

Volume 13 | Issue 2

Summer 2010

A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York

Paula Z. Segal
CUNY School of Law

Follow this and additional works at: <https://academicworks.cuny.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Paula Z. Segal, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York*, 13 N.Y. City L. Rev. 313 (2010).
Available at: 10.31641/clr130204

The CUNY Law Review is published by the Office of Library Services at the City University of New York. For more information please contact cunylr@law.cuny.edu.

A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York

Acknowledgements

Thank you to Juan Cartagena at Community Service Society of New York for asking the question and to Professor Ruthann Robson for her guidance in developing the answer into this Note. Thank you also to family and friends who have cheered me on through the writing process.

A MORE INCLUSIVE DEMOCRACY: CHALLENGING FELON JURY EXCLUSION IN NEW YORK

Paula Z. Segal†

ABSTRACT

New York excludes all individuals who have ever been convicted of a felony from its jury pool except in the most extraordinary circumstances.¹ This practice undermines the representativeness of juries, their inclusiveness, as well as public confidence in the courts. It leaves whole communities underrepresented in one of the foundations of democracy. It also compromises an individual's constitutional rights. People with felony-conviction histories are included in the jury pools of nearly half of United States jurisdictions, yet the effectiveness of judicial systems in those jurisdictions has not been compromised. The mechanisms for insuring that juries are competent and unbiased—*voir dire*, peremptory challenges and challenges for cause—all work in those jurisdictions without alienating a segment of the population from the mechanisms of civic participation. The citizens of New York deserve no less.

Copyright © 2011 by Paula Z. Segal.

† J.D. Candidate, 2011, Haywood Burns Fellow in Civil and Human Rights, Belle Zeller Scholar, City University of New York School of Law. Thank you to Juan Cartagena at Community Service Society of New York for asking the question and to Professor Ruthann Robson for her guidance in developing the answer into this Note. Thank you also to family and friends who have cheered me on through the writing process.

¹ See *infra* note 3.

CONTENTS

INTRODUCTION	315
I. BANISHED FROM DEMOCRACY	317
II. HISTORY OF NEW YORK'S JURY POOL	327
A. Evolution of Felon Jury Exclusion in New York ..	327
B. Expanding New York's Jury Pool	331
III. CONSTITUTIONAL CHALLENGES	332
A. "Drawn From a Fair Cross Section of the Community"	335
1. Excluding Individuals with Felony-Conviction Histories is a Prima Facie Violation of the Fair-Cross-Section Requirement	347
2. Excluding African Americans and Hispanics is a Prima Facie Violation of the Fair-Cross- Section Requirement	350
3. Excluding African American and Hispanic Men	351
4. Justifying the Infringement: New York's "Significant" Interest	352
B. Equal Protection	360
1. Jurors' Right to Non-Discriminatory Jury Construction	360
2. Irrational Classification: Felons versus Misdemeanants	361
3. Heightened Scrutiny for "Felons"	369
4. Strict Scrutiny for a Fundamental Right	373
5. Disparate Racial Impact in Jury Selection	377
C. Due Process	383
IV. CONCLUSION	384

INTRODUCTION

Thomas Jefferson called the jury the “school by which the people learn the exercise of civic duties as well as rights.”² Yet many citizens are permanently expelled from the jury system. Felon jury exclusion disqualifies anyone with a history of felony conviction from the jury pool in New York State.³ Anyone who has ever taken a guilty plea to a charge that he or she was in possession of eight ounces of marihuana, rather than stand trial, will never be included in the jury pool.⁴ Neither will anyone ever convicted of scalping tickets to a sporting event where there was a premium of \$1000 or more over the price of the tickets;⁵ nor anyone who was once convicted of a crime that was at the time a felony but is not one today for reasons of having been reduced to a misdemeanor or declared unconstitutional.⁶ New York law disqualifies anyone who was at any time in his or her life convicted of a crime for which the court could have chosen a sentence of a year or more incarceration from jury service for life.⁷

Citizens who have conviction histories do not adversely affect the judicial process by being included in the jury pool. The prevailing argument in favor of felon jury exclusion is simply a deference to stereotyped notions about jury purity, divorced from the realities of jury selection.⁸ The law’s conflation of a felony-conviction his-

² LINDA KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES 129 (1998).

³ *People v. Adams*, 747 N.Y.S.2d 909, 915 (Sup. Ct. Kings Cnty. 2002). There is a very narrow exception: the issuance of a Certificate of Relief from Disabilities (“CRD”), *see* N.Y. CORRECT. LAW § 701 (McKinney 2003 & Supp. 2010), or a Certificate of Good Conduct (“CGC”), *see* N.Y. CORRECT. LAW § 703-a (McKinney 2003 & Supp. 2010), relieves a convicted person of the automatic bar from serving on a jury. *See* 1991 N.Y. Op. Att’y Gen. 38, 42–44 (1991). However, the determination whether a person is then eligible for jury service is at the discretion of the Commissioner of Jurors. *Id.* Even when a person convicted of a felony does receive a CRD or a CGC, it does not actually restore the right to serve on the jury. *Adams*, 747 N.Y.S.2d at 915. The author spoke to a representative of the Commissioner who said that, although there is no available data for the number of people who become re-qualified to serve on a jury by getting either Certificate, the number is “very small.” Telephone Interview with Elissa Krauss, Research Coordinator, Unified Court System’s Office of Court Research-Jury Trial Project (Nov. 12, 2009).

⁴ *See* N.Y. PENAL LAW § 221.20 (McKinney 2008).

⁵ *See infra* note 27 and accompanying text.

⁶ Telephone Interview with Elissa Krauss, *supra* note 3.

⁷ N.Y. PENAL LAW § 10.00(5) (McKinney 2009). Similarly, federal law states that an individual who “has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored” shall not be deemed qualified to serve on grand and petit juries in the district court. 28 U.S.C. § 1865(b)(5) (2006).

⁸ *See infra* Part III.A.3.

tory with a bias that would affect jury deliberations has resulted in the abrogation of citizens' rights to participate in a key democratic institution. Simultaneously, it is a threat to civil litigants' and criminal defendants' rights to impartial juries drawn from their communities.

The exclusion particularly bars participation by members of those communities whose ties to the democratic process are already weak. Through the racial disparities in the criminal justice system, a disproportionate number of minority citizens are excluded from the jury pool.⁹ Researchers estimate that 33% of African American males have felony-conviction histories.¹⁰

Felon jury exclusion is at cross-purposes with the inclusive goals of the American jury system. To make up for a shortage of jurors, New York courts have reformed the jury recruitment process at great cost.¹¹ However, New York continues to ban a large swath of citizens from inclusion in the pool due to felon jury exclusion.¹² Eliminating the blanket exclusion would expand the jury pool, make juries more inclusive and representative, and help integrate citizens who have completed their criminal sentences into democratic society.

Permanent felon exclusion is vulnerable to a challenge through litigation: it is likely a violation of the fair-cross-section requirement imposed on all criminal and civil juries by New York law and the U.S. Constitution, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹³

This Note presents a history of New York's felon jury exclusion, discusses the effects it is having on present-day juries and communities, and describes the constitutional deficiencies of the practice. Part One describes the effects of the exclusion in New York and presents some alternatives to New York's policy. Part Two presents the legislative history of the exclusion and efforts to re-

⁹ See *infra* notes 37–42 and accompanying text.

¹⁰ Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS OF AM. ACAD. POL. & SOC. SCI. 281, 290 tbl.2 (2006).

¹¹ See *infra* notes 102–13 and accompanying text.

¹² See N.Y. JUD. LAW § 510(3) (McKinney 2003).

¹³ The Fair Cross-Section requirement is imposed on criminal juries, see *infra* notes 141–42 and accompanying text, by the “impartial jury” requirement of the Sixth Amendment to the Constitution, see *infra* notes 124–26 and accompanying text, and on civil juries through the Supreme Court’s application of Sixth Amendment principles in the civil context, see *infra* notes 127–35, and its supervisory authority, see *infra* note 130 and accompanying text, and the requirements of the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, §1.

form New York's jury system aimed at expanding the jury pool and increasing participation by citizen jurors. Part Three presents viable constitutional challenges to the exclusion under the fair-cross-section requirement and the Due Process and Equal Protection Clauses. Felon jury exclusion suffers all the infirmities of an unsustainable policy. In light of its effects and constitutional flaws, the policy should be re-examined.

I. BANISHED FROM DEMOCRACY

New York's felon jury exclusion law works to the detriment of the democratic process and creates a class of permanent political exiles, disproportionately concentrated in poor urban communities.

Anyone with a felony-conviction history is disqualified from the jury pool in New York for life. The New York statute plainly states, "to qualify as a juror a person must . . . [n]ot have been convicted of a felony."¹⁴ New York defines "felon" as anyone convicted of a crime for which he or she could have been sentenced to incarceration for a year or more.¹⁵ This requirement is uniform for all juries in the New York State court system.¹⁶

This policy stands in contrast to New York's restoration of convicted individuals' right to vote upon completion of her sentence of incarceration or period of parole.¹⁷ Felon jury exclusion creates

¹⁴ N.Y. JUD. LAW § 510(3).

¹⁵ N.Y. PENAL LAW § 10.00(5) (McKinney 2009). An individual convicted of any crime for which he or she could have received a sentence of a year or more incarceration but was actually sentenced to probation or a lesser period is nevertheless disqualified from the jury pool for life. For example, crimes that describe drug use, possession, and sale in small quantities are all felonies under New York Penal Law, with sentencing left to the discretion of judges. *See* N.Y. PENAL LAW § 220.46 (McKinney 2008) (Criminal injection of a narcotic drug); N.Y. PENAL LAW § 221.20 (McKinney 2008) (Criminal possession of marihuana in the third degree—more than 8 ounces); N.Y. PENAL LAW § 221.45 (McKinney 2008) (Criminal sale of marihuana in the third degree—more than 25 grams).

¹⁶ *See* N.Y. JUD. LAW § 510(3).

¹⁷ The New York statute provides:

No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. The governor, however, may attach as a condition to any such pardon a provision that any such person shall not have the right of suffrage until it shall have been separately restored to him.

N.Y. ELEC. LAW § 5-106(2) (McKinney 2007). *See Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc), for a challenge to this statute as a violation of the Voting Rights Act. In *Hayden v. Paterson*, 594 F.3d 150, 164–65, 171 (2d Cir. 2010), the Second Cir-

a permanent bar to participation in one of the foundational institutions of American democracy.

Before the proliferation of the penitentiary for physically excluding law-breakers from society, “civil death” was generally imposed in continental Europe on a case-by-case basis on those whose offenses were serious enough to warrant exclusion but not serious enough for the death penalty to be imposed.¹⁸ It entailed, among other things, the permanent loss of the right to vote, to enter into contracts, and to inherit or bequeath property; the offender was treated as if already dead.¹⁹ Today almost all individuals convicted of crimes in the United States return to society in a physical sense, some immediately following conviction, but their citizenship rights return in a much more limited sense. Felon jury exclusion is one of a constellation of permanent disabilities imposed on those with conviction histories.²⁰ Although governments that assign such disabilities do not exile those who have run afoul of the law in penal colonies or physically exclude them from the population,²¹ upon release from prison or discharge from non-incarceration sentences individuals with conviction histories find themselves in an internal exile disturbingly similar to “civil death.”²²

Jury exclusion applies to those who have been incarcerated and those who have not. All individuals living in New York communities who have histories of being convicted of crimes for which they could have been sentenced to a year in prison are excluded from the jury pool, regardless of the age of the conviction, where the conviction occurred, or the sentence the individual actually received. An individual convicted of a felony as a young adult continues to be excluded from the jury pool until his or her death.²³

cuit dismissed the claims that New York’s felon disenfranchisement statute was a violation of the Fourteenth and Fifteenth Amendments while acknowledging that disenfranchisement statutes, when first enacted, were motivated in part by discriminatory intent against citizens who were not white. For an overview and history of felon disenfranchisement in United States, see Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 154–61 (1999) [hereinafter *Internal Exile*]. For recent trends tending to make felon disenfranchisement less prevalent in states nationwide, see generally Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1150–64 (2003–2004).

¹⁸ See *Internal Exile*, *supra* note 17, at 154.

¹⁹ *Id.*

²⁰ *Id.*

²¹ The federal government excludes immigrants who carry foreign criminal convictions. See Nora V. Demleitner, *Thwarting a New Start? Foreign Convictions, Sentencing and Collateral Sanctions*, 36 U. TOL. L. REV. 505, 506–09 (2005).

²² See *Internal Exile*, *supra* note 17, at 154–55.

²³ There is a narrow exception. See *supra* note 3.

Felon jury exclusion, as a lifetime infirmity, applies to individuals convicted under New York statutes later held unconstitutional, removed from the penal law, or reclassified as misdemeanors.²⁴

Since 1977, the year that New York's jury qualification law was last revised and felon exclusion deliberately retained,²⁵ the number of people touched by the criminal justice system in the United States and in New York State has exploded. In 2008, the United States had more than 7.3 million adults—one in 31—under criminal justice supervision.²⁶ In New York State in 2007, the latest year for which data is available, there were nearly 63,000 people incarcerated in state prisons, 30,000 detained in local jails, 123,000 on probation, and another 43,000 under parole supervision.²⁷ If current national incarceration trends continue, an estimated 1 in 15 people born in 2001 will serve time in state or federal prison during their lifetime.²⁸

There has also been a dramatic expansion of the number of felony prosecutions since New York's jury qualifications were reformed in 1977.²⁹ State court felony filings increased 36% between 1978 and 1984.³⁰ The increase accelerated in the 1980s: between 1985 and 1991, felony filings rose by more than 50%.³¹

Available data about how many people have histories of being

²⁴ Telephone Interview with Elissa Krauss, *supra* note 3. Individuals convicted of felonies in other jurisdictions that would not have been felonies in New York are likewise excluded. Even when the judge who hears the details of a particular case determines that incarceration is unwarranted or would not serve the purposes of the criminal law, if the judge could have sentenced the defendant to a year in prison for the crime of which the defendant has been convicted, New York's felon jury exclusion statute applies. See N.Y. JUD. LAW § 510(3) (McKinney 2003); N.Y. PENAL LAW § 10.00(5) (McKinney 2008).

²⁵ See *infra* notes 89–94 and accompanying text.

²⁶ THE PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 5 (2009), http://www.pewcenteronthestates.org/uploadedFiles/PSPP_lin31_report_FINAL_WEB_3-26-09.pdf.

²⁷ NEW YORK STATE DIV. OF CRIMINAL JUSTICE SERVS., NEW YORK STATE CRIMINAL JUSTICE 2007 CRIMESTAT REPORT, 32–40 (Mar. 2008), <http://www.criminaljustice.state.ny.us/pio/annualreport/2007crimestatreport.pdf>.

²⁸ THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, 7 (2003), <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=836>.

²⁹ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536 (2001).

³⁰ NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1984, 189–90 tbl.35 (1986), available at http://contentdm.ncsconline.org/cdm4/item_viewer.php?CISOROOT=/ctadmin&CISOPTR=609&REC=2.

³¹ NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1991, 37 tbl.1.25 (1993), available at http://contentdm.ncsconline.org/cdm4/item_viewer.php?CISOROOT=/ctadmin&CISOPTR=616&REC=1.

convicted or placed under correctional supervision is more speculative than data about who is currently under such supervision. Based on demographic life tables, researchers estimate that there are approximately 11.7 million former felons nationwide, plus 4.4 million individuals who have been convicted of felonies that were currently under criminal justice supervision as of 2004.³² A total of approximately 16.1 million people nationwide made up this “felon class,” approximately 7% of the adult population.³³ In 1978, approximately 4.7 million people had felony-conviction histories, approximately 3% of the adult population.³⁴

The criminal justice system has disparate impact by race and gender. One in 18 men was under correctional supervision in 2008, compared to one in 89 women.³⁵ The impact of the criminal justice system on men has increased over the last three decades: in 1978, 5% of the adult male population had felony-conviction histories; in 2004, 13%.³⁶

The racially skewed impacts of the criminal justice system have long been accepted as fact by researchers.³⁷ Courts, too, have come to accept that criminal justice systems discriminate by race.³⁸ A report by the Pew Center on the States underscores serious discrepancies when the numbers of those under correctional supervision in 2008 were dissected by race and gender. Nationwide, 1 in 11 African American adults and 1 in 27 Hispanic adults are under cor-

³² See Uggen et al., *supra* note 10, at 290 tbl.2.

³³ *Id.* at 288 fig.2.

³⁴ *Id.* at 290 tbl.2.

³⁵ See THE PEW CTR. ON THE STATES, *supra* note 26, at 7.

³⁶ See Uggen et al., *supra* note 10, at 290 tbl.2.

³⁷ See generally, e.g., TODD CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 63–67 (2007); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); John Donohue III & Steven Levitt, *The Impact of Race on Policing and Arrests*, 44 J.L. & ECON. 367 (2001); Mary Romero, *State Violence, and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1088–98 (2001).

³⁸ The federal district court for the Eastern District of Washington State and the Ninth Circuit Court of Appeals have both accepted evidence of racial discrimination in Washington’s criminal justice system. See *Farrakhan v. Gregoire*, 590 F.3d 989, 1009–12 (9th Cir. 2010) (“Washington’s criminal justice system adversely affects minorities to a greater extent than non-minorities . . . this differential effect cannot be explained by factors other than racial discrimination.”); *Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273, at *4–6 (E.D. Wash. Jul. 7, 2006); see generally Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010) (explaining that the U.S. Supreme Court has promoted racial profiling in immigration enforcement and traffic stops).

rectional supervision, compared to 1 in 45 whites.³⁹ The likelihood of a person in 2001 serving time in federal or state prison rises to 1 in 6 for Hispanic males and to 1 in 3 for African American males.⁴⁰ African American males born from 1965 to 1969 were more likely to have prison records in 2004 (22%) than either military records (17%) or bachelor's degrees (13%).⁴¹ Professor Christopher Uggen's projections on who was in the "felon class" in 2006 and 1978 are illustrative: in 1978, almost 8% of African Americans and 13% of African American males were in the felon class; by 2004, the class had exploded to include 22% of African American adults and 33% of African American adult males.⁴²

It is hard to capture what precise effect felon jury exclusion has on racial representativeness of particular juries but it certainly contributes to disparities visible in New York's juries. Based on 2000 Census counts, Blacks and Latinos in New York are prosecuted, convicted, and sentenced to incarceration at rates substantially disproportionate to whites: although Blacks constituted 15.9% of the state population, they comprised 54.3% of the prison population and 50.0% of the parolee population in New York; although Latinos constituted 15.1% of the state population, they comprised 26.7% of the prison population and 32.0% of the parolee population in New York; and although whites constituted 62.0% of the state population, they comprised only 16.0% of prisoners and parolees.⁴³ Collectively, Blacks and Latinos constituted 81.0% of the total prison population in 2000 and 82.0% of the total parolee population, despite being only 31.0% of the overall state population.⁴⁴

The exclusion's racial impacts have ripple effects that undermine the legitimacy of the judicial system in the eyes of minority communities.⁴⁵ The Supreme Court has called the confidence of citizens "the very foundation of our system of justice."⁴⁶ Empirical evidence suggests that members of some underrepresented groups have less confidence in the fairness of the jury system than do

³⁹ See THE PEW CTR. ON THE STATES, *supra* note 26.

⁴⁰ BONCZAR, *supra* note 28, at 8 fig.4.

⁴¹ Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 164 tbl.6 (2004).

⁴² Uggen et al., *supra* note 10.

⁴³ Hayden v. Paterson, 594 F.3d 150, 160 (2d Cir. 2010).

⁴⁴ *Id.*

⁴⁵ See Kevin Johnson, *Hernandez v. Texas: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 193 (2005) (discussing the felon jury exclusion's effect of undermining the legitimacy of the judicial system in the eyes of the Latina/o community).

⁴⁶ Georgia v. McCollum, 505 U.S. 42, 49 (1992).

members of well-represented groups. For example, a nationwide poll of nearly 800 people who had served on civil and criminal juries revealed that African American and white participants have fundamentally different views about the influence of race on jury verdicts, with African Americans perceiving the system as heavily weighted against minorities.⁴⁷ Just under two-thirds of the African American respondents believed that minority criminal defendants receive unfair trials, while just under one-third of the white participants agreed.⁴⁸ Nearly 70% of the African American jurors polled believed that the justice system is more likely to impose the death penalty unfairly on persons of color than on white defendants.⁴⁹ In addition, more than 60% of the African American respondents felt that white plaintiffs experience fairer treatment in civil trials than do minority plaintiffs.⁵⁰ More than two-thirds of African American jurors polled suggested that juries award more money to white plaintiffs than they award to African American, Asian, or Latino plaintiffs for comparable injuries.⁵¹

This study found the following stark explanation offered by African American participant-jurors for why they believe minorities receive such unfair treatment: “the [jury] system is run predominantly by whites.”⁵² There appears to be a powerful correlation between the representativeness of jury venires and public confidence in the fairness of the justice system.⁵³

Blanket felon jury exclusion leaves those with conviction histo-

⁴⁷ Arthur Austin, *Racial Divide Affects Black, White Panelists*, NAT'L L.J., Feb. 22, 1993, at S8-S9.

⁴⁸ *Id.* at S8.

⁴⁹ *Id.* at S9.

⁵⁰ *Id.* at S8.

⁵¹ *Id.*

⁵² *Racial Divide Affects Black*, *supra* note 47 at S8.

