

BLIND ADOPTION:¹ OREGON’S JURY EXCLUSION LAW

by
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Jury service is a core tenet of civic engagement and an essential part of ensuring a trial by a jury of one’s peers. Despite this, millions of Americans are barred from serving on a jury based on a prior criminal conviction. Oregon has one of the harshest jury exclusion laws in the country, barring people from serving on a jury with a felony conviction and certain misdemeanors. The modern context of the criminal justice system requires a new look at Oregon’s law.

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¹ JAMES M. BINNALL, TWENTY MILLION ANGRY MEN: THE CASE FOR INCLUDING CONVICTED FELONS IN OUR JURY SYSTEM 18 (2021) (Binnall uses the phrase “blind adoption” to describe how the U.S. adopted jury exclusion laws based on criminal conviction from English common law).

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INTRODUCTION

Trial by jury has been a cornerstone of freedom and justice for centuries. The Oregon and United States constitutions protect the right of citizens to a jury trial as vital to the administration of justice. Your public service as a juror is one of the most important functions of our democracy. The proper and efficient functioning of the justice system requires jurors to exercise intelligence, integrity, sound judgment and complete impartiality.²

Jury duty is a core civic responsibility of all American citizens.³ Two-thirds of Americans agree that serving on a jury is part of what it means to be a good citizen.⁴ Even though the number of cases that are decided by a jury has declined substantially over the past century,⁵ juries remain an essential and inextricable part of the justice system.⁶ However, millions of Americans are disqualified from jury service due to criminal convictions.⁷ Laws excluding people with criminal convictions are deeply rooted in our nation’s justice system. Oregon’s law, however, is one of the harshest in the country, barring people with misdemeanor as well as felony convictions. Oregon’s law was passed as an effort to protect crime victims’ rights. The law fails to achieve its stated policy goals and instead imposes an arbitrary bar to civic engagement.

² Kevin Kress, *Oregon Juror Handbook*, OR. STATE BAR (May 2018), <https://www.osbar.org/public/jurorhandbook.htm>.

³ *A Guide to Naturalization*, U.S. CITIZENSHIP AND IMMIGR. SERVS., <https://www.uscis.gov/sites/default/files/document/guides/chapter2.pdf> (last visited Oct. 24, 2022).

⁴ John Gramlich, *Jury Duty Is Rare, but Most Americans See It as Part of Good Citizenship*, PEW RSCH. CTR. (Aug. 24, 2017), <https://www.pewresearch.org/fact-tank/2017/08/24/jury-duty-is-rare-but-most-americans-see-it-as-part-of-good-citizenship>.

⁵ Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 28 (2017), <http://judicature.duke.edu/articles/going-going-but-not-quite-gone-trials-continue-to-decline-in-federal-and-state-courts-does-it-matter>.

⁶ J. Jack Zouhary, *Jury Duty: A Founding Principle of American Democracy*, CIV. JURY PROJECT, <https://civiljuryproject.law.nyu.edu/jury-duty-a-founding-principal-of-american-democracy> (last visited Oct. 24, 2022).

⁷ See One Voice, Miss. NAACP, & The Sent’g Project, *Felony Disenfranchisement in Mississippi*, THE SENT’G PROJECT (Feb. 13, 2018), <https://www.sentencingproject.org/policy-brief/felony-disenfranchisement-in-mississippi> (6.1 million Americans are disenfranchised due to felony convictions).

Passed via ballot measure as part of the 1999 Oregon “Victims’ Bill of Rights” and codified as Article I, section 45 of the Oregon Constitution,⁸ Oregon’s jury exclusion law bars those with a felony conviction from serving on a jury for 15 years from the date of conviction to the date of the jury summons. It also bars anyone with a conviction for a misdemeanor crime involving violence or dishonesty from serving on a jury for 5 years from the date of the jury summons.⁹ Only six states, including Oregon, exclude people who have been convicted of certain misdemeanors.¹⁰ This Note argues Oregon’s jury exclusion law does not achieve the policy goals of lawmakers and unfairly disenfranchises people who have already served their sentence.¹¹ Part I describes the history of jury exclusion laws in the United States. Part II outlines the legal challenges to such laws under the federal Constitution. Part III explains common policy arguments for jury exclusion laws and describes the legislative and electoral history of Article I, section 45 of the Oregon Constitution. Part IV examines the consequences of the exclusion law and its disproportionate impact on racial minorities arguing the law should be repealed.

I. THE RIGHT TO A JURY OF ONE’S PEERS

A. *The Sixth Amendment*

The right to a trial by a jury of one’s peers is codified in the Sixth Amendment of the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.¹²

⁸ OR. CONST. art. I, § 45; ELECTIONS DIV., OR. SEC’Y OF STATE, OFFICIAL RESULTS: NOVEMBER 2, 1999 SPECIAL ELECTION (1999), <http://records.sos.state.or.us/ORSOSWebDrawer/RecordView/6920723> [hereinafter OFFICIAL RESULTS: NOVEMBER 2, 1999]; Or. Sec’y of State, *Initiative, Referendum, and Recall*, OR. BLUE BOOK 24, <https://sos.oregon.gov/blue-book/Documents/elections/initiative.pdf> (last visited May 26, 2023).

⁹ OR. REV. STAT. § 10.030(3)(a) (2021); OR. CONST. art. I, § 45.

¹⁰ Ginger Jackson-Gleich, *Rigging the Jury: How Each State Reduces Jury Diversity by Excluding People with Criminal Records*, PRISON POL’Y INITIATIVE (Feb. 18, 2021), <https://www.prisonpolicy.org/reports/juryexclusion.html>.

¹¹ Because Oregon’s jury exclusion law only applies to grand juries and criminal trial juries, this Note refers exclusively to juries in a criminal context.

¹² U.S. CONST. amend. VI.

In the pre-Revolutionary American colonies, juries were a powerful tool to nullify the seditious libel laws imposed by British rule.¹³ Juries frequently disregarded the black letter law and exonerated people accused of these types of crimes as a rebellion against the unjust laws.¹⁴ Amidst this background, the right to an impartial jury in criminal cases became a major point of agreement during the constitutional drafting.¹⁵ The right to a jury trial served two purposes for the Framers: first, it protected the rights of the person accused of a crime, and second, it allocated political power away from the government and into the hands of the general public.¹⁶ The Framers viewed a trial by a jury of one's peers as a key check on the power of the state, including the right in the Bill of Rights and widely adopted by the states.¹⁷

In the background of these lofty policy goals was the reality that, at the time of the founding, only white, land-owning men qualified for jury service at all.¹⁸ The Federal Judiciary Act of 1789 left the power to determine who could serve on a jury to the states.¹⁹ The first jury exclusion laws in the United States restricted jury eligibility only to white men who owned land.²⁰ The land-owning requirement quickly fell away,²¹ but the race and gender requirement remained through most of the 20th century.²² In practice, this meant that Black citizens and women were excluded from jury service until well into the 20th century.²³ As other categorical bans to jury service are repealed, jury exclusion laws based on past criminal convictions stand out as outdated.

