

# Inequitable and Undemocratic:

## A Research Brief on Jury Exclusion in Massachusetts and a Multipronged Approach to Dismantle It

*Prepared by Katy Naples-Mitchell and Haruka Margaret Braun for the  
Jury Selection Working Group of the Roundtable on Racial Disparities in  
Massachusetts Criminal Courts*

June 2023



**HARVARD** Kennedy School

**MALCOLM WIENER CENTER**  
for Social Policy

THE PROGRAM IN CRIMINAL JUSTICE POLICY  
AND MANAGEMENT



## Executive Summary

This research brief, prepared for the Jury Selection Working Group of Harvard Kennedy School's Roundtable on Racial Disparities in Massachusetts Criminal Courts, synthesizes research on jury exclusion based on a felony record or having a loved one who has been arrested, prosecuted, or convicted of a crime and proposes a set of equitable reforms to reduce discrimination against people with criminal legal system contact in the jury selection process.

After an introduction in Part I (*see pp. 1-2*), Part II begins with a brief history of felony jury disqualification. The majority of states, rooted in a tradition of English common law that was modified and codified in the Jim Crow era, continue to exclude people with felony records from jury service, but a handful of outlier states offer a radically different vision of jury composition (*see p. 3.*)

Part III takes stock of the current landscape of felony charging and sentencing in Massachusetts and the reach of the Commonwealth's jury exclusion. Section A reviews available data to estimate that at any given time, at least 95,000 people are disqualified from jury service by virtue of a felony conviction within the last seven years, a pending felony charge, or current incarceration. Black and Hispanic people are disproportionately affected by this, with Black people convicted of felonies at more than 4 times the rate among White people, and Hispanic people convicted of felonies at more than twice the rate among White people. But ironically, the statutory felony disqualification specifically excludes, and only temporarily, people convicted of felonies who receive *shorter* sentences of incarceration or who are never sentenced to incarceration at all. Still, the disqualification results in a period of exclusion in the community for the vast majority of people sentenced for felony offenses, even those sentenced to periods in state prison. Further, women are disparately barred from jury service on the basis of this disqualification by virtue of relatively shorter felony sentences (*see pp. 3-7.*)

In Section B, the brief then reviews how other states approach felony exclusion. States including Maine, Indiana, North Dakota, Colorado, Illinois, and Iowa only exclude people from jury service *during a period of incarceration*. Other states, like California, Connecticut, Florida, and Louisiana, have recently reduced their periods of exclusion or expanded the categories of people with criminal records eligible to serve. Taken together, these peer jurisdictions illustrate that involving people with felony convictions in juries is administrable and workable, and that Massachusetts could join a wave of reforms aimed at improving equity in jury service (*see pp. 7-10.*)

In Section C, the brief then reviews other barriers to jury service for people with a criminal record, or their loved ones, beyond *de jure* exclusion. This section begins by reviewing research on the

practical complexities of informing people who have previously lost their rights that those rights have been restored and engaging them in civic participation. It then turns to other forms of *de facto* exclusion, as new research shows that the sweep of exclusion is broader than statutory disqualification. In court systems like Massachusetts, court officials routinely exclude people with any kind of criminal record, or people with loved ones with a criminal record, from the jury venire (the pool of people called to jury service from which a jury is chosen) through mechanisms like for cause challenges (removing a juror who cannot be impartial or comprehend the proceedings) and peremptory strikes (removing a juror for *any* reason at all). This results in racial disparities in seated juries, as people of color, and Black people in particular, are more likely to experience arrest, prosecution, or conviction directly *and* more likely to have family members with those experiences than any other racial or ethnic group. The current law on for cause challenges, criminal record checks, and peremptory strikes in Massachusetts do not protect against these kinds of exclusions—even though research shows that the rationale for these exclusions – an assumed inherent bias against the prosecution among people with criminal records or their loved ones – is not supported by empirical findings (see pp. 10-18.)

In Part IV, the brief synthesizes the research and proposes a set of evidence-based reforms modeled on specific practices in other jurisdictions to preempt each layer of exclusion that keeps people with felony records out of the venire, the courtroom, the jury box, and the deliberations room. These reforms are divided into two categories: those addressing *de jure* exclusion and those addressing *de facto* exclusion. First, the brief proposes adjusting the statutory language to eliminate *de jure* disqualification of people with felony convictions and people facing felony charges from serving on juries. Turning next to *de facto* exclusions, the brief proposes revising the jury questionnaire to focus less on a person’s criminal history or the criminal histories of their social ties and more on their individualized biases; creating new rules to limit requests by prosecutors or defense attorneys to run the criminal records of prospective jurors; codifying rules that prevent “for cause” challenges from removing a juror based on the fact of a criminal record; creating a new regime to guide peremptory strikes, which enumerates specific rationales—including having a loved one with a criminal record or having prior contact with law enforcement—that are presumptively invalid because of their disparate racial impact; requiring affirmative restoration of affected individuals to the jury rolls by the office of the jury commissioner, creation of a standardized notice, and proactive notification by multiple agencies to inform people newly eligible to serve of their restored rights; and delaying implementation to allow for training of court officials and effective restoration and notification of potential jurors (see pp. 19-26.)

# Table of Contents

I.	Introduction .....	1
II.	A Brief History of Felony Jury Exclusion .....	3
III.	The Current Landscape .....	3
A.	Felony Charging and Sentencing in Massachusetts and the Reach of the Commonwealth’s Felony Exclusion .....	3
B.	How Peer States Approach Felony Exclusion .....	7
	<i>Categories of State Approaches to Felony Jury Exclusion</i> .....	8
C.	Removing the Statutory Bar Alone May Not Be Enough .....	10
	<i>Practical Implementation Hurdles</i> .....	10
	<i>For Cause Challenges and Criminal Record Checks in Massachusetts</i> .....	12
	<i>Peremptory Strikes in Massachusetts</i> .....	13
	<i>Racial Disparities in Criminal Legal System Contact &amp; Jury Exclusion</i> .....	17
IV.	A Holistic Suite of Evidence-Based Reforms to Engage People with Criminal Records as Jurors	19
A.	Eliminating <i>De Jure</i> Disqualification .....	19
B.	Eliminating Opportunities for <i>De Facto</i> Exclusion .....	20
V.	Conclusion .....	26

## I. Introduction

Jury service is one of the core rights and responsibilities of citizenship, but in many places around the country, people are prohibited from serving on juries after being convicted of crimes. This form of disenfranchisement parallels the voting disenfranchisement commonly experienced by people with felony records. No state allows currently incarcerated or detained people to serve on juries—no doubt in part because the administrative hurdles and logistical complexities would be legion. But a few states across the country have moved to either eliminate or reduce the level or extent of disenfranchisement that people with felony convictions face when it comes to jury service.<sup>1</sup> This is for good reason: these exclusions are problematic in a number of ways.

Jury disqualifications prevent reintegration into the community for people with criminal convictions. They are often based on fears that jurors with convictions will harbor biases against prosecutors and other members of law enforcement or state actors, but those fears are not borne out in social science literature. Felony jury disqualifications contribute to racial and gender disparities in the population of people eligible for jury service (the “jury pool”), even though research has shown that more diverse juries lead to more reliable convictions. And, when disqualifications based on a criminal record are time-limited—excluding people from jury service only for a set period of years after their conviction—they have the odd effect of disproportionately barring people with more minor criminal penalties from civic engagement than people with longer terms of incarceration.

Massachusetts is a prime example of these unintended policy consequences. Massachusetts allows citizens with felony convictions to serve on juries seven years after their conviction and provided they are no longer incarcerated and not facing a pending felony charge.<sup>2</sup> In other words, anyone who spends more than seven years in prison is eligible to serve on a jury immediately upon their release from prison.<sup>3</sup> Each year for the last four fiscal years, more than twenty thousand people were charged with at least one felony offense in Massachusetts.<sup>4</sup> All of these people were excluded from jury service while the felony charge remained pending. And while fewer people are *convicted* of felony offenses annually (some cases get dismissed, some cases get diverted, some defendants take pleas to lesser included offenses, and some people are acquitted at trial, for example), best estimates suggest that ten thousand people are convicted of a felony every year. Taken together, a conservative estimate of 95,000 people are disqualified from jury service because of a felony conviction within seven years, a pending felony charge, or current incarceration at any given time.

The Massachusetts policy, like many policies of felony-based jury exclusion, is illogical as well as inequitable. It creates the unexpected result that people given longer carceral sentences—

presumably for generally more serious offenses—are deemed more fit for jury service upon their release from custody than people who receive *shorter* sentences of incarceration or who are never sentenced to incarceration at all. It disrupts the presumption of innocence, barring jury service for people merely accused of felony offenses. And in addition to undermining civic engagement and operating as a form of temporary civil death akin to voter disenfranchisement, the Commonwealth’s felony jury exclusion leads to both racial and gender disparities in the jury venire—the pool of people called to jury service from which a jury is chosen. Given historical and ongoing racial disparities in charging and sentencing, policies of felony exclusion have the predictable effect of excluding people of color, and disproportionately Black people, from jury service.<sup>5</sup> Moreover, women convicted of felonies, and in particular women in state prison in the Commonwealth, tend to serve shorter average sentences than men sentenced to state prison; thus, the felony exclusion from jury service disproportionately bars similarly situated women with recent felony convictions from becoming jurors because their shorter sentences indicate they are more likely to experience a period of jury exclusion in the community after release from incarceration.

This research brief explores an integrated approach to removing barriers to jury service for people with felony convictions, pending felony charges, and other criminal legal system contacts. Research demonstrates that eliminating the felony jury exclusion is practicable, equitable, and administrable—producing fairer, more representative juries,<sup>6</sup> improving community safety through community reintegration,<sup>7</sup> and removing one of the most glaring mechanisms of racial disproportionality in composing the venire. But the experience of other jurisdictions<sup>8</sup> suggests the need for a holistic approach to ensure that eliminating the *de jure* felony exclusion does not give way to a continuing *de facto* expulsion of people with criminal records from juries or to new harms—whether because of allowable strikes at later phases of jury selection, or because of practical hurdles and a lack of notification about new eligibility to directly affected people. If the goal is to ensure that people with criminal records make it not only into the jury pool but, further, into the courtroom, the jury box, *and* the deliberations room, eliminating the statutory legal exclusion of people with recent felony convictions from jury service may not be enough.<sup>9</sup> Therefore, this research brief offers a series of recommendations, including removing the felony disqualification, proactively notifying newly eligible jurors of their rights, adjusting the standards governing challenges for cause and peremptory challenges during jury selection, and affirmatively reinstating jury eligibility for people previously disqualified and eliminated from the jury rolls by virtue of a felony record or pending felony charge.

## II. A Brief History of Felony Jury Exclusion

Felony jury exclusion dates back to a long tradition of “civil death” imposed on a case-by-case basis in continental Europe for offenses deemed serious enough to warrant legal and social exclusion but not the death penalty, the more common punishment for a felony offense at the time. “Civil death” included, among other consequences, the permanent loss of the right to vote, to enter into contracts, and to inherit or bequeath property.<sup>10</sup> In medieval England, jury service was limited in 1166 to the “more lawful men,”<sup>11</sup> in 1314 disqualification expanded to those convicted of conspiracy,<sup>12</sup> and in a 1410 statute King Henry IV extended exclusion of those who had committed unlawful acts to juries in both civil and criminal cases.<sup>13</sup>

Like its English predecessors, early U.S. colonial practice circumscribed the jury pool and evaluated “appropriateness” of those eligible to serve on a jury.<sup>14</sup> While statutory limitations on jury service by people with felony convictions were rare around 1800, jury service by people with felony records was equally rare given the extension of common law “civil death” and the fact that jury service was generally limited to male property holders.<sup>15</sup> After the Civil War, discretionary qualification laws and the exclusion of people with felony records were used to keep Black men from participating in jury service. During the Jim Crow era, the enforcement of such exclusion was racially biased, and justified on the grounds that exclusion could be avoided by refraining from committing crimes—ignoring the weaponized criminalization which targeted Black people.<sup>16</sup> Many states adopted statutes to exclude those with felony records from jury eligibility by around 1900 through explicit exclusion or through character requirements,<sup>17</sup> and by the 1940s, almost all states excluded people with felony convictions through explicit exclusion or character requirements, such as “good moral character.”<sup>18</sup> “[M]ost states have changed their felon exclusion laws since 1900, and now exclude all felons rather than some, and decide to exclude based on objective criteria rather than commissioners’ whims,”<sup>19</sup> insulating the laws from equal protection challenge, which had at times succeeded when a history of discriminatory intent or clear racial targeting of open-textured, discretionary morality tests could be proven.<sup>20</sup>

## III. The Current Landscape

### A. Felony Charging and Sentencing in Massachusetts and the Reach of the Commonwealth’s Felony Exclusion

Massachusetts disqualifies citizens from jury service who have been convicted of a felony within seven years, are currently incarcerated, or are facing a pending felony charge.<sup>21</sup> Using available public data sources, the authors have tried to estimate roughly how many people are excluded from jury service every year because of this policy.