⁵³ The rebellion in Los Angeles following the acquittal of four police officers in the Rodney King beating by a jury that included no African Americans is an unusually dramatic, but nonetheless familiar, example of how non-representative tribunals erode public confidence in the legal system. More recently, another California jury with no African Americans acquitted of murder the officer who shot twenty-two year old Oscar Grant to death on the Fruitvale BART platform while he lay face down. Demian Bulwa, *Verdict: Jury finds former BART officer guilty of involuntary manslaughter charge*, S.F. CHRON., Jul. 9, 2010, at A1. The officer was convicted of involuntary manslaughter. *Id.* Again, taking to the streets was the public's response to the verdict. *Id.*; see also Tanya Coke, Note, *Lady Justice May Be Blind, But Is She A Soul Sister? Race Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327 (1994) (discussing the prevalence of all-white juries in the United States in the twenty-first century, despite the perception that the U.S. Constitution promises a jury of “peers,” and positing that the Court's non-discrimination principles in the area of jury selection are putting minority defendants and victims at a disadvantage).

ries geographically outside the borders of American democracy.⁵⁴ Studies of the effects of the criminal justice system on the local level show that, even in a single city, the effects are undeniably felt disproportionately by a small number of neighborhoods. Fourteen of the fifty-nine community districts in New York City (“NYC”), home to only 17% of NYC’s adult male residents, account for over 50% of all adult males sent to New York State prisons each year from NYC.⁵⁵ These neighborhoods are concentrated in three distinct areas of NYC: northern Manhattan, northeastern Brooklyn, and the South Bronx.⁵⁶ These communities within the borders of New York State are distinguished from the rest of the nation in their connection to and participation in the foundational institutions of democratic process by the aggregation of geographic concentrations of criminal convictions and the citizenship-limiting effects of such practices as felon jury exclusion. Professor George Fletcher discusses “political disenfranchisement [as] a technique for reinforcing the branding of felons as the untouchable class of American society . . . permanently banished from the political com-

⁵⁴ See James M. Binnall, *Sixteen Million Angry Men: Reviving a Dead Doctrine to Challenge the Constitutionality of Excluding Felons from Jury Service*, 17 VA. J. SOC. POL’Y & L. 1, 39–41 (2009) (discussing the isolating effect of felon jury exclusion on the formerly incarcerated). The restricted citizenship rights of citizens with conviction histories parallel the denial of rights to permanent residents, with one crucial difference—permanent residents have the possibility of changing their status through naturalization while U.S. citizens with criminal conviction histories have no hope of changing their histories. See *Internal Exile*, *supra* note 17, at 158–59.

⁵⁵ See Justice Mapping Ctr., *High Resettlement Neighborhoods: New York City* (Oct. 2006), <http://www.justicemapping.org/expertise/> (follow “NYC Analysis – Oct. 2006” hyperlink); CLEAR, *supra* note 37 (discussing corrosive effects of the criminal justice system on the communities from which a concentrated number of those incarcerated in the United States come from and return to). Clear points out the effects of mass incarceration on the internal society of communities—social disorganization, coercive mobility, a lack of public safety, and effects on human capital and social networks. *Id.* at 69–91. Permanent alienation from the democratic institution of jury service further isolates these communities and their problems and pressures. See *id.*

⁵⁶ As an example, the neighborhood of Brownsville is situated in Brooklyn’s 16th Community District. This neighborhood is among those with Brooklyn’s highest proportion of residents living below the federal poverty line. The residents who live in District 16 are nearly all people of color. During 2003, 1 in 20 adult men in Brooklyn’s 16th Community District was admitted to jail or prison—14 of every 1,000 adult men with a Brownsville address were admitted to a state prison and 38 of every 1,000 were admitted to a city jail at least one time. This figure does not reflect those living in the District who are on parole, probation or other community supervision. Even more troubling, 1 in every 12 young men between the ages of 16 and 24 go to either prison or jail from this District every year. JUSTICE MAPPING CTR., *supra* note 55; see also CLEAR, *supra* note 37, at 65–67 (discussing Tallahassee).

munity.”⁵⁷ The localized effects of the criminal justice system send whole communities “the message that they are inherently unreliable members of the democracy.”⁵⁸

Excluding those with felony-conviction histories from the jury pool denies those individuals and the communities they live in an opportunity for participating in a key democratic process. It adds force to the effects of the U.S. Census Bureau’s practice of counting prisoners in the communities where they are incarcerated as opposed to the communities that they come from for the purposes of districting.⁵⁹ Those incarcerated outside their communities in

⁵⁷ George Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1898–99 (1999).

⁵⁸ *Id.* at 1898. Professor Fletcher goes on to describe the role of incarceration in a democratically governed society:

The challenge of recognizing that we implicitly endorse a caste system in criminal law is to reformulate our theories of punishment. The emphasis on reintegration into society should come front and center. . . . [W]e should be encouraging inmates to begin thinking of themselves as useful members of society with all the attendant responsibilities.

Id. at 1907. Although he is addressing the franchise specifically, his words ring even truer in the context of jury service—while voting is merely a right, jury duty is an *obligation* of citizenship. The political incidents of citizenship are jealously guarded from those not qualified under the law to hold them. At a recent City University of New York National Lawyer’s Guild student-chapter sponsored Know Your Rights workshop on constitutional rights in police and pedestrian encounters at an artist collective in Brooklyn, a young African American male participant, unprompted, shared the following story with the author: his brother had been arrested and served time for a crime and had subsequently received a New York Juror Questionnaire. Among the questions asked in the questionnaire is, “Have you ever been convicted of a felony?” N.Y. State Unified Court System, Juror Qualification Questionnaire, <http://www.nycourtsystem.com/applications/qualify/> (follow “Please click here to continue and submit your Qualification Questionnaire” hyperlink, then enter requested information) (last visited Sept. 11, 2010). As this participant understood what happened, his brother had answered this question incorrectly—by checking the box marked “No” when he should have checked “Yes”—and was charged with perjury for his incorrect answer. He was convicted of the perjury charge and was incarcerated for four months. There are many reasons that an individual might answer such a question incorrectly: he might not understand that the crime of which he had been convicted is a “felony” under the law, he might not realize that he was actually convicted if he took a plea to the charges or was sentenced to time served, he might forget a long-ago conviction. Assuming this story is true, the fact that a prosecutor took advantage of such a mistake to charge, prosecute and convict this person suggests that New York’s felon jury exclusion law is creating a situation where a class of New Yorkers are permanently vulnerable to involvement in the criminal justice system.

⁵⁹ See U.S. CENSUS BUREAU, FACTS ABOUT CENSUS 2000 RESIDENCE RULES, http://www.census.gov/population/www/censusdata/resid_rules.html#Inst (last visited Sept. 11, 2010). Professor Pamela S. Karlan explains how this policy silences communities:

[T]he interaction of incarceration and disenfranchisement can skew the balance of political power within a state. The Census Bureau counts inmates where they are incarcerated. The population figures the Bu-

institutions in upstate New York are disenfranchised and yet simultaneously counted as residents in the communities where they are held during incarceration.⁶⁰ These additional bodies inflate the population of communities that host prisons, adding to their representation and tax base through the districting process. At the same time, the home communities of those incarcerated at the time of the Census are reduced by the number of their regular residents who have been forcibly migrated outside the community.⁶¹ The geographic effect of this double disenfranchisement leaves communities adrift.

Members of the founding generation construed jury service to be central to the process of democracy. Thomas Jefferson described the jury as the “school by which the people learn the exercise of civic duties as well as rights.”⁶² James Wilson, a Philadelphia jurist and signer of the U.S. Constitution, understood that through jury service voters “come to know, to shape, and thus to admire the law.”⁶³ Alexis de Tocqueville, writing after a tour of the United States in 1835, wrote, “the jury, which is the most energetic means

reau provides are used by states to draw legislative districts. Because every state but Maine and Vermont disenfranchises individuals while they are incarcerated, people in prison serve as essentially inert ballast in the redistricting process. Especially given the prevalent practice of building prisons far away from the cities where most inmates lived before they were sent to prison, these practices increase the power of officials who have no reason to represent these only notional “constituents.” At the same time, incarceration reduces the population of the communities from which inmates come, and to which most of them return, thereby diminishing those communities’ entitlement to legislative seats and legislative clout.

Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1364–65 (2003).

⁶⁰ See *supra* note 17.

⁶¹ This practice may soon be ending locally. New York joins Maryland and Delaware as the only states in which those incarcerated are counted in the communities they come from, not the communities to which they are sent, at least for districting purposes at the state level. On August 3, 2010, the New York Legislature approved a measure sponsored by Senator Eric Schneiderman and Assembly Member Hakeem Jeffries that would require that inmates be counted as residents of their home counties—where nearly all will return—rather than of the areas where they are imprisoned for New York state and local redistricting. Joel Stashenko, *State Set to End Policy of Prison Gerrymandering*, 244 N.Y. L.J. 1 (col. 3) (Aug. 5, 2010); see S. 6725, 233d Leg. Sess. (N.Y. 2010); A. 9834, 233d Sess. Law (N.Y. 2010); see also Prisoners of the Census, <http://www.prisonersofthecensus.org/newyork.html#leg>. Federal districting is not affected by this legislation.

⁶² KERBER, *supra* note 2, at 129.

⁶³ *Id.* “Perhaps more than any other signer of the Constitution, Wilson linked the educational function of the jury with the claim of the people to judge for themselves.” *Id.* at 229 n.22.

of making the people rule, is also the most efficacious means of teaching it to rule well.”⁶⁴

There is modern empirical evidence suggesting that people who have served on juries believe that they have benefited from that service and that they have more respect for the courts than people who have not served on juries.⁶⁵ At least one court has given credence to the rehabilitative value of jury participation: in 2006, a Colorado court reasoned that a state statute that allowed those with felony-conviction histories to serve on petit juries was rationally related to the legislative purpose of rehabilitating convicted felons and reintegrating them into society once their punishment was complete.⁶⁶

Experts making recommendations about jury service for those with conviction histories agree. In 1967, a Presidential Task Force on Corrections stated, “[t]here seems little justification for . . . permanently disqualifying all convicted felons from serving as jurors,” and recommended that, for selection of jurors for all juries,

[r]eliance should instead be placed primarily on the powers given both parties to challenge jurors, since they and the judge are in a position to consider the relevance of a particular case. The legislature might prescribe certain convictions as grounds for challenge for cause; the judge could allow other convictions to constitute such grounds according to their relevance to the case. In addition, it might be appropriate for the legislature to provide for disqualification in certain cases at least for some period of years.⁶⁷

More recently, the American Bar Association (“ABA”), in its recommendations for jury pool limitations for all juries, urged that only those who have been convicted of a felony and are in actual confinement or on probation, parole, or other court supervision be excluded.⁶⁸ In the ABA’s view, the desire for a jury representative of the population outweighs the effect that the presence of

⁶⁴ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 268 (Henry Reeve trans., Lawbook Exchange 2003) (1838).

⁶⁵ Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 *CONN. L. REV.* 389, 467 (2004).

⁶⁶ *People v. Ellis*, 148 P.3d 205, 210 (Colo. App. 2006), *cert. denied*, 2006 WL 3393584 (Colo. Nov. 27, 2006).

⁶⁷ Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 *AM. U. L. REV.* 65, 142 (2003–2004) (quoting TASK FORCE ON CORR., PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 90 (1967)).

⁶⁸ AMERICAN BAR ASS’N, *THE ABA PRINCIPLES FOR JURIES AND JURY TRIALS* 8 (2004), http://www.abanet.org/juryprojectstandards/The_ABA_Principles_for_Juries_and_Jury_Trials.pdf.

felons on juries may have on the public's respect for the process or the bias introduced into jury deliberations.⁶⁹

Successful policy models for felon jury *inclusion* exist throughout the United States.⁷⁰ Despite the inclusion of individuals with felony-conviction histories in the jury pools of nearly half of U.S. jurisdictions,⁷¹ there has been no failing of the judicial process nor any sign that unsound jury verdicts result from including individuals with conviction histories in the pool of those qualified to serve on a civil or criminal jury. Through the blanket felon jury exclusion statute, New York is contributing to the disempowerment of communities and trampling on individuals' constitutional rights in the service of protecting against an unsubstantiated rhetorical harm.

II. HISTORY OF NEW YORK'S JURY POOL

A. *Evolution of Felon Jury Exclusion in New York*

Prior to 1940, jury selection in New York was achieved through different systems in each different county of the City and the State. A "key man" in each county was responsible for calling jurors to serve and insuring that those called were of a sufficiently high "caliber" to have the privilege and the power.⁷² Although no standard

⁶⁹ *Id.*

⁷⁰ As of 2003, no one was excluded from jury pools in Maine, not even those who are incarcerated at the time when they are called to serve. Kalt, *supra* note 67, at 153. Alaska, Idaho, Indiana, Minnesota, North Carolina, North Dakota, Rhode Island, South Dakota, Washington, and Wisconsin included everyone in the jury pool except people under correctional supervision (parole, probation or incarceration). *Id.* at 150–57. Those with felony-conviction histories in Illinois and Iowa were included in the jury pool but challengeable for cause. *Id.* at 142. Arizona included first time offenders in all its jury pools. *Id.* at 141. Colorado had no felon jury exclusion at all for the petit jury pool. *Id.* at 151. Oregon included individuals with felony-conviction histories in the *civil* jury pool. *Id.* at 156. Connecticut, D.C., Kansas, Massachusetts, and Oregon included felons but imposed waiting periods. *Id.* at 151–56.

⁷¹ As of 2003, twenty U.S. jurisdictions included those with a history of felony conviction in their jury pools. Kalt, *supra* note 67, at 71. Some states have recently reformed their jury qualification statutes to include those with conviction histories in the pool. The Colorado legislature repealed Colorado's felon jury exclusion statute in 1989. *Id.* at 151 (citing COLO. REV. STAT. § 78-1-1 (1963)). The Washington legislature wrote statutes restoring the right to serve on a jury automatically upon completion of a sentence for an offense committed after July 1, 1984. WASH. REV. CODE ANN. §§ 2.36.070(5), 9.94A.637 (West 2009). Oregon adopted constitutional provision by a citizen initiative in 1999 that automatically restores the right to serve on a jury 15 years after a felony conviction or the completion of a sentence of incarceration. OR. CONST. art. I § 45(1). In 1993, the North Dakota legislature made changes that allowed felons to serve on juries after incarceration, limited only by a challenge for cause. *See City of Mandan v. Baer*, 578 N.W.2d 559, 563 (N.D. 1998).

⁷² Until recently, many state and all federal courts selected jury venires through

set of qualifications or disqualifications had been promulgated or standard procedure required, potential jurors “possessing all other qualifications which are or may be required or prescribed by law” have been protected from discrimination “on account of race, creed or color” by law since 1895:

[A]ny person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen [on account of race, creed or color] shall, on conviction thereof, be deemed guilty of a misdemeanor and be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not less than thirty days, nor more than ninety days, or both such fine and imprisonment.⁷³

Juror qualifications for counties in New York City were first standardized in 1940.⁷⁴ Before standardization, any disqualification was at the discretion of the Commissioner, the “key man” for the county.⁷⁵ New York then had a practice of impaneling “blue-ribbon” juries for cases of high interest.⁷⁶ From July 1, 1937, to June 30, 1946, these special juries convicted in 79% of the cases while the general juries convicted in 57%.⁷⁷ Blue-ribbon juries were

the key-man system. Under this system, citizens of good standing (the ‘key’ persons after whom the system is named) recommend to the court people in the community who will make responsible jurors. Notwithstanding that the highly subjective nature of the key persons’ decisions make this system inherently susceptible to discrimination, the Supreme Court has held that key-man systems are not unconstitutional per se. *Carter v. Jury Comm’n*, 396 U.S. 320, 331–37 (1970). But key-man systems violate the Equal Protection Clause if they meet certain conditions, including impermissible motivation. *Castaneda v. Partida*, 430 U.S. 482, 499–501 (1977). No state in recent years has successfully defended a key-man system having a nontrivial disparate racial impact before the U.S. Supreme Court.

⁷³ N.Y. CIV. RIGHTS LAW § 13 (Banks Law Publishing Co. 1909).

⁷⁴ See N.Y. JUD. LAW § 596 (McKinney 1940).

⁷⁵ See *supra* notes 72–73 and accompanying text.

⁷⁶ New York’s special jury statutes then allowed the impaneling of blue-ribbon juries for special cases. These special juries have been termed “blue ribbon” to connote a jury composed of individuals of considerable education and business experience. Frederick F. Lewis, *Constitutional Law—Use of “Blue Ribbon” Juries in State Courts*, 26 TEX. L. REV. 533, 534 (1948). Blue-ribbon juries were used for particularly important or intricate cases or where “the issue to be tried has been so widely commented upon that an ordinary jury cannot without delay and difficulty be obtained” or that for any other reason “the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury.” *Fay v. New York*, 332 U.S. 261, 268–69 (1947). Blue-ribbon jurors had to be selected from those accepted for the general panel by the county clerk, subpoenaed for a personal appearance and had to testify under oath as to his or her qualification and fitness. *Id.* at 267. The then-extant special juror statute prescribed standards for their selection by the clerk after such a subpoena. These standards allowed the New York City jury clerk to narrow the jury panel from approximately 60,000 qualified jurors to approximately 3,000 qualified blue-ribbon jurors. Lewis, *supra* at 534.

⁷⁷ *Moore v. New York*, 333 U.S. 565, 566–67 (1948).

widely criticized and repeatedly challenged in the courts.⁷⁸ In response, New York started to reform the jury system with the aim of eliminating the need for blue-ribbon juries: a bill was introduced which made changes to the general juror procedure with the explicit intention of making all juries more like the blue-ribbon juries in “calib[er].”⁷⁹ The explicit objective of reform was to provide the courts with “juries of high character and caliber.”⁸⁰

The new procedure included personal interviews with the Jury Commissioner. Those who he deemed to be of sufficiently high caliber would be allowed to serve. Individuals who had been “convicted of a felony or a misdemeanor involving moral turpitude” were newly disqualified by law from jury service.⁸¹ The Citizen’s Crime Commission of the State of New York approved the bill while drawing attention to the “difficulties and discrimination” that the differential disqualification would lead to: “What difference does it make whether he has stolen \$99 worth of goods or \$101. In the first case he would be guilty of a misdemeanor (not involving moral turpitude), in the second case a felony.”⁸² The first would not be disqualified, but the second would. To resolve this unequal treatment, the Commission suggested disqualifying all misdemeanants as well,⁸³ but the bill was passed as written.⁸⁴ The ambiguous

⁷⁸ See, e.g., *id.* (holding that blue-ribbon juries do not violate the U.S. Constitution); *Fay*, 332 U.S. at 261 (upholding the constitutionality of blue-ribbon juries).

⁷⁹ Letter from Francis J. Sinnott, County Clerk, County of Kings Clerk’s Office, to the Honorable Nathan R. Sobel, Counsel to the Governor, Executive Chamber, (Mar. 16, 1940) (microformed in Bill Jacket, L. 1940, ch. 202, at 22) (on file with the New York Public Library: Science, Industry and Business Library); Letter from Leonard S. Saxe, Executive Secretary, to the Honorable Nathan R. Sobel, Counsel to the Governor, Executive Chamber (Mar. 14, 1940) (microformed in Bill Jacket, L. 1940, ch. 202, at 19–20) (on file with the New York Public Library: Science, Industry and Business Library); NEW YORK COUNTY LAWYER’S ASSOCIATION COMMITTEE ON STATE LEGISLATION, REPORT NO. 172 (1940) (microformed in Bill Jacket, L. 1940, ch. 202, at 14–15) (on file with the New York Public Library: Science, Industry and Business Library).

⁸⁰ N.Y. JUD. LAW § 596 (1940), amended by 1940 N.Y. Laws ch. 202; see also COMMITTEE ON CRIMINAL COURTS LAW AND PROCEDURE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT NO. 65 (1940) (microformed in Bill Jacket, L. 1940, ch. 202, at 7, 10–11) (on file with the New York Public Library: Science, Industry and Business Library).

⁸¹ N.Y. JUD. LAW § 596 (1940), amended by 1940 N.Y. Laws ch. 202; ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON STATE LEGISLATION, REPORT NO. 47 (1940) (microformed in Bill Jacket, L. 1940, ch. 202, at 4) (on file with the New York Public Library: Science, Industry and Business Library).

⁸² Letter from the Citizens’ Crime Commission to the Honorable Herbert Lehman, Governor (Mar. 16, 1940) (microformed in Bill Jacket, L. 1940, ch. 202, at 2–3) (on file with the New York Public Library: Science, Industry and Business Library).

⁸³ *Id.*

⁸⁴ See N.Y. JUD. LAW § 596 (1940), amended by 1940 N.Y. Laws ch. 202.

“felony or misdemeanor involving moral turpitude” disqualification later also became law for juries in NYC.⁸⁵ In 1955, a statute was added governing juror qualifications outside NYC, which also included a disqualification for those convicted of a “felony or a misdemeanor involving moral turpitude.”⁸⁶

The 1940 statute was amended twice before it was replaced completely: the first amendment removed a property owner requirement⁸⁷ and the second lowered the age requirement to 18.⁸⁸ Both amendments made more individuals eligible for jury service.