¹³ Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 874 (1994).

¹⁴ *Id.*

¹⁵ *Id.* at 871; THE FEDERALIST NO. 83, at 562 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.”).

¹⁶ Alschuler & Deiss, *supra* note 13, at 876.

¹⁷ See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 655 (1973) (noting that the right to a jury trial is one of the only rights universally adopted in state constitutions).

¹⁸ See Alschuler & Deiss, *supra* note 13, at 877–78.

¹⁹ An Act to Establish the Judicial Courts of the United States, ch. 20 § 29, 1 Stat. 73, 88 (1789).

²⁰ See Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 LA. L. REV. 55, 58 (2020).

²¹ An Act to Establish the Judicial Courts of the United States, 1 Stat. ch. 20 (1798); see also Alschuler & Deiss, *supra* note 13, at 868 (“Unpropertied white men, initially excluded from jury service, became jurors fairly rapidly.”).

²² Taylor v. Louisiana, 419 U.S. 522, 534 (1975).

²³ See Norris v. Alabama, 294 U.S. 587, 596 (1935) (following a campaign by the NAACP, the Court struck down the all-white jury conviction of the Scottsboro boys because of illegal race

1. *Fair Cross-Section Requirement of the Sixth Amendment*

As part of the expansion of jury eligibility among citizens, the Supreme Court read the Sixth Amendment's "impartial" requirement to mean that juries must represent a fair cross-section of the community.²⁴ The cross-section requirement "declares that juries must be drawn from a broadly representative pool."²⁵ This implied right to have a representative jury is codified at the federal and state level, including in Oregon.²⁶ Widespread codification of this federal constitutional right signifies the states' commitment to having juries be as inclusive as possible. Practically, this requirement means that jury pools are generally made up of voter registration lists.²⁷ However, one key exception to the overlap between voters and eligible jury members is jury exclusion laws for past criminal convictions, meaning many people convicted of crimes can vote but are barred from jury service. Even though almost any cross-section of a community would include people with criminal convictions, courts have been clear that there is no right for a defendant to be tried by a jury with a juror who has a criminal conviction.²⁸

discrimination in the jury selection); *Batson v. Kentucky*, 476 U.S. 79, 94 (1986) (holding that defendants may raise a racial discrimination challenge when a racial group is significantly underrepresented on a jury venire); *see also* James Forman Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 922, 929–31 (2004) (explaining that the Civil Rights Act of 1875 and the 14th and 15th Amendments passed during the Reconstruction era prohibited race discrimination in jury service; most states had a de facto ban on non-white citizens serving on a jury until well into the 20th century). Interestingly, a 1921 law in Oregon mandated that in cases involving a minor, half the jury must be women. Act of Feb. 25, 1921, ch. 273, § 10, 1921 OR. LAWS 513, 515. The same law also allowed women an automatic exemption from jury service all together by virtue of their sex. *Id.*; R. Justin Miller, *The Woman Juror*, 2 OR. L. REV. 30, 38–39 (1922).

²⁴ *Glasser v. United States*, 315 U.S. 60, 86 (1942); *see also* Hoag, *supra* note 20, at 67; BINNALL, *supra* note 1.

²⁵ Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 75 (2003).

²⁶ 28 U.S.C. § 1861 ("Declaration of Policy"); OR. REV. STAT. § 10.215(1) (2021) ("the records furnished by the Department of Transportation . . . will furnish a fair cross section of the citizens of the county"); *see also* ALA. CODE § 12-16-55 (2022); ARIZ. REV. STAT. ANN. § 21-302(D) (2022); CAL. CIV. PROC. CODE § 197(A) (West 2023); COLO. REV. STAT. § 13-71-104(2) (2023); D.C. CODE § 11-1901 (2023); DEL. CODE ANN. tit. 10, § 4501 (2023); HAW. REV. STAT. § 612-1 (2022); IDAHO CODE § 2-202 (2023); IND. CODE § 33-28-5-9(1) (2022); IOWA CODE § 607A.1 (2023); KAN. STAT. ANN. § 43-155 (2022); MD. CODE ANN., CTS. & JUD. PROC. § 8-104 (LexisNexis 2023); MISS. CODE ANN. § 13-5-2 (2023); MO. REV. STAT. § 494.400 (2022); NEB. REV. STAT. § 25-1645 (2022); N.Y. JUD. LAW § 500 (McKinney 2023); N.D. CENT. CODE § 27-09.1-01 (2021); S.D. CODIFIED LAWS § 16-13-10.1 (2023); UTAH CODE ANN. § 78B-1-103(1)(A) (West 2022); W. VA. CODE § 52-1-1 (2022).

²⁷ Kalt, *supra* note 25, at 188.

²⁸ *See infra* note 41.

B. *History of Jury Exclusion Laws Based on Criminal Conviction*

For as long as there have been juries, there have been laws excluding convicted felons from serving on them. With the Assize of Clarendon of 1166 and the 1410 law of Henry the IV,²⁹ jury exclusion laws were baked into the legal system from its earliest days. The deep roots of these laws suggest that lawmakers today likely imposed them without an independent or modern justification.³⁰ Although state legislators certainly intentionally enact jury exclusion laws, the justifications for such laws are often seen as obvious and tend to lack modern empirical support.³¹ Oliver Wendell Holmes warned of this type of reliance on old common law traditions:

History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened scepticism [sic], that is, toward a deliberate reconsideration of the worth of those rules It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.³²

Many states have “blindly adopted” jury exclusion laws.³³ Even as a citizen’s inclusion on a jury roll has “become the rule rather than the exception,” jury exclusion laws based on past criminal convictions have stayed the same for centuries.³⁴ Despite the persistence of these laws, the modern context has changed dramatically.³⁵ The incarceration rate in the United States has increased by 500% in the past four decades.³⁶ Increased criminalization means more people live with the collateral consequences of a criminal conviction than ever before. Over 20 million Americans have been convicted of a felony and over 70 million Americans have an arrest record; that is more than one in three Americans.³⁷ Considering the sheer

²⁹ Kalt, *supra* note 25, at 100.

³⁰ *Id.* at 100–01; Binnall, *supra* note 1, at 18 (“The development of such statutes signals a trend in the rather unremarkable history of civic restrictions—the blind adoption of traditional practices.”).

³¹ Kalt, *supra* note 25, at 102, 104.

³² Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

³³ Binnall, *supra* note 1, at 18.

³⁴ Kalt, *supra* note 25, at 101.

³⁵ *Id.* at 117 (“[C]urrent policy is based more on inertia than careful consideration.”).