In each of the last four years, more than twenty thousand people were charged with at least one felony offense in Massachusetts: in FY2019: 26,790 unique defendants; in FY2020: 23,182 unique defendants; in FY2021: 21,996 unique defendants; and in FY2022: 23,184 unique defendants.<sup>22</sup> A conservative estimate suggests at least 23,000 people are disqualified from jury service due to a pending felony at any time.<sup>23</sup>

There are no publicly available data on how many people incurred felony convictions within the last seven years, but even a conservative estimate would suggest more than 70,000 felony convictions enter within the Commonwealth within a seven-year period.<sup>24</sup> The Superior Court is the trial court in Massachusetts with jurisdiction over all felony matters, but it shares jurisdiction over many felonies with two other Trial Court Departments, District and Municipal Courts.<sup>25</sup> As a matter of volume, most felony cases begin<sup>26</sup> and end in District or Municipal Court; however, the majority of Superior Court convictions are for felony offenses, whereas the majority of District or Municipal Court convictions are for misdemeanors.<sup>27</sup> In FY2013, the last year with available data from the Massachusetts Sentencing Commission across both District (or Municipal) and Superior Courts, a combined 13,299 defendants were convicted of felonies: 10,241 in District or Municipal Court and 3,058 in Superior Court.<sup>28</sup> In FY2018, the last year of available data focused only on Superior Court cases, 2,764 people were convicted of felonies in Superior Court alone, and more than 1,700 of these people were sentenced to state prison.<sup>29</sup> A conservative estimate that 10,000 people are convicted of a felony every year would suggest a cumulative 70,000 people have been convicted of a felony within the last seven years.<sup>30</sup>

Finally, an additional category of people is disqualified from jury service because of current incarceration. Anyone incarcerated on a felony would be encapsulated by the above categories, unless they are serving long-term incarceration because their felony conviction entered more than seven years ago. For example, more than 1,000 people in the Commonwealth are serving sentences of life without the possibility of parole. Additionally, anyone held in pretrial detention for a misdemeanor charge—for example, due to cash bail or a bail revocation—would also not be included in the above estimates. All told, the available data patchwork suggests that, at any given time, a conservative estimate of 95,000 people in the Commonwealth are disqualified from jury service by virtue of either a pending felony charge, a felony conviction within the last seven years, and/or current incarceration.<sup>31</sup>

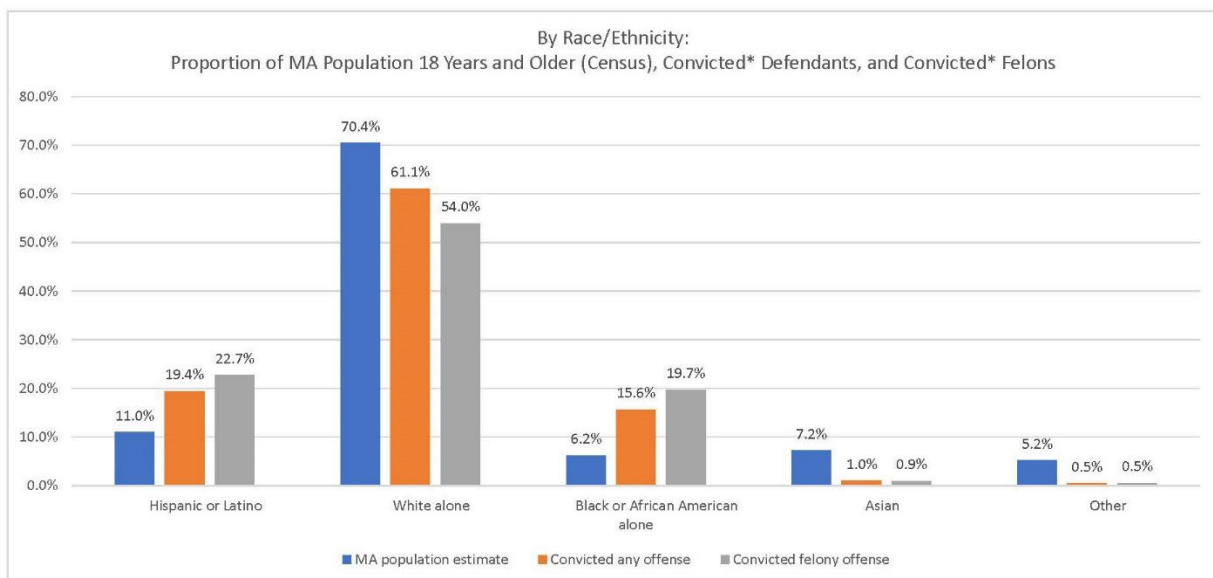
In Massachusetts, people of color are more likely to be charged with more serious crimes, carrying higher penalties, for similar underlying conduct relative to their white counterparts; more likely to have their cases resolved in Superior Court where the same offenses carry stiffer penalties; and more likely to be sentenced to harsher punishments for the same offense.<sup>32</sup> The 2020 report on *Racial Disparities in the Massachusetts Criminal System* published by Harvard Law School's Criminal Justice Policy Program (CJPP) determined that "racial and ethnic differences in the type and severity of initial charge" accounted for over 70 percent of resulting racial disparities



in sentence length.<sup>33</sup> A 2021 Massachusetts Trial Court report using 2019 data confirmed that a greater proportion of Black/African-American defendants were charged with a lead felony offense (29.2%) than the percentage of Hispanic (21.9%), other (20.4%), and White (18.6%) defendants, or defendants overall (21.2%).<sup>34</sup>

As the CJPP report detailed, these disparate charging patterns also result in disparate convictions and sentences. The Department of Research and Planning of the Massachusetts Trial Court provided data to the Roundtable showing the demographic distribution by race, gender, and age at offense of the Massachusetts population, people convicted of all crimes, and people convicted of felonies within a seven-year period extending from January 1, 2013 to December 31, 2019.<sup>35</sup> As can be seen in Figure 1, reproduced below, Black people comprised 6.2% of the Massachusetts population, but 19.7% of people convicted of a felony offense in that period. Similarly, Hispanic or Latino/a/e people comprised 11% of the Massachusetts population, but 22.7% of people convicted of a felony offense. This overrepresentation of Black and Hispanic people is compounded by a corresponding relative underrepresentation of White people. White people comprised 70.4% of the Massachusetts population, but only 54% of people convicted of a felony in the relevant period. Using a comparative disproportionality analysis, these data reveal that between 2013 and 2019 and relative to the demographic breakdown of the Commonwealth’s overall population, Black people were convicted of felonies at more than 4.1 times the rate for White people and Hispanic/Latino/a/e people were convicted of felonies at more than 2.6 times the rate for White people.

Figure 1



\*During 7-year period from January 1, 2013 to December 31, 2019.

Source: Massachusetts Trial Court, Department of Research and Planning

Not only did the CJPP study build on years of similar findings,<sup>36</sup> but these disparities are consistent with national trends. Of the 19.8 million people in the United States with felony convictions, seven million are African American.<sup>37</sup> According to 2010 data, nationwide, one third of Black men had felony convictions—and Massachusetts was one of the top five states where 20% or more of African American men had a felony conviction.<sup>38</sup>

All told, research shows that some 95,000 people in Massachusetts are estimated to be disqualified from jury service at any time by virtue of a pending felony charge, felony conviction within seven years, or current incarceration – the vast majority arising from the first two categories – and they are disproportionately Black and Hispanic/Latino/a/e. This almost certainly contributes to racial disparities in jury service in at least some counties and district courts across Massachusetts.

Thus, while Black people and Hispanic/Latino/a/e people are more likely to be disqualified because they are more likely to have pending felony charges and felony convictions, they are also more likely to have longer sentences of incarceration and therefore to experience less disqualification in the community. Among those who have felony convictions, White people who are disqualified likely experience average greater lengths of community disqualification because they are more likely to be sentenced to probation or to shorter jail and prison sentences.

The current exclusion that bars people from jury service within seven years of the date of their conviction on a felony offense means that the overwhelming majority of people convicted of felony offenses, and even the vast majority of people sentenced in Superior Court to a term in state prison, experience some period of exclusion in the community during which they are unable to serve on a jury by virtue of the recency of their conviction. The seven-year, post-conviction jury exclusion especially, and ironically, affects people who are convicted of felonies and sentenced to anything less than state prison, including a term of incarceration in the House of Correction (“HOC”) or probation. Massachusetts defines a felony as any offense “punishable by death or imprisonment in the state prison . . . .” G.L. c. 274, § 1. The operative word here is “punishable.” Not all people convicted of felonies are sentenced to incarceration. Some receive probation only—indeed, according to the Prison Policy Initiative, some 38,000 people are currently on probation in Massachusetts.<sup>39</sup> Others serve sentences of up to 2.5 years (30 months) in the House of Correction. Still others serve sentences of more than 2.5 years in state prison.<sup>40</sup> In other words, every person sentenced to state prison is serving at least one felony offense, but the entire universe of people convicted of felony offenses is not represented only by those sentenced to state prison.

While examining only people sentenced to state prison in superior court does not reach the full universe of people affected by felony jury exclusion, data on people sentenced to state prison terms offer an important window into the reach of this barrier to jury participation. Even among this limited subset of people with more severe felony sentences, the majority experience some

period of exclusion in the community. Further, even if formally sentenced to incarceration, a judge can declare a person's "time served", and the time someone spends incarcerated may be further reduced by parole, credit time,<sup>41</sup> or good time. In FY18, the last year of available data on new Superior Court sentences, the mean minimum sentence to state prison imposed was 53.47 months (~4.5 years) and the mean maximum sentence to state prison was 64.78 months (~5.4 years).<sup>42</sup> Nearly 80% of people sentenced to state prison in FY18 were sentenced to a maximum term of seven years or less (83 months or less).<sup>43</sup> Thus, the vast majority of people convicted of a felony and sentenced to state prison still experience a period of jury exclusion in the community.

Gender disparities in felony charging, convictions, and sentencing cast a further pall over the Commonwealth's felony jury exclusion. While women comprised only 13.8% of people convicted of felony offenses in Massachusetts between 2013 and 2019 per data provided by the Massachusetts Trial Court Department of Research and Planning, women convicted of felonies tend to be sentenced to less committed time overall. Even women serving state prison sentences tend to serve shorter sentences on average than men, meaning both that more women convicted of felonies are affected by the community exclusion and that any periods of exclusion from jury service in the community within seven years after their felony conviction are, ironically, comparatively longer. According to official data from the Massachusetts Department of Correction, men spend an average of 6.3 years in prison before being released on parole or 4.9 years before being released due to expiration of sentence, and women spend an average of 2.1 years in prison before being released on parole or 2.3 years before being released due to expiration of sentence.<sup>44</sup> In other words, women generally serve significantly shorter felony sentences in state prison than men on average, which means women convicted of felonies are more likely to feel the brunt of the felony jury exclusion in the community—with more time out of incarceration where the recency of a felony conviction will affect their jury eligibility.

The Commonwealth's exclusion of people from jury service within seven years of a felony conviction has existed for decades. Particularly in light of the practical effects of that exclusion, the time is ripe to revisit it.

## **B. How Peer States Approach Felony Exclusion**

Most states in the U.S. maintain some form of felony exclusion from jury service by statute. Per the Prison Policy Initiative,<sup>45</sup> states range from limiting juror eligibility only during a period of current incarceration (with varying degrees of permissiveness in terms of other mechanisms of jury expulsion) to excluding people from jury service permanently including throughout any period of incarceration, based on all past felony convictions, and even for some past misdemeanor convictions.<sup>46</sup> Maine is in a category of its own, with no statutory exclusion,

followed closely by states in the most permissive column that do not by statute generally prohibit jury participation after any period of incarceration ends, including Indiana, North Dakota, Colorado, Illinois, and Iowa. By contrast, more than half of jurisdictions impose permanent restrictions on jury eligibility after a person is convicted of a felony, which in some states can only be restored by a gubernatorial pardon. In the remaining jurisdictions, falling somewhere in the middle, eligibility depends on factors such as full sentence completion (including probation or parole), restoration of civil rights, nature of the offense or charge category (excluding people convicted of crimes of moral turpitude, specific enumerated offenses, etc.), type of jury proceeding (a few states have more restrictive rules for the grand jury than the petit jury), and/or a time-limited exclusion (commonly three years, five years, ten years, or fifteen years). Massachusetts is presently the only state with a seven-year exclusion from the time of conviction.

### ***Categories of State Approaches to Felony Jury Exclusion***

#### ***1. Current Incarceration***

Today, Maine is the only U.S. jurisdiction that places no legal exclusion on the eligibility of a person with a felony record to serve as a juror, though incarcerated jurors are excused from service. Like many other jurisdictions, Maine's early history prohibited people with a felony record from serving on juries. It was not until 1981, when Maine repealed Section 1254's mandatory exclusion of prospective jurors "convicted of any scandalous crime or gross immorality," that a person with a felony record became eligible to serve on a jury.<sup>47</sup> Maine now construes jury service as a form of civic inclusion, which can be understood as an effort to foster successful reintegration and prevent future criminal contacts for prospective jurors with a felony record.<sup>48</sup> As such, the state conducts the screening of prospective jurors that have a felony record using their normal jury selection procedures.

Some states do not disqualify people with a felony record from jury service after incarceration, but nevertheless allow convictions to be used as a basis for challenge in the jury selection process or leave the door open to the possibility of *de facto* exclusions. In Iowa, a juror may be challenged for "a previous conviction of the juror of a felony unless it can be established through the juror's testimony or otherwise that the juror's rights of citizenship have been restored." Similarly, Colorado also allows a felony conviction to be used as a basis of challenge in the jury selection process. Illinois does not bar people with felony records from jury service, but it does stipulate that jurors must be of "fair character" or "approved integrity." North Dakota only proscribes jury service for people on the basis of conviction for any criminal offense that specifically disqualifies them "by special provision of law."

## 2. *Current Incarceration + Completion of Sentence*

Thirteen states exclude a person with a felony record from jury eligibility until the full completion of their sentence. Disqualification thus extends to people under parole or probation supervision for a felony conviction, or sometimes with outstanding unpaid fines, fees, or restitution. These states include Alaska, California, Florida, Idaho, Minnesota, Montana, New Mexico, North Carolina, Ohio, Rhode Island, South Dakota, Washington, and Wisconsin.