In 1977, when New York’s entire jury selection system was again restructured, it was repealed completely. Restructuring followed the Federal Jury Selection and Service Act of 1968 (“JSSA”) objective: “to promote greater citizen participation in the civil and criminal jury system.”⁸⁹ Statistics then showed that “women, young people and minorities [were] under-represented in grand juries.”⁹⁰ The New York statute and the JSSA were both designed to meet the constitutional requirement that juries be selected from a fair cross section of the community in the district or division wherein the court convenes.⁹¹ The focus shifted from the “caliber” of juries to the “inclusiveness” of the jury pool. Interviews for all potential jurors were eliminated and replaced with interviews only for those who wish to be excused from jury service.⁹² The New York law presently contains the following language:

It is the policy of this state that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the county or other governmental subdivision wherein the court convenes; and that all eligible citizens shall have the opportunity to serve on grand and petit juries in the courts of this state, and shall have an obligation to serve when

⁸⁵ *Id.*

⁸⁶ N.Y. JUD. LAW § 596 (1940), *amended by* 1955 N.Y. Laws ch. 797.

⁸⁷ N.Y. JUD. LAW § 596 (1940), *amended by* 1967 N.Y. Laws ch. 49.

⁸⁸ N.Y. JUD. LAW § 596 (1940), *amended by* 1974 N.Y. Laws ch. 890.

⁸⁹ Memorandum of the Office of Court Administration (microformed in Bill Jacket, L. 1977, ch. 316, at 148) (on file with the New York Public Library: Science, Industry and Business Library).

⁹⁰ Letter from Milton Beller, Legislative Director, Legal Aid Society, to the Honorable Judah Gribetz, Counsel to the Governor, Executive Chamber (June 10, 1977) (microformed in Bill Jacket, L. 1977, ch. 316) (on file with the New York Public Library: Science, Industry and Business Library).

⁹¹ *Id.*; N.Y. JUD. LAW § 500 (McKinney 2003); 28 U.S.C. § 1861 (2006).

⁹² N.Y. JUD. LAW § 512, 1977 N.Y. Laws 1, 4 ch. 316 (McKinney 2009) (repealed 1996).

summoned for that purpose, unless excused.⁹³

Individuals with felony-conviction histories were disqualified under the 1977 statute but misdemeanants were no longer disqualified.⁹⁴ This reduced the number of criminal convictions that would result in disqualification of potential jurors, but did not similarly reduce the number of persons excluded.⁹⁵ The conditions under which the New York legislature opted to include felon jury exclusion in a jury selection system designed to be *inclusive* are starkly different from conditions today. According to Professor Uggen's projections, in 1978, the felon class included approximately 3% of the national population,⁹⁶ 5% of adult men,⁹⁷ 8% of African Americans, and 13% of African American men.⁹⁸ But the explosion of the "felon class" between 1978 and the present has amplified the effects of the exclusion far beyond its 1977 scope. By 2004, approximately 7% of Americans were in the "felon class,"⁹⁹ including 13% of adult men, 22% of African American adults and 33% of African American men. Under New York's felon jury exclusion statute, they are all disqualified from the jury pool.¹⁰⁰ The scope of disqualification created by felon jury exclusion, which may have been reasonable under 1977 conditions, is no longer reasonable and can hardly be characterized as promoting "citizen participation"¹⁰¹ in the jury system.

B. *Expanding New York's Jury Pool*

In 1995, only 12% of the people who were summoned to jury duty in New York City appeared in court.¹⁰² Judge Judith Kaye, who was then Chief Judge of the New York Court of Appeals, recognized that this low turnout rate was having an effect on the representativeness and inclusiveness of New York juries, as well as interfering with courts' abilities to actually do the work of adminis-

⁹³ N.Y. JUD. LAW § 500 (McKinney 2003).

⁹⁴ N.Y. JUD. LAW § 510 (McKinney 2003).

⁹⁵ See Uggen et al., *supra* note 10 and accompanying text.

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See *id.*

⁹⁹ See *id.*

¹⁰⁰ N.Y. JUD. LAW § 510 (McKinney 2003).

¹⁰¹ See Memorandum of the Office of Court Administration, *supra* note 89 and accompanying text.

¹⁰² Robert C. Walters et al., *Jury of Our Peers: An Unfulfilled Constitutional Promise*, 58 SMU L. REV. 319, 351 (2005).

tering justice.¹⁰³ In response, Judge Kaye and the New York legislature repealed all exemptions from jury service; increased the daily rate that jurors were paid; required companies with over 20 employees to pay while their employees fulfilled their jury duty; added taxpayer, welfare-recipient, and unemployment lists to the lists from which potential jurors were identified; and hired a national change-of-address service to track down New Yorkers whose jury questionnaires had been returned by the U.S. Post Office.¹⁰⁴ Five years after these reforms began, the participation rate of qualified summoned jurors was up from 12% to 37%.¹⁰⁵ Despite the recognized need to expand the jury pool in New York, felon jury inclusion was conspicuously absent from Justice Kaye's admirable reforms.¹⁰⁶

To make up for the shortage of jurors and to create a more inclusive and representative jury pool, and to make more jurors available to fill the crucial democratic role of hearing and deciding the cases of their fellow New Yorkers, New York courts have reformed the jury recruitment process at great administrative and financial cost.¹⁰⁷ Yet, New York continues to ban a large swath of citizens from inclusion in the pool through felon jury exclusion.¹⁰⁸ In light of Justice Kaye's goals and her successful efforts to reform the system, felon jury exclusion is a relic that should be the next obstacle removed from the path to a process that reliably produces impartial juries representing a cross section of New York's communities.

III. CONSTITUTIONAL CHALLENGES

The exclusion of individuals with felony-conviction histories from New York's jury pool can be challenged not only on ethical and practical grounds, but also as a violation of constitutional principles.¹⁰⁹ Even where arguments about the constitutional implica-

¹⁰³ See Judith S. Kaye, *Albany Law Review Symposium: Refinement or Reinvention, The State of Reform In New York: The Courts*, 69 ALB. L. REV. 831, 841, 843 (2006).

¹⁰⁴ Walters et al, *supra* note 102, at 351-52.

¹⁰⁵ *Id.*

¹⁰⁶ See *id.* at 351-54.

¹⁰⁷ *Id.* at 351.

¹⁰⁸ N.Y. JUD. LAW § 510(3) (McKinney 2003).

¹⁰⁹ Felon jury exclusion may also violate the International Covenant on Civil and Political Rights ("ICCPR"), which states, "Every citizen shall have the right and the opportunity . . . without unreasonable restrictions . . . [t]o have access, on general terms of equality, to public service in his country." International Covenant on Civil and Political Rights, art 25, G.A. Res. 2200A (XXI), ¶ 21, U.N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316 (Dec. 16, 1966); see Kalt, *supra* note 67, at 142; see also *Internal*

tions of felon jury exclusion might not lead courts to declare it unconstitutional, recognition of such implications should have sufficient rhetorical and persuasive power to cause policymakers to reject it as undesirable or politically impractical. Given the disparate racial effects of the statute, its extreme impact on minority communities' access to the judicial process, as well as the goals of inclusiveness and representativeness enshrined in the jury selection statutes and the policies of the courts themselves, felon jury exclusion seems ripe for legislative reform.

This Part will address the most severe constitutional infirmities of the statute—its violation of the fair-cross-section requirement,¹¹⁰ its infringement on litigants' and jurors' Equal Protection rights under the Fourteenth Amendment,¹¹¹ and the introduction of bias into the judicial process that threatens the Due Process rights¹¹² of defendants and civil litigants.

Felon jury exclusion is likely a violation of the constitutional fair-cross-section requirement. A jury selected from a pool that represents a "fair cross section on the venire" is a gloss on the "impartial jury" due a criminal defendant under the Sixth Amendment.¹¹³ The fair-cross-section requirement applies to civil juries through the Supreme Court's application of Sixth Amendment principles in the civil context, its supervisory authority, and the Due Process Clause of the Fourteenth Amendment.¹¹⁴ A pool that represents a "fair cross section of the community" is explicitly required by New York law for all juries.¹¹⁵ Felon jury exclusion, which interferes with a fair and reasonable representation of community members with conviction histories and minorities in the jury pool, is an impermissible violation of this requirement.¹¹⁶

The Equal Protection Clause of the Fourteenth Amendment protects both litigants and prospective jurors from government action based on irrational or protected classifications. Felon jury exclusion classifies felons versus misdemeanants; a court is likely to find this classification to be irrational.¹¹⁷ A court may also give

Exile, *supra* note 17, at 160 (discussing the applicability of Article 25 of the ICCPR to felon disenfranchisement laws). The United States has ratified the ICCPR.

¹¹⁰ See *infra* Part III.A.

¹¹¹ See *infra* Part III.B.

¹¹² See *infra* Part III.C.

¹¹³ *Holland v. Illinois*, 493 U.S. 474, 480 (1990).

¹¹⁴ *Id.*

¹¹⁵ N.Y. JUD. LAW § 500 (McKinney 2003); *Oglesby v. McKinney*, 788 N.Y.S.2d 559, 564 (Sup. Ct. 2004).

¹¹⁶ See *infra* Part III.A.1–3.

¹¹⁷ See *infra* notes 276–317 and accompanying text.

heightened scrutiny to classifications based on felony-conviction history if it concludes that individuals with such histories are a semi-suspect class or that such classifications are the product of animus.¹¹⁸ The racial impact of felon jury exclusion on the composition of juries may elicit strict scrutiny from a court; if it does, the exclusion is sure to fail.¹¹⁹

Finally, the Due Process Clause of the Fourteenth Amendment protects the judicial process from the appearance of bias.¹²⁰ Felon jury exclusion's racial impact magnifies the appearance of a skewed judicial system and likely violates this Due Process requirement.¹²¹

Standing will not be hard to establish for such a challenge.¹²²

¹¹⁸ See *infra* notes 303–17 and accompanying text.

¹¹⁹ See *infra* notes 382–420 and accompanying text.

¹²⁰ See *infra* notes 421–30 and accompanying text.

¹²¹ Felon jury exclusion may also violate the potential juror's right to privacy recognized as penumbral to the Ninth Amendment: a juror called for service who is not eliminated at the questionnaire stage will be subject to undue public attention when his or her past felony convictions become known during the *voir dire* process. See Amanda Kutz, *A Jury of One's Peers: Virginia's Restoration of Rights Process and Its Disproportionate Effect on the African American Community*, 46 WM. & MARY L. REV. 2109, 2147–49 (2005). The Due Process Clause is also the constitutional site of the "irrebuttable presumption doctrine," a doctrine historically used to protect rights deemed "important" from curtailment based on presumptions rather than individual review. See Binnall, *supra* note 54, at 4, 20–30. Binnall argues that the doctrine, last applied by the Supreme Court in *Cleveland Board of Ed. v. LaFleur*, 414 U.S. 632 (1974), should be revived. Under this doctrine, heightened scrutiny will be applied to jury exclusion, a right whose "infringement serves to disempower." Binnall, *supra* note 54, at 21.

¹²² The criteria for third-party standing to litigate a claim of unconstitutional discrimination are (1) that the litigant must have suffered an actual injury that gives him or her a sufficiently concrete interest in the outcome of the issue in dispute; (2) that the litigant must have a close relation to the third party such that there will be no loss in terms of effective advocacy by letting the litigant raise the excluded juror's claims; and (3) that there must exist some hindrance to the third party's ability to protect his or her own rights. *Powers v. Ohio*, 499 U.S. 400, 411 (1991). In *Powers*, the Court held that a defendant had standing to litigate the rights of excluded jurors because (1) the litigant suffered an actual injury when discrimination in the selection of jurors cast doubt on the integrity of the judicial process and placed the fairness of a criminal proceeding in doubt; (2) the relationship between a litigant and jurors is sufficiently close in light of other relationships where third-party standing has been granted and its closeness is reinforced by common interests in eliminating discrimination from the courtroom; and (3) suits by excluded jurors are rare and the barriers to a suit by an excluded juror are daunting. *Id.* at 413–15. In *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628–31 (1991), the Court applied the same analysis in deciding that civil litigants had standing to raise rights of excluded jurors, and in *Georgia v. McCollum*, 505 U.S. 42, 56 (1992), to grant standing to the prosecutor in a criminal case. Potential jurors themselves have standing to litigate their own right to be included in the jury pool. See *Batson v. Kentucky*, 476 U.S. 79, 87 (1986); *McCollum*, 505 U.S. at 48; *Bokulich v. Jury Comm'n*, 298 F. Supp. 181, 190 (N.D. Ala. 1968), *aff'd*, *Carter v. Jury Comm'n*, 396 U.S. 320, 329 (1970). In *Johnson v. Durante*, 387 F. Supp. 149 (E.D.N.Y. 1975), Queens County residents excluded from the grand jury rolls at discretion of

Courts liberally grant standing to civil litigants, criminal defendants, excluded jurors, and parties to a litigation seeking third-party standing to challenge a violation of excluded jurors' equal protection rights.¹²³

A. "Drawn From a Fair Cross Section of the Community"

Americans expect to find juries "of their peers" in all courtrooms—state or federal, civil or criminal. This expectation arises out of the "impartial jury" guaranteed by the Bill of Rights for civil and criminal juries.¹²⁴ The Sixth Amendment of the United States Constitution guarantees all criminal defendants "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."¹²⁵ A jury "drawn from a fair cross section of the community" is the Supreme Court's gloss on the words "impartial jury."¹²⁶ The cross-section requirement originated in a 1946 federal civil case *Thiel v. Southern Pacific Co.*¹²⁷ In *Thiel*, the Court held the exclusion of day laborers from the jury pool by the jury commissioner to be a violation of the fair-cross-section requirement; the commissioner had not been calling

commissioners on the basis of gender, occupation, locality, and race also brought a successful challenge under the Equal Protection Clause.

¹²³ A civil litigant or criminal defendant has standing to challenge a jury that is constructed in a way that systematically excludes members of the group he or she belongs to under Equal Protection, *Batson*, 476 U.S. at 96 (racial group), or a jury selection process that is not designed to represent a fair-cross-section of the community, whether or not the systematically excluded groups are groups to which he himself belongs. *See, e.g.*, *Holland v. Illinois*, 493 U.S. 474, 477 (1990) (finding that a white defendant has standing to challenge use of peremptory challenges that excluded African American jurors as fair-cross-section violation); *Taylor v. Louisiana*, 419 U.S. 522, 526 (1975) (finding that a male defendant has standing to challenge statute that results in exclusion of large portion of women from the jury pool as fair cross-section violation). Courts freely award third-party standing to civil litigants, criminal defendants, and prosecutors to challenge jury exclusions that violate Equal Protection for the excluded jurors. *See, e.g.*, *Campbell v. Louisiana*, 523 U.S. 392, 400 (1998) (holding a white defendant can raise the third-party Equal Protection claims of African American would-be grand jurors); *Powers*, 499 U.S. at 415 (holding that a white defendant has third-party standing to raise the Equal Protection claims of African American petit jurors excluded through peremptory challenges by the prosecution).

¹²⁴ U.S. CONST. amend. VI.

¹²⁵ *Id.* In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court applied the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment.

¹²⁶ *Holland v. Illinois*, 493 U.S. 474, 480 (1990); *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

¹²⁷ *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) ("[E]very jury [need not] contain representatives of all the economic, social, religious, racial, political and geographical groups of the community . . . [b]ut . . . prospective jurors [must] be selected by court officials without systematic and intentional exclusion of any of these groups.").

such laborers based on the belief that they would be excused for financial hardship by the judge when they appeared to serve.¹²⁸ The Court did not provide a single authority for this holding. The same year, the Court faced a case challenging the exclusion of women from criminal juries, *Ballard v. United States*.¹²⁹ In *Ballard*, the Court quoted extensively from *Thiel*, and explained that the imposition of the cross-section requirement was an exercise of its supervisory power over the administration of justice in the federal courts.¹³⁰

After *Thiel* and *Ballard*, the cross-section requirement developed simultaneously in the civil and criminal contexts. In *Taylor v. Louisiana*, a criminal case, the Court read it directly into the Sixth Amendment's requirements for a criminal trial.¹³¹ The Court explained its understanding of the requirement:

We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.¹³²

There are several popular misconceptions of the fair-cross-section requirement. Some think that it only applies to criminal trials. Others believe that the Court only has the authority to impose the requirement on the federal courts. Neither is true. Fair-cross-section

¹²⁸ *Id.* at 222.

¹²⁹ *See Ballard v. United States*, 329 U.S. 187 (1946).

¹³⁰ *Id.* at 193. Admittedly, the Supreme Court does not have supervisory power over New York State courts. But no authority suggests that a different constitutional standard for a properly representative jury pool under the impartial jury requirement applies outside the federal judiciary.

¹³¹ *Taylor*, 419 U.S. at 530 (citing *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Thiel*, 328 U.S. at 227).

¹³² *Id.*

tion jurisprudence principles developed under the Sixth Amendment and the supervisory authority of the Supreme Court are routinely applied to constitutional challenges of jury construction in trials not covered by the Sixth Amendment guarantee and outside the Court's authority.¹³³ The Court has contributed to the confusion. The *Taylor* Court distinguished an earlier criminal case, *Hoyt*, another challenge to the exclusion of women from jury pools unless they affirmatively volunteered, because the earlier case "did not involve a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community and the prospect of depriving him of that right if women as a class are systematically excluded."¹³⁴ But *Hoyt* was an Equal Protection challenge; the defendant did not raise a Sixth Amendment challenge at all. Nevertheless, in 1991, the Court stated that *Taylor* "in effect" overruled *Hoyt*,¹³⁵ eliminating the suggestion that the fair-cross-section requirement uniquely applies to the Sixth Amendment jury context.

Although the issue of whether a jury drawn from a fair cross section is required in a civil trial has not been directly before the United States Supreme Court or any New York court, other courts that have recognized a civil litigant's constitutional right to a jury drawn from a fair cross section of the community analogous to the right of a criminal defendant in state court have gone unchallenged. For example, in *Timmel v. Phillips*, a malpractice suit, the Fifth Circuit recognized such a right when faced with the identical issue.¹³⁶ That court also cited *Thiel* and *Duren* and explicitly stated:

[A]lthough the standard for determining whether there has been a violation of the proper jury selection requirement was developed in the context of criminal cases, we assume, without deciding, that the fair cross-section requirement is similarly re-

¹³³ See, e.g., *People v. Guzman*, 454 N.Y.S.2d 852, 862 (App. Div. 1982) ("We are of the view that these principles are equally applicable to the selection of grand jurors [in state court], since such individuals are drawn from the same pool as petit jurors, and the same policy principles govern both."); see also *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (plurality) (finding that a violation of the fair-cross-section requirement in criminal grand and petit jury construction exists despite supervisory power of Supreme Court not applying to state court, Sixth Amendment not applying to grand juries and not yet applying to state petit juries); *Roberson v. Hayti Police Dep't*, 241 F.3d 992, 996-97 (8th Cir. 2001) (suggesting that a civil litigant's cross-section claim in federal civil case could be viable if the evidence offered showed systematic exclusion of African American people from the jury venire).

¹³⁴ *Taylor*, 419 U.S. at 534 (citing *Hoyt v. Florida*, 368 U.S. 57 (1961)).

¹³⁵ *Payne v. Tennessee*, 501 U.S. 808, 828 n.1 (1991) (citing *Taylor* as "overruling in effect" *Hoyt*).

¹³⁶ *Timmel v. Phillips*, 799 F.2d 1083, 1085 (5th Cir. 1986).

quired by the Constitution in civil cases.¹³⁷

Supreme Court, federal and New York cases provide strong language in support of this conclusion. "The American tradition of trial by jury, considered in connection with *either criminal or civil proceedings*, necessarily contemplates an impartial jury drawn from a cross section of the community."¹³⁸ If it is unfair for a criminal defendant to be tried by a jury that has not been chosen from a fair cross section of the community, it is equally unfair for the fair-cross-section requirement to be unfulfilled in a civil trial.¹³⁹ "A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders."¹⁴⁰

New York law explicitly requires all juries to be drawn at random from a fair cross section of the community in the county or other governmental subdivision wherein the court convenes: all lit-

¹³⁷ *Id.* at 1086 n.5.

¹³⁸ *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946) (emphasis added).

¹³⁹ *Mitchell v. Morgan*, 844 F. Supp. 398, 404 (M.D. Tenn. 1994) *aff'd sub. nom. Thandiwe v. Morgan*, 41 F.3d 1508 (6th Cir. 1994).