³⁶ *Growth in Mass Incarceration*, THE SENT’G PROJECT, <https://www.sentencingproject.org/research> (last visited May 20, 2023).

³⁷ Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 11:30 PM), <https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>; Nicholas Eberstadt, *Why is the American Government Ignoring 23 Million of its Citizens?*, WASH. POST (Mar. 31, 2016, 8:34

number of people with criminal convictions, and with communities of color overrepresented,³⁸ modern and independent justification is badly needed for jury exclusion laws.

II. CONSTITUTIONAL CHALLENGES TO JURY EXCLUSION LAWS

Jury exclusion laws have consistently been upheld by courts.³⁹ The most common legal argument raised by challengers is that these laws violate the fair cross-section requirement of the Sixth Amendment.⁴⁰ Defendants argue that the fair cross-section principle requires the inclusion of those with criminal convictions in the jury selection pool. Every court, including the Oregon Supreme Court, that has considered a fair cross-section challenge to a jury exclusion law based on past criminal conviction has rejected it.⁴¹ Rooted in the “impartial” requirement of the Sixth Amendment text, the fair cross-section requirement does not mandate including felons, or other criminals, in the jury pool because those with criminal convictions are not a “distinctive group.”⁴² While scholars have argued that courts have misapplied the fair cross-section requirement in the context of jury exclusion laws,⁴³ the

PM), https://www.washingtonpost.com/opinions/why-is-the-american-government-ignores-23-million-of-its-citizens/2016/03/31/4da5d682-f428-11e5-a3ce-f06b5ba21f33_story.html.

³⁸ Jackson-Gleich, *supra* note 10.

³⁹ James L. Buchwalter, Annotation, *Disqualification or Exemption of Juror for Conviction of, or Prosecution for, Criminal Offense*, 75 A.L.R.5TH 295 (2000) (chronicling court challenges to jury exclusion laws at the federal and state level). See, e.g., *Carter v. Jury Comm'n*, 396 U.S. 320, 332 (1970) (holding that states are “free to confine the [jury] selection . . . to those possessing good intelligence, sound judgment, and fair character”).

⁴⁰ Kalt, *supra* note 25, at 75.

⁴¹ *State v. Compton*, 39 P.3d 833, 842 (Or. 2002) (en banc) (rejecting a cross-section challenge to felon exclusion); see also Kalt, *supra* note 25, at 76 (citing, for example, *United States v. Barry*, 71 F.3d 1269, 1273–74 (7th Cir. 1995) (rejecting a cross-section challenge to felon exclusion)); *United States v. Foxworth*, 599 F.2d 1, 4 (1st Cir. 1979) (rejecting a cross-section challenge to felon exclusion); *United States v. Best*, 214 F. Supp. 2d 897, 905 (N.D. Ind. 2002) (finding the cross-section argument regarding felon exclusion “unavailing”); *Carle v. United States*, 705 A.2d 682, 686 (D.C. Cir. 1998) (rejecting the ineffective assistance claim relating to the cross-section argument).

⁴² See *Compton*, 39 P.3d at 842 (“We have little difficulty concluding that felons, like nonregistered voters, are not a distinctive group for purposes of the fair cross-section requirement under the Sixth Amendment. We therefore conclude that defendant’s fair cross-section argument fails under the federal constitution.”) (citing *Barry*, 71 F.3d at 1274 (holding persons charged with felonies are not a distinctive group)).

⁴³ U.S. CONST. amend. VI (“[T]he accused shall enjoy the right . . .”). See generally Laurie Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081 (1987).

standard is simply “too muddled to say definitively that is either consistent or inconsistent with felon exclusion.”⁴⁴

Further, the Sixth Amendment does not offer relief to a potential juror who may have been discriminated against, only for a defendant challenging the makeup of their specific jury.⁴⁵ This greatly limits the number of litigants who can bring these types of claims and completely precludes excluded jurors from making a challenge.

Other common challenges to jury exclusion laws are brought under the Equal Protection Clause and have fared just as poorly. Though the Supreme Court has declared that “individual jurors themselves have a right to nondiscriminatory jury selection procedures,” the guarantee is limited to protected classes.⁴⁶ While the Fourteenth Amendment can offer relief to potential jurors who were discriminated against, unlike Sixth Amendment claims, those with criminal convictions are not a legally cognizable group.⁴⁷ Discrimination against those with criminal convictions is legal under the Fourteenth Amendment just like discrimination against age and economic status.⁴⁸ Relying on the Equal Protection Clause causes tension with the Sixth Amendment jurisprudence: the equal protection argument asserts that there is not a meaningful difference between groups while the Sixth Amendment argument holds that different groups must be included precisely because of their different perspectives.⁴⁹ In light of the long jurisprudence upholding these types of jury exclusion laws, it is likely that neither the Sixth nor the Fourteenth Amendment are successful avenues to challenging jury exclusion laws.

Interestingly, courts generally uphold verdicts when, despite the exclusion laws, a person with a criminal conviction serves on a jury anyway, usually due to a juror

⁴⁴ Kalt, *supra* note 25, at 76.

⁴⁵ Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 730–31 (1992) (arguing that a Sixth Amendment analysis is insufficient for jury inclusion because the doctrine only focuses on a particular jury composition and not on what groups must be included in a jury pool).

⁴⁶ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140–41 (1994).

⁴⁷ See Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 209 (1995) (noting that cases dealing with these types of jury exclusion laws focus on “whether a group is ‘cognizable,’ and have borne out the centrality, as well as the difficulty, of the cognizability question”).

⁴⁸ *Id.* at 210.

⁴⁹ *Id.*; see also *J.E.B.*, 511 U.S. at 140–41 (holding that striking a juror based on gender is a violation of that juror’s rights under the Equal Protection clause because women just as capable as men in judging cases impartially). Under a Sixth Amendment claim, the litigant in *J.E.B.* would have to argue that including women is mandated because women are included under a fair cross-section of the community and an impartial jury demands the inclusion of a woman’s perspective.

not reporting their past criminal conviction.⁵⁰ Parties then argue that the presence of a convicted person on a jury violates the right to an impartial jury because convicted people are inherently biased; these claims are rejected absent evidence of actual bias of a specific juror.⁵¹ Ultimately, courts have reaffirmed that discrimination against those with criminal convictions is constitutionally permissible. While courts do not appear open to reconsidering the constitutionality of these laws, the policy arguments supporting these laws fail to justify why states should discriminate in this manner.