Until January 2020, Californians who had a felony conviction were not permitted to serve on juries. With the passage of S.B. 310,<sup>49</sup> effective January 1, 2020, people convicted of a felony are permitted to serve on juries unless they are incarcerated, under any form of supervision, or are a registered sex offender.<sup>50</sup> Similarly, Florida changed its executive clemency rules in March 2021 to allow people with past felony convictions (other than a conviction for murder or a sex offense) to become eligible for jury service after the completion of their sentence, including the payment of legal financial obligations.<sup>51</sup>

Washington recently changed its policy of rights restoration. Washington falls into the group of states that exclude a person with a felony record from jury eligibility until the full completion of their sentence, including any term of probation or parole and repayment of fines, fees, and restitution; people have to proactively get their rights restored. But in a law that took effect in January 2022, Washington established automatic restoration of voting rights after release from incarceration. To the extent jury service is contingent upon restoration of rights, that automatic restoration provision may also make more people eligible for jury service.

## 3. *Current Incarceration + Temporary Period of Exclusion*

The restoration of jury eligibility after a fixed period of time following conviction or sentence completion is also common, codified in Connecticut, the District of Columbia, Kansas, Massachusetts, Nevada, and Oregon. In Oregon, the right to serve as a juror in civil trials is immediately restored after incarceration, but people are ineligible to serve as a grand juror or a juror in a criminal trial for 15 years after service of a felony sentence and 5 years after service of a sentence for a misdemeanor involving dishonesty or violence.<sup>52</sup> In Kansas, people with felony records are ineligible for jury service for ten years after conviction. In Massachusetts, a person with a felony record is disqualified for jury eligibility for seven years following conviction. In Nevada, civil jury rights are restored upon the completion of a sentence, but criminal jury rights are not regained until six years after a person is discharged from their sentence.

A number of jurisdictions recently reduced their existing time limits of jury ineligibility. District of Columbia Superior Court Chief Judge Robert Morin announced in June 2020 that people with felony convictions would be eligible to serve as petit jurors one year after the completion of their sentence, lowering the term from ten years post-completion.<sup>53</sup> In June 2021, Connecticut enacted a law lowering the years of jury disqualification for post-felony conviction from seven to three.<sup>54</sup> In the same month, Louisiana ended the practice of a lifetime jury service ban for people with a felony record through the passage of a law that allows jury eligibility five years following the completion of a sentence.<sup>55</sup>

#### *4. Permanent Exclusion*

The remaining states either prohibit people with felony convictions from serving on juries indefinitely after conviction (Arizona<sup>56</sup>, Arkansas, Delaware, Florida, Georgia, Hawaii, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New York, Oklahoma, Tennessee, Utah, Vermont, Virginia, West Virginia, Wyoming) or apply that disqualification more broadly even to some people convicted of certain misdemeanor offenses as well (Maryland, New Jersey, Pennsylvania, South Carolina, Texas).

For further reading, and examples of some of the statutory provisions in these states, see our [Appendix A](#).

## **C. Removing the Statutory Bar Alone May Not Be Enough**

### ***Practical Implementation Hurdles***

The process of rights restoration requires careful attention to practical impediments, political socialization, and social stigma. When people have been told they've lost their rights, reversing that status quo is difficult to do. The stigma of a criminal record carries deeply embedded dehumanizing myths that can change people's perceptions of themselves,<sup>57</sup> and the fact of incarceration itself, compounded by felony disenfranchisement laws, has a chilling effect on exercising civil and political rights for people who become system-involved and their families.<sup>58</sup>

Many people who are formerly incarcerated or who have a felony conviction may assume that their rights have been dissolved whether or not they legally retain them; others may disengage from government interaction because the process of prosecution and incarceration has diminished their trust in government or interest in political participation.<sup>59</sup> New research on juror notification in Louisiana and California after juror exclusions have been legislatively removed illustrates the major gaps on the ground in notification efforts and the need for accurate information dissemination and proactive notification.<sup>60</sup> A field experiment in Connecticut has

shown that “a simple informational outreach campaign” to people with felony records recently released from incarceration “can recover a large proportion of the reduction in participation observed following incarceration” with respect to registering to vote and voting – hypothesizing that where “even a single mailing generated these effects, this research suggests that more sustained outreach could perhaps be even more effective.”<sup>61</sup> A study in Iowa found similar results.<sup>62</sup> Others have not found significant effects of notification efforts, some directly after conviction instead of upon release.<sup>63</sup> In view of this research, on balance, any shift in public policy toward juror inclusion could be improved by a comprehensive, community-based public information campaign to reach directly affected people upon release from incarceration.

This is especially important where failure to respond to a jury summons can itself result in future negative court interactions—including, at the end of the process,<sup>64</sup> a summons for a criminal offense for juror delinquency, an arrest warrant, or potentially a non-bailable default warrant for a missed court appearance if the individual does not respond to the summons for any number of reasons (they moved and it never reached them; they never opened the envelope, assuming it was sent in error because they believed their felony conviction barred them from jury service, etc.). Such an information campaign could be woven into existing (re)entry services, including by requiring the Department of Correction, county sheriffs, the Parole Board, the Probation Department, and the Committee for Public Counsel Services to inform newly eligible people convicted of felony offenses of their rights and responsibilities to serve on juries—both at the time of conviction *and* at the time of their discharge from incarceration. Materials should emphasize (1) that the law has recently changed, (2) how to respond to a summons—including by delaying jury service for up to a year, and (3) the importance of responding to a summons. Partnerships and outreach efforts with community-based organizations and faith communities in the neighborhoods most affected by incarceration<sup>65</sup> could build trust in the information shared and help people navigate their options in how to respond to a summons.

In addition to an information campaign so people know they have this right who previously did not, and in addition to trying to limit the possibility that this will create new warrants for people wary of court involvement in their own lives, Roundtable members explained that people in heavily policed, prosecuted, and incarcerated communities have legitimate distrust of jury service and may be wary to serve because they do not wish to send someone deeper into criminalization and punishment. In general, creating resources, trainings, and listening sessions for people in such communities, especially communities of color, would be a valuable complement to help people understand the role jurors play in democracy—in expressing the will of a community and in ensuring that prosecutors meet their hefty burden of proving guilt beyond a reasonable doubt.<sup>66</sup> Finally, given structural inequities, there is need to compensate low-income people at least for their service to help ensure participation; this is the case whether or not jury exclusions are eliminated or reduced.<sup>67</sup>

However, even if the *de jure* exclusion of people with felony records were removed from statute and there was careful attention toward practical impediments identified here, current law still allows the exclusion of jurors with felony records based on criminal record checks and for cause challenges. *De facto* expulsion may also continue if parties – particularly prosecutors – still use peremptory challenges to exclude people due to a criminal record (or a loved one or other associate with a criminal record). If people with felony records can be struck for cause based on the mere fact of their record (and not any unique bias or relationship to the case at bar) or with peremptories (for no reason at all), eliminating the legal barrier to eligibility to be called into the venire will not resolve the problem of actually getting people with felony records into the jury box.

### ***For Cause Challenges and Criminal Record Checks in Massachusetts***

For cause challenges remove jurors from the venire who judges determine cannot be impartial through individualized voir dire. Judges must ask jurors whether they can be unbiased and listen to the evidence, but there are limits on what kinds of views and beliefs are a reasonable basis for excusing a juror due to perceived partiality. In 2019, in *Commonwealth v. Williams*, the Supreme Judicial Court clarified that “in determining each prospective juror’s ability to be impartial, although a judge may require a prospective juror to set aside an opinion regarding the case, the judge shall not expect a prospective juror to set aside an opinion born of the prospective juror’s life experiences or belief system.” 481 Mass. 443, 449 (2019).<sup>68</sup> The Court held that “a prospective juror may not be excused for cause merely because he or she believes that African-American males receive disparate treatment in the criminal justice system.” *Id.* at 451. While judges must take care not to ask jurors to set aside views born of life experience under this binding precedent, jurors are nevertheless still commonly excused because of their own criminal record or because of the criminal record of a family member.<sup>69</sup>

Further, the Supreme Judicial Court has held that where jurors do not disclose their criminal histories on the juror questionnaire but a criminal record is later revealed by a criminal record check, the judge can reasonably infer “that the jurors had concealed their criminal histories purposefully, and thus could not be expected to be impartial or to follow the court’s instructions.” *Commonwealth v. Cousin*, 449 Mass. 809, 821-822 (2007),<sup>70</sup> *cert. denied*, 553 U.S. 1007 (2008). In other words, this discrepancy - treated like impeachment evidence - becomes the basis for a for-cause exclusion of a juror with a criminal record. While the exclusion is not based on the fact of the criminal record alone, it is inextricably bound up with the juror’s criminal record.

The Supreme Judicial Court revisited the question of prosecutors’ checks of jurors’ criminal records this past summer in *Commonwealth v. Grier*, 490 Mass. 455, 469-470 (2022).<sup>71</sup> The defendant challenged the prosecutor running jurors’ criminal records as an equal protection



violation given the well-documented disproportionality in arrests, charges, and sentences against people of color and Black people in particular. The Supreme Judicial Court determined that checking the criminal records (CORI) of potential jurors was not improper despite clear racially disparate impact because a facial equal protection challenge requires proof of discriminatory intent. The Court also determined that “the record indicates that the judge did not excuse the juror because of his previous arrests and criminal charges. Rather, the judge excused him due to concerns about his candor and level of comprehension” because he had not disclosed decades-old arrests and charges despite being prompted to do so on the juror questionnaire. *Id.* at 467-468.

### ***Peremptory Strikes in Massachusetts***

“Courts have consistently upheld reasons such as a juror’s prior arrest, a juror’s loved one’s incarceration, or a juror’s distrust of the criminal legal system as facially race-neutral and, overwhelmingly, sufficient to defeat a *Batson* objection.”<sup>72</sup> While Massachusetts judges must take care not to ask jurors to set aside views born of life experience under Supreme Judicial Court precedent, jurors are nevertheless still commonly excused with peremptory strikes because of their own criminal record or because of the criminal record of a family member.

According to a November 2022 study in the *Law and Society Review* by scholars Matthew Clair and Alix S. Winter, even lower-level forms of criminal legal system association commonly result in people being excluded from juries through either for cause challenges or peremptory strikes—contributing to inequality in jury composition.<sup>73</sup> These researchers conducted in-depth, semi-structured interviews with a total of 103 system actors—prosecutors (24), defense attorneys (27), and judges (52)—in a state trial court system in an undisclosed Northeastern state where people with felony convictions are excluded from jury service for a limited period (true, for example, in Massachusetts and Connecticut).<sup>74</sup> The researchers found that, in practice, “the exclusion of criminal legal system-associated individuals from juries extends beyond statutory felon-juror exclusion laws,” such that people who have been victims of crime, people perceived to have any direct criminal legal contact, and “alleged offenders’ and perceived victims’ family members and friends” may all be excluded based on assumptions about their inherent biases as jurors. The authors’ major findings are as follows:

*With respect to people arrested, accused, or convicted of crimes—and their social networks:*

- Most prosecutors (17 of 24, or 71%) reported “a desire to remove people perceived to be offenders from juries, because they believe that such jurors are more likely than jurors without such system association to be biased against the prosecution.”<sup>75</sup>

- By contrast, only a small number of judges (9 of 52, or 17%) “acknowledge the possibility that perceived offenders and their social networks might be biased against the prosecution.”<sup>76</sup>
- More than a third of public defenders (10 of 29, or 37%) expressed a desire to “retain jurors with experience as offenders” but “complain[ed] that prosecutors’ use of their peremptory challenges makes the retention of such potential jurors unlikely.”<sup>77</sup>

*With respect to people victimized by crime—and their social networks:*

- More than half of public defenders (15 of 27, or 55.6%) reported “a desire to remove perceived victims from seated juries, because public defenders believe that victims are likely to hold biases against criminal defendants.”<sup>78</sup>
- Only three prosecutors (3 of 24, or 12.5%) mentioned perceived victims and said they’d want to know more about whether perceived victims and members of their social networks would be able to be impartial jurors.<sup>79</sup>
- Among judges, a substantial minority (15 of 52, or 28.8%) reported concern with respect to perceived victims, and the concerns “tend[ed] to revolve around perceived victims’ emotional well-beings and their abilities to be impartial in light of their emotional states—a concern that is often gendered.”<sup>80</sup>

Given the size of the sample and the nature of the qualitative methodology, the authors do not focus on the specific percentages, but rather use these responses to gauge and hypothesize about how widespread these views are—and what kinds of actions these views prompt in courtrooms. By excluding potentially large swaths of people from disproportionately policed communities, the jury selection process may reproduce unequal power structures in the law’s administration: “Court officials’ racialized and gendered efforts to exclude people with criminal legal association from jury service likely function to reproduce inequality in the structure of the law by removing the voices of perceived offenders and victims of crime.”<sup>81</sup> All told, “court officials’ combined efforts likely result in the systematic exclusion of criminal legal system-associated individuals—people with the most direct knowledge of the factors at play—from participating in the interpretation and application of the criminal law as jurors.”<sup>82</sup>

The interviews conducted by Clair and Winter revealed that “If a prosecutor strikes a perceived offender or their social ties, a public defender has little recourse—other than an accusation of direct racial or gender discrimination—to keep the person on the jury. Although some officials recognize the racialized consequences of the exclusion of perceived offenders, they lament that such exclusions do not constitute racial discrimination under the law.”<sup>83</sup> These research findings are confirmed in precedential decisions by the Massachusetts Supreme Judicial Court. For

example, in *Commonwealth v. Jackson*, while the Court acknowledged “the need for careful consideration of strikes based on minor offenses, particularly those involving young black men who have been subject to disparate treatment in the criminal justice system,” 486 Mass. 763, 780 n.27 (2021), the Court nevertheless found that a trial judge had not abused his discretion in allowing the strike of a Black juror because her two sons, who were roughly the same age as the defendant, had been arrested previously; one had been caught in a stolen car seven years earlier when he was still a juvenile, but the charge was swiftly dismissed and he was not prosecuted, and the other had been prosecuted for minor marijuana possession two years earlier and had to pay a fine. The judge found that the fact that her “two children had been involved with the criminal justice system” was a “legitimate reason for exercising a peremptory challenge” because someone “who has experienced her children being arrested and prosecuted . . . may harbor a bias, conscious or unconscious against the Commonwealth.” *Id.* at 780. See also, e.g., *Commonwealth v. Martinez-Pegeuro*, 20-P-157, 8-9 (Mass. App. Ct. Nov. 25, 2020) (unpublished) (upholding peremptory strike of sole Hispanic member of the venire in a prosecution against a Hispanic defendant where the prospective juror’s brother was charged with murder in another state and the defendant was facing a charge of drug possession with intent to distribute, and rejecting state constitutional challenge to striking people whose loved ones had criminal records resulting in unintentional discrimination); *Commonwealth v. Lopes*, 478 Mass. 593, 601 (2018) (noting that a family member’s involvement with the criminal system may provide a group-neutral reason for exercising a peremptory challenge).