¹⁴⁰ *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630 (1991) (citing *Thiel*, 328 U.S. at 220); *see also Jones v. New York City Transit Auth.*, 483 N.Y.S.2d 623, 625 n.2 (Civ. Ct. 1984) (challenging the denial of jury trial in a civil trial under Jones Act, which guarantees trial by jury for injured seamen; "Although the seventh amendment right to jury trials has not been incorporated into the fourteenth amendment, the principles developed under the sixth amendment are logically applicable to civil trials. . . . [I]f a State chooses to provide jury trials it must do so on terms that comport with notions of due process and equal protection."). The Constitutional Fair Cross Section requirement for the construction of civil juries may also be located in the Due Process Clause of the Fourteenth Amendment. *See, e.g., People v. Guzman*, 457 N.E.2d 1143, 1146-47 (N.Y. 1983); *Peters v. Kiff*, 407 U.S. 493, 502 (1972); *Mitchell*, 844 F. Supp. at 403 (finding that a civil litigant seeking damages under § 1983 for injuries received while incarcerated has a due process right to a jury chosen from a fair cross-section of the community). In *Peters*, different opinions issued by Supreme Court Justices found different grounds for holding that there had been a constitutional violation in construction of the jury pool. The opinion announcing the judgment of the Court located the violation in the Due Process Clause: "if a State chooses, quite apart from constitutional compulsion, to use a grand or petit jury, due process imposes limitations on the composition of that jury." *Peters*, 407 U.S. at 501. Justice Marshall's opinion and its due process concerns have subsequently been approvingly discussed by Chief Justice Burger, when announcing the opinion of the Court in *Hobby v. United States*, 468 U.S. 339, 343 (1984) (discussing grand jury foreman selection procedures at issue), who quoted from it and described its reasoning that unconstitutionally discriminatory jury selection procedures violate due process by creating the appearance of institutional bias and casting "doubt on the integrity of the whole judicial process." *Id.*; *see Taylor v. Louisiana*, 419 U.S. 522, 526 (1975). Justice White filed an opinion concurring in the judgment, in which Justices Brennan and Powell joined, finding a violation of non-discriminatory jury construction protected by a federal statute "which reflects the central concern of the Fourteenth Amendment with racial discrimination." *Peters*, 407 U.S. at 507 (White, J., concurring in the judgment).

igants in New York courts have a statutory right to such a jury.¹⁴¹

Our notions of what a proper jury is have developed in harmony with our basic concepts of democracy and representative government.¹⁴² The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.¹⁴³ The Supreme Court has characterized our society's understanding of a jury as "a body truly representative of the community."¹⁴⁴ While striking down a jury selection system that diminished representativeness by excluding a cognizable group from jury service as unconstitutional and "contraven[ing] . . . the very idea of a jury," the Supreme Court described the jury as,

'a body truly representative of the community,' composed of 'the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.'¹⁴⁵

Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people.¹⁴⁶

The jury system postulates a conscious duty of participation in the machinery of justice. . . . One of its greatest benefits is in

¹⁴¹ N.Y. JUD. LAW § 500 (McKinney 2003); *Oglesby v. McKinney*, 788 N.Y.S.2d 559, 564 (Sup. Ct. 2004); *People v. Guzman*, 454 N.Y.S.2d 852, 860–62 (App. Div. 1982), *aff'd*, 457 N.E.2d 1143 (N.Y. 1983). The New York Constitution also guarantees the right to a trial by jury "in all cases in which it has heretofore been guaranteed forever." N.Y. CONST. art. I § 2. The word "heretofore" had to be taken as meaning "before 1846." *Cf. Moot v. Moot*, 108 N.E. 424, 425 (N.Y. 1915) ("The measure of the right of trial by jury preserved by the state Constitution (article 1, § 2) in actions for divorce is the right to a jury trial in such cases as it existed at the time of the adoption of the Constitution of 1846."); *Blum v. Fresh Grown Preserve Corp.*, 54 N.E.2d 809, 810 (N.Y. 1944) (quoting *Moot*, 108 N.E. at 425).

¹⁴² See *Taylor v. Louisiana*, 419 U.S. 522, 526–27 (1975). *Cf. Berghuis v. Smith*, ___ U.S. ___, 130 S. Ct. 1382, 1396 (2010). The democratic process may be approaching a crossroads. In a recent concurrence, Justice Clarence Thomas pointed out that "historically, juries did not include a sampling of persons from all levels of society or even from both sexes," as a reason why the fair-cross-section requirement should not be read into the Constitution. He did not, however, point out other historically acceptable practices—a legalized slave trade, no franchise for women, strict limits on property ownership—that might provide a reason why the requirement is needed. Thomas concluded his opinion by saying that "in an appropriate case, [he] would be willing to reconsider our precedents articulating the 'fair cross section' requirement." *Id.*

¹⁴³ *Powers v. Ohio*, 499 U.S. 400, 406 (1991).

¹⁴⁴ *Taylor*, 419 U.S. at 526–27.

¹⁴⁵ *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970) (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940); *Strauder v. West Virginia*, 100 U.S. 303, 304 (1879)).

¹⁴⁶ *Powers*, 499 U.S. at 407.

the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse.¹⁴⁷

It "affords ordinary citizens a valuable opportunity to participate in a process of government, an experience fostering, one hopes, a respect for law."¹⁴⁸ With the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.¹⁴⁹

Once a state chooses to provide grand and petit juries, whether or not constitutionally required to do so,¹⁵⁰ it must hew to federal constitutional criteria in ensuring that the jury selection is free of bias.¹⁵¹ It is a crucial component of a jury of any size to forbid arbitrary exclusions of a particular class from the jury rolls.¹⁵² Successful challenges to discrimination effectuated by a well-meaning statute that results in reduced representation of a group in the jury pool are the hallmark of cross-section doctrine. In *Taylor v. Louisiana*, the Court declared unconstitutional under the Sixth and Fourteenth Amendments a jury selection scheme that only included women in the jury pool if they affirmatively volunteered.¹⁵³ The policy was created out of respect for women's roles as mothers and homemakers, but had the effect of creating a gross disproportionality between those from "an identifiable class of citizens" eligible for jury service and those represented in the venire.¹⁵⁴ In a county that was 53% female, only 11% of those in the "jury wheel" were women and no women were in the 175-person venire from which the jury in the case was selected.¹⁵⁵

Four years later, the Court clarified the standard for evaluat-

¹⁴⁷ *Id.* at 406 (quoting *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922)).

¹⁴⁸ *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting).

¹⁴⁹ *Powers*, 499 U.S. at 407.

¹⁵⁰ The Seventh Amendment of the United States Constitution only guarantees the right to jury trials in civil cases in federal court under certain circumstances: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Thus, some civil cases are not required to be heard by a jury under the U.S. Constitution. The Seventh Amendment has not been applied to the states. U.S. CONST. amend. VII.

¹⁵¹ *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970).

¹⁵² *See, e.g., Williams v. Florida*, 399 U.S. 78, 102 (1970) ("As long as arbitrary exclusions of a particular class from the jury rolls are forbidden the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one." (internal citation omitted)).

¹⁵³ *Taylor v. Louisiana*, 419 U.S. 522, 524-25 (1975).

¹⁵⁴ *Id.* at 524.

¹⁵⁵ *Id.*

ing whether there is a violation of the fair-cross-section requirement in *Duren v. Missouri*, a criminal case in which the defendant successfully challenged a statutory scheme that provided for an automatic exemption of women from the jury pool upon their request, again out of respect.¹⁵⁶ Fifty-four percent of the adults in the county where the *Duren* trial took place were women but during eight of the ten months immediately prior to the trial, only 14.5% of the persons on the weekly venires were women.¹⁵⁷ The all-male jury in *Duren* was selected from a panel of 53, of whom five were women.¹⁵⁸ The Court announced the following rule:

In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. . . . [O]nce the defendant has made a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross section of the community, [the government] bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant [governmental] interest.¹⁵⁹

No matter what the source of the fair-cross-section requirement in a particular case, courts use the *Duren* standard to judge compliance.¹⁶⁰

¹⁵⁶ *Duren v. Missouri*, 439 U.S. 357, 360 (1979).

¹⁵⁷ *Id.* at 362–63.

¹⁵⁸ *Id.* at 363.

¹⁵⁹ *Id.* at 364, 369. There is no need to prove discriminatory intent for a successful cross-section challenge. *Duren*, 439 U.S. at 368 n.26; *United States v. Jackman*, 46 F.3d 1240, 1246 (2d Cir. 1995); see also Laurie Magid, *Challenges to Jury Composition: Purging the Sixth Amendment Analysis of Equal Protection Concepts*, 24 SAN DIEGO L. REV. 1081, 1090–91 (1987) (stating that it is easier to show prima facie violation under Sixth Amendment fair cross-section analysis than under Fourteenth Amendment equal protection analysis, because it is not necessary to show discriminatory intent). The New York Court of Appeals in *Guzman* also explained that, in its view, standards under fair cross-section requirements and the Equal Protection Clause differ somewhat in that fair cross-section “distinctiveness” encompasses the broader principle that juries should be drawn from a source fairly representative of the community, whereas equal protection focuses upon classes which have historically been discriminatorily excluded or substantially underrepresented. *People v. Guzman*, 454 N.Y.S.2d 852, 861 (App. Div. 1982), *aff’d*, 457 N.E.2d 1143 (N.Y. 1983).

¹⁶⁰ See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (requiring Fair Cross Section by “constitutional concept of jury trial”; *Duren* standard discussed; decided on Equal Protection grounds); *Mitchell v. Morgan*, 844 F. Supp. 398, 403 (M.D. Tenn. 1994) (finding Fair Cross Section required by Due Process Clause of Fourteenth Amendment);

For a challenge to be successful, the excluded group must be “distinctive.” The distinctive group requirement has its roots in *Hernandez v. Texas*, a case challenging the exclusion of Mexican-Americans from grand and petit juries.¹⁶¹ In *Hernandez*, the Supreme Court held that it is a violation of the Equal Protection Clause to try a defendant before a jury from which members of his or her “distinct class” are excluded.¹⁶² The Court defined and limited a “distinct class” to those groups that “required the aid of the courts” in securing protection from local prejudice or discrimination.¹⁶³ But in *Duren*, the Court declared that women, when they were excluded from the jury pool through an automatic exemption, were a distinct class without any discussion of whether they historically required the aid of the courts.¹⁶⁴ After *Duren*, distinctive or cognizable groups are not limited to those that have historically been the target of prejudice or discrimination.¹⁶⁵

In 1986, the Court explained that it deliberately has not provided a precise definition of “distinct group” for fair-cross-section purposes.¹⁶⁶ Instead, the Court pointed to the purposes of the cross-section requirement, as outlined in *Taylor*, for guidance as to who constitutes a distinctive group: (1) guarding against the exercise of arbitrary power and ensuring that the commonsense judgment of the community will act as a hedge against the overzealous or mistaken prosecutor, (2) preserving public confidence in the fairness of the criminal justice system, and (3) implementing our belief that sharing in the administration of justice is a phase of civic responsibility.¹⁶⁷

Despite the Court’s deliberate avoidance of creating a standard, New York courts have not been so reticent. In *People v. Guzman*, the New York Court of Appeals held that a group is distinctive if that group constitutes “a substantial and identifiable segment of

Timmel v. Phillips, 799 F.2d 1083, 1085 (5th Cir. 1986) (finding Fair Cross Section “required by the Constitution in civil cases”); *Guzman*, 454 N.Y.S.2d at 860–61 (noting that a Fair Cross Section is required by section 500 of the New York Judiciary Law); *Oglesby v. McKinney*, 788 N.Y.S.2d 559, 564–55 (Sup. Ct. 2004) (adhering to the same principle of the New York Judiciary Law).

¹⁶¹ *Hernandez v. Texas*, 347 U.S. 475 (1954).

¹⁶² *Id.* at 482.

¹⁶³ *Id.* at 478.

¹⁶⁴ *Duren*, 439 U.S. at 364.

¹⁶⁵ *See, e.g.*, *Lockhart v. McCree*, 476 U.S. 162, 174 (1986) (holding exclusion of jurors opposed to death penalty, or “death qualification” of jury, does not violate the fair cross-section requirement of the Sixth Amendment).

¹⁶⁶ *Lockhart*, 476 U.S. at 174.

¹⁶⁷ *Id.* at 174–75.

the community.”¹⁶⁸ Other courts, including one New York court, have further defined the elements needed to show that a group is substantial and identifiable: (1) that the group is defined and limited by some clearly identifiable factor; (2) that a common thread or basic similarity in attitude, ideas, or experience runs through the group; and (3) that there is a community of interest among members of the group such that the group’s interests cannot be adequately represented if the group is excluded from the jury selection process.¹⁶⁹

Although a history of discrimination is not an element for *Duren* purposes, courts do seem more likely to find that those with such a history are a distinctive or cognizable group.¹⁷⁰ African Americans, Hispanics, and women have been accepted by New

¹⁶⁸ *People v. Guzman*, 457 N.E.2d 1143, 1146–47 (N.Y. 1983).

¹⁶⁹ *People v. Mateo*, 664 N.Y.S.2d 981, 995 (Monroe Cnty. Ct. 1997) (citing *Willis v. Kemp*, 838 F.2d 1510, 1514 (11th Cir. 1988)); *see also* *Anaya v. Hansen*, 781 F.2d 1 (1st Cir. 1986); *Carle v. United States*, 705 A.2d 682, 685 (D.C. 1998) (citing federal courts applying this formulation of the distinct group test); *cf.* *United States v. Greene*, 995 F.2d 793, 797 (8th Cir. 1993) (using a different formulation to determine that persons who have been charged but not convicted of a felony are not a distinctive group). At least one court has added another requirement to the first prong of *Duren*: distinctiveness should apply only to groups that “have been subjected to discrimination and prejudice within the community.” *Anaya*, 781 F.2d at 5. Where the “distinctiveness” of less educated individuals and young adults was at issue under the *Duren* test, the First Circuit reasoned that the history of discrimination and prejudice requirement was necessary to distinguish the groups that matter for jury selection purposes from the “literally thousands of ‘cognizable groups’” present in society, including “barbers, overweight persons, Red Sox fans, scoutmasters, Marine veterans, radio amateurs, and so on, ad infinitum.” *Id.* at 6. That court was responding to a concern about the explosion of claims it foresaw if groups with no such history are held distinctive for *Duren* purposes. That court feared that, once a group is “distinctive,” a mere showing of statistical underrepresentation of group members on the venire in comparison to their representation in the community as a whole will make out a prima facie violation of the Cross Section Requirement. *Id.* at 8. It overlooked the third *Duren* element: systematic exclusion. The *Anaya* court minimized the impact of not finding the contested groups to be distinctive by explicitly pointing out that the Constitution provides other protections from “invidious exclusion of qualified persons from jury service, whatever group they come from.” *Id.* at 7. The court seems to suggest that a challenge under the Equal Protection clause would be appropriate any time there was evidence of intentional discrimination against any distinct group. *See Anaya*, 781 F.2d at 4.

¹⁷⁰ *See* Kalt, *supra* note 67, at 71; Donald H. Zeigler, *Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045, 1062 (1978) (suggesting that what motivates judicial decisions about distinctiveness “may be [the courts’] confusion of the concepts of cognizability and suspectness”); *id.* at 1064 (arguing that “to date, courts have treated cognizability in much the same manner in sixth amendment and equal protection cases”); Mitchell S. Zuklie, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 132–146 (1996) (describing conflation between cross-section doctrine and equal protection; suggesting new test for group cognizability for cross-section purposes).

York courts as distinctive groups for fair-cross-section purposes.¹⁷¹ The Supreme Court has accepted these as distinctive groups as well.¹⁷² The Court has explained that exclusion of these groups from jury service denies criminal defendants the “benefit of the common-sense judgment of the community” as a protection against arbitrary governmental power.¹⁷³ Excluding potential jurors “on the basis of some immutable characteristic such as race, gender, or ethnic background” creates an “appearance of unfairness” which undermines public confidence in the criminal justice system; such an exclusion also deprives members of historically disadvantaged groups of their rights as citizens to participate in the administration of justice.¹⁷⁴ Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.¹⁷⁵ As the Court has clearly explained, “[t]o exclude racial groups from jury service [is] at war with our basic concepts of a democratic society and a representative government.”¹⁷⁶

Groups without a history of disadvantage seem to have a more tenuous relationship with distinctive status. Day laborers, whose exclusion was held impermissible in *Thiel* in 1946, and other economic groups may not be a distinctive group for the purposes of modern fair-cross-section doctrine because it is too difficult to delineate membership at a single moment in time¹⁷⁷ and because the

¹⁷¹ *People v. Guzman*, 454 N.Y.S.2d 852 (App. Div. 1982) (Hispanics); *People v. Parks*, 359 N.E.2d 358 (N.Y. 1976) (women); *People v. Hobson*, 643 N.Y.S.2d 610 (App. Div. 1996) (African Americans).

¹⁷² *See, e.g.*, *Berghuis v. Smith*, ___ U.S. ___, 130 S. Ct. 1382 (2010); *Duren v. Missouri*, 439 U.S. 357, 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 522 (1975); *Hernandez v. Texas*, 347 U.S. 475, 478 (1954).

¹⁷³ *Lockhart v. McCree*, 476 U.S. 162, 174–75 (1986).

¹⁷⁴ *Id.*

¹⁷⁵ *Edmonson v. Leesville Concrete Co., Inc.* 500 U.S. 614, 630 (1991) (“[R]acial discrimination in the selection of jurors ‘casts doubt on the integrity of the judicial process.’ . . . A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their verdicts, no less than those of their criminal counterparts, become binding judgments of the court. Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.” (internal citations omitted)).

¹⁷⁶ *Taylor*, 419 U.S. at 527.

¹⁷⁷ *Anaya v. Hansen*, 781 F.2d 1, 4 (1st Cir. 1986) (distinguishing *Thiel* on the issue of blue-collar workers: “*Thiel* . . . cannot be read as mandating that blue-collar workers are a ‘cognizable group’ as that term was used in *Duren*, such that a mere showing of statistical underrepresentation, with little more, indicates a prima facie violation of the sixth amendment. In *Thiel*, there was uncontroverted evidence that wage earners were deliberately discriminated against; ‘[b]oth the clerk of the court and the jury commissioner testified that they *deliberately* and *intentionally* excluded from the jury lists all persons who work for a daily wage.’”); *People v. Mateo*, 664 N.Y.S.2d 981, 996

blue-collar “community of interest” encompasses diverse occupations and varying compensation levels.¹⁷⁸ A New York court has held that young people, poor people, and recent migrants to a county are not distinctive under *Duren* because these groups do not share sufficiently similar characteristics, failing the second element of the test.¹⁷⁹

There are some limits on groups that are distinctive under *Duren* despite their fitting either the Supreme Court’s intentionally imprecise standard or the more exacting standard adopted by New York courts. Groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors in a particular case—for example, those who refuse to impose the death penalty in a capital case—are not distinctive groups for cross-section purposes.¹⁸⁰ An attribute that is “within the individual’s control” cannot define a distinctive group for jury-selection purposes.¹⁸¹

For a successful challenge to proceed, representation of the distinctive group in the jury pool must be not “fair and reasonable.” The Supreme Court has not articulated a single standard for determining whether it is.¹⁸² The most commonly used instruments for measuring the fairness and reasonableness of representation are the comparative disparity¹⁸³ and absolute disparity/absolute numbers¹⁸⁴ tests.

(Monroe Cnty. Ct. 1997) (“The [*Thiel*] Court did not hold that poor people constitute a distinct group within the community . . . *Thiel* held that discrimination against individuals living below the poverty level in the manner in which jurors were selected was unjustified, [not] that poor people constitute a distinctive group within the community”); *United States v. McDaniels*, 370 F. Supp. 298 (E.D. La. 1973), *aff’d sub nom. United States v. Goff*, 509 F.2d 825 (5th Cir. 1975).

¹⁷⁸ *Anaya*, 781 F.2d at 6.

¹⁷⁹ *Mateo*, 664 N.Y.S.2d at 995–97 (finding that economic status and age are “flexible” statuses; poor people are not “a distinct, cognizable group since membership in that group may shift from day to day” and members may have different “attitudes, experiences, and ideas”; no evidence was presented to establish that recent migrants to a county are “defined or limited by some factor, or that a common thread or similarity in attitudes and ideas exist among [them], or that there is a community of interests”).

¹⁸⁰ *Lockhart v. McCree*, 476 U.S. 162, 174 (1986) (holding that prospective jurors who refuse to impose the death penalty are not a distinctive group).

¹⁸¹ *Id.* at 176.

¹⁸² See *Berghuis v. Smith*, ___ U.S. ___, 130 S. Ct. 1382, 1393 (2010).

¹⁸³ “Comparative disparity is calculated by dividing the absolute disparity by the population figure for a population group. It measures the diminished likelihood that members of an underrepresented group, when compared to the population as a whole, will be called for jury service.” *Ramseur v. Beyer*, 983 F.2d 1215, 1231–32 (3d Cir. 1992).

¹⁸⁴ See *infra* notes 185–89 and accompanying text.

Courts in the Second Circuit frequently apply the “absolute disparity/absolute numbers” test for unfair underrepresentation.¹⁸⁵ The significant figure is the difference between the percentage of the population made up by a particular group and the percentage of the jury pool. To illustrate, where a minority group is 45% of the population but represents 35% of the jury pool, this is a 10% disparity.¹⁸⁶ In *Taylor*, where 53% of eligible country residents were women but no more than 10% of the jury wheel was made up of women, the disparity was sufficient to show unfair and unreasonable underrepresentation.¹⁸⁷ In *Duren*, 54% versus approximately 15% was sufficient.¹⁸⁸ In *Barnes*, where African Americans were underrepresented by approximately 2.8% and Hispanic-Americans were underrepresented in the jury pool by approximately 2.3%, no unfair representation was found.¹⁸⁹

Underrepresentation must be both general and reflected in the specific venire.¹⁹⁰ In *People v. Parks*, where the court accepted the fact that women constituted over 50% of Nassau County residents, the fact that they constituted only 33% of prospective jurors was not sufficient to establish underrepresentation and meet the *Duren* standard.¹⁹¹ In that case, the fact that five of the original twelve prospective jurors were women and, ultimately, three women sat on the petit jury, contributed to that court’s deciding that they were not unfairly underrepresented.¹⁹²

Underrepresentation must be systematic to sustain a *Duren* jury construction challenge. It is “systematic” if it is “inherent in the particular jury-selection process utilized.”¹⁹³ The underrepresentation does not need to be intentional; it is sufficient that “a large discrepancy” between the number of eligible jurors of a particular distinctive group in the population and the number of that group impaneled on the venire occur “not just occasionally, but in every weekly venire for a period of nearly a year.”¹⁹⁴

¹⁸⁵ See, e.g., *United States v. Rioux*, 97 F.3d 648, 655–56 (2d Cir. 1996); but see, e.g., *United States v. Jackman*, 46 F.3d 1240, 1247 (2d Cir. 1995) (“ [T]he absolute numbers approach is of questionable validity when applied to an underrepresented group that is a small percentage of the total population.”) (citing *United States v. Biaggi*, 909 F.2d 662, 678 (1990)).