III. POLICY ARGUMENTS IN FAVOR OF JURY EXCLUSION LAWS

While jury exclusion laws based on past criminal convictions are largely the product of blind adoption of old English common law, policy arguments supporting such laws frequently arise when lawmakers propose repealing or amending the law. Justifications for excluding those with criminal convictions from serving on a jury generally fall within two categories: the public's perception that allowing formerly incarcerated individuals to serve on a jury is unfair and the belief that those with criminal convictions are uniformly biased against the prosecution.⁵²

First, policymakers argue that allowing convicted people to serve on a jury would give the public a sense that the jury system is unfair or corrupt. This argument can be victim focused: allowing someone who committed a crime on a jury to decide a case is a dignitary harm against a potential future victim.⁵³ This argument also relies on a general feeling by the public that it would be unfair.⁵⁴ Supporters of felony exclusion laws also argue that this is one more proper collateral consequence

⁵⁰ See, e.g., *United States v. Boney*, 977 F.2d 624, 633 (D.C. Cir. 1992) (“The Sixth Amendment right to an impartial jury similarly does not require an *absolute bar* on felon-jurors.” (emphasis in original)); *Coleman v. Calderon*, 150 F.3d 1105, 1117 (9th Cir. 1998), *rev'd on other grounds*, 525 U.S. 141 (1998) (holding that the Sixth Amendment does not prohibit ex-felons from jury duty).

⁵¹ See, e.g., *Boney*, 977 F.2d at 633 (“A per se rule would be appropriate, therefore, only if one could reasonably conclude that felons are always biased against one party or another. But felon status, alone, does not necessarily imply bias . . . [T]he Sixth Amendment guarantee of an impartial trial does not mandate a per se invalidation of every conviction reached by a jury that included a felon.”).

⁵² See Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 614, 629 (2013); Kalt, *supra* note 25, at 73–74.

⁵³ See, e.g., Bob Kouns & Dee Dee Kouns, *Measure No. 75 Argument in Favor*, VOTERS' PAMPHLET, Nov. 1999 Special Election, at 42, 44 (arguments in favor of Oregon's jury exclusion law framed as a victims' rights issue).

⁵⁴ John Phillips, *California Moves to Let Felons Serve on Juries*, SAN GABRIEL VALLEY TRIB. (June 13, 2019, 11:42 AM), <https://www.sgvtribune.com/2019/06/13/california-moves-to-let-felons-serve-on-juries> (arguing that allowing formerly convicted felons on a jury would be “like having crazy cat ladies vote on how many cats a person should own”).

of a criminal conviction.⁵⁵ This type of civil collateral consequence aims “to sanction offenders in their role as members of self-governing political communities.”⁵⁶ The presence of a conviction is clear evidence that, as the Seventh Circuit stated, the “persons have shown poor judgment.”⁵⁷ Just like old English common laws, the assumption that people convicted of crimes are bad, and therefore deserve the collateral consequences that come with a conviction, seems to be sufficient for many policymakers to maintain jury exclusion laws.

The second argument frequently cited in favor of these types of exclusion laws claim that people convicted of crimes harbor biases against the prosecution.⁵⁸ Many frame this argument as painfully obvious. One columnist wrote, after California considered repealing their jury exclusion law, that “felons are prevented from serving on juries because of their obvious and inherent bias against prosecutors and law enforcement. If you honestly believe that jurors in California who’ve served time won’t be more lenient towards accused criminals, I’ve got a bullet train to sell you.”⁵⁹ While “[o]pponents of felon jury service do not maintain that every felon is unfit to be a juror,” opponents argue that a prior conviction is too convenient of a metric to be ignored.⁶⁰

A. Oregon’s Jury Exclusion Law

The relevant provisions of Oregon’s jury exclusion law are as follows:

(3)(a) Any person is eligible to act as a grand juror, or as a juror in a criminal trial, unless the person:

...

(E) Has been convicted of a felony or served a felony sentence within the 15 years immediately preceding the date the person is required to report for jury service; or

⁵⁵ Milena Tripkovic, *Collateral Consequences of Conviction: Limits and Justifications*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC’Y 18, 20 (2017).

⁵⁶ See *id.* (imposing civil restrictions on a convicted person is a polity’s way of labeling them a “bad citizen”).

⁵⁷ *United States v. Barry*, 71 F.3d 1269, 1274 (7th Cir. 1995).

⁵⁸ 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, 2 (2014).

⁵⁹ Phillips, *supra* note 54.

⁶⁰ Michael Conklin, *A Felon Among Us: Should Felons Be Allowed on Juries?*, 34 REGENT U. L. REV. 133, 137–38 (2021) (“Felon status is a binary, objective measure that is easy to ascertain. There is no such corresponding measure that could be implemented to identify and exclude non-felons who lack character.”).

(F) Has been convicted of a misdemeanor involving violence or dishonesty, or has served a misdemeanor sentence based on a misdemeanor involving violence or dishonesty, within the five years immediately preceding the date the person is required to report for jury service.⁶¹

The same statute prohibits discrimination in jury service based on “race, religion, sex, sexual orientation, gender identity, national origin, age, income, occupation” or physical disability.⁶² Oregon has had a jury exclusion law on its books since it was founded as a state.⁶³ The 1999 law expanded the time frame that convicted felons must wait to be eligible for jury duty and added certain misdemeanor crimes.⁶⁴

1. *Legislative History of Oregon Revised Statute Section 10.030(3)(a)*

The Oregon Victims’ Bill of Rights was originally passed in 1996⁶⁵ but the Oregon Supreme Court struck it down because the law violated the single-subject rule, a rule that requires ballot measures to only include one subject per measure.⁶⁶ In 1999, State Representative Kevin Mannix referred each provision of the Victims’ Bill of Rights to the legislature so each provision could be passed as an individual issue.⁶⁷ Voters passed five out of the eight ballot measures.⁶⁸ Measure 75, the Oregon Felons Banned from Serving on Juries Amendment, was put on the ballot to

⁶¹ OR. REV. STAT. § 10.030(3)(a)(E)–(F) (2021).

⁶² OR. REV. STAT. § 10.030(1), (4) (2021).

⁶³ STATE OF OREGON, THE ORGANIC AND OTHER GENERAL LAWS OF OREGON, 1843–1872, 290–91 (Eugene Semple, State Printer, 1874) (the first jury qualifications are found at chapter XII, title I, § 918); see also Rose Jade, *Voter Registration Status as a Jury Service Employment Test: Oregon’s Retracted Endorsement Following Buckley v. American Constitutional Law Foundation, Inc.*, 39 WILLAMETTE L. REV. 557, 562 (2003) (“In 1843, persons deemed competent to serve as Oregon jurors possessed the following requisite set of characteristics: male, U.S. citizen, over twenty-one years of age, having at least one year’s residency in the county, having never been convicted of a felony or ‘misdemeanor involving moral turpitude,’ in possession of his natural faculties, of sound mind, and white.”).

⁶⁴ OR. REV. STAT. § 10.030 (d) (1995) (the right to serve on a jury was restored automatically upon release from prison). See OR. REV. STAT. § 137.281(3)(c), (5) (1995).