The supposed inherent bias of people with criminal convictions and their loved ones against the state is a common policy rationale for felony jury exclusion and for allowing peremptory strikes of jurors with loved ones ensnared by the criminal legal system.<sup>84</sup> This rationale not only intentionally deprives juries of people with direct experience in critically understanding the weighty government burden to prove guilt beyond a reasonable doubt, it also has been debunked by empirical evidence.

A 2014 study by James Binnall, an expert on felony jury exclusion and a person with a felony conviction himself, examined the validity of this “inherent bias” rationale.<sup>85</sup> He compared the pretrial biases of three groups of participants: individuals with felony convictions, eligible jurors not convicted of felonies, and law school students not convicted of felonies. The study found that a felony conviction alone is not the sole predictor of pretrial bias that favors the defense or disfavors the prosecution – and, in fact, enrollment in law school had a greater effect on pretrial bias than a felony conviction.<sup>86</sup> A felony conviction does not uniformly lead to negative views of the law that might create a pro-defense or anti-prosecution bias; people with felony records did not possess a disproportionately negative view of the law, and there was no significant difference between their views of the law and those of other eligible jurors. Lawmakers, judges, and even

researchers nevertheless “continue to repeat the assertion that a juror with a criminal record is more likely to sympathize with a criminal defendant, without citing supportive data.”<sup>87</sup>

Another study Binnall conducted utilized a mock-jury experiment that included people with felony convictions and people without convictions to evaluate the quality of juror participation and deliberations among different groups.<sup>88</sup> Binnall found that participants with felony convictions displayed greater engagement, the quality of deliberations for all involved was not negatively affected by the presence of members with convictions, and participants with felony convictions were as likely to convict as those without. Binnall’s mock jury experiments found that not only were there “few statistically significant differences between felon-jurors and non-felon-jurors” but ex-felon jury participants actually brought up more novel case facts during deliberations and did so more accurately than did non-felon participants.

The U.S. Commission on Civil Rights, after a comprehensive inquiry into the collateral consequences of criminal records, determined that “States should eliminate blanket restrictions on jury service because of a criminal conviction as these restrictions do not safeguard the jury process. Rather, challenges to potential jurors for cause in cases where bias is presented are effective safeguards.”<sup>89</sup> This recommendation is critical in two respects and approximates the system currently at work in Maine. First, it calls for eliminating blanket restrictions and reining in other mechanisms of exclusion. Second, it notes that the remaining mechanism should be limited to for-cause challenges, and only in cases “where bias is presented.” In other words, this recommendation does not accept—as the law currently does in Massachusetts—the legitimacy of a proffered *inherent bias* peremptory strike exercised on the basis of a criminal record or a loved one’s criminal record. The partiality or impartiality of jurors with felony convictions can be carefully assessed for specific bias with existing safeguards for jury empanelment for similarly situated jurors with no criminal records.

Excluding people from the jury venire based on a criminal record, or removing them from the venire after they are called to the courthouse, creates “bias even while being sought in the name of bias-removal” by seating juries with a less diverse array of life experiences, viewpoints, and perspectives.<sup>90</sup> Their exclusion may also undermine the jury’s fact-finding province. Wrongful convictions are commonly driven by false confessions and law enforcement or government misconduct. If courts filter out all those who have experienced, firsthand or secondhand, any negative contact with the criminal legal system, the empaneled jury may be less likely to question the validity of a confession or the legality of actions taken by law enforcement. The charge of jurors is to critically examine the evidence to determine whether the government has met its hefty burden to prove a defendant’s guilt beyond a reasonable doubt. Including jurors whose unique life experiences give content to what kinds of doubts may be reasonable enhances, rather than undermining, the fairness of the jury system. Further, having contact with the criminal legal

system represents a critical life experience to include on juries in order to ensure that defendants' Sixth Amendment rights to a jury of their peers and a jury venire representing a fair cross-section of the community are honored.

### ***Racial Disparities in Criminal Legal System Contact & Jury Exclusion***

---

**Black and Hispanic people are significantly more likely than White people to be related to someone who has personal experience in the criminal legal system.**

---

According to a national survey conducted by FWD.us and Cornell University involving a representative sample of more than 4000 people, Black people are 50 percent more likely than White people to have a family member who is currently or formerly incarcerated, and three times more likely than White people to have a family member who has spent a decade or more in prison.<sup>91</sup> Latinx people experience family incarceration at rates slightly higher than White people, but are almost twice as likely to have a family member incarcerated for more than a year. In terms of raw numbers, more than six in ten Black people—63 percent—have had an immediate family member incarcerated, and nearly one-third—31 percent—have had an immediate family member incarcerated for at least a year. Almost five in ten Latinx people—48 percent—have had an immediate family member incarcerated and nearly two in ten—17 percent—have had an immediate family member incarcerated for more than a year. This survey only queried incarceration; other involvement in the criminal legal system, from arrests to probation to crime victimization, also disproportionately affects Black and Latinx people.<sup>92</sup> A more recent study by Youngmin Yi at the University of Massachusetts Amherst confirmed that 60% of Black adults have had an immediate relative incarcerated, 53% have had an extended relative incarcerated, and 74% have experienced both.<sup>93</sup>

---

**Evidence shows that having a loved one with a criminal record is disparately used to exclude Black and Hispanic people from jury service.**

---

Excluding jurors of color based on a relative with a criminal history is a common practice. The examples of courts allowing peremptory strikes of Black and Hispanic jurors justified based on their relationship to someone with a criminal record are legion.<sup>94</sup> Courts have upheld such strikes even when unchallenged White jurors also had loved ones convicted of crimes, strongly

suggesting that the proffered justification was pretextual and the true motive discriminatory, consciously or unconsciously. For example,

The circuit court in *United States v. Houston* affirmed the denial of a *Batson* claim relating to the prosecution's proffered justification for dismissing three African American jurors—that they had family members who had been convicted of crimes—even though it was undisputed that four of the white jurors, whom the prosecution had left unchallenged, also had family members who had been convicted of crimes.<sup>95</sup>

In sheer numbers, the fact of a family member's incarceration could exclude roughly two-thirds of Black people and half of all Hispanic people from juries, while shielding the prosecutor's motives behind a veil of asserted race neutrality. A prosecutor consciously or unconsciously looking to strike a Black or Hispanic person from a jury may effectuate the peremptory by invoking a connection to a loved one who has been arrested or prosecuted.<sup>96</sup>

In 2020, the Berkeley Law Death Penalty Clinic published empirical research on jury selection in California which found that “a juror's close relationship with people who had been stopped, arrested, or convicted of a crime” was the second most common rationale prosecutors offered for striking Black and Latinx jurors.<sup>97</sup> The researchers reviewed 683 decisions of the California courts of appeal involving *Batson* claims between 2006 and 2018; 670 of those cases—98%—involved defense counsel objecting to prosecutors' strikes, which disproportionately targeted Black jurors (480 cases, or 71.6%) and Latinx jurors (190 cases, or 28.4%).

The researchers coded the qualitative responses offered by prosecutors and found that “[p]rosecutors' reasons for striking jurors correlate with racial stereotypes . . . In 35% of the cases, prosecutors relied on a juror's close relationship with people who had been stopped, arrested, or convicted of a crime.”<sup>98</sup> With respect to Black jurors, prosecutors averred strikes were justified by a close relationship with someone who had been stopped, arrested, or convicted of a crime in “33.3% (160) of the 480 cases in which defense counsel challenged prosecutors' strikes of Black jurors.”<sup>99</sup> With respect to Latinx jurors, “Nearly as often as demeanor-based reasons, prosecutors based their strikes on a Latinx juror's close relationship with someone who had a negative experience with law enforcement, including having been stopped, arrested, or convicted of a crime . . . in 33.7% (64) of cases.”<sup>100</sup>

## IV. A Holistic Suite of Evidence-Based Reforms to Engage People with Criminal Records as Jurors

Social science research and experiences in peer jurisdictions offer a promising path to producing more representative, democratic, and equitable juries in the Commonwealth—juries that research shows conduct more thorough deliberations and produce more reliable outcomes. This section of the research brief synthesizes a series of recommendations to foster those goals and to remove the legal (*de jure*) and practical (*de facto*) barriers to jury service for people with criminal legal system ties. The policies discussed below include removing applicable felony disqualification provisions from statute, editing the juror questionnaire, changing policy on criminal record checks of prospective jurors, adjusting the standards governing challenges for cause and peremptory challenges during jury selection, proactively notifying newly eligible jurors of their rights, and affirmatively reinstating jury eligibility for people previously disqualified from the jury rolls by virtue of a felony record or pending felony charge.

### A. Eliminating *De Jure* Disqualification

#### 1. Eliminate the Statutory Felony Exclusion

Following the model adopted by Maine four decades ago, Massachusetts could begin to rectify its felony jury exclusion by striking the language in statute that specifically prohibits participation of people with felony records on juries within seven years of their conviction.

Following this change, all people who are not presently incarcerated should be eligible to serve as jurors, including people currently on parole or probation. People on parole and probation who have not been convicted of a felony within the last seven years are already presently eligible to serve as jurors and not disqualified; this change would simply expand that protection to all people not currently “in the custody of a correctional institution.” Eliminating the exclusion would be a simpler and more comprehensive fix than writing an affirmative inclusion into the law, and both statutory authority and case law clearly define “in the custody of a correctional institution” not to include someone who is on probation or parole.<sup>101</sup>

#### 2. Preserve the Presumption of Innocence

Massachusetts is also an outlier in prohibiting people merely facing felony charges from sitting on juries; this could also be reconsidered and eliminated from statute, removing the barrier to people merely accused of felony crimes from serving on juries.

Taken together with the language above, the only remaining disqualification related to criminal legal involvement would be anyone “in the custody of a correctional institution.” This would necessarily still include any person detained pretrial in a county jail or state prison, regardless of the nature of their charges.

## **B. Eliminating Opportunities for *De Facto* Exclusion**

### **1. Reform Access to CORI Information, including the Jury Questionnaire and Prosecutorial Record Checks**

Another source of racial disparity in jury selection, and another source of expulsion of people with criminal records, is prosecutors requesting jurors’ CORI records and/or asking potential jurors about their records (on the jury questionnaire, in voir dire, etc.).

Even were there no longer to be a codified *de jure* exclusion, continuing to ask jurors about their criminal records or to allow prosecutors to check prospective jurors’ records presupposes that someone’s criminal history is relevant to their jury service. If the purpose of the voir dire inquiry is to discern bias in favor of or against law enforcement or the prosecution, the judge or the parties can simply ask about such bias directly. The conclusion of the social science research summarized above is that someone’s criminal history is irrelevant to their jury service, and additional studies illustrate that excluding jurors based on assumptions about inherent biases related to the criminal legal system will disproportionately exclude Black people and other people of color. In view of this research, perhaps prospective jurors should not even be asked, either during voir dire or on the juror questionnaire, about their CORI—but should instead be directly asked about biases and sources of bias.

There are a few possible ways to reduce discussion of CORI of potential jurors in the courtroom. First, policymakers could restrict the jury commissioner’s province to look into CORI because a felony record would no longer be a basis for disqualification. Presently, G.L. c. 234A, § 33 allows the court, the officer of the jury commissioner, and the clerk of court or assistant clerk to “inquire into the criminal history records of grand and trial jurors for the limited purpose of corroborating and determining their qualifications for juror service.”<sup>102</sup> However, even if the statutory felony exclusion were removed, the jury commissioner still needs to be able to remove people who are incarcerated from the jury rolls. Accordingly, the jury commissioner still needs access to CORI because currently incarcerated people are not eligible—and because the jury commissioner may need to proactively return people to the jury rolls who were temporarily disqualified by virtue of a recent felony conviction after any change in the law takes effect.



Alternatively, policymakers could restrict or adjust the questions on the jury questionnaire. Presently, statutory authority specifically requires that the jury questionnaire include questions about “present or past involvement as a party to civil or criminal litigation”. G.L. c. 234A § 22 (“The information elicited by the questionnaire shall be . . .”).<sup>103</sup>

In response to this statutory mandate, the Massachusetts jury questionnaire involves a large section entitled “YOUR EXPERIENCE WITH THE LAW” which includes a searching set of questions about experiences with the criminal legal system. Prospective jurors are instructed to “check all that apply” and are asked whether the prospective juror or “anyone in [their] household or family” has ever had any of the following experiences with the law:

- Been arrested?
- Been charged with a crime?
- Been convicted of a crime?
- Been a crime victim?
- Been sued?
- Filed a lawsuit?
- Been a witness in a civil/criminal case?
- Been seated on a jury?
- Been served with a court order?
- Sought a court order (restraining order, stay-away order, injunction, etc.)?

