive arguments against inclusion.

### III. A STUDY OF ANTICIPATED INTERACTIONS: HOW CLOSE IS TOO CLOSE?

The present study further explores the contours of public opinion toward jurors convicted of a felony offense. Utilizing originally-collected survey data from 815 Californians, we examine attitudes toward jurors with a felony criminal history in general and as (1) fellow jurors and (2) finders of fact. Our analysis focuses on California not only because it has one of the largest populations of citizens convicted of a felony in the U.S.,<sup>113</sup> but also because the state recently passed Senate Bill 310, allowing most citizens with a felony record to serve on juries.<sup>114</sup> However, California's demographics could also limit the generalizability of our findings. While California is often stereotyped as a bastion of liberalism, the state is more ideologically diverse than typically portrayed. For example, nearly 35% of the California votes in 2016 were for Trump.<sup>115</sup> Moreover, this survey includes a sizeable proportion of conservatives (23%) and moderates (44%), with liberals only comprising one-third of the sample (33%). Although this ideological diversity speaks to the

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<sup>110</sup> John Doble, *Attitudes to Punishment in the U.S.: Punitive and Liberal Opinions*, in *CHANGING ATTITUDES TO PUNISHMENT: PUBLIC OPINION, CRIME AND JUSTICE* 148, 162 (Julian Roberts & Mike Hough eds., 2002).

<sup>111</sup> Brandon K. Applegate, Francis T. Cullen, Bonnie S. Fisher, & Thomas Vander Ven, *Forgiveness and Fundamentalism: Reconsidering the Relationship Between Correctional Attitudes and Religion*, 38 *CRIMINOLOGY* 719, 754 (2000).

<sup>112</sup> See *supra* note 33 and accompanying text.

<sup>113</sup> See Shannon et al., *supra* note 68.

<sup>114</sup> See California Legislative Counsel's Digest, *supra* note 48.

<sup>115</sup> The New York Times, *California Election Results 2016*, *NEW YORK TIMES* (Aug. 1, 2017), <http://www.nytimes.com/elections/results/california>.

robustness of our findings, future research should extend analyses to other states, especially those that recently restored convicted felons' voting rights such as Virginia, Louisiana, and Florida.

A non-profit survey research institute at California State University, Sacramento—California Speaks Opinion Research (*CALSPEAKS*)—conducted this original survey on behalf of the authors in August 2017.<sup>116</sup> Voting-age Californians (aged 18 years or older) were randomly selected from the U.S. Postal Service Delivery Sequence File of California residential addresses and from a comprehensive listing of California telephone numbers (approximately sixty-five percent of which were mobile phone numbers). Participants were recruited via phone and/or postcard, receiving a \$5 gift card for participating via Qualtrics in a computer-assisted telephone survey lasting approximately ten to fifteen minutes. These 815 respondents were part of a larger longitudinal *CALSPEAKS* panel with a response rate of roughly fifty-five percent.<sup>117</sup>

## A. Variables

### 1. Outcome Variables

We examine three outcome variables measuring respondents' attitudes towards jurors with a felony conviction. The first is a binary (yes/no) question about general support for jurors with a felony conviction. That question asks whether “[a] citizen who has been convicted of a felony should be allowed to serve as a juror?” We also employ two ordinal measures that tap into the contextual nature of support for such jurors. The first ordinal question asks, “[i]f I were selected to serve on a jury, I would feel comfortable if one of my fellow jurors was a convicted felon?” Our second ordinal question asks, “[i]f I were a party to a case (a litigant), I would feel comfortable if one of the jurors deciding my case was a convicted felon?” These two ordinal questions tap into respondents' attitudes toward anticipated interactions with jurors who have a felony record in two different contexts. The first ordinal question about serving on a jury with someone who has a felony record, speaks to

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<sup>116</sup> David Barker, Kim Nalder, & Barbara Kerschner, *CALSPEAKS Survey of Californians, August 2017*, CAL. STATE UNIV., SACRAMENTO, INST. SOC. RSCH. (2017).

<sup>117</sup> To prevent the professionalization of survey respondents, participants were prohibited from taking more than six surveys per year. In addition, respondents that failed “attention check” questions or those that completed the survey in less than one-half of the mean completion time were removed from the sample to ensure that participants were paying attention throughout the entire survey.

respondents' willingness to cooperate with such individuals during the jury process, whereas the second ordinal question speaks to respondents' confidence in the ability of a juror with a felony record to adequately decide their case. For our ordinal outcome variables, respondents selected one of the following responses based on a five point Likert scale: (1) "strongly disagree," (2) "somewhat disagree," (3) "neither agree nor disagree," (4) "somewhat agree," and (5) "strongly agree."