⁶⁵ *Initiative, Referendum and Recall*, OR. SEC’Y OF STATE: OR. BLUE BOOK 22–23, <https://sos.oregon.gov/blue-book/Documents/elections/initiative.pdf> (last visited May 3, 2023).

⁶⁶ *Armatta v. Kitzhaber*, 959 P.2d 49, 71 (Or. 1998) (“[W]e conclude that the measure contains two or more amendments, in violation of Article XVII, section 1, of the Oregon Constitution. Because Measure 40 was not passed in compliance with Article XVII, section 1, it is invalid in its entirety.”).

⁶⁷ Ashbel S. Green, *Experts Ponder Crime-Issues Vote*, OREGONIAN, Nov. 4, 1999, at C1, 1999 WL 7237570.

⁶⁸ Measures that passed were those protecting private businesses from competition from prison labor, granting victims certain rights during criminal prosecutions, limiting pretrial release of persons accused of violent felonies, requiring terms of prison to be fully served, and banning convicted persons from serving on a jury. The measures that failed were those would have given

include the language as an amendment to the Oregon constitution. The ballot measure passed with 57.75% voting in favor and 42.25% against.⁶⁹ The voter pamphlet included inflammatory language warning Oregonians of the danger of including convicted criminals in a jury:

“Some criminals are clever, manipulative people with powerful personalities. They revel in making a mockery of our criminal justice system. Such people should never be on a jury because the damage they can do to society in general and the victims in particular is enormous. Where our constitution speaks of our rights to be tried by a jury of our peers, it does not mean a criminal gets to be tried by a jury of criminals.”⁷⁰

“If you were a crime victim, would you want a jury of fair-minded citizens? Or instead, would you like to have a jury full of felons, sex offenders, and thieves?”⁷¹

“If someone is not responsible enough to follow the law, how can they be responsible enough to decide guilt or innocence . . . Most criminals feel that somehow they are the victim. That a wrong was committed against them. How can a person in this situation be fair and objective?”⁷²

The arguments in favor almost uniformly reference violent felons and not the language which bars jury service for certain misdemeanors involving dishonesty and violence.⁷³ This strategic decision relies on scare tactics rather than reasoned judgment. The focus on violent felonies is also largely irrelevant as Oregon already barred convicted felons from serving on a jury.⁷⁴ The argument in opposition cited in the voters' pamphlet focused on the cost of enforcement and arguments for less retribution and more rehabilitation of convicted people.⁷⁵ One unique argument against the measure warns that people caught fishing without a license would be barred

the general public the right to deny a defendants' waiver of a right to a jury trial, would have allowed murder convictions by a nonunanimous jury, and would have limited the immunity available to defendants who agree to testify. OFFICIAL RESULTS: NOVEMBER 2, 1999, *supra* note 8.

⁶⁹ *Id.*

⁷⁰ Bob Kouns & Dee Dee Kouns, *Measure No. 75 Argument in Favor*, VOTERS' PAMPHLET, Nov. 1999 Special Election, at 42, 44.

⁷¹ Steve Doell, *Measure No. 75 Argument in Favor*, VOTERS' PAMPHLET, Nov. 1999 Special Election, at 42, 44 (emphasis omitted).

⁷² Julie Hedden, *Measure No. 75 Argument in Favor*, VOTERS' PAMPHLET, Nov. 1999 Special Election, at 42, 44.

⁷³ *Id.*

⁷⁴ OR. CONST. art. I, § 45; OR. REV. STAT. § 10.030 (d) (1995).

⁷⁵ David Smigeiski, Peter V.H. Serrell, & Martin Gonzalez, *Measure No. 75 Arguments in Opposition*, VOTERS' PAMPHLET, Nov. 1999 Special Election, at 42, 45–46.

from jury service.⁷⁶ The arguments against Measure 75 incorporate general objections to all of the provisions within the Victims' Bill of Rights.

Overall, the arguments for and against Measure 75 incorporate the arguments for the other, more contentious measures within the Victim's Bill of Rights.⁷⁷ All three "Arguments in Opposition" appear as arguments against the seven ballot measures. None of the arguments are specific to Measure 75.⁷⁸ Instead, they focus on the cost of implementing the new measures and argue that the measures are redundant to other rights already guaranteed to victims.⁷⁹ The inclusion of a jury exclusion law lacks specific or careful justification and was instead passed relying on the general bias of the public. It also was passed in the wake of the federal 1994 Crime Bill, a law that "gave the federal stamp of approval for states to pass even more tough-on-crime laws . . . [and] encouraged even more punitive laws and harsher practices on the ground . . ."⁸⁰ This tough-on-crime era provided a rich environment for the blind adoption of long standing common laws like jury exclusion laws.⁸¹

2. *Crimes Included in Section 10.030(3)(a)*

ORS 10.030(3)(a) bars those convicted of any felony from serving on a jury for 15 years from the end of their sentence and those convicted of misdemeanors involving violence or dishonesty from serving on a jury for 5 years. ORS 10.030(3)(a) includes all felonies in the jury service ban. Oregon law prohibits those convicted of a felony from serving on a jury for 15 years prior to the date of the jury summons.⁸²

Oregon's law is one of only six other states that includes certain misdemeanors.⁸³ ORS 10.030(3)(a) does not define what qualifies as a misdemeanor of dishonesty or violence. Looking to the Oregon Rules of Evidence and the regulations governing notaries, crimes of dishonesty may include crimes involving fraud, theft, or forgery.⁸⁴ However, without statutory language or court guidance, it is unclear which misdemeanors would actually bar someone from jury service. This is at least an enforcement problem for the law as written, particularly because the law relies

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019) <https://www.aclu.org/news/smart-justice/how-1994-crime-bill-fed-mass-incarceration-crisis>.

⁸¹ BINNALL, *supra* note 1, at 18.

⁸² OR. REV. STAT. § 10.030(3)(a) (2021).

⁸³ Jackson-Gleich, *supra* note 10.

⁸⁴ OR. REV. STAT. § 40.355 (2021); OR. ADMIN. R. 160-100-0510 (2022); *see also* State v. Gallant, 764 P.2d 920, 923 (Or. 1988) (en banc) (holding theft in the second degree is a crime involving dishonesty).

on a potential juror answering the question of whether they have been previously convicted of a qualifying misdemeanor.⁸⁵ Jurors may forget or honestly believe they did not commit a crime that involved dishonesty or violence without more clear guidance.

IV. OREGON'S LAW SHOULD BE REPEALED

Oregon's jury exclusion law was passed without strong policy arguments. It disproportionately burdens communities of color, relies on the general public's animus towards people convicted of crimes, and creates an ineffective and overly broad categorical exemption. Oregon courts should rely on an individualized assessment of each juror's potential bias and not on a blunt, overly broad characterizations of ORS 10.030.