They are then instructed to “please describe” the situation if they answered “yes” to any of the prior questions. Here is a copy of the relevant section of the juror questionnaire:

---

**YOUR EXPERIENCE WITH THE LAW** *(Please check all that apply)*

Have you or anyone in your household or family ever had any of the following experiences with the law?  No  Yes

<input type="checkbox"/> Been arrested?	<input type="checkbox"/> Been charged with a crime?	<input type="checkbox"/> Been convicted of a crime?	<input type="checkbox"/> Been a crime victim?
<input type="checkbox"/> Been sued?	<input type="checkbox"/> Filed a lawsuit?	<input type="checkbox"/> Been a witness in a civil/criminal case?	<input type="checkbox"/> Been seated on a jury?
<input type="checkbox"/> Been served with a court order?	<input type="checkbox"/> Sought a court order <i>(restraining order, stay-away order, injunction, etc.)?</i>		

If “Yes,” please describe: \_\_\_\_\_

---

Have you or anyone in your household or family ever worked for any of the following?  No  Yes

<input type="checkbox"/> Law enforcement agency?	<input type="checkbox"/> Court system?
<input type="checkbox"/> Corrections/detention system?	<input type="checkbox"/> Other law-related employer?

If “Yes,” please describe: \_\_\_\_\_

---

Is there anything else in your background, experience, employment, training, education, knowledge, or beliefs that might affect your ability to be a fair and impartial juror?  No  Yes

If “Yes,” please describe: \_\_\_\_\_

---

Collecting this information on the jury questionnaire not only allows prosecutors and defense attorneys to engage in the targeted peremptory strikes described above and documented in the Clair & Winter study and Berkeley Law Death Penalty Clinic study (with prosecutors tending to remove prospective jurors who have personally experienced, or people with family members who have experienced, arrest or prosecution, and defense attorneys tending to remove prospective jurors and people with loved ones who have been victimized by crime)—it also creates the preconditions for exclusion “for cause” based on an inadvertent omission, mistake, or misrepresentation in filling out the juror questionnaire.<sup>104</sup>

There is a risk that eliminating the questions altogether from the jury questionnaire would lead prosecutors and defense attorneys to request the question during voir dire in less precise or less consistent ways *or* would lead prosecutors and defense attorneys to rely on assumptions and stereotype-based judgments in the absence of concrete criminal legal history information.<sup>105</sup> However, having the more detailed check-boxes that require people to separate an arrest, a criminal charge, and a conviction—and that asks about any member of their household or family—reinforces the notion that a criminal record, without a specific tie to the case at bar, is relevant to one’s jury service, despite research indicating that it should not be and demonstrating its racially disparate effect.

Based on the current statutory language, the office of the jury commissioner has wide authority to adjust the jury questionnaire to ask fewer questions and provide less comprehensive but more relevant information to understanding jurors’ potential individualized biases from their criminal legal system contacts. One possible change would be to remove the phrase “or anyone in your household or family,” limiting the information available to court officials to information about the juror’s own personal criminal legal system contacts. Another possible change would be to reduce the specific check-boxes and provide a more open-ended, broad-textured question asking the juror to reflect on their own biases directly. For example, the questionnaire could read instead:

- “Have you had any personal experiences with the legal system? This might include your own experience being arrested, being charged with a crime, or being a crime victim. Please describe.”
- “If yes, would that experience or those experiences affect your ability to be a fair and impartial juror? Please describe.”

The jury commissioner could, instead or in addition, adjust the questionnaire to ask whether the juror had any personal connection to the specific courthouse, judge, prosecutor, or District Attorney’s Office involved in the case, including past experience as a defendant or a victim, which would more directly relate to potential biases that would impede a juror’s ability to be fair or impartial.

Finally, one other possible area for reform would be to constrain prosecutors' access to CORI information as a check on the answers voluntarily provided on the jury questionnaire. At present, the Supreme Judicial Court has affirmed that prosecutors have the authority to review CORIs despite the absence of specific authority in the above statutes. See *Commonwealth v. Cousin*, 449 Mass. 809, 816-818 (2007) (documenting the long history of allowing prosecutors to inquire into prospective jurors' criminal records, that numerous other jurisdictions routinely permit such access, and that prosecutors must share the information gleaned during a CORI check with defense counsel). Further, the Supreme Judicial Court has held that, despite the disparate impact of criminal records, this practice does not violate equal protection principles. *Commonwealth v. Grier*, 490 Mass. 455, 469-470 (2022).

Concurring in *Cousin*, Justice Ireland suggested that at the very least there should be procedures in place such that, if a prosecutor wants to request a juror's CORI, they must be required to undertake that CORI check before declaring that the Commonwealth is satisfied with an empaneled jury at the start of trial; in other words, at the very least, after the jury has been sworn a CORI check would not be permitted. At present, there are no restrictions on the timing of a CORI check; a prosecutor could wait until a jury is already seated or even already deliberating, which wastes judicial resources by potentially leading to a mistrial.

In *State v. Andujar*, 254 A.3d 606 (N.J. 2021), the New Jersey Supreme Court held that all requests to run criminal records must receive advanced permission from the trial court, and that such requests require "a reasonable, individualized, good-faith basis." *Id.* at 611. "What matters is that juries selected to hear and decide cases are chosen free from racial bias—whether deliberate or unintentional." *Id.* at 623. The New Jersey Supreme Court proposed a detailed procedure, *id.* at 626-627, which could be a template for other jurisdictions.

New statutory language could be adopted to restrict prosecutors' province to request CORI. Massachusetts could adopt, by statute, a version of the New Jersey rule in the *Andujar* decision and Justice Ireland's proposal.

## 2. Guide "For Cause" Challenges

Maine screens all of its jurors using the normal jury selection procedures; there are no special provisions for how to approach jurors with a felony record. However, given current law and common practice in Massachusetts of excusing jurors for cause and with peremptories based on a juror's criminal record or a loved one with a criminal record, the Commonwealth may benefit from special touchstones to guide judges and attorneys when a prospective juror has a prior record. Otherwise, the default may be the status quo, which largely allows excusing jurors with records, thereby impeding the forecasted effect of enabling people with felony records to serve on juries by eliminating the statutory felony exclusion. The Massachusetts statute on individualized voir dire could be adjusted to accommodate this change, making clear that the fact

of a prior criminal conviction or a loved one with prior criminal legal system contacts, standing alone, shall not be the basis to excuse a juror for cause and any challenge for cause requires individualized evaluation of bias.

### 3. Set Limits on Peremptory Strikes

As outlined above, peremptory strikes against people with criminal records, or people whose loved ones have criminal records, have a racially disparate impact and prevent otherwise eligible jurors who do not evince specific, individual bias from serving on juries. When attorneys justify strikes on race-neutral grounds, they often cite reasons that have been proven to be reliable proxies for race: jurors' distrust of the criminal legal system, their demeanor or attire, their neighborhood, having a family member with past involvement with law enforcement or the criminal legal system, having a prior criminal record, or not being a native English speaker.<sup>106</sup> Any basis for a peremptory strike that correlates with racism or racial exclusion perpetuates discrimination in jury selection.

A bill introduced last legislative session, which ultimately was sent to study and did not make it out of committee, aimed to reduce racial proxies as a basis for peremptory strikes, Senate Bill 918.<sup>107</sup> A version of the bill has been reintroduced in the current session as House Bill H.1651.<sup>108</sup> The bill was modeled on recent developments in Washington and California that adopted an "objective observer" standard to root out common strike justifications that are historically correlated with discrimination or a disparate impact against people of color, Black jurors in particular. These recent changes in Washington and California, and the courtroom culture in Maine, are all instructive.<sup>109</sup> An approach like Washington's General Rule 37<sup>110</sup> – which eliminates the first step of a *Batson* challenge and identifies presumptively invalid reasons for a peremptory strike, including "having prior contact with law enforcement officers" – may be important to include in any proposed model legislation, part of a comprehensive scheme.

### 4. Notify and Build Trust with Impacted People

While studies on the impact of notification are mixed, research suggests that notifying people about their eligibility (at sentencing for people not sentenced to incarceration, and after any period of incarceration for people released from a carceral felony sentence), and taking affirmative steps to ensure their automatic inclusion in the jury pool without having to personally apply, will lead to the most robust inclusion of people with felony records in the jury pool.

States that change their laws require conscientious attention to ensure that newly eligible people are properly restored to the jury pool. For example, if a state bars a person with a felony from voting and it pulls the jury pool from voter records, the change would be meaningless because people with felony records would still be skipped. People in Massachusetts are eligible to vote upon their release from incarceration on a felony sentence, but there may still be additional

administrative process needed to ensure that people with felony records are affirmatively added to the jury pool. Research suggests automatic inclusion through state efforts will reach more people than an individual process of application.

California recently changed its laws to allow those who have completed their sentences to serve jury duty (except people convicted of murder or designated as sex offenders). Until this change, California law barred *30 percent* of the state’s Black men from serving on juries.<sup>111</sup> In a study of how California counties responded to this new juror eligibility for people with felony records in the absence of statewide, top-down notification requirements, researchers determined that “California counties have taken an inconsistent approach . . . . The message delivered and the method of delivering that message have been varied and, in many instances, objectively inadequate . . . . at best mixed messages and at worst outright falsities.”<sup>112</sup>

Massachusetts can preempt this mixed milieu by requiring standardized notification directly addressed to affected people, outreach by trusted entities in communities most affected by incarceration, and affirmative efforts by the Office of the Jury Commissioner to return people with recent felony records to the jury pool. “[T]o ensure full civic participation by those with a felony criminal conviction – mandatory, empirically informed procedures for the adequate dissemination of information are necessary . . . .”<sup>113</sup> Empirical research identifies the following as some of the hallmarks of an effective notification system:

- ***The notice should be in writing, short, readable, and a standalone notice.*** For example, in a study of voting rights restoration in Iowa, the notification pamphlet was two paragraphs in length, written in large font, and informing those with a felony conviction only “what rights were and were not being restored upon discharge.” Avoid “densely, complexly worded pamphlets” “distributed as part of a larger discharge packet that contained additional information on a host of topics.”<sup>114</sup>
- ***The notice should be delivered personally to those affected, whether in person or by mail.*** In Iowa, notifications were delivered via the U.S. Postal Service, addressed to the respondent personally.
- ***The notice should be informative and encouraging.*** The language should convey not only that someone is newly eligible to serve on a jury, but that the state actively wants them to be a juror and will assist them to make it possible, including by allowing people to postpone service for up to a year in response to a summons, *see* G.L. c. 234, § 34. Consequences for non-response should be included and clearly explained, but contextualized by the important purpose of having a jury of one’s peers, which people with felony records should intimately understand. The Commonwealth should convey that those with felony convictions would actually be a great asset to juries.

- ***The notice should be standardized.*** Having individual counties create their own notices risks inaccurate or incomplete information being disseminated and is administratively inefficient. Instead, a single, simple notice should be used statewide, and can be offered by various government agencies. People could be advised by the Committee for Public Counsel Services or the county bar advocate office at a felony sentencing, informed by the Probation Department and the Parole Board upon beginning felony supervision, and informed by the Department of Correction and the county sheriffs upon release from a felony sentence to incarceration.

Statutory language on affirmative notification requirements and notice by specific agencies should be developed in consultation with the relevant agencies, taking into consideration their administrative requirements and expertise.

#### 5. Delay Implementation to Allow for a Grace Period

In view of the fact that these changes will take time for the Office of the Jury Commissioner and the trial courts to enact, the effective date should be delayed by a reasonable amount of time—perhaps one year or 18 months after passage. Returning people to the jury rolls who are no longer statutorily excluded may require a significant administrative burden and expenditure of resources by the Office of the Jury Commissioner. Further, additional time should be permitted to allow for a notification campaign, even beyond the period of time the Office of the Jury Commissioner will require for administrative restoration. Delayed implementation would also benefit court officials, allowing time prior to the effective date to provide training and professional development for trial judges, trial prosecutors, and defense attorneys on the new rules of jury empanelment. Finally, this would have a number of indirect practical benefits, allowing time for an information campaign to reach newly eligible people and limiting the prospect that people will ignore jury summonses based on a misunderstanding of their eligibility, resulting in potential future negative court contacts like default warrants for non-appearance or non-response to a summons.

## V. Conclusion

The exclusion of people with felony records from juries is rooted in a few common myths: (1) that people with felony records are incapable of civic participation or deserving of continuing retribution in the form of lingering civil death beyond their prescribed sentence, and (2) that people with felony records might somehow jeopardize the adjudicative process, whether by virtue of their supposed fallible character or their presumed inherent bias. Empirical research has debunked both sets of myths, showing that people with felony records are not generally more biased against the prosecution in criminal trials than other prospective jurors, that jury service

among people with felony records is a benefit for demographic diversity of juries and the diversity of life experiences among jurors, and that jury inclusion improves community reintegration of people with felony records.

Longstanding practice and the culture of the court system in Maine illustrates that a jury system which includes people with felony records is possible, productive, and administrable. [As Appendix A illustrates](#), most other jurisdictions continue to exclude jurors with felony records from jury service, but the Commonwealth need not be dissuaded from this equitable course by their examples. This research brief lays out considerations and potential template language for attempting to realize a system in Massachusetts that promotes jury diversity and community reintegration. The time is ripe for change.