## 2. Predictor Variables

Our statistical models take into account additional respondent demographics shown to predict criminal justice attitudes in prior research,<sup>118</sup> including race,<sup>119</sup> gender,<sup>120</sup> income,<sup>121</sup> education,<sup>122</sup> age,<sup>123</sup> marital status,<sup>124</sup> and religion.<sup>125</sup> Notably, we also account for political

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<sup>118</sup> See Candaly B. Rade, Sara L. Desmarais, & Roger E. Mitchell, *A Meta-Analysis of Public Attitudes Toward Ex-Offenders*, 43 CRIM. JUST. & BEHAV. 1260, 1280 (2016) (for a review of factors influencing attitudes toward those convicted of criminal offenses).

<sup>119</sup> We measured respondent race and ethnicity using four categories: White, Black, other races (e.g., Asian, Middle Eastern, Native American), and Hispanic. Whites comprise the largest group of respondents (54%), followed by other races (22%), Hispanic (18%), and Black (5%).

<sup>120</sup> Gender was dichotomously coded, with males comprising 51% of the sample.

<sup>121</sup> Socio-economic status was derived from variables measuring income and educational attainment. Income was captured with three categories: \$50,000 or less, \$50,001-\$100,000, and \$100,001 or more. Given California's high levels of median income, which is 15% higher than the U.S. more generally at \$63,783, it is not surprising that most respondents had an income of \$50,000 or more. U.S. Census, *U.S. Census Bureau QuickFacts: California* (2017), <https://www.census.gov/quickfacts/fact/table/ca/PST045217> (last visited Nov. 1, 2018).

<sup>122</sup> Education is represented by four categories, indicating if respondents have a high school degree or less, attended college or graduated with a two-year college degree, have a four-year college degree, or have a post-graduate degree. Most respondents either attended some college or graduated with a four-year college (59%), and are typically within the \$50,001-\$100,000 (36%) and \$100,000 or more (37%) income brackets. This result was expected given California's high level of median income, which is 15% higher than the U.S. more generally at \$63,783. Thus, it is not surprising that most respondents had an income of \$50,000 or more.

<sup>123</sup> We captured respondent age by a series of categories: 18 to 34, 35 to 49, 50 to 64, and 65 or older. Most respondents are age 35 to 49 years old (31%).

<sup>124</sup> We divided marital status into three categories: married/civil union, single/never married, and others (e.g., divorced, separated, widowed). Most respondents are married or in a civil union (45%).

<sup>125</sup> Our religiosity measure separates Protestants from other Christians because they are thought to be especially punitive due to their biblical literalism and authoritarian views of God, leaving us with four categories: Protestant, other Christian (e.g., Catholic, Mormon), other religions (e.g., Jewish, Muslim, Buddhist), and non-religious.

ideology. Prior studies have found political ideology to be an important correlate of criminal justice attitudes, particularly in the context of record-based voting rights.<sup>126</sup> We divided political ideology into three categories: liberal, moderate, and conservative.<sup>127</sup>

### B. Analytic Strategy

Statistical models were analyzed using sampling weights, making our sample of 815 respondents representative of nearly 8 million voting-age Californians.<sup>128</sup> Therefore, the use of sampling weights increases the studies generalizability to Californians. Predicted probabilities for our ordinal and dichotomous outcome variables were then generated from our statistical models by political ideology to further interrogate potential ideological divides. The predicted probabilities help illustrate any statistical differences that might exist across respondents' ideological spectrum net of other demographic factors included in the regression models (e.g., race, gender, age).<sup>129</sup> Generating predicted probabilities

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Respondents are split among Protestantism (29%), other Christian denominations (31%), and Atheism (33%), with other religions comprising a smaller group (7%). See Brandon K. Applegate et al., *supra* note 111; Jasmine R. Silver & Eric Silver, *Why are Conservatives More Punitive than Liberals? A Moral Foundations Approach.*, 41 LAW HUM. BEHAV. 258 (2017).

<sup>126</sup> See Jeff Manza, Clem Brooks, & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68(2) PUB. OP. Q. 275, 286 (2004); Brian Pinaire, Milton Heumann, & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. LAW J. 1519 (2002); Sam Levine & Ariel Edwards-Levy, *Most Americans Favor Restoring Felons' Voting Rights, But Disagree On How*, HUFFINGTON POST (Mar. 21, 2018), [https://www.huffpost.com/entry/felons-voting-rights-poll\\_n\\_5ab2c153e4b008c9e5f3c88a](https://www.huffpost.com/entry/felons-voting-rights-poll_n_5ab2c153e4b008c9e5f3c88a).

<sup>127</sup> There is a fair amount of diversity across these ideological dimensions. Most respondents are moderates (44%), followed by liberals (33%) and conservatives (23%).

<sup>128</sup> Our binary outcomes were analyzed using logistic regression, while ordinal dependent variables were estimated via ordered-logistic regression. We adjust for small amounts of missing data using chained multiple imputations, creating twenty multiply imputed datasets were constructed using the following variables as predictors in the imputation model: gender, age, race/ethnicity, income, and education. We also calculated variance inflation factors (VIFs) using OLS versions of our models. VIFs for each model are below 3, indicating that multicollinearity is not an issue.