A. *Disproportionate Impact on Minority Populations*

The fact that the criminal justice system disproportionately burdens communities of color is well-established.⁸⁶ Specifically, collateral consequences which flow from a criminal conviction disenfranchise non-white Americans at a much higher rate than white Americans.⁸⁷ This means that racial minorities are much more likely to be affected by a jury exclusion law based on past criminal history. The disproportionate effect of these exclusion laws "is no coincidence" and "a [potential juror's] connection with the criminal justice system is not race neutral."⁸⁸ The exclusion of those with criminal convictions accelerate the racial injustices in the criminal justice system by creating a feedback loop: whiter juries are more likely to convict people

⁸⁵ Kress, *supra* note 2.

⁸⁶ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (rev. ed. 2012).

⁸⁷ See J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42, 43 (2009) ("African Americans and Latinos face significantly greater likelihood of being arrested, convicted, and incarcerated than whites."); see also Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WISC. L. REV. 1045, 1053–54 (2002); Jennifer Rae Taylor, *Constitutionally Unprotected: Prison Slavery, Felon Disenfranchisement, and the Criminal Exception to Citizenship Rights*, 47 GONZ. L. REV. 365, 369 (2012); CHRISTOPHER UGGEN, RYAN LARSON, & SARAH SHANNON, *THE SENT'G PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT*, 2016, 3 (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-LostVoters.pdf>; EQUAL JUST. INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* 14–16 (2010), <https://eji.org/wpcontent/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf>.

⁸⁸ Roberts, *supra* note 52, at 603.

of color, those convicted are then excluded from jury service, and the resulting jury pool is more white.⁸⁹

Given Oregon's racist history, the disproportionate impact of these types of exclusion laws should be deeply concerning.⁹⁰ Oregon is 86.2% white.⁹¹ For Black defendants in Oregon, the statistical reality of the racial demographics is a huge barrier to getting a diverse jury even without exclusion laws. A 1994 report by the Oregon Supreme Court sought to address racism within the court system.⁹² The report explicitly found "strong evidence demonstrates that racial minorities are at a disadvantage in virtually all aspects of the Oregon court system."⁹³ In 2020, the United States Supreme Court struck down Oregon's non-unanimous jury convictions; one main argument against the law was its racist history and disproportionate impact on communities of color.⁹⁴ This case offers a timely opportunity to revisit the laws that govern Oregon's juries more broadly, particularly laws that disproportionately impact communities of color. Oregon should repeal ORS 10.030(3)(a) for the same reason and to continue the state's effort to eradicate racist systems. In a state that over criminalizes non-white citizens, any jury exclusion law based on a criminal conviction is suspect.

B. *Limitations of the Categorical Exclusion*

Outside of their racially disparate impact, the main argument for abolishing jury exclusion laws based on criminal convictions is that the categorical ban is overly

⁸⁹ *Id.* at 604; see also Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 363 (2012) ("[N]egative feedback loops . . . inhibit the ability of minority group members to participate meaningfully in the justice system and exact political change.").

⁹⁰ An 1849 law barred Black people from owning land in Oregon:

Whereas, situated as the people of Oregon are, in the midst of an Indian population, it would be highly dangerous to allow free negroes and mulattoes to reside in the Territory or to intermix with the Indians, instilling into their minds feelings of hostility against the white race, therefore . . . Be it enacted by the Legislative Assembly of the Territory of Oregon, That it shall not be lawful for any negro or mulatto to come into, or reside within the limits of this territory.

Act of Sept. 26, 1849, 1850 Or. Laws 181 (cited in the preamble by OFF. STATE CT. ADM'R, OR. JUD. DEP'T, REPORT OF THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM 2 (May 1994), <https://www.ojp.gov/pdffiles1/Digitization/153720NCJRS.pdf>).

⁹¹ *QuickFacts Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/OR> (last visited Mar. 26, 2023).

⁹² OFF. STATE CT. ADM'R, OR. JUD. DEP'T, REPORT OF THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM 1–2 (MAY 1994), <https://www.ojp.gov/pdffiles1/Digitization/153720NCJRS.pdf>.

⁹³ *Id.* at 2.

⁹⁴ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020).

broad. In contrast to the common policy arguments in favor of these types of jury exclusion laws, a categorical ban on people with criminal convictions is an improper adoption of the general public's prejudice and is rooted in unsupported allegations of bias.

1. *Giving Effect to General Perception of Bias*

First, and most importantly, laws must not give effect to general biases of the public.⁹⁵ The criminal justice system exists exclusively to seek justice.⁹⁶ Even though policymakers frequently rely on the gut instinct of the general public's support of exclusion laws, jury exclusion laws are, in part, to blame for the disappearance of the trial by jury.⁹⁷ Excluding people with among the most intimate experience with the criminal justice system from the jury, "undermine[s] the perceived impartiality of the justice system and, at the most fundamental level, the rule of law."⁹⁸ Crime victims, who also have an intimate experience with the criminal justice system, are not categorically banned.

2. *Lack of Demonstrable Bias of People with Criminal Convictions*

The most common, yet unsupported, argument for excluding people with criminal convictions from jury service is the argument that convicts are per se biased against the prosecution.⁹⁹ The presence of bias in juries is unavoidable as everyone has their own experiences and perspectives. In fact, a jury of one's peers suggests the necessity of people bringing this experience into the courtroom to prevent overly harsh or unjust results. However, people with prior convictions are barred from jury service frequently based on the belief that they are irrevocably and incurably biased against the prosecution.¹⁰⁰ Lawmakers and courts are "unfazed by the want of empirical evidence on the inherent bias rationale."¹⁰¹

⁹⁵ Isabel Bilotta, Abby Corrington, Saaid A. Mendoza, Ivy Watson & Eden King, *How Subtle Bias Infects the Law*, 15 ANN. REV. L. & SOC. SCI. 227, 228 (2019).

⁹⁶ *About the Oregon Department of Justice*, OR. DEP'T OF JUST., <https://www.doj.state.or.us/oregon-department-of-justice/about-the-oregon-department-of-justice> (last visited May 20, 2023) ("Every day, we are dedicated to . . . [p]ursuing justice and upholding the rule of law.").

⁹⁷ See Kevin R. Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 183, 191, 196–99 (2005); see also *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.").

⁹⁸ Johnson, *supra* note 97, at 158; see also Roberts, *supra* note 52, at 605 (noting the irony that "the very same values are cited as justifications for these exclusions, and thus are undermined even as they are purportedly being championed").