## Endnotes

---

<sup>1</sup> See, e.g., Ginger Jackson Gleich, *Rigging the jury: How each state reduces jury diversity by excluding people with criminal records*, Prison Policy Initiative (Feb. 18, 2021), <https://www.prisonpolicy.org/reports/juryexclusion.html>; *50-State Comparison: Loss & Restoration of Civil/Firearms Rights*, Collateral Consequences Resource Ctr., [https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/#2\\_Voting\\_Jury\\_Service\\_Public\\_Office\\_State\\_Law\\_on\\_Firearms](https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/#2_Voting_Jury_Service_Public_Office_State_Law_on_Firearms) (updated Dec. 2021) (“2. Voting, Jury Service, Public Office & State Law on Firearms”).

<sup>2</sup> See G.L. c. 234A, § 4(7) (excluding any “person [who] has been convicted of a felony within the past seven years or is a defendant in pending [sic] felony case or is in the custody of a correctional institution”).

<sup>3</sup> In Massachusetts, “A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.” G.L. c. 274, § 1. In other words, a misdemeanor is any criminal offense that does not carry the potential penalty of state prison time. The maximum sentence for a misdemeanor is 30 months - or 2.5 years - in the House of Correction. While a felony is any criminal offense that may be punishable by state prison time, not all people convicted of felonies are sentenced to incarceration and, if sentenced to incarceration, people may still be sentenced to time in the House of Correction as opposed to state prison for some felony offenses.

<sup>4</sup> Massachusetts Trial Court, Department of Research and Planning, *Criminal Cases Filed, Charge and Defendant Detail* (Aug. 31, 2022), <https://public.tableau.com/app/profile/drap4687/viz/CriminalCasesFiledChargeandDefendantDetail/CriminalCases> (FY2019: 26,790 unique defendants; FY2020: 23,182 unique defendants; FY2021: 21,996 unique defendants; FY2022: 23,184 unique defendants) (last updated Jan. 25, 2023).

<sup>5</sup> See, e.g., Alexis Hoag, *An Unbroken Thread: African American Exclusion from Jury Service, Past and Present*, 81 Louisiana L. Rev. 55 (2020); Darren Wheelock, *A Jury of One’s “Peers”: The Racial Impact of Felony Jury Exclusion in Georgia*, 32 Just. Sys. J. 335 (2011); Paula Z. Segal, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York*, 13 N.Y. City L. Rev. 313 (2010); Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 Am. Univ. L. Rev. 65 (2003).

<sup>6</sup> See, e.g., Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *Unequal Jury Representation and Its Consequences*, Nat’l Bureau of Econ. Res., Working Paper 28572, <http://www.nber.org/papers/w28572>.

<sup>7</sup> Christopher Uggen, Jeff Manza & Angela Behren, *‘Less than the average citizen’: stigma, role transition and the civic reintegration of convicted felons*, at 258-290, [https://users.cla.umn.edu/~uggen/Uggen\\_Manza\\_Behrens\\_CH\\_04.pdf](https://users.cla.umn.edu/~uggen/Uggen_Manza_Behrens_CH_04.pdf); James M. Binnall, *Summoning Criminal Desistance: Convicted Felons’ Perspectives on Jury Service*, 43 L. & Soc. Inquiry 4 (2018), <https://www.cambridge.org/core/journals/law-and-social-inquiry/article/summonsing-criminal-desistance-convicted-felons-perspectives-on-jury-service/EC0CB60376E2CEBEDD222CAAE1AA1A3B>.

<sup>8</sup> See, e.g., James M. Binnall & Lauren M. Davis, *Californians with a Felony Conviction Are Now Eligible for Jury Service: How Would They Know?*, 32 Stan. L. & Pol’y Rev. Online (Aug. 27, 2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/08/32-Stan.-L.-Poly.-Rev.-Online-1-1.pdf>.

<sup>9</sup> See Matthew Clair & Alix S. Winter, *The Collateral Consequences of Criminal Legal Association During Jury Selection*, 56 L. & Soc’y Rev. 532 (2022), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/lasr.12629> (finding—based on in-depth, semi-structured interviews with 103 prosecutors, defense attorneys, and judges in a state trial court system in the Northeast where people with felony convictions are excluded from jury service for a limited period—that “the exclusion of criminal legal system-associated individuals from juries extends beyond statutory felon-juror exclusion laws,” such that people perceived to have been victimized, people perceived to have any direct criminal legal contact, and “alleged offenders’ and perceived victims’ family members and friends” may all be excluded based on assumptions about their inherent biases). An earlier, unpublished version of this study is available at: [https://scholar.harvard.edu/files/matthewclair/files/clairandwinter\\_isr\\_2022.pdf](https://scholar.harvard.edu/files/matthewclair/files/clairandwinter_isr_2022.pdf). Cf. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 Minn. L. Rev. 592 (2013).



<sup>10</sup> Paula Z. Segal, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York*, 13 N.Y. City L. Rev. 313, 318 (2010), <https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1276&context=clr>.

<sup>11</sup> Assize of Clarendon, 1166, The Avalon Project, <https://avalon.law.yale.edu/medieval/assizecl.asp>.

<sup>12</sup> 1 ROTULI PARLIAMENTORUM 289 (London 1767–77) (“Ordinatum est per Consilium . . . quod nullus, quicumq[ue] fuerit, de Conspiracone prius convictus ponatur in Assis, Jurat’ seu Recogniconibus aliquibus infra Com’ vel extra . . . .” [It has been ordained by the Council, that no one, no matter who he be, who has earlier been convicted of conspiracy, be appointed to the Assizes, to jury service, or any inquests within the counties or without.]). Translation by Dr. Anna Graham.

<sup>13</sup> 11 Hen. 4, c. 9 (1410).

<sup>14</sup> James M. Binnall, *Twenty Million Angry Men: The Case for Including Convicted Felons in Our Jury System* at 18 (2021) (“[T]here is no legislative history to explain the enactment of these disabilities. . . . It is likely, however, that civil disabilities in America were actually the result of the unquestioning adoption of the English penal system by our colonial forefathers and the succeeding generation who continued existing practices without evaluation.” (citation omitted)).

<sup>15</sup> See *Tennessee v. Garner*, 471 U.S. 1, 13 n.11 (1985) (“The roots of the concept of a ‘felony’ lie not in capital punishment but in forfeiture. Not all felonies were always punishable by death. Nonetheless, the link was profound.”) (citations omitted).

<sup>16</sup> Kalt, *supra* note 5, at 91-92.

<sup>17</sup> See, e.g., Cal. Civ. Proc. Code § 199 (Bender-Moss 1909) (“malfeasance in office or any felony or other high crime”); Colo. Rev. Stat. § 3668 (1908) (“felony”); Del. Rev. Stat. ch. 109, § 1 (1893) (deeming qualified voters “liable to serve as jurors”); *id.* at 184 (disenfranchising felons); Fla. Gen. Stat. § 1570 (1906) (“bribery, forgery, perjury, larceny, or high or infamous crime”); Idaho Rev. Code § 3942 (1908) (“felony or misdemeanor involving moral turpitude”); Kan. Gen. Stat. §§ 3976 (Dassler 1905) (requiring jurors to be qualified electors), 171 (disenfranchising felons); Ky. Stat. § 2248 (Carroll 1903) (disqualifying felons from grand jury service); 2 La. Rev. L. art. 159 (Wolff 1904) (“treason, perjury, forgery, bribery, or other crime punishable by imprisonment in the penitentiary”); Mont. Rev. Code § 6338 (1907) (“malfeasance in office, or any felony or other high crime”); Nev. Comp. Stat. tit. XIX, § 657 (1901) (“criminal offense, punishable by imprisonment in the penitentiary” or “by special provision of law”); Nev. Comp. Laws § 3867 (1900) (“treason, felony, or other infamous crime”); N.D. Rev. Code § 514 (1905) (“criminal offense, punishable by imprisonment in the penitentiary” or “by special provision of law”); Ohio Rev. Stat. Ann. § 6797 (Anderson 1903) (“felony”); Or. Code § 965 (1902) (“felony, or a misdemeanor involving moral turpitude”); S.D. Stat. § 699 (Parsons 1901) (“criminal offense, punishable by imprisonment in the penitentiary” or “by special provision of law”); Tex. Civ. Stat. Ann. art. 3139(6) (Sayles 1897) (“felony”); Utah Comp. Laws § 1298 (1907) (“malfeasance in office or any felony or other high crime”); Va. Code Ann. § 3139 (West 1904) (“bribery, perjury, embezzlement of public funds, treason, felony, or petit larceny”); Wash. Code § 5939 (Pierce 1905) (“felony”); Wis. Stat. § 2524 (1898) (deeming qualified electors eligible for jury service); Wis. Const. art. III, § 2 (1848) (disenfranchising “any person convicted of treason or felony) (amended 1986); Wyo. Rev. Stat. § 3341 (1899) (“malfeasance in office, or any felony or other high crime”).

<sup>18</sup> A 1942 report listed thirty-three states (plus D.C.) as excluding people with criminal records from jury service. The states were: Alabama, Arizona, California, Colorado, D.C., Florida, Idaho, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>19</sup> Kalt, *supra* note 5, at 90, 90 n.114.

<sup>20</sup> *Id.* at 91 (“As in *Hunter*, a successful equal protection challenge would require clear evidence of discriminatory intent in actively maintaining or enacting a particular felon exclusion law.”).

---

<sup>21</sup> See G.L. c. 234A, § 4(7) (excluding any “person [who] has been convicted of a felony within the past seven years or is a defendant in pending [sic] felony case or is in the custody of a correctional institution”).

<sup>22</sup> Massachusetts Trial Court, Department of Research and Planning, *Criminal Cases Filed, Charge and Defendant Detail* (Aug. 31, 2022), <https://public.tableau.com/app/profile/drap4687/viz/CriminalCasesFiledChargeandDefendantDetail/CriminalCases> (last updated Jan. 25, 2023). The available data do not include any years prior to FY2019.

<sup>23</sup> Felony cases routinely take more than a year to resolve, so a single-year snapshot likely significantly understates the number of people disqualified from jury service by virtue of a pending felony charge. However, the same defendant may be charged in multiple years, so simply aggregating annual totals for two or three years may overstate the total number of unique defendants.

<sup>24</sup> This number *does not* establish the number of *unique defendants* convicted of a felony in a given year or across seven years.

<sup>25</sup> The divisions of the Boston Municipal Court are the equivalent of District Courts in other Massachusetts communities.

<sup>26</sup> A relatively small percentage of cases each year involve lead felony charges. In 2019, the lead charge in eight out of 10 (80.8%) scheduled arraignments was a misdemeanor, meaning felonies accounted for the lead charge in just 19.1% of cases—and felonies subject only to the final jurisdiction of the Superior Court (a more severe category of felonies, which require indictment before a grand jury) represented just 2.9% of lead charges. See Mass. Trial Court, *Survey of Pretrial Statistics in Criminal Cases: FY2019* at 16 (May 2021), <https://www.mass.gov/doc/massachusetts-trial-court-survey-of-pretrial-statistics-in-criminal-cases-fy2019/download>. Still, this combined figure represents tens of thousands of cases annually—more than 29,000 cases involved a lead felony charge in FY2019. This represents the number of cases with a lead felony charge, but not necessarily the number of unique individuals charged with felony offenses.

<sup>27</sup> See, e.g., Mass. Sentencing Comm’n, *Survey of Sentencing Practices: FY 2013* at 10 (Dec. 2014), <https://www.mass.gov/doc/survey-of-sentencing-practices-fy-2013/download>.

<sup>28</sup> *Id.* at 10. *Id.* at 76 (“Boston Municipal Court is included in the district court category.”). Again, this number appears not to represent unique defendants—rather, it represents the number of cases resulting in conviction.

<sup>29</sup> Mass. Sentencing Comm’n, *Survey of Superior Court Sentencing Practices: FY 2018* at 10-13 (Oct. 2019), <https://www.mass.gov/doc/survey-of-superior-court-sentencing-practices-fy-2018/download>.

<sup>30</sup> Both of these sets of numbers are a bit outdated, and they also illustrate a trendline that caseloads in the Commonwealth and overall convictions have decreased in recent years. Further, multiplying any one-year snapshot by seven to estimate the number of felony convictions across seven years may overestimate the total number of *unique defendants* convicted of a felony within the last seven years, since people may have been convicted on multiple cases across different years and therefore duplicated by the aggregation. This is why we use the known undercount of 10,000 felony convictions relative to the FY2013 published statistic.

<sup>31</sup> Any individual might be represented in *both* the group of people with a pending felony charge and the group of people with a recent felony conviction or currently incarcerated; these people would be double-counted by aggregating the totals, which is why the totals use conservative estimates to counteract that risk of duplication.

<sup>32</sup> Elizabeth Tsai Bishop, Brook Hopkins, Chijindu Obiofuma & Felix Owusu, *Racial Disparities in the Massachusetts Criminal System*, Criminal Justice Policy Program at 2 (2020), <https://hls.harvard.edu/wp-content/uploads/2022/08/Massachusetts-Racial-Disparity-Report-FINAL.pdf> (noting that Black and Latinx people were more likely to have their cases resolved in Superior Court than District or Municipal Court, “both because they are more likely to receive charges for which the Superior Court exercises exclusive jurisdiction and because prosecutors are more likely to exercise their discretion to bring their cases in Superior Court instead of District Court when there is concurrent jurisdiction”). *Id.* at 14 (see Figure 2).

---

<sup>33</sup> *Id.* at 2.

<sup>34</sup> Mass. Trial Court, Survey of Pretrial Statistics in Criminal Cases: FY2019 at i, 9, 10 (May 2021), <https://www.mass.gov/doc/massachusetts-trial-court-survey-of-pretrial-statistics-in-criminal-cases-fy2019/download>. See also Massachusetts Trial Court, Department of Research and Planning, *Criminal Cases Filed, Charge and Defendant Detail*, <https://public.tableau.com/app/profile/drap4687/viz/CriminalCasesFiledChargeandDefendantDetail/CriminalCases> (last updated Jan. 25, 2023).