¹⁸⁶ *United States v. Barnes*, 520 F. Supp. 2d 510, 514 n.5 (S.D.N.Y. 2007).

¹⁸⁷ *Taylor v. Louisiana*, 419 U.S. 522, 524 (1975).

¹⁸⁸ *Duren v. Missouri*, 439 U.S. 357, 365–66 (1979).

¹⁸⁹ *Barnes*, 520 F. Supp. 2d at 515.

¹⁹⁰ *Duren*, 439 U.S. at 366.

¹⁹¹ *People v. Parks*, 359 N.E.2d 358, 365 (N.Y. 1976).

¹⁹² *Id.*

¹⁹³ *Duren*, 439 U.S. at 366.

¹⁹⁴ See *id.*; *United States v. Jackman*, 46 F.3d 1240, 1246 (2d Cir. 1995).

An exclusion that is the result of a legislative act can be “systematic.”¹⁹⁵ Underrepresentation resulting from voluntary behavior patterns “unencouraged by state action”¹⁹⁶ does not make out systematic exclusion.¹⁹⁷

Where no facts are pled that demonstrate a systematic exclusion, the courts defer to the intention of jury construction procedures. For example, in *United States v. Bullock*, the defendant lost a cross-section claim under *Duren* on the element of systematic exclusion even though a venire of 100 potential jurors did not include any African Americans or minority individuals.¹⁹⁸ The defendant did not describe the process by which the exclusion was effectuated and the court deferred to the district’s goal of achieving balanced juries and explicitly stated, “[t]hat the district court failed in its attempt to achieve such balance does not detract from the court’s demonstrably race-neutral approach to juror selection.”¹⁹⁹

1. Excluding Individuals with Felony-Conviction Histories is a Prima Facie Violation of the Fair-Cross-Section Requirement

I propose that, under *Duren*,²⁰⁰ felon jury exclusion is a prima facie violation of the fair-cross-section requirement. The purposes of the fair-cross-section doctrine laid out by the Court in *Taylor* are not served by excluding those with a history of felony convictions from the jury pool. The commonsense judgment of a community certainly includes all members of a community, whether or not they have had contact with the criminal justice system. This judg-

¹⁹⁵ *Jones v. New York City Transit Auth.*, 483 N.Y.S.2d 623, 625 n.2 (Civ. Ct. 1984).

¹⁹⁶ *People v. Taylor*, 743 N.Y.S.2d 253, 264 (Sup. Ct. 2002).

¹⁹⁷ *Id.* at 263–65 (finding no systematic exclusion where Hispanics were voting less, driving less, and filing tax returns with less frequency than their fellow citizens and jury pool lists were derived from lists of registered voters, licensed drivers and tax payers); *People v. Guzman*, 454 N.Y.S.2d 852, 854–56 (App. Div. 1982), *aff’d*, 457 N.E.2d 1143 (N.Y. 1984) (finding no systematic exclusion where Hispanics responded in different proportions to subpoenas and summonses for jury service and different proportions claimed statutory exemptions); *People v. Mateo*, 664 N.Y.S.2d 981, 996–98 (Monroe Cnty. Ct. 1997) (finding no systematic exclusion where Hispanics were voting less and driving less and jury pool lists were derived from lists of registered voters and licensed drivers); *People v. Marrero*, 487 N.Y.S.2d 853, 854 (App. Div. 1985) (finding no systematic exclusion where jury selection took place on Jewish holiday, thus excluding Orthodox Jews who chose to take exemption from the pool for the holiday).

¹⁹⁸ *United States v. Bullock*, 550 F.3d 247, 251–52 (2d Cir. 2008). It may have been possible for the plaintiff to meet the fair-cross-section requirement had he pled specific facts.

¹⁹⁹ *Id.*; *see also* *United States v. Joyner*, 201 F.3d 61, 75 (2d Cir. 2000).

²⁰⁰ *Duren v. Missouri*, 439 U.S. 357, 359 (1979).

ment is not threatened by allowing those with such histories to be included in the jury pool. If a particular individual does not have the judgment needed to identify and protect against arbitrary exercises of power, that person would be struck during *voir dire*.

Including those with conviction histories would boost public confidence in the fairness of the criminal justice system. It would alleviate some of the perception that blacks and whites are treated differently by the courts by reducing some of the racial imbalance in the jury pool.²⁰¹ The justice system as a whole would likely gain credibility because a system that does not avoid the involvement of those who have experienced its reverberations in their own lives seems fairer than one that avoids such individuals. When the civic responsibility endemic to the administration of justice is shared by those who are re-entering civil society after a conviction, the entire society benefits from the integration that is achieved.

The *Duren* concept of a cognizable or distinct group encompasses those with conviction histories, whether characterized as a requirement that the group be “substantial and identifiable”—in the words of the New York Court of Appeals—or by elements adopted by some New York courts. At least one federal circuit court has already conceded that individuals’ contact with the criminal justice system is sufficient to make them a distinctive group for cross-section purposes.²⁰²

People with conviction histories fit within the more exacting criteria articulated by New York courts for distinct or cognizable groups under *Duren*. Individuals with conviction histories are certainly a “substantial and identifiable segment” of many communities, as articulated in *Guzman*.²⁰³ The experience of those with conviction histories also fits well into the elements adopted by the

²⁰¹ See generally *supra* note 47 and accompanying text (describing the perceived and often factually disproportionate treatment of blacks and other minority groups in the justice system, using the trial of Rodney King as backdrop).

²⁰² *United States v. Greene*, 995 F.2d 793, 797 (8th Cir. 1993) (discussing persons who have been charged with a crime but not convicted); cf. *United States v. Barry*, 71 F.3d 1269 (7th Cir. 1995). In *Barry*, the Seventh Circuit concluded that those who have pending felony charges against them are not a distinctive group in reference to the purposes set out in *Taylor* because, by running afoul of the law, accused persons have shown poor judgment, not “the common-sense judgment of the community.” *Barry*, 71 F.3d at 1273. The reasoning overlooked the basic fact that simply being *accused* of a crime is not dispositive of either an individual’s past actions or intrinsic qualities. That court also theorized that alleged felons’ exclusion, “more than their inclusion, would be likely to preserve public confidence in the criminal justice system.” *Id.* Scientific evidence of juror’s and the public confidence in the system contradicts the Seventh Circuit’s theory. See *supra* note 47 and accompanying text.

²⁰³ See, e.g., *supra* notes 55–56 and accompanying text.

Mateo court;²⁰⁴ those with felony histories are certainly defined and limited to this discrete factor. Felony-conviction histories are much simpler to define than “youth” or “poverty”; one need only look at a person’s criminal record. As enumerated, a common experience also runs through the group of people with felony-conviction histories—that of being convicted. Conviction data in New York demonstrate that this is not entirely within an individual’s control.²⁰⁵ There is also a community of interest among these people who have had encounters with the criminal justice system, their advocates, supporters, friends, and families. Although courts have held otherwise,²⁰⁶ the interests cannot be adequately represented if all individuals with criminal conviction histories were eliminated from the jury pool; the entire community’s voice would be stifled.

The explicit limits placed on groups that can be held cognizable under *Duren* do not encompass those with felony-conviction histories. A felony-conviction history is not an indication of an attitude that would prevent or substantially impair competent performance of the duties of a juror in a particular case.²⁰⁷ While behavior that leads to a felony conviction is probably within an individual’s control, the conviction itself is not. Factors outside an individual’s control that can lead to a permanent history of a felony conviction include the assignment by the legislature of certain transgressions to the status of “felonies,” policing patterns in certain communities, and burdens on the courts that result in many innocent defendants taking pleas to felony charges in exchange for “time served,” or other low-impact sentences.

The second and third *Duren* elements are easily met. As all persons with felony-conviction histories are disqualified and only a

²⁰⁴ See *People v. Mateo*, 664 N.Y.S.2d 981, 995 (Monroe Cnty. Ct. 1997) (the elements are race or sex, a common thread or basic similarity in attitudes, ideas, experiences, or a community of interests).

²⁰⁵ See *supra* text accompanying notes 35–42; see also Bob Herbert, *Watching Certain People*, N.Y. TIMES, Mar. 2, 2010, at A23.

²⁰⁶ The California Supreme Court has addressed the effects that eliminating those with conviction histories from the jury pool has on the voice of the community and held that it did not have negative effects, though with spurious reasoning. See *Rubio v. Superior Court*, 593 P.2d 595, 609 (Cal. 1979). There, the court held that ex-felons’ interests could be adequately represented because “several classes of persons eligible for jury service have had similar experiences of loss of personal liberty followed by social stigmatization.” *Id.* at 599. The court used the example of people who have been confined to mental institutions that are “more like a prison than a medical facility.” *Id.* at 599 n.7. This case is not binding on New York courts and its reasoning is dubious. In response to the majority’s reasoning, Judge Tobriner took issue with what he termed “the majority’s ‘vicarious’ representation analysis.” *Id.* at 603 (Tobriner, J., dissenting).

²⁰⁷ *United States v. Barry*, 71 F.3d 1269, 1274 (7th Cir. 1995).

few are accidentally included in the jury pool, it will not be difficult to show that there is a “by the numbers” disparity, both generally and in a specific venire. Individuals with felony histories are excluded by statute; that exclusion is per se systematic.²⁰⁸

Felony convictions are distinguishable from voluntary acts free from encouragement by state action. Data evincing trends of racially biased policing and prosecutions, as well as the criminalization of addiction by the War on Drugs, all point to the involuntary nature of at least some felony convictions.²⁰⁹ Felony conviction necessarily involves actions by the state.²¹⁰ The state is involved in policing communities, apprehending suspects, arresting and charging them, creating classifications of offenders, assigning status to those convicted, and creating collateral consequences such as felon jury exclusion. The state has created an ever-widening shadow of collateral consequences of conviction from which it is nearly impossible to escape.

Felon jury exclusion is a systematic exclusion that results in unfair and unreasonable jury pool underrepresentation of the distinctive group of persons with conviction histories. Therefore, I propose that it is a prima facie violation of the fair-cross-section requirement that can only be sustained if New York can show that a significant state interest, as stated in *Duren*, is manifestly and primarily advanced by the exclusion.

2. Excluding African Americans and Hispanics is a Prima Facie Violation of the Fair-Cross-Section Requirement

Under *Duren*, I propose that felon jury exclusion is also a *prima facie* violation of the fair-cross-section requirement due to its systematic exclusion of African Americans and Hispanics from the jury pool.²¹¹ For purposes of cross-section doctrine in New York courts, African Americans and Hispanics are distinctive groups.²¹²

A “by the numbers” analysis is likely to find that approximately 22% of African American adults are excluded from the jury pool in

²⁰⁸ *Jones v. New York City Transit Auth.*, 483 N.Y.S.2d 623, 625 n.2 (Civ. Ct. 1984).

²⁰⁹ *See supra* notes 37–45 and accompanying text.

²¹⁰ *See Shelly v. Kraemer*, 334 U.S. 1, 14 (1948) (stating that the proposition that the action of state courts and of judicial officers in their official capacities constitutes state action within the meaning of the Fourteenth Amendment is a principle which has long been settled by past Supreme Court decisions).

²¹¹ *See supra* notes 159–199 and accompanying text.

²¹² *See People v. Guzman*, 454 N.Y.S.2d 852 (App. Div. 1982); *People v. Parks*, 359 N.E.2d 358 (N.Y. 1976); *People v. Hobson*, 643 N.Y.S.2d 610 (App. Div. 1996).

New York State.²¹³ In a case where no African Americans or Hispanics are on the jury or in the jury pool, this is likely sufficient to establish underrepresentation. A more successful challenge will be set in a community severely impacted by the racial imbalances of the criminal justice system.

Data show that African Americans and Hispanics are more often the bearers of felony-conviction histories and therefore the blanket exclusion from the jury pool of all individuals with such histories systematically excludes them disproportionately.²¹⁴ This is inherent in the jury selection process and should be sufficient to make out a systematic exclusion under *Duren*, as long as the exclusion is shown to occur “not just occasionally.”²¹⁵ Under *Duren*, systematic underrepresentation need not be intentional to make out a prima facie violation of the fair-cross-section requirement.²¹⁶ A neutral statute that refers to a neutral characteristic can be the unconstitutional method for such underrepresentation. There is no discriminatory intent requirement to make out a prima facie case of a fair-cross-section violation.²¹⁷

3. Excluding African American and Hispanic Men

African American and Hispanic *men* are particularly absent from the cross section of the community that is the jury pool.²¹⁸ The criminal justice system has a more profound impact on minority men than minorities in general.²¹⁹ The Second Department of the New York Appellate Division is open to considering a hybrid race-and-gender group. It has remanded cases in which the defendant alleged discriminatory preemptory challenges to African

²¹³ See *supra* notes 40–47 and accompanying text.

²¹⁴ See *supra* notes 37–42 and accompanying text.

²¹⁵ *Duren v. Missouri*, 439 U.S. 357, 366 (1979).

²¹⁶ *Edmonson v. Leesville Concrete Co., Inc.* 500 U.S. 614, 630 (1991) (“[R]acial discrimination in the selection of jurors ‘casts doubt on the integrity of the judicial process.’ . . . A civil proceeding often implicates significant rights and interests. Civil juries, no less than their criminal counterparts, must follow the law and act as impartial factfinders. And, as we have observed, their verdicts, no less than those of their criminal counterparts, become binding judgments of the court. Racial discrimination has no place in the courtroom, whether the proceeding is civil or criminal.”) (internal citations omitted); *Washington v. Davis*, 426 U.S. 229, 239–41 (1976).

²¹⁷ *Davis*, 426 U.S. at 239–41.

²¹⁸ See *supra* notes 35–42 and accompanying text (discussing the racially skewed impacts of the criminal justice system by relaying statistics that reflect disproportionately larger percentages of men—especially African American and Hispanic men—than other classes regarding felony convictions).

²¹⁹ See *supra* notes 35–42 and accompanying text.

American males²²⁰ and African American females²²¹ on the jury panel to give the defense the opportunity to present evidence that they are cognizable groups that warrant protection under *Batson v. Kentucky*.²²² A court may find that African American males or Hispanic males are a cognizable group for *Duren* purposes as well. African American men and Hispanic men are limited by two distinct factors: race and gender. They, at least superficially, share similarities in attitudes, ideas and experience (just ask any marketing executive); and there is certainly a “community of interest among members of the group such that the group’s interests cannot be adequately represented from the jury selection process.”²²³ African American or Hispanic women, who are excluded in significantly smaller numbers, certainly represent some of the group’s interests,²²⁴ but do not share the attitudes or experiences of minority men in American society.

“By the numbers” approximately 33% of African American adult males are excluded from the jury pool in New York State.²²⁵ In a case where no African American or Hispanic men are on the jury or in the jury pool, this is likely sufficient to establish underrepresentation.

4. Justifying the Infringement: New York’s “Significant” Interest

Once a *prima facie* violation of the right to a jury drawn from

²²⁰ *People v. Jerome*, 828 N.Y.S.2d 78, 79 (App. Div. 2006); *cf. Curtis v. State*, 685 So. 2d 1234, 1237 (Fla. 1997) (finding that white men are a cognizable group in the jury venire context). But other jurisdictions have avoided the issue of whether African American men are a distinctive group or dismissed it with little analysis. *See, e.g., Carle v. United States*, 705 A.2d 682, 685 (D.C. 1998) (issue of whether African American men are a distinctive group raised but not considered in the context of a Cross Section Challenge to D.C.’s ten-year exclusion of convicted felons from the jury pool); *United States v. Greer*, 900 F. Supp. 952, 957 (N.D. Ill. 1995) (finding that the defendant identified “no authority that African American males, or any other group defined along race and gender lines, is a *Duren* distinctive group”).

²²¹ *People v. Garcia*, 636 N.Y.S.2d 370, 372 (App. Div. 1995); *see Jean Montoya, “What’s So Magic[al] About Black Women?” Peremptory Challenges at the Intersection of Race and Gender*, 3 MICH. J. GENDER & L. 369, 392–403 (1996) (arguing for the viability of an equal protection challenge to peremptory challenges based on either intersectional—both race and gender—status or on separate charges of discrimination by race and by gender).

²²² *See Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986) (The right to equal protection prohibits discriminatory preemptory challenges).

²²³ *See supra* note 169 and accompanying text.

²²⁴ *See, e.g., United States v. Blair*, 493 F. Supp. 398, 407 (D. Md. 1980) (“[I]t is not clear why blacks of both sexes should not be considered in determining whether there has been underrepresentation of a racial group under a particular jury plan.”).

²²⁵ *See supra* notes 40–47 and accompanying text.

a fair cross section of the community has been established, the government bears the burden of justifying the infringement by showing that a “significant state interest” is “manifestly and primarily advanced by those aspects of the jury-selection process” that result in the disproportionate exclusion of a distinctive group.²²⁶

The right to a proper jury cannot be overcome on merely rational grounds or for the purposes of administrative convenience.²²⁷ The government interest must be based on something more than a stereotype. In *Taylor*, where there was a prima facie case of a violation of the fair-cross-section requirement created by a statute that excluded all women from the jury pool unless they volunteered to serve, the State claimed that differential treatment of women was justified because women served as caretakers for their children and that the state had an interest in protecting the role of women in the home.²²⁸ The Court did not disagree with the validity of these assertions but nonetheless reasoned,

[i]t is untenable to suggest these days that it would be a special hardship for *each and every* woman to perform jury service or that society cannot spare any women from their present duties. This may be the case with many, and it may be burdensome to sort out those who should be exempted from those who should serve. But that task is performed in the case of men, and the administrative convenience in dealing with women as a class is insufficient justification for diluting the quality of community judgment represented by the jury²²⁹

Felon exclusion is normally discussed as a regulation of the jury system, not a punishment for potential jurors.²³⁰ Felon exclusion laws are aimed at protecting society from the dangers of tainted juries.²³¹ The specific interests usually put forward by governments to justify felon exclusion from jury service are (1) inher-

²²⁶ *Duren v. Missouri*, 439 U.S. 357, 367–68 (1979).

²²⁷ *Taylor v. Louisiana*, 419 U.S. 522, 534–35 (1975).

²²⁸ *Id.* at 534.

²²⁹ *Id.* at 534–35 (emphasis added).

²³⁰ See *R.R.E. v. Glenn*, 884 S.W.2d 189, 193 (Tex. App. 1994) (civil malpractice case under Texas constitution, referring to “purity and efficiency of the jury system” as the basis of criminal exclusion); see also Fletcher, *supra* note 57 (discussing the lack of convincing justification for disenfranchisement as punishment).

²³¹ All collateral consequences, including jury exclusion, are a legal burden constituting punishment that should only be imposed through individualized sentencing, not by a statute, under the Bill of Attainder Clauses of the U.S. Constitution, contained in Article I, Sections 9 and 10. U.S. CONST. art. I § 9 cl. 3; U.S. CONST. art. I § 10, cl. 1. But in *Hawker v. New York* the Court held that where consequences are regulatory in nature, they do not violate the ex post facto clause. 170 U.S. 189, 197–98 (1898).

ent bias brought to the process by felon jurors²³² and (2) protecting juries from a lack of probity.²³³

At least one court has reasoned that the bias of a person with a conviction history, if such persons are in the jury pool, stands in the way of “having jurors who can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.”²³⁴ But it is not clear whether a felon-juror’s bias will be *for* or *against* a criminal defendant.²³⁵

Although arguably plausible in a criminal trial context, bias hardly seems credible in the civil trial context. Felons might have an “ax to grind” when judging a prosecutor’s case, but it is hard to see how a felony conviction would prejudice them in a civil case.²³⁶ “[T]he existence of potential biases or prejudices of a juror with a prior felony conviction is substantially lessened in a civil case as opposed to a criminal case.”²³⁷ In *Companiononi v. Tampa*,²³⁸ a Florida appeals court held that a civil litigant was not entitled to a new trial on account of the failure of the two jurors to disclose prior felony convictions without a showing of actual bias or prejudice.²³⁹ That

²³² Courts have struggled with articulating this justification as anything more than “the bias justification.” In a rare instance of an explicit discussion of what the bias justification actually is, one court inartfully stated:

[A] person who has suffered the most severe form of condemnation that can be inflicted by the state [sic] a conviction of felony and punishment therefor [sic] might well harbor a continuing resentment against “the system” that punished him and an equally unthinking bias in favor of the defendant on trial, who is seen as a fellow underdog caught in its toils.

Rubio v. Superior Court, 593 P.2d 595, 600 (Cal. 1979).

²³³ See *infra* note 245–48 and accompanying text.

²³⁴ United States v. Greene, 995 F.2d 793, 797 (8th Cir. 1993).

²³⁵ See United States v. Barry, 71 F.3d 1269, 1273 (7th Cir. 1995) (“[W]e think that there is no need to theorize about whether an accused felon is likely to be biased against the government or, on the other hand, whether he is likely to think, from some personal experience, that all persons charged will be likely to lie to avoid conviction and so be biased against the defendant.”).

²³⁶ Kalt, *supra* note 67, at 168.

²³⁷ Froede v. Holland Ladder & Mfg., 207 Mich. App. 127, 133 (Mich. Ct. App. 1994) (decided before Michigan amended its law to exclude all felons from all jury service).