<sup>129</sup> Given that differences in the underlying distribution of non-linear outcomes can differ across groups in ways that might impact the efficacy of equality of coefficient tests, we compare predicted probabilities instead since they are not influenced by different error terms. See Paul D. Allison, *Comparing Logit and Probit Coefficients Across Groups*, 28 SOCIO. METHODS & RSCH. 186, 208 (1999); J. Scott Long, *Group Comparisons in Logit and Probit Using Predicted Probabilities* (2009); J. Scott Long & Sarah A. Mustillo,

allows us to rule out potential confounding explanations for differences across outcomes or respondent ideological groups.

## C. Results

### 1. Descriptive Statistics

First, we found that about half of respondents (49%) support the inclusion of jurors with a felony history.<sup>130</sup> For our ordinal outcome measures, the average is around 3 (“neither agree nor disagree”) out of a scale ranging from 1 “strongly disagree” to 5 “strongly agree.” Since 3 falls in the middle of this one through five scale and corresponds to a “neither agree nor disagree” response, the fact that the average response is three suggests that most respondents are somewhat ambivalent about these issues. There are, however, slight differences in the average support in the context of anticipated interactions, with respondents being slightly less comfortable having a juror with a felony conviction as a trier of fact (average=2.87) than serving as a fellow juror (average =3).

### 2. Statistical Models

Consistent with the literature on attitudes towards crime and justice, our statistical models indicate that political ideology is a strong predictor of attitudes towards jurors with a felony criminal record.<sup>131</sup> Compared to liberals, conservatives are 56% less likely to favor the inclusion of jurors with a felony criminal record, whereas moderates are 37% less likely to favor the inclusion of jurors with a felony criminal record. However, the ideological gap between conservatives and liberals in terms of attitudes toward the inclusion of jurors with a felony criminal record was much larger than the gap between moderates and liberals. Thus, producing a three-tiered ideological hierarchy with liberals being the most supportive of inclusion, conservatives being the least supportive, and moderates in the middle.

Political ideology is also a strong predictor of respondents’ comfort with a juror who has a felony criminal record as a fellow juror or as a trier of fact. Conservatives are 66% and 62% (respectively) less likely than liberals to feel comfortable with a juror who has a felony

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*Using Predictions and Marginal Effects to Compare Groups in Regression Models for Binary Outcomes*, SOCIO. METHODS & RSCH. (2018).

<sup>130</sup> See Table 1 for summary statistics in Appendix A.

<sup>131</sup> See Table 2 Appendix B for a list of odds ratios from logistic/ordered-logistic regression models.



conviction as a fellow juror or as a trier of fact in their case. Meanwhile, moderates are 32% and 38% (respectively) less likely than liberals to feel comfortable with a juror who has a felony conviction as a fellow juror or as a trier of fact in their case. These findings reveal a stark ideological divide between political groups with respect to anticipated interaction, with liberals being the most comfortable with an anticipated interaction with a juror who has a felony conviction, while conservatives are the least comfortable.

Several other demographic characteristics also shape attitudes toward jurors with a felony conviction. Respondents who are either female, more educated, or older, hold less favorable views of jurors with a felony conviction. In particular, females feel less comfortable serving alongside a juror with a felony conviction or having such jurors as a trier of fact in their case, while post-graduates and respondents over 65 feel less comfortable with a juror who has a felony conviction deciding their case. Since most Americans with a felony criminal record are young males with lower levels of education, it may be that perhaps respondents who are female, more educated, or older are less able to relate to the plight of those with a felony conviction and thus less supportive of their inclusion in the jury process. Although some prior research has found race and religiosity to be possible predictors of criminal justice attitudes,<sup>132</sup> our results reveal few racial-ethnic or religious differences. However, this does not mean that race does not matter. Political ideology often falls along racial lines with racial minorities typically being more liberal than whites. Thus, the respondent's race might be indirectly linked to their attitude toward the inclusion of jurors with a felony record through political ideology. A notable exception to the null findings on respondent race includes other racial groups who are less supportive of jurors with a felony conviction generally, which includes serving alongside such a juror or having such a juror decide their case. Given racial stereotypes surrounding crime, it may be that other racial groups view the inclusion of jurors with a felony record through a racialized lens.<sup>133</sup>