<sup>35</sup> The authors thank the Department of Research and Planning of the Massachusetts Trial Court for undertaking this analysis. The authors note that the analysis did not include the number of people convicted of felonies, only the percentage distribution.

<sup>36</sup> For example, more than four decades ago, a 1979 investigation by the *Boston Globe's* Spotlight Team opened, “Blacks convicted in the superior courts of Massachusetts receive harsher penalties than whites convicted of the same crimes, a detailed analysis of court and prison records has found.” *Blacks Receive Stiffer Sentences*, *Boston Globe*, Apr. 4, 1979, A1, <https://www.newspapers.com/clip/81447925/the-boston-globe>. According to data compiled by the Massachusetts Sentencing Commission in 2016, people of color are overrepresented at each increasing metric of punishment, measured by rates of conviction, indictments to Superior Court, rates of incarceration-based sentences, and rates of sentences to prison instead of the HOC. People of color are: more likely to be convicted of a crime than rate of representation in the population (33% vs. 22%); a greater share in superior court, reflecting higher rates of indictments (68% white in district court vs. 48% white in superior court); a higher rate of sentences to incarceration (38% of sentences to incarceration are for people of color, compared to 33% of convictions); a higher rate of sentences to prison than jail (57% of DOC population, compared to 38% of sentences to incarceration); and staggeringly over-represented in state prisons. A 2016 analysis by The Sentencing Project found that in Massachusetts, Black people were incarcerated at roughly 8 times the rate of white people and Hispanic people are incarcerated at roughly 5 times the rate of white people. Mass. Sentencing Comm’n, *Selected Race Statistics 2–3, 5–8* (2016), <https://www.mass.gov/files/documents/2016/09/tu/selected-race-statistics.pdf#page=3>; see also *Massachusetts Profile*, Prison Policy Initiative, <https://www.prisonpolicy.org/profiles/MA.html> (finding based on 2010 data that the imprisonment rate for Black people in Massachusetts is seven times higher than that of white people). Reports by the Council on State Governments Justice Center in 2016 confirm these data, finding that a larger portion of Black and Hispanic people were convicted than white people and a larger portion of Black and Hispanic people were sentenced to incarceration relative to white people. See, e.g., Council of State Governments Justice Center, Working Group Meeting 6 Interim Report on Race 9–10 (Dec. 21, 2016), [https://csgjusticecenter.org/wp-content/uploads/2020/10/JR-in-Massachusetts\\_sixth-presentation.pdf#page=9](https://csgjusticecenter.org/wp-content/uploads/2020/10/JR-in-Massachusetts_sixth-presentation.pdf#page=9).

<sup>37</sup> James M. Binnall, *Jury Diversity in the Age of Mass Incarceration: An Exploratory Mock Jury Experiment Examining Felon-Jurors’ Potential Impacts on Deliberations*, 25 *Psychol., Crime & L.* 345 (2018), <https://doi.org/10.1080/1068316x.2018.1528359>.

<sup>38</sup> Sarah K. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 *Demography* 1795 (2017), <https://doi.org/10.1007/s13524-017-0611-1>.

<sup>39</sup> Leah Wang, *Punishment Beyond Prisons 2023: Incarceration and Supervision by State*, Prison Policy Initiative (May 2023), <https://www.prisonpolicy.org/reports/correctionalcontrol2023.html>; see also *Massachusetts Correctional Control Pie Chart 2023*, Prison Policy Initiative (May 2023), [https://www.prisonpolicy.org/graphs/correctional\\_control2023/MA\\_correctional\\_control\\_2023.html](https://www.prisonpolicy.org/graphs/correctional_control2023/MA_correctional_control_2023.html).

<sup>40</sup> Per the Massachusetts Sentencing Commission, in the last year of available data (FY2018), “93.0% of superior court defendants were convicted of felonies and 7.0% were convicted of misdemeanors. Among defendants sentenced to incarceration, 752 (30.0%) were sentenced to HOC and 1,756 (70.0%) were sentenced to the DOC.” Mass. Sentencing Comm’n, *Survey of Superior Court Sentencing Practices: FY 2018* at 11 (Oct. 2019), <https://www.mass.gov/doc/survey-of-superior-court-sentencing-practices-fy-2018/download>. However, most people convicted of felonies are ultimately not imprisoned, and these data are limited by cases where the

conviction enters in superior court, not district or municipal court. See, e.g., Kalt, *supra* note 5, at 136 n.322 (“Most felons are not imprisoned.”). The vast majority of cases filed in the Commonwealth conclude in the district and municipal courts.

<sup>41</sup> Many people spend time in jail pretrial and receive credit for time in pretrial detention. In other words, their time in state prison may be reduced by some portion of credit time, and so they may be released sooner relative to their *date of conviction* (the trigger for the seven-year period of jury disqualification) than even the prescribed sentence length would suggest.

<sup>42</sup> Mass. Sentencing Comm’n, *Survey of Superior Court Sentencing Practices: FY 2018* at 13 (Oct. 2019), <https://www.mass.gov/doc/survey-of-superior-court-sentencing-practices-fy-2018/download>.

<sup>43</sup> See *id.* at 13, *Table 7. State Prison Sentences: Minimum and Maximum Sentence Length*.

<sup>44</sup> Mass. Dep’t of Corr., Div. of Research & Planning, *Prison Population Trends 2021* (2022), <https://www.mass.gov/doc/prison-population-trends-2021/download#page=4>.

<sup>45</sup> Ginger Jackson Gleich, *Rigging the jury: How each state reduces jury diversity by excluding people with criminal records*, Prison Policy Initiative (Feb. 18, 2021), <https://www.prisonpolicy.org/reports/juryexclusion.html>.

<sup>46</sup> Other scholars group states slightly differently. See, e.g., James M. Binnall, *Felon Jurors in Vacationland: A Field Study of Transformative Civic Engagement in Maine*, 71 Me. L. Rev. 71, 73 (2019).

<sup>47</sup> The first substantive revision occurred in 1971, when Maine tied the right of a person with a felony record to sit on a jury to the right to vote. However, this change in language did not change the disqualification of one’s eligibility for jury service. Maine also has since removed the provision linking juror eligibility to voting rights.

<sup>48</sup> <https://digitalcommons.maine.edu/cgi/viewcontent.cgi?article=1661&context=mlr>

<sup>49</sup> Available at [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB310](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB310).

<sup>50</sup> See *Governor Newsom Signs Criminal Justice Bills to Support Reentry, Victims of Crime and Sentencing Reform*, Office of Governor Gavin 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>51</sup> Available at [https://www.fcor.state.fl.us/docs/clemency/clemency\\_rules.pdf#page=5](https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf#page=5).

<sup>52</sup> Available at [https://oregon.public.law/statutes/ors\\_10.030](https://oregon.public.law/statutes/ors_10.030).

<sup>53</sup> DC Superior Court Changes Jury Plan to Reduce Time Before Returning Citizens Can Serve as Jurors (June 15, 2020), <https://newsroom.dccourts.gov/press-releases/dc-superior-court-changes-jury-plan-to-reduce-time-before-returning-citizens-can-serve-as-jurors>.

<sup>54</sup> Available at <https://www.cga.ct.gov/2021/ACT/PA/PDF/2021PA-00170-R00HB-06548-PA.PDF>.

<sup>55</sup> Available at <https://www.legis.la.gov/Legis/ViewDocument.aspx?d=1202864>.

<sup>56</sup> In Arizona, exclusion becomes permanent upon conviction of a second felony. See Ariz. Rev. Stat. § 13-907.

<sup>57</sup> Kelly E. Moore, June P. Tangney & Jeffrey B. Stuewig, *The Self-Stigma Process in Criminal Offenders*, 1 Stigma Health 206 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5067087>.

<sup>58</sup> Naomi F. Sugie, *Chilling Effects: Diminished Political Participation among Partners of Formerly Incarcerated Men*, 62 Social Problems 550 (2015), [https://www.jstor.org/stable/44014875#metadata\\_info\\_tab\\_contents](https://www.jstor.org/stable/44014875#metadata_info_tab_contents); Regina Austin, *“The Shame of It All”: Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 Colum. Hum. Rts. L. Rev. 173 (2004-2005).

<sup>59</sup> See, e.g., Michael L. Owens & Hannah Walker, *The Civic Voluntarism of “Custodial Citizens”: Involuntary Criminal Justice Contact, Associational Life, and Political Participation*, 16 Perspectives on Politics 990 (2018) (finding that the negative effects of involuntary criminal justice contact on voting participation among individuals and communities may endure, despite personal connections to community-based organizations that can amplify forms of non-voting civic engagement, even in a state where the franchise is restored immediately after incarceration).

<sup>60</sup> James M. Binnall & Blake Krawl, Research Brief, The Juror Project, What We've Got Here is Failure to Notify: How Louisiana Has Ignored Jurors with a Felony Conviction Since the Implementation of H.B. 84 (2023), <https://static1.squarespace.com/static/575a1290c6fc08644b94f918/t/63d1ef1718562e05bb29679b/1674702618207/What+We+Have+Here+is+Failure+to+Notify+-+Final+-+For+Will+Review.pdf> (finding 86% of parishes and 79% of Judicial District Courts in Louisiana have failed to publicize juror eligibility changes mandated by H.B. 84 or have publicized incorrect information regarding those changes).

<sup>61</sup> Alen S. Gerber et al., *Can Incarcerated Felons Be (Re)integrated into the Political System? Results from a Field Experiment*, 59 Am. J. Pol. Sci. 912 (2015), <https://doi.org/10.1111/ajps.12166>.

<sup>62</sup> Marc Meredith & Michael Morse, *The politics of the restoration of ex-felon voting rights: The case of Iowa*, 10 Q. J. Pol. Sci. 41 (2015), <https://scholar.harvard.edu/files/morse/files/iowa.pdf>.

<sup>63</sup> Marc Meredith & Michael Morse. 2014. "Do Voting Rights Notification Laws Increase Ex-Felon Turnout?" *Annals of the American Academy of Political and Social Science* 651(1): 220–49.

<sup>64</sup> *Delinquent jurors and the delinquency process*, Mass.gov, <http://mass.gov/service-details/delinquent-jurors-and-the-delinquency-process> (last visited June 5, 2023).

<sup>65</sup> See, e.g., Benjamin Forman, Mass Inc, *The Geography of Incarceration: The Cost and Consequences of High Incarceration Rates in Vulnerable City Neighborhoods*, (2016), <https://massincmain.wpenginepowered.com/wp-content/uploads/2016/11/The-Geography-of-Incarceration.pdf>; Benjamin Forman & Lindiwe Rennert, Mass Inc, *The Geography of Incarceration in a Gateway City: The Cost and Consequences of High Incarceration Rate Neighborhoods in Worcester* (Sept. 2017), [https://massinc.org/wp-content/uploads/2017/09/geography.crime\\_.report.8.pdf](https://massinc.org/wp-content/uploads/2017/09/geography.crime_.report.8.pdf).

<sup>66</sup> Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 Minn. L. Rev. 1149 (1996); David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. Mich. J.L. Reform 861 (1994); see also Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677 (1995).

<sup>67</sup> The lack of fair compensation and lack of childcare reduces the ability of low-income people (who are disproportionately people of color) to participate in jury duty. Currently, the state of Massachusetts requires employers to pay for the first three days of juror service and compensates \$50/day thereafter. It also has funding for unemployed jurors. Unfortunately, while \$50 is more than many states pay jurors, it is still far below minimum wage for a full day of work, and perhaps more importantly does not account for the rapid rates of inflation. E.J. Seamone, *A Refreshing Jury COLA: Fulfilling the Duty to Compensate Jurors Adequately*, 5 N.Y.U. J. Legis. & Pub. Pol'y 289 (2002). Furthermore, childcare and transportation expenses are only available to unemployed and retired jurors, and only for the first three days of service. A recent survey by the administrative Office of the Courts of California found that 35% of jurors report that jury service imposed a financial hardship. See Elisabeth Semel et al., Berkeley Law Death Penalty Clinic, *Whitewashing the Jury Box: How California Perpetuates the Discriminatory Exclusion of Black and Latinx Jurors* (2020), <https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf>. Therefore, fair compensation of jurors is a relatively straightforward way to reduce barriers to racial diversity on juries. Basing jury compensation per day on the minimum wage would enable or incentivize more low-income residents to participate. Financial hardship should not be a barrier to service. Matching juror compensation to minimum wage rather than a fixed amount would ensure that jurors of today and of the future do not face this risk.

<sup>68</sup> Available at: <http://masscases.com/cases/sjc/481/481mass443.html>.

<sup>69</sup> See, e.g., Clair & Winter, *supra* note 9, at 541-543 (describing prosecutors' efforts to remove jurors with even minor criminal system ties).

<sup>70</sup> Available at: <http://masscases.com/cases/sjc/449/449mass809.html>.

<sup>71</sup> Available at: <http://masscases.com/cases/sjc/490/490mass455.html>.

---

<sup>72</sup> Semel et al., *supra* note 67, at vi.

<sup>73</sup> Clair & Winter, *supra* note 9.

<sup>74</sup> The specific state in which the research was conducted from December 2013 to April 2016 is not identified in order to protect the privacy and confidentiality of interviewees. However, the description of the court system appears to mirror the structure of the Massachusetts Trial Court, *id.* at 537-538, and the type of codified jury exclusion is also identical to the Massachusetts statute, *id.* at 539 (“In Northeast State, like many other states, individuals are disqualified from jury service if they have been recently convicted of a felony, are currently charged with a felony, or are currently in custody.”).

<sup>75</sup> *Id.* at 540.