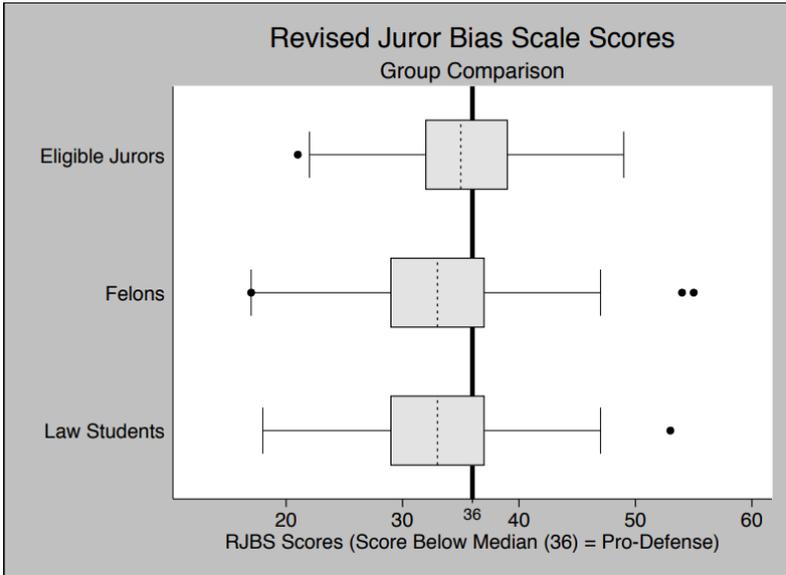
⁹⁹ Kalt, *supra* note 25, at 74–75.

¹⁰⁰ Binnall, *supra* note 58, at 2.

¹⁰¹ *Id.* at 2.

James Binnall conducted an empirical study to measure the amount of bias people with felony convictions demonstrate when serving on a mock jury.¹⁰² Measuring the level of pro-defense or pro-prosecution bias, Binnall evaluated three groups: eligible jurors (general public), those with felony convictions, and law students. Figure 1 summarizes his findings:¹⁰³

Figure 1



As shown above, the felons group showed more pro-defense bias than the general public. However, their bias was statistically insignificant from law students. Interestingly, Binnall included law students because he hypothesized that their understanding of the presumption of innocence and burden of proof would lead them to be biased in favor of the defense.¹⁰⁴ It is illuminating that those with a strong understanding of two core components of our justice system demonstrate the same bias as felons, yet only one of those groups is categorically denied from serving on a jury.

Binnall's findings do not claim to prove that those with criminal convictions do not harbor biases that would make them unfit to serve on a jury. Rather, his findings offer strong support for repealing the categorical bans and allowing parties, prosecutors, and defense attorneys to assess the biases of individual people, much

¹⁰² *Id.* at 3.

¹⁰³ *Id.* at 14.

¹⁰⁴ *Id.* at 10.

like they do the same for other assumably biased groups.¹⁰⁵ The Oregon Supreme Court acknowledges that those convicted of a crime are a diversely motivated group:

Although convicted felons are defined by a common factor, namely, that they have been found guilty of violating the law, their reasons and ways of doing so are many and varied. A person who has committed a felony offense by violating environmental or tax laws, for example, does not necessarily have the same attitude, ideas, or experience as a person who has committed robbery or rape.¹⁰⁶

Individual assessment of a potential juror also cures the contradiction of courts upholding verdicts with criminal-jurors absent proof of actual bias.¹⁰⁷ Rather than adopting the requirement of actual bias in an after-the-fact challenge to the makeup of a jury, Oregon should adopt this standard at the beginning of a trial.

3. *When Other Collateral Consequences Are Restored*

Many of the justifications for the jury exclusion laws are not specific to jury service. If those with criminal convictions are inherently biased, then it follows that other rights like voting and holding public office should also be withheld.

When someone is convicted of a felony in Oregon, they are automatically deprived of the rights to hold public office, hold a position of private trust, act as a juror, and vote upon incarceration.¹⁰⁸ A categorical ban on those with criminal convictions does not make sense when other collateral consequences are absent. However, with the sole exception of serving on a jury, all of these rights are immediately restored upon release from incarceration, even if the person is on parole.¹⁰⁹ If Oregonians with criminal convictions can be trusted to vote and hold public office upon release, there is little justification for withholding jury service for several years. Jurors hear and weigh evidence and are asked to decide, similar to voters who assess candidates and decide. While not a perfect corollary, the responsibilities and judgment required for both voting and jury service suggests that reinstatement of one right upon completion of a conviction would justify reinstating the other. Further, jury

¹⁰⁵ *Id.* at 3 (noting that other groups, “which may assumedly harbor some form of pretrial bias (e.g., law enforcement personnel or crime victims), take part in the jury selection process [and] are subject to individual screening,” while convicted people are unique in suffering this type of pretrial exclusion).

¹⁰⁶ *State v. Compton*, 39 P.3d 833, 842 (Or. 2002) (en banc) (internal quotations omitted).

¹⁰⁷ *See Coughlin v. Tailhook Ass’n*, 112 F.3d 1052, 1059 (9th Cir. 1997) (“[T]he participation of a felon-juror is not an automatic basis for a new trial. We also agree . . . that the participation of a felon-juror can be the basis for a new trial if the juror’s participation in the case results in ‘actual bias’ to one or more of the parties.”).

¹⁰⁸ OR. REV. STAT. § 137.281(1), (3) (2021).

¹⁰⁹ OR. REV. STAT. § 137.281(7) (2021); OR. REV. STAT. § 10.030(3)(a)(E), (F) (2021); OR. REV. STAT. § 10.030(3)(b)(A) (2021).

service has historically been tied to voter eligibility.¹¹⁰ Some argue that jury service and voting should be inextricably linked; the existence of one right necessitates the other.¹¹¹ The same arguments for barring jury service after a criminal conviction apply to voting rights.¹¹² Although pulling jurors from lists of registered voters is not perfect,¹¹³ tying the jury pool to voter rolls would be particularly equitable in Oregon because Oregon has automatic voter registration.¹¹⁴ Regardless of the method used for jury selection, withholding jury service but allowing voting rights is an illogical legal framework.

C. *Benefits for Including Convicted People on a Jury*

Repealing ORS 10.030(3)(a) would not guarantee that people with a prior criminal conviction would serve on a jury. Potential jurors still have to be selected after voir dire.¹¹⁵ However, the indignity of a blanket ban would be avoided. James Binnall described his own experience being denied jury service while he was a practicing attorney in the state of California.¹¹⁶ He described the automatic exclusion as “degrading,” “mortify[ing],” and “illogical.”¹¹⁷ Aside from the irony that he entered the courthouse for jury service through the “Attorneys Only Entrance,” Binnall was eager to serve, an attitude much needed in a crowd of citizens summoned for jury service.¹¹⁸ Disenfranchisement upon release from prison is labeled “civil death,” a fate suffered after serving the punishment deemed fit for the crime committed.¹¹⁹ Civic activities such as voting, running for local office, joining a state bar, and jury

¹¹⁰ Hoag, *supra* note 20, at 73.