### 3. *Predicted Probabilities from Statistical Models*

In light of prior research highlighting the role of ideology in

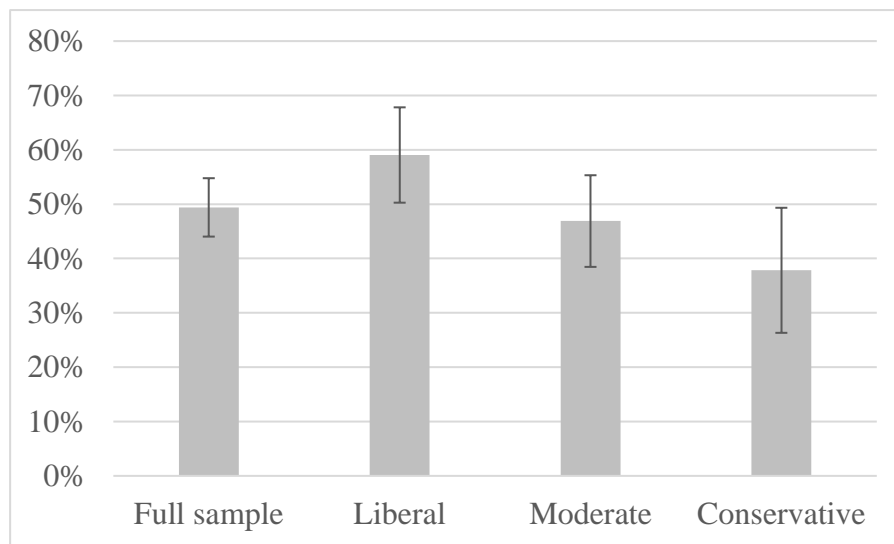
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<sup>132</sup> See Andrea Leverentz, *Neighborhood Context of Attitudes Toward Crime and Reentry*, PUNISHMENT & SOC'Y 13, 64–92 (2011) (race); see also Silver & Silver, *supra* note 125 (religion).

<sup>133</sup> KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA* (2003).

shaping attitudes towards criminal justice policies,<sup>134</sup> and the strong significance of political ideology in our statistical models, Figures 1-2 display predicted probabilities across ideological groups.<sup>135</sup> Figure 1 illustrates that overall support for jurors with a felony conviction varies across ideological groups. While roughly half of the respondents support jurors with a felony conviction generally (49%), overall support is higher among liberals (59%) than moderates (47%) and conservatives (38%). Figure 2 reveals no statistical differences in the anticipated interaction outcome variables. That is, the differences between support for serving alongside a juror with a felony record and having such a juror decide the case are not statistically different. Most respondents were ambivalent about interacting with a juror who has a felony record, with roughly 33% indicating that they “neither agree nor disagree” with serving alongside such a juror or having such a juror decide their case net of other factors.

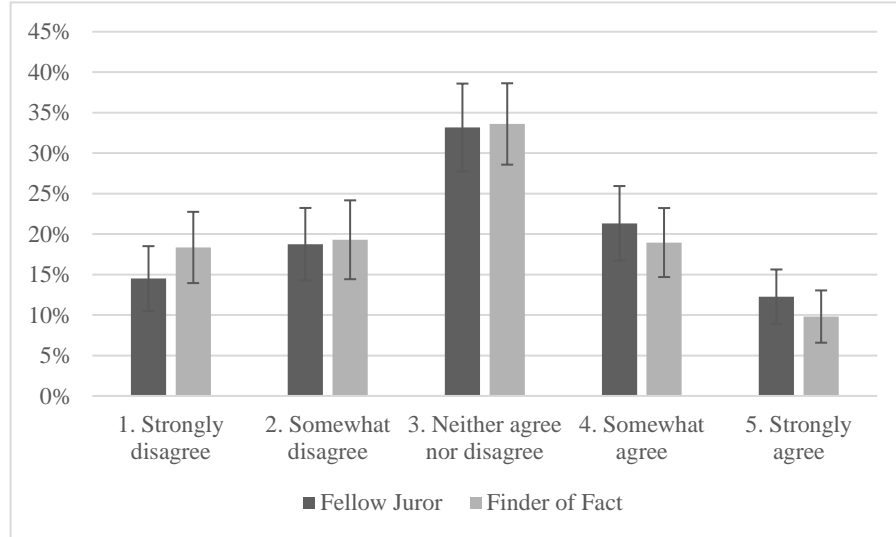
**Figure 1. Overall Support for Record-Based Juror Inclusion by Political Ideology**



<sup>134</sup> See Rade et al., *supra* note 118.

<sup>135</sup> Predicted probabilities from models generated by holding covariates constant at mean values.

**Figure 2. Record-Based Juror Exclusion by Anticipated Interactions**



In contrast, Figure 3 shows stark ideological differences in support for jurors with a felony conviction. In particular, Figure 3 indicates that conservatives are more likely to strongly disagree (24%) or somewhat disagree (24%) with feeling comfortable serving on a jury with such jurors compared to liberals (9% and 14%, respectively). Similarly, conservatives are more likely to strongly disagree (27%) or somewhat disagree (22%) with feeling comfortable having a juror with a felony conviction decide their case compared to liberals (12% and 15%, respectively).