²³⁸ Companiononi v. Tampa, 958 So. 2d 404, 417 (Fl. Dist. Ct. App. 2007).

²³⁹ Other jurisdictions vary. For example, the Florida felon jury exclusion statute reads:

No person who is under prosecution for any crime, or who has been convicted in this state, any federal court, or any other state, territory, or country of bribery, forgery, perjury, larceny, or any other offense that is a felony in this state or which if it had been committed in this state would be a felony, unless restored to civil rights, shall be qualified to serve as a juror.

FL. STAT. § 40.013(1) (2009); *cf.* N.Y. JUD. LAW § 510(3).

court reasoned that a rule requiring a new trial whenever a juror served when he or she should have been disqualified due to a felony-conviction history “would be supportable only if one could conclude that the service of a juror with a prior felony conviction—no matter how old the conviction or however unrelated to the matter to be tried—would deprive one or both of the parties of a fair and impartial jury.”²⁴⁰ That court conceded that “many persons with prior felony convictions undoubtedly serve on juries” in Florida,²⁴¹ and dismissed the notion that the presence of a juror with a conviction history by itself leads to a biased jury as inapplicable in the civil context.²⁴²

The bias rationale is one of administrative convenience and therefore insufficient to constitute a “significant state interest” that would justify eliminating a distinct group from the jury pool. It is a gross overgeneralization. The rest of the jury selection process is designed to make individualized determinations of nonpartiality.²⁴³ *Voir dire* eliminates individuals who are not fit to serve by treating jury competence as “an individual rather than a group or class matter.”²⁴⁴ Treating convictions as grounds for a challenge “for cause” is an alternative that addresses concerns about the bias of a particular jury while treating all potential jurors as individuals. Under the current law, New York conflates felony-conviction history with a bias that would affect jury deliberations. This results in the abrogation of citizens’ rights to participate in a democratic institution and threat to civil litigants’ and criminal defendants’ rights to impartial juries drawn from their communities.

The probity justification may be rational but it is not sufficient to be a significant government interest. Courts have recognized the government’s legitimate interest in protecting probity of juries as a rational basis in the Equal Protection context for excluding felons from juries in criminal trials.²⁴⁵ But mere rationality is not sufficient to meet the *Duren* “significant state interest” standard.²⁴⁶

²⁴⁰ *Companiononi*, 958 So. 2d at 413.

²⁴¹ *Id.* at 417.

²⁴² *Id.* at 413–14.

²⁴³ Kalt, *supra* note 67, at 102–05; Binnall, *supra* note 54, at 33.

²⁴⁴ *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946).

²⁴⁵ *See, e.g.*, *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) (rational basis review of Equal Protection Clause claim of discrimination against felons); *United States v. Greene*, 995 F.2d 793, 795 (8th Cir. 1993); *United States v. Foxworth*, 599 F.2d 1, 4 (1st Cir. 1979) (holding that felon exclusion “is intended to assure the ‘probity’ of the jury” is rationally based) (quoting H.R. Rep. No. 90-1076 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1792, 1796).

²⁴⁶ *See supra* text accompanying note 226.

Deference to probity seems absurdly paternalistic and another administrative justification for felon jury exclusion given the fact that many felons are honest, many dishonest people are not felons, and many people in the population have committed acts that are felonies under the law but have never been caught.²⁴⁷ In his article *The Number They Gave Me When They Revoked My Citizenship: Perverse Consequences of Ex-Felon Civic Exile*, James M. Binnall presents the probity justification put forward for felon jury exclusion as the product of a belief that a felony conviction is evidence of an intrinsic, permanent character flaw that is a barrier to functional self-government.²⁴⁸ As Binnall explains, this belief is based on at least three untested presumptions: that a felony conviction is a clear sign of “bad character”; that a person’s character will never change; and that good character is necessary to have an understanding of the public good and the ability to self-govern.²⁴⁹ Allowing these presumptions to create a policy that excludes a distinctive group from the jury pool may be rational but it is not a significant government interest.

Recidivism is a justification sometimes proffered for keeping all individuals with felony-conviction histories out of the jury pool based on the theory that they are likely to continue being criminals.²⁵⁰ The argument that felons should be barred from juries because they are, as a group, likely to re-offend, as Professor Kalt points out, is incompatible with notions of due process and the presumption of innocence.²⁵¹ This concern about “criminals” on juries is not shared by all courts. The United States District Court for the Eastern District of New York has clearly stated that “[e]ven if [a] juror had been engaged in criminal conduct at the time of the *voir dire*, his jury service would not, of itself, have violated [the criminal defendant’s] constitutional rights to a fair and impartial jury.”²⁵²

²⁴⁷ See Kalt, *supra* note 67, at 102–03; ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 112 (2003).

²⁴⁸ James M. Binnall, *The Number They Gave Me When They Revoked My Citizenship: Perverse Consequences of Ex-Felon Civic Exile*, 44 WILLAMETTE L. REV. 667, 673–74 (2008).

²⁴⁹ *Id.*

²⁵⁰ See Kalt, *supra* note 67, at 145–48.

²⁵¹ *Id.* at 146.

²⁵² *Blount v. Keane*, No. CV-91-0115, 1992 WL 210982, at *6 (E.D.N.Y. Aug. 6, 1992). Some jurisdictions now impose a waiting period after the end of criminal justice supervision or the time of sentencing before the right to be selected for jury service is restored to address concerns about allowing those who have just been released from supervision and are statistically likely to have further contact with the criminal justice system to be included in the jury pool. See Kalt, *supra* note 67, at 145–48.

The reluctance of judges to overturn verdicts reached by juries that erroneously contain members with felony-conviction histories, unless the appellant can show actual bias in the jury deliberations, undermines the most common argument against felon jury exclusion—that individuals with felony-conviction histories inherently bring bias to the jury. The mere presence of a juror who has been convicted of a felony on a New York jury does not invalidate the proceeding or require that a new trial be held absent a showing of fraud or prejudice.²⁵³ The Third Department has held that the fact that a juror was, unbeknownst to him, the subject of a grand jury investigation while serving on a criminal trial jury and had a youthful offender adjudication in his past was not sufficient to require setting aside the verdict reached by the jury on which he served on the ground that the defendant had been denied his right to a fair and impartial jury.²⁵⁴ That court found the facts insufficient to constitute a violation of section 510 of the New York Judiciary Law.²⁵⁵ That court also noted that, even if there were sufficient facts to find a violation, the verdict need not be set aside because the juror's presence, without more, was neither prejudicial under section 440.10(f) nor a violation of the defendant's constitutional rights under section 440.10(h) of the New York Criminal Procedure Law.²⁵⁶ There do not appear to be any New York civil cases in which litigants challenged a verdict because of the presence of a juror who had been convicted of a felony.

A blanket felon jury exclusion only serves the interest of administrative convenience. Such exclusions are explicitly unlawful in the employment context absent consideration of particular guidelines.²⁵⁷ *Voir dire* procedures in New York currently successfully

²⁵³ *People v. Mercado*, 753 N.Y.S.2d 125 (App. Div. 2002) (requiring the showing of bias due to felon jurors' non-disclosure of his status before a new trial is granted); *People v. White*, 354 N.Y.S.2d 735 (App. Div. 1974) (where grand jury foreman had not disclosed his felony-conviction history, the court refused to overturn the verdict without a showing of bias).

²⁵⁴ *People v. Astle*, 503 N.Y.S.2d 175, 177 (App. Div. 1986).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ An employer must not have a blanket ban on hiring or retaining individuals who have records of arrest or conviction. When making an adverse hiring or retention decision based on criminal record history, guidelines issued by the U.S. Equal Employment Opportunity Commission at the federal level require that an employer show that there is an underlying business necessity for the decision and that it has considered (1) the nature and gravity of the offense or offenses, (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought. U.S. Equal Emp't Opportunity Comm'n, *Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964*, as amended by 42 U.S.C. § 2000e et seq. (Feb. 4, 1987); U.S. Equal Emp't Opportunity Comm'n, *Policy Gui-*

eliminate those members of the community whose experience leads them to a biased view of the justice system—crime victims, police officers, lawyers, etc.—without excluding them categorically.²⁵⁸ In the jurisdictions that allow those with felony-conviction histories to serve on juries, *voir dire* also successfully eliminates those whose specific conviction histories suggest they would be biased members of a jury.²⁵⁹

In his defense of disqualification for jury service based on an exclusion that, although admittedly disproportionately excluding African Americans, is based on a “good reason,”²⁶⁰ Professor Randall Kennedy ignores the role of *voir dire* in the jury selection process. He writes,

[t]hose who have been charged with or convicted of committing felonies are likely to bear a grudge against the criminal justice system. Furthermore, in the vast majority of instances, committing a serious crime can properly be seen as a disturbing sign of personal irresponsibility.²⁶¹

This logic does not amount to a significant government interest. It is purely conjecture and does not take into account the specific abilities and biases of a particular potential juror. Studies of public opinion about the jury system suggest that, due to racial impact, excluding all those with felony-conviction histories actually does more harm to the public’s perception of the jury system as unbiased than any effect that a single individual with a felony convic-

dance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended by 42 U.S.C. § 2000e et seq. (Sept. 7, 1990). Under Article 23-A of the New York State Correction Law, a criminal conviction is only relevant if a direct relationship exists between the conviction and the prospective job or if employment would pose an unreasonable risk to persons or property. N.Y. CORR. LAW § 753 (McKinney 2009). An employer cannot presume a direct relationship or an unreasonable risk exists; instead, it must evaluate the following factors, among others, before reaching that conclusion: (1) New York public policy in favor of employing people with conviction histories; (2) the necessary duties and responsibilities of the job and the bearing the conviction has on the fitness and ability of the applicant or employee to fulfill them; (3) how long ago the offense occurred, how serious it was, and the applicant or employee’s age at that time; (4) evidence from the applicant or employee of rehabilitation and good conduct; (5) the legitimate interest of the employer in protecting people and property; and (6) a Certificate of Relief from Disabilities or Certificate of Good Conduct issued either by a court or the Board of Parole to the applicant or employee. *Id.* Both certificates create a legal presumption that the applicant or employee is “rehabilitated” of her convictions. *See* N.Y. CORR. LAW § 750 et seq. (McKinney 2009).

²⁵⁸ *See* Kalt, *supra* note 67, at 102–03; Binnall, *supra* 54, at 33.

²⁵⁹ *See* Kalt, *supra* note 67.

²⁶⁰ RANDALL KENNEDY, RACE, CRIME AND THE LAW 235 (1998).

²⁶¹ *Id.* Professor Kennedy presents a similarly stereotype-based explanation for why the criterion of “sanity” is appropriate. *Id.* at 234–35.

tion who was subject to *voir dire* and selected for jury service can possibly have on its actual bias.²⁶²

Justifications for felon exclusion do not fit easily into the usual explanations for the functioning of criminal law and therefore are not treated with the deference usually afforded to penological interests.²⁶³ Being excluded from the jury pool does not serve to rehabilitate a convicted felon.²⁶⁴ Quite the opposite—it suggests that whatever rehabilitation is accomplished during the time an individual serves for his crime is either futile or insufficient to allow him or her to participate fully in civil society.²⁶⁵ The threat of jury exclusion is not likely to deter a potential criminal.²⁶⁶ Excluding those with conviction histories from the jury pool does nothing to prevent future crimes.²⁶⁷

Simply because felon jury exclusion in New York was retained when the rest of the jury selection process was reformed to bring it into compliance with the fair-cross-section requirement does not make it per se constitutional.²⁶⁸ The reasoning of the Court in *Taylor* is instructive:

If at one time it could be held that . . . juries must be drawn from a fair cross section of the community but that this requirement permitted the almost total exclusion of women, this is not the case today. Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place.²⁶⁹

Since 1977, when felon jury exclusion in New York was thought to comply with the fair-cross-section requirement, the effect of the exclusion has changed. The reach of the criminal justice system has expanded to an unprecedented scale. Its impacts on minority communities are well known. Arguing that the exclusion should be judged by the effects the exclusion was projected to have in 1977 despite thirty years of data demonstrating much greater restrictions on the jury pool than could have then been

²⁶² See, e.g., note 47 and accompanying text.

²⁶³ See, e.g., *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Internal Exile*, *supra* note 17, at 160–61 (discussing the penological explanations for all collateral sentencing consequences).

²⁶⁴ Kalt, *supra* note 67, at 132–33.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 135.

²⁶⁷ *Id.*

²⁶⁸ See Richard Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 *YALE L.J.* 1568, 1603–04 (2007).

²⁶⁹ *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

imagined²⁷⁰ is not likely to convince a court.

B. *Equal Protection*

If the state chooses to use juries, grand juries and the venires for petit juries are subject to the Equal Protection Clause's requirements with respect to the method of their selection.²⁷¹ When discriminatory selection mechanisms based on group stereotypes rooted in and reflective of historical prejudice have the effect of excluding group members from civil and criminal juries, they violate the Equal Protection rights of those excluded.²⁷²

1. Jurors' Right to Non-Discriminatory Jury Construction

All citizens have the right not to be excluded from grand- and petit-jury lists on the basis of irrelevant factors such as race or employment status.²⁷³ Any group excluded from the jury pool can potentially raise an Equal Protection Clause challenge to the exclusion under the Fourteenth Amendment to the United States Constitution.²⁷⁴

²⁷⁰ See *supra* notes 29–31, 33–34, 42 and accompanying text.

²⁷¹ See *Cobbs v. Robinson*, 528 F.2d 1331, 1334 (2d Cir. 1975) (grand juries); *Batson v. Kentucky*, 476 U.S. 79, 85–86 (1986) (petit juries).

²⁷² *Carter v. Jury Comm'n*, 396 U.S. 320, 329–30 (1970); *Edmonson v. Leesville Concrete Co. Inc.*, 500 U.S. 614, 630–31 (1991). Commentators suggest that the fundamental injury inflicted by discrimination in jury selection is its effect on the excluded jurors. See, e.g., Barbara Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It Anyway?* 92 COLUM. L. REV. 725 (1992); Joel H. Swift, *The Unconventional Equal Protection Jurisprudence of Jury Selection*, 16 N. ILL. U. L. REV. 295 (1996). For example, Barbara Underwood suggests that the primary reason for prohibiting race-based jury selection is to bring all citizens into full and equal participation in the institutions of American self-government. 92 COLUM. L. REV. at 727. This sentiment echoes the International Covenant on Civil and Political Rights' "participation" requirement. See International Covenant on Civil and Political Rights, art 25, G.A. Res. 2200A (XXI), ¶ 21, U.N. GAOR, Supp. No. 16 at 52, U.N. Doc. A/6316 (Dec. 16, 1966).

²⁷³ *Powers v. Ohio*, 499 U.S. 400, 423 (1991) (Scalia, J., dissenting) (citing *Carter*, 396 U.S. 320, *Thiel v. S. Pac. Co.*, 328 U.S. 217 (1946)); *Hernandez v. Texas*, 347 U.S. 475, 479 (1954).

²⁷⁴ U.S. CONST. amend. XIV, § 1; see, e.g., *United States v. Foxworth*, 599 F.2d 1, 4 (1st Cir. 1979); *Carter*, 396 U.S. at 329; *Johnson v. Durante*, 387 F. Supp. 149, 149 (E.D.N.Y. 1975) (brought by county residents for discrimination by sex, occupation, locality and race in creating Queens County grand jury rolls at the discretion of commissioners). Tanya Coke argues that in cases involving racially diverse juries this application of Equal Protection—a race neutral doctrine—places the individual juror's rights above the defendant's and the public's interest. See Tanya Coke, *Lady Justice May Be Blind, But Is She a Soul Sister? Race Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 339–48 (1994). In *Georgia v. McCollom*, 505 U.S. 42, 54–55 (1992), the Court held that a defense attorney's racial use of peremptory challenges violated the jurors' Equal Protection rights. Coke explains that the result of this hold-

In both *Johnson* and *Carter*, potential jurors successfully challenged the discriminatory application of neutral statutes through the subjective judgments of individual officials, the commissioners, and clerks charged with creating a panel of qualified jurors.²⁷⁵

2. Irrational Classification: Felons versus Misdemeanants

New York's felon jury exclusion law classifies felons as disqualified from inclusion in the jury pool but misdemeanants as qualified.²⁷⁶ Potential jurors excluded from the jury pool due to felony-conviction history may be able to successfully challenge the statute on the grounds that it arbitrarily discriminates between similarly situated individuals, i.e., those who have ever been convicted of a felony versus those who have ever been convicted of a misdemeanor. The Equal Protection Clause requires that all persons similarly situated must be treated similarly.²⁷⁷ The statute will only be sustained if the Court finds that it passes the rational-basis test, i.e., that the interest furthered is legitimate and the classification reasonably related to that interest.²⁷⁸ The interests of an inclusive jury selection system were set out by the Court in *Taylor*: guarding against arbitrary power, preserving confidence in the justice system, and sharing the civic responsibility of administering justice.²⁷⁹ Other states and the federal judiciary specifically cite probity and bias as justifications for excluding those with felony-conviction histories.²⁸⁰ A court is likely to view all these as legitimate interests.

The remaining issue is whether allowing misdemeanants to be included in the jury pool while disqualifying those with felony conviction-histories is reasonably related to these interests.²⁸¹ When

ing is that a defense attorney who strikes a white juror in hopes of seating a member of a minority is impermissibly violating the jurors' rights.

²⁷⁵ *Carter*, 396 U.S. at 329; *Johnson*, 387 F. Supp. at 149. These cases can be distinguished from a challenge to the felon jury exclusion statute in that they did not challenge a legislative act, but challenges to legislative discrimination in the jury pool are certainly permitted. See *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975); *Duren v. Missouri*, 439 U.S. 357, 367 (1979) .

²⁷⁶ N.Y. JUD. LAW § 510(3) (McKinney 2003).

²⁷⁷ Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344 (1949); see *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (“[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”).

²⁷⁸ *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

²⁷⁹ *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

²⁸⁰ See *supra* note 232 and accompanying text.

²⁸¹ Courts, when faced with similar issues in the jury context, have not given this question a thorough analysis. For example, in *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993), the District Court rejected the claim that federal jury exclusion “un-

comparing two individuals who both have criminal history records, the distinctions between a “felon” and a “misdemeanant” may be arbitrary. A person convicted of a misdemeanor and sentenced to 364 days incarceration by the court based on the violence of his crime cannot rationally be said to be more qualified to serve on a jury than a person convicted of a drug-related felony and sentenced to a rehabilitation program or another alternative to incarceration.²⁸²

Even under rational-basis review, courts are skeptical of classifying individuals by their felony-conviction histories alone.²⁸³ In *Smith v. Fussenich*,²⁸⁴ the court struck down automatic disqualification of individuals with felony histories from employment with licensed detective or security guard agencies on Equal Protection grounds using rational-basis review. That court’s reasoning could apply to New York’s felon jury exclusion statute—another automatic disqualification—as well:

The critical defect in the blanket exclusionary rule here is its overbreadth. The statute is simply not constitutionally tailored

constitutionally discriminates against convicted felons” without discussing the grounds for the claim. In *United States v. Greene*, 995 F.2d 793, 795 (8th Cir. 1993), the court dismissed a claim that federal jury exclusion for those accused of a felony was unconstitutional under rational basis review. The following arguments were made by the challenger: (1) “it is irrational to exclude persons who have merely been accused of a felony when persons actually convicted of one are eligible to serve if their civil rights have been restored”; (2) “differentiating in juror eligibility between those who have been charged but not convicted and others who have not been charged contributes nothing toward the likelihood that jurors will be of unquestionable integrity”; (3) “the exclusion of those who have been charged but not convicted tends to eliminate blacks disproportionately from juror pools. (Evidence to this effect was presented in the trial, was accepted as true by the trial court, and is evidently not seriously disputed by the government[]);” and (4) “the exclusion of persons merely accused of a felony is offensive to the presumption of innocence given to criminal defendants.” Although the *Green* court’s holding does not bolster the argument that classification of felons versus misdemeanants violates the rational relationship test under the Equal Protection Clause, its reasoning is not dispositive as to what another court will hold when faced with this argument.

²⁸² This reasoning echoes the concerns of the Citizens’ Crime Commission in 1940: “What difference does it make whether he has stolen \$99 worth of goods or \$101. In the first case he would be guilty only of a misdemeanor, in the second case of a felony.” Letter from the Citizens’ Crime Commission to the Honorable Herbert Lehman, Governor, dated Mar. 16, 1940, Bill Jacket, L. 1940, ch. 202, at 2–3. The faulty logic exposed by the Commission seems even more so given the discretion that judges have at sentencing. The classification of a crime as a felony sets the maximum possible sentence at a year or more incarceration. Judges often elect to sentence offenders to much less than the maximum sentence and often elect punishments that do not include incarceration at all such as assignment to a rehabilitation program.

²⁸³ See *infra* notes 309–14 and accompanying text.