¹¹¹ See *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 625, 626 (1991) (equating voting rights with jury service); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 206 (1995) (“[T]he link between jury service and other rights of political participation such as voting is an important part of our overall constitutional structure, spanning three centuries and eight amendments: the Fifth, Sixth, Seventh, Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth.”).

¹¹² *But see*, Ilya Somin, *Why Mandatory Jury Service Is a Poor Justification for Mandatory Voting*, THE WASH. POST (Mar. 25, 2015, 5:36 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/25/why-mandatory-jury-service-is-a-poor-justification-for-mandatory-voting/> (“Key differences between jury service and voting are often ignored . . .”).

¹¹³ See, e.g., Ronald Randall, James A. Woods, & Robert G. Martin, *Racial Representativeness of Juries: An Analysis of Source List and Administrative Effects on the Jury Pool*, 29 JUST. SYS. J. 71 (2008) (explaining that use of voter lists for jury service increases the representation of Black Americans but leaves out Hispanic Americans).

¹¹⁴ OR. REV. STAT. § 247.017(3) (2023).

¹¹⁵ OR. R. CIV. P. 57 (C)–(D).

¹¹⁶ BINNALL, *supra* note 1, at 2.

¹¹⁷ *Id.* at 2–3.

¹¹⁸ *Id.* at 2.

¹¹⁹ Ewald, *supra* note 87, at 1049 n.13.

service can be profound experiences for those reentering society.¹²⁰ A categorical ban on jury service stunts people's reentry journey and is especially confounding in Oregon where people can vote and run for office immediately upon release.

Categorical exclusion of those with criminal convictions harm the potential juror, specific trials, and the jury system as a whole. Being denied jury service on the basis of a past, and sometimes long past, crime is a substantial dignitary harm that prevents people from successfully reintegrating into society.¹²¹ Juries are also void of the experience of those with criminal convictions. This should not be done lightly as "[e]xperience is a key part of the jury's arsenal" and a diverse set of experience is part of "what justifies [the jury system's] existence."¹²² Categorical exclusion laws also undermine public perception of the fairness of juries.¹²³ Particularly in Oregon, where all white juries are prevalent, exclusion laws "undermine the perceived impartiality of the justice system."¹²⁴

D. *Practical Effect of Repeal*

Repealing Oregon's jury exclusion law, in practice, would be a moderate change as it would subject former convicts to the same individualized assessment as any other citizen. No doubt, many people with criminal convictions would be struck during voir dire. There also would be many cases where the presence of a criminal conviction would not be a basis for either party to strike a juror. Courts already refuse to overturn convictions when a juror defies the law and makes it on to a jury absent a finding of actual bias.¹²⁵ Repealing ORS 10.030(3)(a) would just apply this

¹²⁰ See, e.g., Ewald, *supra* note 87; Taylor, *supra* note 87.

¹²¹ BINNALL, *supra* note 1, at 3–4.

¹²² Roberts, *supra* note 52, at 605.

¹²³ Ashish S. Joshi & Christina T. Kline, *Lack of Jury Diversity: A National Problem with Individual Consequences*, A.B.A. (Sept. 01, 2015), <https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2015/lack-of-jury-diversity-national-problem-individual-consequences> ("[A] heterogeneous jury not only confirms that the system is fair and impartial for the defendant . . . but also assures the public at large.").

¹²⁴ Johnson, *supra* note 97, at 158 (noting that exclusion laws may partly be to blame for the disappearance of the trial by jury as defendants do not have faith that they will get a fair trial); Aimee Green, *Oregon's Jury System Designed to 'Dampen' Voice of Minorities, Judge Rules*, OREGONIAN (Dec. 16, 2016), https://www.oregonlive.com/portland/2016/12/did_black_defendant_get_fair_t.html. See Betsy Hammond, *White Defendants, White Jurors: Outcry Over Race in Verdict's Wake*, OREGONIAN (Oct. 27, 2016), https://www.oregonlive.com/oregon-standoff/2016/10/white_defendants_white_jurors.html. *But see* Michael Conklin, *A Felon Among Us: Should Felons Be Allowed on Juries?*, 34 REGENT U. L. REV. 133, 140–41 (2021) (arguing that people may have the opposite reaction and assume juries are less fair with people with criminal convictions serving on them).

¹²⁵ See, e.g., Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1059 (9th Cir. 1997) (holding that "the participation of a felon-juror can be the basis for a new trial if the juror's participation in the

standard on the front end of jury selection. If the justice system is not subverted unless a juror had demonstrated actual bias, there should be no justification for barring them in the first place.

Major barriers exist to ensuring inclusive juries in Oregon. There is a growing call to reform the preemptory challenge procedure in Oregon because of the high bar to prove discrimination.¹²⁶ Reforms to preemptive challenges paired with repealing the jury exclusion law would be a significant step towards ensuring a more inclusive and just system.

CONCLUSION

Jury exclusions laws should be a vestige of the past. Oregon's law is out of step with the rest of the country; it was passed relying on general prejudices of the public and unfounded accusations of uniform bias. The harm against people with criminal convictions vastly outweighs any benefit exclusion laws provide. The American jury is a powerful check on the government and a poignant representation of our highest values: an impartial justice system, an all-inclusive democracy, and robust civic engagement. Oregon's jury exclusion law undermines these goals and should be repealed.

case results in 'actual bias' to one or more of the parties"); *United States v. Harmon*, 21 F. Supp. 3d 1042, 1049 (N.D. Cal. 2014) (same).

¹²⁶ There is a growing call for Oregon to adopt a similar law to Washington state to remedy the insufficient protection offered by *Batson*. See *State v. Curry*, 477 P.3d 7, 14 (Or. Ct. App. 2019) (discussing the Washington rule and arguing for Oregon to adopt a similar rule) ("Washington's experience, and whether a similarly concrete set of rules would improve our handling of preemptory challenges, are questions that may be appropriate for the Council on Court Procedures and the legislature to consider."); *State v. Vandyke*, 318 Or. App. 235, 239 n.1 (2022) (Aoyagi, J., concurring) (same); Willamette Univ. Coll. of L. Racial Just. Task Force, *Remedying Batson's Failure to Address Unconscious Juror Bias in Oregon*, 57 WILLAMETTE L. REV. 85, 117 (2021). Under Washington State Court Rule 37, the court "need not find purposeful discrimination to deny the preemptory challenge" but should "evaluate the reasons given to justify the preemptory challenge in light of the totality of the circumstances." In doing so, "[i]f the court determines that an objective observer could view race or ethnicity as a factor in the use of the preemptory challenge, then the preemptory challenge shall be denied." WASH. CT. GEN. R. 37(e) (2018).