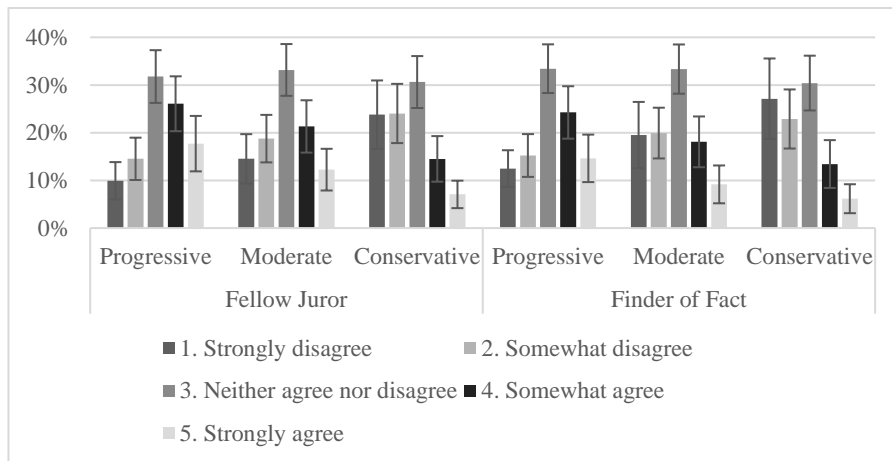
In between these two extremes lie the moderate respondents, with 15% strongly disagreeing and 18% somewhat disagreeing about feeling comfortable with serving alongside a juror who has a felony conviction, whereas 19.4% strongly disagree and 19.8% somewhat disagree with feeling comfortable having such a juror decide their case. Thus, predicted probabilities revealed clear ideological differences net of other factors in our statistical models, producing a three-tiered attitudinal hierarchy with liberals being the most supportive and conservatives being the least supportive of jurors with a felony conviction. Among each ideological group we see few statistical differences between ideological groups based on anticipated interactions.<sup>136</sup>

Thus, although political ideology fundamentally shapes

<sup>136</sup> The overlapping confidence intervals suggest statistical non-significance.

respondents' attitudes towards jurors with a felony conviction, anticipated interaction does not. This stands in sharp contrast to the sentiments levied by policymakers against recent legislation that would soften record-based juror exclusion statutes. While it is possible that respondents' attitudes towards the inclusion of jurors with a felony record shape their political ideology not vice versa, we suspect this is not the case for several reasons. For most, the exclusion of jurors with a felony record is not nearly as widely known as voting restrictions in the public sphere,<sup>137</sup> making it unlikely that respondents' attitudes on the topic would shape their political ideologies. Second, our findings are consistent with a robust literature finding that political ideology is strongly correlated with attitudes toward a wide range of crime and justice related issues.<sup>138</sup> This suggests that political ideology influences or shapes attitudes for the inclusion or exclusion of jurors with a felony record and not the other way around.

**Figure 3. Record-Based Juror Exclusion by Anticipated Interactions and Political Ideology**



#### IV. EXCLUSION, FEAR, AND THE POST-TRUTH ERA OF POLICY DEBATE

In line with prior public opinion research on record-based juror exclusion, our results reveal two notable findings. First, the data demonstrates that the public is rather ambivalent about interacting with jurors who have a felony conviction – either as a fellow juror or as a trier

<sup>137</sup> Binnall & Petersen, *supra* note 10, at 7.

<sup>138</sup> Rade, *supra* note 118, at 1269.

of fact. Results also suggest that political ideology is a significant predictor of those views, such that conservatives are far more likely to express discomfort with anticipated interactions than are moderates or liberals. These findings have implications for other jurisdictions which are considering efforts to ease record-based juror exclusion policies, as they ostensibly demonstrate that the public does not seem to share the fears expressed by legislators who oppose inclusion solely on emotive grounds.

This disconnect reflects our current political landscape. Since 2016, politics and policy debates in the United States have shifted, placing less emphasis on verifiable facts and more on appeals to anecdote and emotion.<sup>139</sup> In that same year, the Oxford English Dictionary named “post-truth” its word of the year, defining the term as “an adjective relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief.”<sup>140</sup> Along these lines, advocates no longer stipulate to established facts before advancing a policy preference. Instead, facts have become malleable, and empiricism is perceived by much of the populace [by the public? by specific sections of the population? by everyone?] as a mutable tool of the elite.<sup>141</sup> As Matthew d’Ancona has noted:

We have entered a new phase of political and intellectual combat, in which democratic orthodoxies and institutions are being shaken to their foundations . . . [r]ationality is threatened by emotion . . . [m]ore than ever, the practice of politics is perceived as a zero sum game, rather than a contest between ideas . . . [s]cience is treated with suspicion, and sometimes, open contempt.<sup>142</sup>

As d’Ancona further suggests, one particularly insidious facet of our new post-truth era is an assault on the evidence-based policy debate. Highlighting the danger of ignoring or condemning science, d’Ancona argues, “[w]hen evidence-based research is trusted less than anecdote, and institutional authority is heeded less than conspiracy theories, the consequences can be sudden and deadly.”<sup>143</sup>

Though the effect of ignoring empiricism in a debate concerning the juror eligibility of those with a criminal record is not as immediate or

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<sup>139</sup> MATTHEW D’ANCONA, POST-TRUTH: THE NEW WAR ON TRUTH AND HOW TO FIGHT BACK 7–8 (2017).