²⁸⁴ *Smith v. Fussenich*, 440 F. Supp. 1077, 1079–80 (D. Conn. 1977).

to promote the State's interest in eliminating corruption in certain designated occupations. The legislation fails to recognize the obvious differences in the fitness and character of those persons with felony records. Felony crimes such as bigamy and income tax evasion have virtually no relevance to an individual's performance as a private detective or security guard. In addition, the enactment makes an irrational distinction between those convicted of felonies and those convicted of misdemeanors. Hence, a person is eligible for licensure even though he was convicted of a crime (larceny, false entry, inciting to riot, and riot) which may demonstrate his lack of fitness merely because that crime is classified as a misdemeanor under the Connecticut code. . . . Moreover, the statute's across-the-board disqualification fails to consider probable and realistic circumstances in a felon's life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature of the crime and degree of participation.²⁸⁵

In *Butts v. Nichols*,²⁸⁶ the court struck down a ban on city employment of any felon, reasoning that it was "totally irrational" that a person convicted of an irrelevant felony would lose his or her civil employment eligibility but a person convicted of a relevant misdemeanor would not. In *Miller v. Carter*, a statute that prohibited some individuals with criminal convictions from obtaining chauffeur licenses but not others violated the Equal Protection Clause because "distinctions among those members of the class of ex-offenders are irrational."²⁸⁷

The relationship between a person's conviction history status in the abstract and the restriction of specific rights seems spurious when courts delve into individual challengers' specific convictions and the rights that have been denied them through blanket exclusions. The U.S. District Court for the Western District of New York reversed the denial of an application to take the civil service examination because the plaintiff succeeded "in showing that there is sufficient doubt whether such a relationship exists between the standard of character needed for the job [he was testing for] and his disqualification from that position on the basis of his police record."²⁸⁸ A California court of appeals reversed the denial of a real estate license for a five-year-old conviction for distribution of a controlled substance because "any finding that plaintiff's convic-

²⁸⁵ *Id.* at 1080.

²⁸⁶ *Butts v. Nichols*, 381 F. Supp. 573, 581-82 (S.D. Iowa 1974).

²⁸⁷ *Miller v. Carter*, 547 F.2d 1314, 1316 (7th Cir. 1977), *aff'd*, 434 U.S. 356 (1978).

²⁸⁸ *Carr v. Thompson*, 384 F. Supp. 544, 548 (W.D.N.Y. 1974).

tion was substantially related to the qualifications, functions or duties of a real estate salesman or that such conviction had rendered him unfit to engage in that profession" was absent.²⁸⁹ The same court reversed the revocation of a convicted sex offender's license to sell cars under a statute that gave discretion to the DMV to revoke such a license of a person convicted of a "crime of moral turpitude" because the "conviction was of insufficient connection to the business of selling automobiles to warrant suspension or revocation of a license."²⁹⁰ The Illinois Supreme Court reversed the revocation of a sex offender's driver's license pursuant to a statutory ban despite a "strong presumption of constitutionality" for the legislative enactment because there was lack of an adequate nexus between denial of the license and government interest under Equal Protection rational-basis review.²⁹¹ All these cases are examples of courts striking collateral consequences of conviction for lack of adequate rational relationship between the restriction and the government's interest. Such a relationship seems difficult to establish.²⁹²

Blanket exclusions based on felony-conviction histories are less likely to withstand rational-basis review than those that treat each individual on a case-by-case basis.²⁹³ Blanket exclusions do withstand rational-basis review where they are tailored to correct

²⁸⁹ *Brandt v. Fox*, 153 Cal. Rptr. 683, 689 (Cal. Ct. App. 1979).

²⁹⁰ *Brewer v. Dep't of Motor Vehicles*, 155 Cal. Rptr. 643, 645 (Cal. Ct. App. 1979).

²⁹¹ *People v. Lindner*, 535 N.E.2d 829, 833 (Ill. 1989).

²⁹² If the government interests are probity and having an unbiased jury, then a lack of reasonable relationship should emerge if felony conviction history is the cause of exclusion from the jury pool. Unless the crime that the prospective juror has been convicted of actually implicates his or her truthfulness, the state will have difficulty establishing a reasonable relationship. Therefore, the exclusion might be struck down by a court even under rational basis review. *See* FED. R. EVID. 609(a)(2) ("For the purpose of attacking the character for truthfulness of a witness, evidence that the witness was convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of *dishonesty or false statement* by the witness.") (emphasis added). For all other evidence of past criminal conviction, where dishonesty or false statements were not part of the crime, the court must engage in individualized balancing to determine whether evidence of the witness's conviction should be admissible. *See id.*

²⁹³ *See, e.g., Kindem v. City of Alameda*, 502 F. Supp. 1108 (N.D. Cal. 1980) (striking down a blanket, citywide ban on public employment of ex-felons); *see also Miller v. D.C. Bd. of Appeals & Review*, 294 A.2d 365 (D.C. 1972) (striking down D.C. Board's denial of license to sell costume jewelry on public streets on basis of plaintiff's criminal history); *Hilliard v. Ferguson*, 30 F.3d 649, 652 (5th Cir. 1994) (upholding an employment policy, which required a case-by-case examination of the circumstances of each felon's conviction before hiring decisions were made, after an Equal Protection Clause challenge under rational basis scrutiny).

documented problems with criminality in certain arenas²⁹⁴ or where there is a clear link between the restricted right and the conviction.²⁹⁵ The Supreme Court upheld the absolute disqualification of felons from office in waterfront labor organizations where state and federal legislatures had recognized “a notoriously serious situation” which needed “drastic reform” and had found “impressive if mortifying evidence that the presence on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation.”²⁹⁶ Courts have recognized a clear link between a history of felony convictions and employment, like, for example, employment as a police officer after conviction for crimes generally,²⁹⁷ as well as between an arson conviction and employment as a firefighter.²⁹⁸

As a blanket ban on inclusion in the jury pool, New York’s felon jury exclusion law is similar to other blanket bans struck down by the courts.²⁹⁹ New York’s felon jury exclusion law provides no allowance for a case-by-case examination.³⁰⁰ The exclusion disregards the fact that the *voir dire* process is particularly designed to examine potential jurors on a case-by-case basis.³⁰¹ The exclusion is not tailored to correct documented problems with criminality in the jury pool. No evidence of corruption caused by the presence of individuals with felony convictions in jury pools has been suggested anywhere. There is no clear link between a felony-conviction history in the abstract and negative effects from inclusion in the jury pool of those with such histories. There might be an attenuated

²⁹⁴ See *De Veau v. Braisted*, 363 U.S. 144, 147 (1960).

²⁹⁵ See, e.g., *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988) (upholding two- and five-year exclusions against people convicted of sex or obscenity crimes from sex-related businesses); *Hill v. City of Chester*, No. CIV. A. 92-4357, 1994 WL 463405 (E.D. Pa. Aug. 26, 1994) (upholding city council’s elimination of mayor’s administrative assistant who was a rehabilitated two-time ex-offender); *Hill v. Gill*, 703 F. Supp. 1034, 1037 (D.R.I. 1989) (upholding ban on employment of ex-felons as school bus drivers).

²⁹⁶ *De Veau*, 363 U.S. at 147, 159–60.

²⁹⁷ See, e.g., *Dixon v. McMullen*, 527 F. Supp. 711, 721–22 (N.D. Tex. 1981) (upholding ban for convicted felons on employment as police officers); see also *Upshaw v. McNamara*, 435 F.2d 1188 (1st Cir. 1970) (upholding rejection of appointment as police officer based on felony history).

²⁹⁸ *Carlyle v. Sitterson*, 438 F. Supp. 956, 963 (D.N.C. 1975) (upholding discharge of fireman with previous arson conviction).

²⁹⁹ See *supra* note 257; *Smith v. Fussenich*, 440 F. Supp. 1077, 1079–80 (D. Conn. 1977); *Butts v. Nichols*, 381 F. Supp. 573, 581–82 (S.D. Iowa 1974); *Miller v. Carter*, 547 F.2d 1314, 1316 (7th Cir. 1977), *aff’d*, 434 U.S. 356 (1978).

³⁰⁰ See N.Y. JUD. LAW § 510(3) (McKinney 2003).

³⁰¹ See *supra* notes 258–59 and accompanying text.

link between a felony conviction and service on a criminal jury,³⁰² but when the civil jury pool is considered, the link appears to be severed. There is no reasonable connection between an experience with the *criminal* justice system and a tendency to be biased toward one side or the other in a civil case.

Animus toward a particular group is not a legitimate state interest, and classifications based on animus are not treated with deference under Equal Protection doctrine.³⁰³ In *City of Cleburne v. Cleburne Living Center*, the Court invalidated a zoning restriction that required a group home for the mentally retarded to obtain a special permit, reasoning that the restriction was based on stereotypes of people with mental retardation and paternalism toward the group, characterized by Justice Marshall as “a bare desire to treat the retarded as outsiders, pariahs who do not belong in the community.”³⁰⁴ To show that it had a legitimate reason for enforcing the regulation, the city council in *Cleburne* pointed to the “negative attitude” and “fears” of other residents of the community regarding people with mental retardation.³⁰⁵ The Court plainly stated that such “vague, undifferentiated fears” were not a permissible basis for the regulation.³⁰⁶

Jury-pool qualifications based upon classifying those with and without conviction histories warrant a standard of review higher than deferential rational basis because of the animus inherent in the classification itself. An analogy to *Cleburne* reveals that felon jury exclusion is based on animus alone: stereotypes of people with felony-conviction histories and paternalism toward the group underlie justifications for the exclusion, and there is a bare desire by lawmakers to treat those with conviction histories as outsiders—“pariahs who do not belong in the community.”³⁰⁷ The probity and bias arguments in support of felon jury exclusion are based on “vague, undifferentiated fears,” unsubstantiated by any actual danger to the impartiality of the judicial process created by allowing individuals with felony-conviction histories to be included in the jury pool.³⁰⁸ Courts already seem to be doing a more searching

³⁰² See *supra* notes 236–42 and accompanying text.

³⁰³ *Romer v. Evans*, 517 U.S. 620, 632 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 432 (1985); see also *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

³⁰⁴ *Cleburne*, 473 U.S. at 432; see also *id.* at 473 (Marshall, J., concurring in judgment in part and dissenting in part).

³⁰⁵ *Id.* at 448 (majority opinion).

³⁰⁶ *Id.* at 448–49.

³⁰⁷ *Id.* at 473 (Marshall, J., concurring in judgment in part and dissenting in part).

³⁰⁸ *Id.* at 448–49 (majority opinion) (“[M]ere negative attitudes, or fear, unsubstan-

inquiry when classifications by felony-conviction history are challenged.³⁰⁹ Restrictions based on felony-conviction history are already frequently struck down by the courts as violations of equal protection under rational-basis review, despite the supposed deference of this standard.³¹⁰ Where restrictions are not struck down, courts focus a lot of attention on the importance of the particular government interest at stake, again in the face of the supposed deference of rational-basis review.³¹¹

The animus behind the exclusion and the searching treatment already afforded to classification by felony-conviction history by courts nationwide suggest that at least the minimal standard of re-

tiated by factors which are properly cognizable in a [given] proceeding, are not permissible bases for treating [one group of individuals] differently from [another group of individuals].”).

³⁰⁹ See, e.g., *Lewis v. Ala. Dep't Pub. Safety*, 831 F. Supp. 824 (M.D. Ala. 1993) (striking blanket exclusion of people convicted of a misdemeanor of force, violence, or moral turpitude from the state's list of towing contractors as over- and under-inclusive under rational basis review) (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Reed v. Reed*, 404 U.S. 71 (1971)). Another indication that a less deferential inquiry is being done on challenges to felony-conviction classifications is found in the Alabama court's citations to *Moreno* and *Weber*. These are a signal that it is analyzing the exclusion of felons under scrutiny reserved for classifications based on animus or other illegitimate government interests. In *Moreno*, the Court struck down the denial of food stamp benefits for individuals living in households that included non-family members because the regulation was explicitly targeted at “hippie communes” and explained that “a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” 413 U.S. at 534 (emphasis added). In *Weber*, the Court struck down the denial of workers' compensation benefits for illegitimate children of the deceased under rational basis, acknowledged “[t]he burdens of illegitimacy,” and stated that “[t]he status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage.” 406 U.S. at 171, 175. In *Reed*, decided prior to the Court's assignment of a heightened degree of scrutiny to classifications based on gender, the Court struck down a mandatory preference for fathers over mothers as administrators of a deceased child's estate under rational basis, stating that “[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.” 404 U.S. at 76–77. Note that even *Romer v. Evans*, 517 U.S. 620 (1996), which is often cited as applying “rational basis with bite” scrutiny to a legislative act negatively targeting non-heterosexuals, was not so clear in its use of precedent. *Romer* did not cite these or any other prior rational basis-with-bite cases.

³¹⁰ See, e.g., *Smith v. Fussenich*, 440 F. Supp. 1077, 1079–80 (D. Conn. 1977).

³¹¹ See, e.g., *M & Z Cab Corp. v. City of Chicago*, 18 F. Supp. 2d 941, 947 (N.D. Ill. 1998) (upholding revocation of taxi medallions based on felony conviction “to protect those who rely on the taxicab industry from the dangers associated with convicted felons.”).

view used by the Court in *Cleburne* should be applied to felon jury exclusion—“rational basis with bite”-level scrutiny.³¹² Under this standard of judicial oversight, “simply discerning any regulatory reason, however plausible, will not serve to satisfy the rational-basis requirement. The relevant inquiry should more properly focus upon whether the means utilized to carry out a regulatory purpose substantially furthers that end.”³¹³ This standard is an elevated level of scrutiny through which courts invalidate state actions that appear “to rest on an irrational prejudice,”³¹⁴ or are drawn “for the purpose of disadvantaging the group burdened by the law.”³¹⁵

Laws that discriminate against those with felony-conviction histories may fall into one or the other impermissible category or straddle both. They are based on fears of threatening probity and bringing bias to the courtroom. They are also part of a constellation of collateral consequences of conviction that may be imposed as a lifelong punishment for once having strayed from the boundaries for behavior defined by law.³¹⁶ Felon jury exclusion, given the lack of empirical evidence for the oft-proffered justifications, certainly seems to rest on an irrational prejudice, even if it does not disadvantage those disqualified from jury service.³¹⁷

This heightened scrutiny is sufficient to support a court’s holding that excluding all those with felony-conviction histories from the jury pool is not reasonably related to a legitimate state interest. Like the cases cited above, a court will likely recognize that probity and lack of bias in the jury are legitimate interests but struggle with

³¹² See Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. Soc’y 18, 66–69 (2005) (discussing the similarities between treatment of people with disabilities (as discussed by the Court in *Cleburne*), homosexuals (as discussed by the Court in *Romer*), and people with criminal history records).

³¹³ *Lewis v. Ala. Dep’t of Pub. Safety*, 831 F. Supp. 824, 826 (M.D. Ala. 1993).

³¹⁴ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985).

³¹⁵ *Romer v. Evans*, 517 U.S. 620, 633 (1996).

³¹⁶ *Internal Exile*, *supra* note 17, at 154.

³¹⁷ It is important to acknowledge that some individuals are more than happy to be excused or even permanently disqualified from jury service, never again receiving a summons or actually showing up for jury duty, although this individual sentiment is at cross-purposes with the development of the civic life of the nation. See, e.g., Ludmilla Lelis, *Many Who Get Jury Duty Call Don’t Always Heed It*, ORLANDO SENTINEL, Apr. 20, 2009, at B1 (“Trial by jury is a civil right guaranteed by the U.S. Constitution, making jury service a civic duty.”); see also Nathan Koppel, *Excuse Me, Your Honor, the Dog Ate My Civic Duty*, WALL ST. J., Sept. 18, 2008, at A22 (stating, “a whopping 32% of people [polled] said that when they were called for jury duty, they didn’t bother to attend,” and that “[t]hose who do grace the courthouse steps still often wiggle out of their civic duty.”).

the reasonable relationship between these interests and a blanket felon jury exclusion.

3. Heightened Scrutiny for “Felons”

The third paragraph of footnote four in *United States v. Carolene Products Co.* proposed that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”³¹⁸ The Court has held that this footnote means that when applying Equal Protection analysis, strict scrutiny of a legislative classification is required when the statute operates to the particular disadvantage of a suspect class.³¹⁹ “Legislation predicated on such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law.”³²⁰

A suspect class is one with a preponderance of the following characteristics: a history of discrimination against class members;³²¹ political powerlessness of the class;³²² immutability of the characteristic for individual class members;³²³ irrelevance of the characteristic to legitimate state objectives;³²⁴ discreteness;³²⁵ and coherence of the class. The Court has also identified some classes that are “quasi-suspect” and therefore warrant scrutiny at a level between rational basis and the strict scrutiny applied to suspect classes.³²⁶

It is settled that all classifications established by the states based on race and ancestry, as well as classifications by national origin, are suspect for Equal Protection Clause purposes.³²⁷ The

³¹⁸ *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

³¹⁹ *See, e.g.*, *Regents of University of California v. Bakke*, 438 U.S. 265, 290–91 (1978); *McCleskey v. Kemp*, 481 U.S. 279, 346 (1987) (“[R]acial discrimination is fundamentally at odds with our constitutional guarantee of equal protection.”).

³²⁰ *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

³²¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

³²² *Id.*

³²³ *Plyler*, 457 U.S. at 220.

³²⁴ *Id.* at 217–18.

³²⁵ *Id.* at 230.

³²⁶ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 437–38 (1985).

³²⁷ *Johnson v. California*, 543 U.S. 499, 505–07 (2005) (illustrating that racial classifications receive strict scrutiny even in penological context); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”).

Court has also created an intermediate tier of scrutiny for quasi-suspect classes that have some, but not all, of the characteristics above; classifications based on gender and legitimacy fall into the intermediate tier.³²⁸ The visibility of a characteristic can play a role in determining what specific level of scrutiny applies because where the characteristic does not “carry an obvious badge,” the likelihood of discrimination decreases.³²⁹

The Court has not held that ex-felons constitute a suspect or quasi-suspect class under equal protection doctrine but its silence does not preclude a lower court from using an elevated level of scrutiny to examine a classification by conviction status. *Richardson v. Ramirez*,³³⁰ a challenge to disenfranchisement of those with conviction histories, is the Supreme Court case courts cite when they apply rational basis to legislative acts that classify individuals by felony-conviction-history status.³³¹ But *Richardson* is not a bar to holding that a classification by felon status is at least quasi-suspect.³³² *Richardson*'s holding was based on the conclusion that disenfranchisement of individuals with conviction histories was constitutional under Section 2 of the Fourteenth Amendment and did not conflict with Equal Protection doctrine.³³³ Section 2 creates a representational penalty for states that disenfranchise otherwise eligible voters by reducing their representation in the House of Representatives by the proportion of excluded to non-excluded voters but explicitly makes an exception for states' exclusion of persons convicted of “rebellion, or other crime.”³³⁴ In *Richardson*, the Court simply did not analyze whether those with conviction histories had the required characteristics to warrant heightened scrutiny as a class.

Whether or not they cite to *Richardson*, courts give little analysis of the appropriate level of scrutiny to use in deciding whether to uphold or strike down legislative acts that affect those with conviction histories. In *Miller v. Carter*, the district court held that a statute that prohibited some individuals with criminal convictions

³²⁸ See *United States v. Virginia*, 518 U.S. 515 (1996) (classifications based on gender); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications based on illegitimacy).

³²⁹ See *Mathews v. Lucas*, 427 U.S. 495, 506 (1976) (holding that because a child's legitimacy is not immediately apparent, only intermediate scrutiny is required for laws that discriminate based on one's parents' marital status).

³³⁰ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

³³¹ See, e.g., *United States v. Foxworth*, 599 F.2d 1, 4 (1st Cir. 1979).

³³² See *Richardson*, 418 U.S. at 78. For a detailed discussion of felony-conviction history as a class for Equal Protection purposes, see Aukerman, *supra* note 312, at 52–69.

³³³ *Richardson*, 418 U.S. at 54.

³³⁴ U.S. CONST. amend. XIV, § 2.

from obtaining chauffeur licenses but not others violated the Equal Protection Clause, but the court did not address whether a level of scrutiny higher than rational-basis review was appropriate.³³⁵ In his concurring opinion, Justice Campbell noted that people with felony-conviction histories have the attributes of a suspect class but decided that, in light of the Supreme Court's reluctance to expand the number of suspect classes, they did not constitute one.³³⁶ Other courts have upheld and struck down statutes that classify by felony-conviction-history status through a rational-basis review either with no analysis of whether such a classification warrants elevated scrutiny or with a conclusory statement in place of analysis.³³⁷ This lack of analysis is the norm in cases where the federal jury exclusion law was challenged under Equal Protection.³³⁸

³³⁵ *Miller v. Carter*, 547 F.2d 1314, 1316 (7th Cir. 1977), *aff'd*, 434 U.S. 356 (1978) (per curiam).

³³⁶ *Id.* at 1321 (Campbell, J., concurring).