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

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 540-41.

<sup>79</sup> *Id.* at 541.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 534 (citations omitted).

<sup>82</sup> *Id.* at 549.

<sup>83</sup> *Id.* at 545.

<sup>84</sup> *Id.* at 535-536 (“[C]ourt officials are concerned about, and collectively seek to remove, potential jurors based on constructions of bias in relation to alleged criminality and victimhood that go well beyond felony status and that implicate not just individuals with direct system association but also those with whom they have social ties.”)

<sup>85</sup> 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, 29 (2014).

<sup>86</sup> *Id.* at 23, 29.

<sup>87</sup> U.S. Comm’n on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* at 126 (2019), <https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf#page=136> (citing Paula Z. Segal, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York*, 13 N.Y. City L. Rev. 313, 358 (2010) (referencing the contention of some researchers that people “who have been charged with or convicted of committing felonies are likely to bear a grudge against the criminal justice system” despite a lack of supportive evidence)).

<sup>88</sup> James M. Binnall (2018): *Jury diversity in the age of mass incarceration: an exploratory mock jury experiment examining felon-jurors’ potential impacts on deliberations*, 25 *Psychology, Crime & Law* 345 (2018), <https://doi.org/10.1080/1068316x.2018.1528359>.

<sup>89</sup> U.S. Comm’n on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* at 137 (2019), <https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf#page=147>.

<sup>90</sup> Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 *Minn. L. Rev.* 592, 605, 607-610 (2013). See also U.S. Comm’n on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* at 131 (2019), <https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf#page=141>; James M. Binnall, *Felon Jurors in Vacationland: A Field Study of Transformative Civic Engagement in Maine*, 71 *Me. L. Rev.* 71, 97-101 (2019).

<sup>91</sup> FWD.us, *Every Second: The Impact of the Incarceration Crisis on America’s Families* (2018), <https://everysecond.fwd.us/downloads/EverySecond.fwd.us.pdf>. See also Clair & Winter, *supra* note 9, at 549 (“Whereas 45% of the adult population has ever had an immediate family member incarcerated, 63% of Black

people, 48% of Hispanic people, and 42% of White people have experienced the incarceration of an immediate family member.”), citing Enns, Peter K., Youngmin Yi, Megan Comfort, Alyssa W. Goldman, Hedwig Lee, Christopher Muller, Sara Wakefield, Emily A. Wang, and Christopher Wildeman. 2019. “What Percentage of Americans Have Ever Had a Family Member Incarcerated?: Evidence from the Family History of Incarceration Survey (FamHIS).” *Socius* 5: 237802311982933, <https://journals.sagepub.com/doi/pdf/10.1177/2378023119829332>.

<sup>92</sup> See, e.g., Clair & Winter, *supra* note 9, at 537. See also, e.g., Alexi Jones & Wendy Sawyer, Prison Policy Initiative, *Arrest, Release, Repeat: How police and jails are misused to respond to social problems* (2019), <https://www.prisonpolicy.org/reports/repeatarrests.html>; The Sentencing Project, Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities>.

<sup>93</sup> Alvin Buyinza, *Incarceration of extended family members disproportionately affects Black families, UMass study finds*, Mass Live News (Jan. 27, 2023), <https://www.masslive.com/news/2023/01/incarceration-of-extended-family-members-disproportionately-affects-black-families-umass-study-finds.html>. Yi, Youngmin. "Racial Inequality in the Prevalence, Degree, Extension, and Permeation of Incarceration in Family Life." *Demography* 60.1 (2023): 15-40.

<sup>94</sup> See generally Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 *Yale L. & Pol’y Rev.* 387, 412–14 (2016). See, e.g., *United States v. Beverly*, 369 F.3d 516, 517 (6th Cir. 2004) (upholding strike of Black juror who had a brother and nephew who had spent time in prison); *United States v. Bartholomew*, 310 F.3d 912, 920 (6th Cir. 2002) (“beyond highlighting the allegedly disparate impact, the defendants made no showing that the prosecutor’s motives were discriminatory”); *Ellis v. Newland*, 23 Fed. App’x 734, 736 (9th Cir. 2001) (upholding strike of two African-American jurors based on “their having relatives currently serving in penitentiaries”); *Devoil- El v. Groose*, 160 F.3d 1184, 1186 (8th Cir. 1998) (upholding strike of all potential Black jurors, including because of a relative in jail or charged with a crime).

<sup>95</sup> Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 *U.C. Davis L. Rev.* 1359, 1409 (2012) (citing *United States v. Houston*, 456 F.3d 1328, 1338 (11th Cir. 2006)).

<sup>96</sup> *Batson v. Kentucky*, 476 U.S. 79, 106–07 (1986) (Marshall, J., concurring) (noting how both conscious and unconscious racism affect prosecutors and judges, and that the *Batson* task requires them to confront and overcome their own racism, which may be difficult to meet).

<sup>97</sup> Semel et al., *supra* note 67.

<sup>98</sup> *Id.* at 15.

<sup>99</sup> *Id.* at 18.

<sup>100</sup> *Id.* at 20.

<sup>101</sup> See generally, e.g., G.L. c. 125, § 1; G.L. c. 127, §§ 130, 133A; *Commonwealth v. Donohue*, 452 Mass. 256, 268–69 (2008); *Commonwealth v. Morasse*, 446 Mass. 113, 116–17 (2006); *Commonwealth v. Beauchemin*, 410 Mass. 181, 186–87 (1991); *Commonwealth v. Hughes*, 364 Mass. 426, 428–29 (1973); *DuPont v. Comm’r of Correction*, 59 Mass. App. Ct. 908, 909–10 (2003); *Commonwealth v. Speight*, 59 Mass. App. Ct. 28, 32 (2003); *Nimblett v. Comm’r of Correction*, 20 Mass. App. Ct. 988, 988 (1985). [A thorough review of the current law on the meaning of “in the custody of a correctional institution” is available here, reproduced as Appendix B.](#)

<sup>102</sup> Available at <https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter234A/Section33>.

<sup>103</sup> Available at <https://malegislature.gov/Laws/GeneralLaws/PartIII/TitleII/Chapter234A/Section22>.

<sup>104</sup> At least one panel of the Massachusetts Appeals Court, in an unpublished decision, suggested that jurors should be required to disclose even sealed or dismissed charges, and recommended that the jury commissioner update the questionnaire accordingly to make this explicit. *Commonwealth v. Reddicks*, 99 Mass. App. Ct. 1118, review denied, 488 Mass. 1102 (2021), and cert. denied *sub nom. Reddicks v. Massachusetts*, 142 S. Ct. 1213 (2022) (“[I]t

might be wise for the jury commissioner to consider revising the questionnaire’s language to expressly state that jurors must disclose all charges and convictions whether dismissed or sealed. Likewise, it may be prudent for judges to caution or remind jurors appearing in their venues of their obligation to disclose all charges and convictions including those sealed or dismissed.”).

<sup>105</sup> This hypothesis follows from the body of research on “ban the box” legislation, which shows that in the absence of concrete criminal history information, employers may make racialized assumptions about job applicants’ criminal records and job seekers with criminal records continue to experience discrimination. See, e.g., Chris Herring & Sandra Susan Smith, *The Limits of Ban-the-Box Legislation* (2022), <https://irle.berkeley.edu/files/2022/03/The-Limits-of-Ban-the-Box-Legislation.pdf>.

<sup>106</sup> See Semel et al., *supra* note 67.

<sup>107</sup> Available at: <https://malegislature.gov/Bills/192/SD424>.

<sup>108</sup> Available at: <https://malegislature.gov/Bills/193/H1651>. The current pending version also strikes out the exclusion of people convicted of felonies within the past seven years from the jury disqualification statute, but does not reach people with pending felony charges or provide for any notification provisions, affirmative restoration, or adjustments to the jury questionnaire or for cause challenges.

<sup>109</sup> James M. Binnall, *Exorcising Presumptions? Judges and Attorneys Contemplate “Felon-Juror Inclusion” in Maine*, 39 *Just. Sys. J.* 378 (2018), <https://www.tandfonline.com/doi/abs/10.1080/0098261X.2018.1496497>. See also James M. Binnall, *Summoning Criminal Desistance: Convicted Felons’ Perspectives on Jury Service*, 43 *L. & Soc. Inquiry* 4 (2018), <https://www.cambridge.org/core/journals/law-and-social-inquiry/article/summoning-criminal-desistance-convicted-felons-perspectives-on-jury-service/EC0CB60376E2CEBDD222CAAE1AA1A3B>.

<sup>110</sup> Available at: <https://casetext.com/rule/washington-court-rules/washington-general-rules/part-1-general-rules/rule-37-jury-selection>.

<sup>111</sup> Dale Chappell, *How States Exclude People With Criminal Records From Jury Service*, *Prison Legal News* (Apr. 1, 2021), <https://www.prisonlegalnews.org/news/2021/apr/1/how-states-exclude-people-criminal-records-jury-service>.

<sup>112</sup> See, e.g., James M. Binnall & Lauren M. Davis, *Californians with a Felony Conviction Are Now Eligible for Jury Service: How Would They Know?*, 32 *Stan. L. & Pol’y Rev. Online* at 17 (Aug. 27, 2020), <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/08/32-Stan.-L.-Poly.-Rev.-Online-1-1.pdf>. See also James M. Binnall & Blake Krawl, *Research Brief, The Juror Project, What We’ve Got Here is Failure to Notify: How Louisiana Has Ignored Jurors with a Felony Conviction Since the Implementation of H.B. 84* (2023), <https://static1.squarespace.com/static/575a1290c6fc08644b94f918/t/63d1ef1718562e05bb29679b/1674702618207/What+We+Have+Here+is+Failure+to+Notify+-+Final+-+For+Will+Review.pdf>; *Systemic Juror Exclusion: How States Continue to Disenfranchise Prospective Jurors Through Improper Policy Implementation*, *Nat’l Ass’n of Criminal Defense Lawyers* (Apr. 27, 2023), [https://www.nacdl.org/Media/SystemicJurorExclusion042723?\\_zs=14e2R1&\\_zl=rHR77](https://www.nacdl.org/Media/SystemicJurorExclusion042723?_zs=14e2R1&_zl=rHR77).

<sup>113</sup> Binnall & Davis, *supra* note 112, at 4.

<sup>114</sup> *Id.* at 18-19.



# Members of the Roundtable on Racial Disparities in Massachusetts Criminal Courts

**Ricardo Arroyo**

Boston City Councilor

**Anthony Benedetti**

Chief Counsel  
Committee for Public Counsel Services

**Stacey Borden**

Founder and Executive Director  
New Beginnings Reentry Services, Inc.

**Paula Carey**

Chief Justice (retired)  
Massachusetts Trial Court

**Lael Chester**

Director, Emerging Adult Justice Project  
Columbia University Justice Lab

**Armand Coleman**

Executive Director, Transformational  
Prison Project

**Mark Coven**

First Justice  
Quincy District Court

**Edward Dolan**

Commissioner  
Massachusetts Probation Service

**Patricia Garin**

Attorney, Shapiro & Teitelbaum  
Adjunct Professor, Northeastern  
University School of Law

**Rahsaan Hall**

President and CEO, Urban League of  
Eastern Massachusetts

**Geraldine Hines**

Visiting Professor, Boston College Law  
School  
Associate Justice of the Massachusetts  
Supreme Judicial Court (retired)

**Pamerson Ifill**

Deputy Commissioner for Pretrial Service  
Massachusetts Probation Service

**Davo Jefferson**

Executive Director  
Green Jobs Youth Corps

**Milton Jones**

Director of Reentry Services  
Louis D. Brown Peace Institute

**Myong Joun**

Associate Justice  
Boston Municipal Court

**Angel Kelley**

Judge, U.S. District Court,  
District of Massachusetts

**Peter Krupp**

Associate Justice  
Massachusetts Superior Court

**Lizz Matos**

Executive Director  
Prisoners' Legal Services of Massachusetts

**Liz Miranda**

Massachusetts State Senator

**Felix Owusu**

Post-Doctoral Research Fellow  
Program in Criminal Justice Policy and  
Management  
Harvard Kennedy School

**Andrew Peck**

Undersecretary for Criminal Justice  
Executive Office of Public Safety

**Gabriella Priest**

Senior Associate  
Justice System Partners

**Deborah Ramirez**

Professor of Law  
Northeastern University School of Law

**David Rangaviz**

Assistant Attorney General, Civil Rights  
Division Massachusetts Attorney General's  
Office

**Rachael Rollins**

Former United States Attorney for the  
District of Massachusetts; Former Suffolk  
County (MA) District Attorney

**Sandra Susan Smith**

Daniel and Florence Guggenheim  
Professor of Criminal Justice; Faculty  
Director, Program in Criminal Justice  
Policy and Management, Harvard Kennedy  
School

**Chynah Tyler**

Massachusetts State Representative

## About the Roundtable on Racial Disparities in Massachusetts Criminal Courts

In the fall of 2020, the release of *Racial Disparities in the Massachusetts Criminal System* marked a potentially important turning point in efforts to address long-standing racial inequities in the Commonwealth's court system. The Report's troubling key findings about substantial bias-driven disparities in criminal caseloads, dispositions, sentencing, and incarceration provided an opening for a conversation long in the making, both about the extent, nature, and source of racial disparities, but also about how poor data quality and limited quantity have stymied efforts to better understand the scope and roots of the Commonwealth's problems. Building on the momentum of the report, in June of 2021 the Program in Criminal Justice Policy and Management kicked off the Roundtable on Racial Disparities in Massachusetts Criminal Courts. The overall goal of the Roundtable is to influence future policies, practices, and procedures in Massachusetts that will help to eradicate sources of racial inequities and resulting disparities in the courts.