<sup>140</sup> Oxford Languages, *Word of the Year 2016*, OXFORD UNIVERSITY PRESS available at: <https://languages.oup.com/word-of-the-year/2016/>.

<sup>141</sup> See D’ANCONA, *supra* note 26.

<sup>142</sup> *Id.* at 10–11.

<sup>143</sup> *Id.* at 76.

deadly as that which d'Ancona highlights in the context of the vaccination dispute, his point is nonetheless noteworthy. Relying on untested assumptions and flawed intuitions—while ignoring a significant body of research that ostensibly undermines the practice of record-based juror exclusion—both promotes the stigmatization of those with a felony conviction and denigrates the very institution that record-based exclusionary statutes purportedly protect.

### A. Promoting Stigmatization

As noted, our findings show that nearly half of respondents are willing to serve alongside a juror with a felony criminal record or have such a juror act as a trier of fact in litigation to which they are a party. Emotive arguments designed to promote opposition to inclusion challenge this acceptance and seem to endorse an outdated view of those with felony criminal convictions. This tactic has far-reaching implications.

Stigma is “an attribute that is deeply discrediting,”<sup>144</sup> and a crucial element of the stigma formation process is separation.<sup>145</sup> In the context of criminal justice policies, separation—or distantiation—is common.<sup>146</sup> Still, as criminologist David Green has argued, a renewed focus on evidence-based reentry initiatives in the U.S. has served to temper the stigma of a criminal conviction, in part by reducing distantiation between those with criminal records and those without.<sup>147</sup> Such initiatives stress empathy for those with criminal histories and make spatial proximity possible.<sup>148</sup> Ideally, rehumanization then occurs as a passive byproduct of closeness.<sup>149</sup>

Empirical evidence tends to support Green’s assertions. In 1954, seminal psychologist Gordon Allport introduced the contact

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<sup>144</sup> GOFFMAN, *supra* note 84, at 3.

<sup>145</sup> See Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 ANN. REV. OF SOCIO. 363–85, 367 (2001); see also Jennifer Crocker, Brenda Major, & Claude Steele, *Social Stigma* in THE HANDBOOK OF SOC. PSYCH. 504–53 (Daniel T. Gilbert, Susan T. Fiske, & Gardner Lindzey eds., 1998).

<sup>146</sup> See David A. Green, *The Rehumanization of the Incarcerated Other: Bureaucracy, Distantiation and American Mass Incarceration*, in PUNISHING THE OTHER 51, 53–59 (Anna Eriksson ed., 2016) (listing 11 factors that contribute to distantiation in corrections and noting “[t]ogether these eleven forces, practices, and ideational constraints—most of which are peculiarly American—increase the social distance between the criminal Other and those of us outside the prison walls . . .”).

<sup>147</sup> See *id.* at 61.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

hypothesis.<sup>150</sup> It suggested that under certain circumstances, proximity and familiarity with stigmatized groups would reduce stigma and prejudice toward those groups.<sup>151</sup> In multiple studies, data show that increased levels of contact predict more favorable attitudes toward those who have been convicted of criminal offenses.<sup>152</sup>

By continually advancing arguments which promote fear and dehumanize those with a felony conviction, policymakers create distance between those with a criminal conviction and those without. Perhaps more insidious is the racial aspect of such tactics. Because racial minorities are more likely to have an encounter with the criminal justice system,<sup>153</sup> separating those with criminal histories from those without often amounts to a measure of de facto segregation. This distance perpetuates the cycle of stigmatization by warning against social and spatial proximity generally, while also undermining efforts to include those with a felony conviction in the jury process—an ideal tool by which to overcome distastiation and stigmatization.<sup>154</sup> Though our respondents did not take the bait, in that they did not report the level of fear and trepidation demonstrated by opponents to record-based juror exclusion,

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<sup>150</sup> GEORGE W. ALLPORT, *THE NATURE OF PREJUDICE* (1954); see also Thomas F. Pettigrew & Linda Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCH. 751, 766 (2006) (“The meta-analytic results clearly indicate that intergroup contact typically reduces intergroup prejudice. Synthesizing effects from 696 samples, the meta-analysis reveals that greater intergroup contact is generally associated with lower levels of prejudice . . .”).

<sup>151</sup> See ALLPORT, *supra* note 150 (arguing that intergroup contact was most influential under certain optimal conditions, namely when members 1) are of equal status, 2) work together cooperatively, 3) share a common collective goal, and 4) enjoy the support of the community. Subsequent research on a variety of stigmatized groups suggests that Allport’s contentions find support in data); Pettigrew & Tropp, *supra* note 150 at 766. (In fact, research also tends to show that even when optimal intergroup contact conditions do not exist, closeness and familiarity still operate to reduce stigma and prejudice even for groups that suffer severe forms of discrimination.)

<sup>152</sup> Paul J. Hirschfield & Alex R. Piquero, *Normalization and Legitimation: Modeling Stigmatizing Attitudes Toward Ex- Offenders*, 48 *Criminology* 27, 41 (2010); see also Christina Mancini, Daniel P. Mears, Eric A. Stewart, Kim M. Beaver, & Justin T. Pickett, *Whites’ Perceptions About Black Criminality: A Closer Look at the Contact Hypothesis* (2012); Gwenda M. Willis, Jill S. Levenson, & Tony Ward, *Desistance and Attitudes Towards Sex Offenders: Facilitation or Hindrance?*, 25 J. OF FAM. VIOLENCE 545, 554 (2010).

<sup>153</sup> See Shannon et al., *supra* note 68; see also ALEXANDER, *supra* note 79.

<sup>154</sup> See Gordon Bazemore & Jeanne B. Stinchcomb, *Civic Engagement and Reintegration: Toward a Community-Focused Theory and Practice*, 36 COLUM. HUM. RTS. L. REV. 241, 244 (2004).

research suggesting that policymakers have a tremendous influence on public opinion makes it likely that emotive, fear-based tactics for defeating efforts to ease record-based juror exclusion will have unintended, negative consequences in the future.

### B. Denigrating the Jury

Respect for the jury demands that any legislative discussion of record-based juror exclusion rely heavily on data and research. Simply put, the jury is too important an institution to ignore such evidence, especially when historically, “there is hardly an opinion involving jury law that does not cite empirical research findings,”<sup>155</sup> and those findings have played a key role in the continued enhancement of the jury process.<sup>156</sup>

Prior research on record-based juror exclusion is quite clear: citizens with a felony criminal conviction pose no more of a threat to the jury process than any other cognizable group of prospective jurors.<sup>157</sup> Rather, evidence suggests that jurors with a criminal history approach the task conscientiously and that participation may help facilitate their successful reintegration.<sup>158</sup> Nonetheless, opposition to the inclusion of those with a felony record ignores the evidence, choosing instead to attempt to scare the public. Our findings ostensibly indicate that their strategy is failing—at least among voting-age California residents.

While some might point out that the jury is rarely used in our criminal justice system, its importance should not be discounted. Alexis de Tocqueville opined that the jury “vests each citizen with a kind of magistracy” and “teaches everyone that they have duties towards society and a role in its government.”<sup>159</sup> Contemporary jurists also laud the jury’s importance and place in American society. For example, analyzing the Sixth Amendment’s guarantee of a right to counsel in a criminal prosecution, Justice Scalia wrote that “[w]hen this Court deals with the content of this guarantee—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating on the spinal column

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<sup>155</sup> VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 5 (1986).

<sup>156</sup> *See* DENNIS DEVINE, *JURY DECISION MAKING: THE STATE OF SCIENCE*. (New York University Press) (2012) (discussing how empirical evidence has shaped the jury over time).

<sup>157</sup> Binnall, *supra* note 22.

<sup>158</sup> *Id.*

<sup>159</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 316 (1835).



of American democracy.”<sup>160</sup> The jury’s value is multidimensional, and the loss of the jury arguably translates into a loss of transparency in criminal trials, the stunting of new case law, the erosion of trial skills among judges and attorneys, and the loss in a defendant’s ability to present their case to tribunal.<sup>161</sup>

Still, by ignoring empirical findings, discussions of record-based juror exclusion rarely conceive of the jury with the esteem it deserves. To be fair, in years past, the dearth of data on the topic significantly contributed to this oversight. Today, however, multiple empirical studies demonstrate that record-based juror exclusion is a flawed policy which makes little utilitarian sense, as the costs of exclusion far outweigh its benefits. Nevertheless, as recent legislative efforts on this front have shown, this research is too often passed over in favor of appeals to anecdotal emotion and fear.

## CONCLUSION

Going forward, jurisdictions considering reform of record-based juror exclusion statutes ought to show deference to public opinion and science. For too long, fear and assumptions have kept exclusion of individuals with a criminal history the default. The public is split on the issue, and the evidence strongly suggests that denying those with a felony conviction the opportunity to serve is both unnecessary and unwise.<sup>162</sup> Moreover, the exclusion of those with a felony conviction from jury service also exacerbates racial divides and tensions, as those with criminal histories are more often people of color who struggle daily with discrimination and co-occurring disadvantages that make it extremely difficult for them to successfully reintegrate after a period of incarceration.<sup>163</sup> As the late sociologist Devah Pager aptly noted:

When we combine the effects of race and criminal record, the problem grows more intense. Not only are [B]lacks much more likely to be incarcerated than whites; based on the findings presented here, they may also be more strongly affected by the impact of a criminal record. Previous estimates of the aggregate consequences of incarceration may therefore underestimate the impact on racial disparities.<sup>164</sup>

Playing on fear threatens to further divide already polarized

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<sup>160</sup> *Neder v. United States*, 527 U.S. 1, 30 (1999).

<sup>161</sup> *See* Conrad Jr. & Clements, *supra* note 13, at 157–164 (2018).

<sup>162</sup> *See* Binnall, *supra* note 22.

<sup>163</sup> *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 961 (2003).

<sup>164</sup> *Id.* at 961.

communities by promoting stigmatization and prejudice, while also disrespecting the jury, a bedrock institution of American democracy. Removing barriers to jury participation for those with a felony conviction would help to reunite communities and restore respect for the jury process. Still, making those with a felony criminal history eligible for jury service will not, in and of itself, ensure jury representativeness. Rather, reform efforts must also include empirically-based notification procedures that inform prospective jurors with a felony conviction of their opportunity to serve and evaluation research that examines how record-based *inclusion* works in practice. Without these additional steps, altering felon-juror exclusion statutes does little to guarantee that legislative change translates into more diverse, representative juries.

2020

*NO FEAR HERE*

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**APPENDICES****Appendix A. Summary Statistics Regarding Attitudes  
Towards Record-Based Exclusion**

	Mean
<b>Binary outcome variable (yes/no):</b>	
Support felon juror	49%
<b>Ordinal outcome variable (1 to 5):</b>	
Comfort with fellow felon juror	3.00
Comfort with felon juror as litigant	2.87
<b>Predictors:</b>	
Liberal	33%
Moderate	44%
Conservative	23%
Protestant	29%
Other Christian	31%
Other religions	7%
Not religious	33%
Male	51%
Female	49%
White	54%
Black	5%
Other	22%
Hispanic	18%
HS grad or less	24%
Some college	29%
College grad	30%
Post-grad degree	16%
\$50000 or less	27%
\$50001-\$100000	36%
\$100001 or more	37%
18 to 34	23%
35 to 49	31%

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50-64		25%
65+		22%
Married/civil union		53%
Single/never married		23%
Other marital status		24%
Observations		815

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First multiply-imputed sample.

**Appendix B. Logistic and Ordered Logistic Regressions  
Predicting Attitudes Towards Record-Based Exclusion**

Model #	(1)	(2)	(3)
Outcome	Support Jurors with a Felony Record	Comfort with a Fellow Juror	Comfort with Finder of Fact
	OR(SE)	OR(SE)	OR(SE)
Moderate	0.63* (0.16)	0.68* (0.15)	0.62** (0.14)
Conservative	0.44** (0.14)	0.34*** (0.10)	0.38*** (0.11)
Other Christian	0.91 (0.26)	0.75 (0.21)	1.03 (0.30)
Other religions	1.38 (0.71)	0.68 (0.22)	0.60 (0.23)
Not religious	1.58 (0.47)	1.07 (0.30)	1.35 (0.41)
Female	0.71 (0.15)	0.61** (0.12)	0.63** (0.13)
Hispanic	0.62 (0.20)	1.11 (0.34)	1.12 (0.35)
Other	0.30*** (0.09)	0.65** (0.14)	0.57** (0.14)
Black	0.75 (0.33)	0.77 (0.38)	0.84 (0.39)
Some college	0.86 (0.28)	0.67 (0.22)	0.61 (0.20)
College grad	1.38 (0.47)	1.14 (0.39)	0.77 (0.27)
Post-grad degree	0.73 (0.31)	1.00 (0.44)	0.46* (0.21)
\$50001-\$100000	0.77 (0.21)	0.85 (0.22)	0.82 (0.20)
\$100001 or more	1.33 (0.43)	1.49 (0.49)	1.56 (0.52)
35 to 49	1.28 (0.41)	0.76 (0.23)	0.90 (0.28)
50-64	0.84 (0.28)	0.75 (0.23)	0.87 (0.26)
65+	0.98 (0.35)	0.66 (0.19)	0.59* (0.18)
Single/never married	1.20 (0.37)	1.11 (0.31)	1.12 (0.30)
Other marital status	1.79** (0.52)	1.61 (0.48)	1.50 (0.48)
Observations	815	815	815

Exponentiated coefficients; Standard errors in parentheses. NOTES: OR = Odds Ratio, SE = Standard Error. Multiply-imputed sample. Reference categories = conservative ideology; Protestant Christian; male; white; high school degree or less; income of \$50000 or less; aged 18 to 34 years-old; married/civil union.

\*  $p < 0.10$ , \*\*  $p < 0.05$ , \*\*\*  $p < 0.01$