³³⁷ *See, e.g.*, *Furst v. N.Y. City Transit Auth.*, 631 F. Supp. 1331, 1336–37 (E.D.N.Y. 1986) (“[E]x-felons do not constitute a suspect class”); *Baer v. City of Wauwatosa*, 716 F.2d 1117, 1125 (7th Cir. 1983) (“[F]elons are not yet a protected class under the Fourteenth Amendment”); *Upshaw v. McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970) (“[A] classification based on criminal record is not a suspect classification”); *Kindem v. City of Alameda*, 502 F. Supp. 1108, 1111 (N.D. Cal. 1980) (“[E]x-felons are not thought to constitute a suspect class”); *Hill v. Gill*, 703 F. Supp. 1034, 1037 (D.R.I. 1989) (“it is clear that the class in question (i.e. persons convicted of felonies) is not a protected one”); *Darks v. City of Cincinnati*, 745 F.2d 1040, 1042 (6th Cir. 1984) (“The parties agree that the constitutional validity of this classification must be measured by the rational basis test.”). Courts also apply rational basis scrutiny to classifications by felony-conviction history in the penological context without analysis. In *Champion v. Artuz*, the Second Circuit Court of Appeals applied rational basis review in affirming the denial of a conjugal visit by a person with a conviction history. 76 F.3d 483, 486 (2d Cir. 1996). Without discussion or citation, the Court of Appeals stated that her status did not place her in a suspect class. *Id.* It decided the case on the question of rationality and gave deference to the penological context. *Id.* One year before the *Richardson* decision, the United States District Court for the Southern District of New York also applied rational basis in the penological context when it held that differing standards for computation of good-behavior time for felons and misdemeanants were constitutional. *Jeffery v. Malcolm*, 353 F. Supp. 395, 398 (S.D.N.Y. 1973). That court reasoned that more relaxed standards for felons, who are serving longer sentences, were reasonable because they provide incentive for prisoners' cooperation with prison authorities for those who will be incarcerated for the longest period of time. *Id.* (“[T]he [s]tate may well have determined that the incentive need be greater where the sentence is longer.”). Cases decided in the penological context are not instructive of the level of analysis required in any other context because state actions in the penological context generally receive greater deference from the courts. *See Turner v. Safley*, 482 U.S. 78, 89 (1987).

³³⁸ *See, e.g.*, *United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993) (“[E]xcluding convicted felons from jury service does not violate the constitutional guarantee of equal protection. The government has a legitimate interest in protecting the probity of juries. Excluding convicted felons from jury service is rationally related to achieving that purpose.”); *United States v. Greene*, 995 F.2d 793, 795 (8th Cir.

Individuals with conviction histories are not likely to meet the standard set by *Carolene Products* and its progeny for being a suspect class, but enough of the attributes of “suspectness” may be present to add felony-conviction history to the short list of classifications that are treated as quasi-suspect and subject to intermediate judicial scrutiny.³³⁹ As discussed, there is a history of discrimination against those with felony-conviction histories; felon jury exclusion and other regulations that restrict the rights of those with conviction histories can be seen as part of this pattern and history.³⁴⁰ Significant societal disabilities derive solely from the fact that a person has a criminal record.³⁴¹ Those with conviction histories are politically powerless—in many jurisdictions they cannot vote.³⁴² A felony-conviction history, once obtained, is an immutable characteristic in that it cannot be changed, as few states provide a mechanism for expungement.³⁴³ Felon jury exclusion may reflect a tendency to continue punishing individuals after they have completed their court-imposed sentences and be further evidence of continued discrimination.³⁴⁴ Individuals with felony-conviction histories make up a discrete and coherent class. In the information age, a felony-conviction history is a highly visible characteristic, suggesting that a higher level of scrutiny is needed because discrimination based on the characteristic is more likely.

1993) (“[E]xclusion from juror eligibility of persons charged with a felony is rationally related to the legitimate governmental purpose of guaranteeing the probity of jurors”); *United States v. Foxworth*, 599 F.2d 1, 4 (1979) (finding that the federal exclusion “is rationally based, and hence is not unconstitutional”).

³³⁹ For a thorough discussion of the *Carolene* factors as they relate to those with conviction histories, see Aukerman, *supra* note 312, at 52–69; see generally Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191 (2006).

³⁴⁰ See also *Internal Exile*, *supra* note 17.

³⁴¹ *Miller v. Carter*, 547 F.2d 1314, 1321 (7th Cir. 1977) (Campbell, J., concurring).

³⁴² See OFFICE OF THE PARDON ATTORNEY, U.S. DEP’T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY, app. B (Oct. 1996), available at www.ncjrs.gov/pdffiles1/pr/195110.pdf.

³⁴³ A felony conviction is immutable only in that it can usually not be altered, but not in the sense that it is an “accident of birth.” See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). This formulation of immutability is important to the analysis of suspectness. See *Plyler v. Doe*, 457 U.S. 202, 218 n.14 (1982) (“Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”). One could argue that policing practices and the proclivities of the criminal justice system have turned the fact of living in a “high-crime” urban area into an “accident of birth.” A successful argument would weigh in favor of felony-conviction history being a suspect classification. One weakness in this argument is the reasoning in *Plyler*, dismissing undocumented persons as a suspect class because “entry into the class is itself a crime.” *Id.* at 219 n.19 (referring to crossing the border without authorization).

³⁴⁴ Demleitner, *supra* note 21.

There is no larger purpose served by maintaining a low level of judicial scrutiny for legislative acts that affect those with conviction histories as a group. In *Cleburne*, the Court reasoned that the latitude legislators require to create good policy for treating “the large and amorphous class” of the mentally retarded, which is a “a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-informed opinions of the judiciary,” prevented the classification of the mentally retarded as a quasi-suspect class.³⁴⁵ Such a classification would trigger heightened scrutiny and interfere with the difficult work of these professionals.³⁴⁶ Upon completing a sentence, an individual with a conviction history need not be “provided for” in the same way that an individual with a “mental retardation” might.³⁴⁷ No similar deference to the work of professionals needs to be given when the group at issue is individuals who have served their sentences and become reintegrated into society. By design, such individuals should be treated as regular citizens once their punishments are complete. In addition, judges, while not generally qualified professionals in the mental health field, are undoubtedly more qualified as a group to answer difficult questions in the field of criminal justice.

If a court concludes that individuals with felony-conviction histories are a quasi-suspect class, New York’s felon jury exclusion statute will need to meet an intermediate standard of review—the state must show that the law is substantially related to a sufficiently important government interest.³⁴⁸ While jury-pool purity is arguably an important interest, felon exclusion is not likely substantially related to this interest in light of other tools already available to insure an impartial jury, such as *voir dire*, challenges for cause, and peremptory challenges available to both sides.

4. Strict Scrutiny for a Fundamental Right

Where legislative classifications of individuals into groups lead to the infringement of a group’s fundamental rights, the courts apply strict scrutiny to determine whether the legislative act is constitutional under the Equal Protection Clause.³⁴⁹ If a court deter-

³⁴⁵ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–43 (1985).

³⁴⁶ *See id.*

³⁴⁷ *See id.* at 442 (“[I]t is undeniable . . . that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. . . . [Some of them] must be constantly cared for.”).

³⁴⁸ *Id.* at 441.

³⁴⁹ *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

mines that being included in a jury pool is a fundamental right, a law that infringes on that right for those classified as having been convicted of a felony but not for others will be subject to strict scrutiny.³⁵⁰ A court is unlikely to hold the law constitutional under this standard because strict-scrutiny review is difficult to satisfy. If the court determines that inclusion in the jury pool is not a fundamental right, the law will be subject to rational-basis review and is likely to stand because the standard is so easy to satisfy. It is possible, though not nearly certain, that a court will conclude that the right to have a chance to serve on a jury is fundamental.³⁵¹

While an individual's right to serve on a particular jury is limited because he or she can be struck from serving on a jury once included in the venire, having a fair chance at jury service through inclusion in the jury pool approaches being a fundamental right whose infringement must trigger the most exacting scrutiny.

The Court has called jury service "a right, a privilege, or a duty,"³⁵² one of the "basic rights of citizenship,"³⁵³ a significant opportunity to participate in civic life,³⁵⁴ and an implied constitutional right derived from "a defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community."³⁵⁵ It has not yet directly addressed the issue of whether the right to be included in a jury pool is fundamental.

Fundamental rights protected by the Due Process Clauses of the Fifth and Fourteenth Amendments include explicit rights present in the text of the Constitution and implicit rights not present in the text but nonetheless fundamental.³⁵⁶ The Supreme Court has held that "fundamental rights" include such rights implicitly protected by the Constitution as the right to privacy³⁵⁷ and the

³⁵⁰ Binnall suggests that under Equal Protection analysis, heightened scrutiny will apply if the court concludes that it classifies and infringes on a right that is "important." See Binnall, *supra* note 54, at 20–21 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 16–34 (2d ed. 1988)).

³⁵¹ The Supreme Court is generally reluctant to find the existence of new fundamental rights, "indicat[ing] that it must 'exercise the utmost care whenever [it is] asked to break new ground' to establish a fundamental right not previously recognized." Anna K. Schall, *The United States Military's "Don't Ask, Don't Tell" Policy: The Aftermath of Lawrence*, 19 KAN. J.L. & PUB. POL'Y 341, 352 (2010) (citing *Lofton v. Sec'y of the Dep't of Children and Family Servs.*, 358 F.3d 804, 816 (11th Cir. 2004) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997))).

³⁵² *Carter v. Jury Comm'n of Greene Cnty.*, 396 U.S. 320, 330 (1970).

³⁵³ *Lockhart v. McCree*, 476 U.S. 162, 176 (1986).

³⁵⁴ *Powers v. Ohio*, 499 U.S. 400, 409 (1991).

³⁵⁵ *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975).

³⁵⁶ See U.S. CONST. amend. V, cl. 3; see also *id.* amend. XIV, § 1, cl. 3.

³⁵⁷ See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

right to travel interstate.³⁵⁸ The right to vote has been described as fundamental.³⁵⁹ To determine whether an implicit right is fundamental, a court uses the *Glucksberg-Palko* standard: it looks to the history and traditions of the nation to determine if the asserted right is objectively “so rooted in the traditions and conscience of our people as to be ranked as fundamental,”³⁶⁰ and “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.”³⁶¹

The U.S. District Court for the Eastern District of Wisconsin is the only court that has addressed the question of whether the right to an opportunity to be a juror is fundamental under *Glucksberg-Palko*.³⁶² That court found historical support for the existence of juries but not for an individual’s right to have the opportunity to serve.³⁶³ It attributed its reluctance to find jury service as a fundamental right to the Supreme Court’s warning in *Glucksberg*:

[W]e have always been reluctant to expand the concept of [fundamental rights] because guideposts for responsible decision-making in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the [Fifth Amendment] be subtly transformed into the policy preferences of the members of this Court.³⁶⁴

The caution expressed by the *Glucksberg* Court may be a difficult bar to overcome, but courts should bear in mind that the Constitution explicitly references juries,³⁶⁵ whereas the right in *Glucksberg*—the right to physician-assisted suicide—was located only in the “penumbra” of implicit rights flowing from the Bill of Rights.³⁶⁶

³⁵⁸ See *Shapiro v. Thompson*, 394 U.S. 618, 629–30 (1969).

³⁵⁹ See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of democratic society . . .”); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966); see also Karlan, *supra* note 17, at 1152.

³⁶⁰ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

³⁶¹ *Id.* at 721.

³⁶² See *United States v. Conant*, 116 F. Supp. 2d 1015, 1022 (E.D. Wis. 2000).

³⁶³ *Id.*

³⁶⁴ *Id.* (internal quotations omitted).

³⁶⁵ U.S. CONST. art. III, § 2; *id.* amends. VI, VII.

³⁶⁶ See *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (outlining the breadth of guarantees provided and liberties protected by the Due Process Clause); see also *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in

A fundamental right need not be an absolute right to warrant strict scrutiny when it is limited by the actions of a legislature.³⁶⁷ Despite the fact that, in *Carter*, the Court explicitly gave the states the right to prescribe qualifications for serving on a jury that eliminate individuals from the pool,³⁶⁸ and despite a long history of juror qualifications that excluded residents of certain geographical areas,³⁶⁹ an individual's right to be in the jury pool may nonetheless be "fundamental." The fundamental rights to traveling across state lines,³⁷⁰ voting,³⁷¹ and privacy³⁷² all give way to regulation that serves compelling government interests. In light of the importance of juries to the American justice system, it may be possible—especially given empirical evidence of the effect on the public's perception of an apparently non-inclusive system's fairness³⁷³—to convince a court that the requirements of ordered liberty and the mandates of history³⁷⁴ must lead to the conclusion that inclusion in a jury pool is a fundamental right of citizens in America's democracy.

If a court concludes that the right to be included in a jury pool is fundamental, it will apply strict scrutiny when confronted with an Equal Protection challenge to New York's felon jury exclusion law to determine whether it is constitutional.³⁷⁵ Felon jury exclusion

the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”).

³⁶⁷ See, e.g., *Roe v. Wade*, 410 U.S. 113, 154 (1973) (“The privacy right . . . cannot be said to be absolute.”).

³⁶⁸ “The States remain free to confine the selection to citizens, to persons meeting specified qualifications of age and educational attainment, and to those possessing good intelligence, sound judgment, and fair character. ‘Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty.’” *Carter v. Jury Comm’n of Greene Cnty.*, 396 U.S. 320, 332–33 (1970) (internal citations omitted).

³⁶⁹ See *United States v. Conant*, 116 F. Supp. 2d 1015, 1022 (E.D. Wis. 2000).

³⁷⁰ See *Shapiro v. Thompson*, 394 U.S. 618, 634–38 (1969) (discussing residence requirement for welfare-benefit eligibility, implicating right to travel across state lines).

³⁷¹ See *Richardson v. Ramirez*, 418 U.S. 24, 41–56 (1974) (discussing restrictions on felons' right to vote).

³⁷² See *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (discussing restriction on contraceptive use in regards to right of privacy).

³⁷³ See *supra* text accompanying note 47.

³⁷⁴ See *supra* notes 62–63 and accompanying text.

³⁷⁵ See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 801, 803 (2006) (stating that the Supreme Court applies strict scrutiny to cases involving Equal Protection claims based on violations of fundamental rights).

facially classifies individuals based on whether or not they have felony-conviction histories. The “suspect,” “quasi-suspect,” or “non-suspect” nature of this classification is not relevant to an Equal Protection analysis where a fundamental right is limited for individuals in one group but not those in another.³⁷⁶ The state will need to show that the law is *narrowly tailored* to a *compelling* government interest, a higher standard than the “significant” interest required by *Duren*.³⁷⁷ The probity and bias arguments usually presented in support of contested jury exclusions are not likely to withstand such scrutiny. Even if they do, the blanket exclusion will certainly fail the narrow tailoring requirement.³⁷⁸

If the court concludes that the right to be included in the jury pool is not fundamental, New York’s jury exclusion law will need to withstand a much more relaxed level of scrutiny: the state will need to show that it is reasonably related to a legitimate government interest.³⁷⁹ Preserving probity and preventing bias in juries are certainly legitimate government interests.³⁸⁰ The result will depend on whether the court is convinced that excluding all felons from jury pools is reasonably related to that interest. The irrationality of classifying felons versus misdemeanants suggests that it is not.

5. Disparate Racial Impact in Jury Selection

Racial classifications are subject to strict scrutiny under Fourteenth Amendment Equal Protection doctrine. Felon jury exclusion has a disproportionate impact by race and is likely to be treated as a racial classification by a court. Equal protection applies with force to protect the incidents of citizenship, of which jury service is one.³⁸¹ While in most other contexts a challenger would

³⁷⁶ See Leslie Friedman Goldstein, *Between the Tiers: The New[est] Equal Protection and Bush v. Gore*, 4 U. PA. J. CONST. L. 372, 373, 374 (2002); see also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

³⁷⁷ See *Duren v. Missouri*, 439 U.S. 357, 367–68 (1979) (requiring a significant state interest, not merely rational grounds, to justify infringement of the “constitutional right to a jury drawn from a fair cross section of the community”); see generally R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225 (2002).

³⁷⁸ See *supra* notes 245–53 and accompanying text.

³⁷⁹ See *supra* notes 253–62 and accompanying text.

³⁸⁰ See *supra* notes 226–69.

³⁸¹ See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622 (1969) (invalidating property-ownership requirement to vote in school district elections); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966) (invalidating poll tax); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) (applying equal protection to grand jury service). For a history of Equal Protection doctrine in jury selection cases, see Swift, *supra* note

have to show intent in addition to impact in order to have the exclusion treated as a racial classification under the Equal Protection Clause,³⁸² discrimination in jury selection is subject to a more relaxed intent requirement that can be met by a presumption based on the magnitude of the disparity. In *Washington v. Davis*, the Supreme Court explicitly created an exception to the discriminatory intent requirement for “cases dealing with racial discrimination in the selection of juries” and explained that a showing of “racially non-neutral selection procedures” would be sufficient to make out a rebuttable prima facie case of racial discrimination.³⁸³

A year after *Davis*, the Supreme Court, in *Castaneda v. Partida*, defended relaxing the intent requirement in jury selection cases based on the special nature of jury discrimination. In *Castaneda*, a habeas corpus petitioner alleged that his indictment by a grand jury on which Mexican Americans were underrepresented violated the Fourteenth Amendment.³⁸⁴ The *Castaneda* Court reaffirmed that substantial underrepresentation of a recognizable group as a result of a selection mechanism is sufficient to create a presumption of discriminatory intent and establish a prima facie case of discriminatory purpose.³⁸⁵ The Court explained the rationale behind the relaxed test for intent in the jury context:

The idea behind the rule of exclusion is not at all complex. If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process.³⁸⁶

To make out a prima facie case using this relaxed test, a defen-

272. The Equal Protection Clause also directly protects criminal defendants from being indicted by grand juries or tried by petit juries that exclude members of their own race. *See supra* note 123. No precedent suggests that litigants do not have the same right in a civil context.

³⁸² *Washington v. Davis*, 426 U.S. 229, 239–41 (1976). Showing that felon jury exclusion intentionally classifies by race will be very difficult. The legislative history of the exclusion does not evidence any such intentional discrimination. New York’s criminalization of racial discrimination in the jury-selection context directly contradicts any claim of intentional racial discrimination by New York’s legislature. *See supra* notes 73–74 and accompanying text. Contrast this history with the Alabama constitution’s criminal disenfranchising provisions which were struck down by the Court in 1985 as a violation of Equal Protection because their original enactment was motivated by a desire to discriminate against African Americans on account of race and the provisions continued to have the intended discriminatory impact until they were revoked. *See Hunter v. Underwood*, 471 U.S. 222 (1985).

³⁸³ *Davis*, 426 U.S. at 241.

³⁸⁴ *Castaneda v. Partida*, 430 U.S. 482, 495–96 (1977).

³⁸⁵ *See id.* at 494, 495.

³⁸⁶ *Id.* at 494 n.13.

dant must meet the “rule of exclusion.” The defendant must show that a substantial underrepresentation over a significant period of time of a “recognizable, distinct class, singled out for different treatment under the laws, as written or as applied,” is the result of the procedure employed to construct the jury pool.³⁸⁷ “[A] selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing,”³⁸⁸ but is not necessary to meet the intent requirement of a claim of racial discrimination in the jury pool.³⁸⁹

Substantial underrepresentation for a significant period of time is established statistically.³⁹⁰ “The goal of such an inquiry is to determine if chance alone could account for a meager representation of minorities.”³⁹¹ Where the racial disparity created by the statutory exclusion of all those charged with felonies was not “gross”—4.1% of the population was African American while 3.996% of the jury pool was—the Seventh Circuit declined to apply heightened scrutiny.³⁹²

But where the disparity is pronounced, the substantial underrepresentation requirement is met. In *Castaneda*, where census statistics showed that the population of the county was 79.1% Mexican-American, but that, over an eleven-year period, only 39% of persons summoned for grand jury service were Mexican-American, the substantial underrepresentation prong of the presumptive intent test was met.³⁹³ In *Alston*, the Second Circuit found substantial underrepresentation where the statistically expected number of

³⁸⁷ See *id.* at 494.

³⁸⁸ *Id.*

³⁸⁹ See, e.g., *Alston v. Manson*, 791 F.2d 255, 257 (2d Cir. 1986) (applying *Castaneda* presumptive intent to state jury-selection scheme defined by statutes that assigned greater representation to rural and suburban areas than urban areas with unintended effect of decreasing representation of African Americans in jury pool; no discretionary mechanism was involved in jury selection); but see *Swift*, *supra* note 272, at 315 (describing the discriminatory intent requirement as “an exercise of discretion by a government officer coupled with a disparate impact on a disadvantaged group”). Professor Swift articulates the requirement in this narrow way but then construes the necessary exercise of discretion broadly, stating that, in *Davis*, the official who created the test which ultimately had racially differentiated results exercised “discretion.” *Id.*

³⁹⁰ See generally Peter A. Detre, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913 (1994) (comparing requirements articulated in the case law under Equal Protection and fair-cross-section analyses, discussing the flaws in the generally accepted “absolute disparity” analysis, and proposing a new measure that more accurately captures fair-cross-section concerns for use in those challenges).

³⁹¹ *Alston*, 791 F.2d at 258.

³⁹² *United States v. Barry*, 71 F.3d 1269, 1272 (7th Cir. 1995).

³⁹³ *Castaneda v. Partida*, 430 U.S. 482, 495 (1977).

African Americans in the array was 501 but actual number in light of the geographic quota system was 368 (5.96% versus 4.38%).³⁹⁴ In *Guzman*, the fact that the probability of being in the grand jury pool was reduced for Hispanics by 75% was sufficient.³⁹⁵ “[T]he probability that the disparity had occurred by chance in a random method of jury selection was less than one in one thousand.”³⁹⁶ Prior to the clear elucidation of the presumptive intent rule, the Court in *Carter* affirmed declaratory relief in the form of a requirement that the jury commission create a new list of potential jurors consistent with constitutional principles when excluded jurors challenged a jury selection mechanism that resulted in only 4% of the African American male population being included in the pool, in contrast with 50% of the white males.³⁹⁷ Substantial underrepresentation of African Americans and Hispanics in New York jury pools will be easy to show statistically.³⁹⁸

Hispanics and African Americans are cognizable groups for Equal Protection purposes. In *Guzman*, the New York Court of Appeals recognized that Hispanics are a cognizable group in the abstract for Equal Protection purposes, and then turned to expert testimony that they were actually a cognizable group in the community in question.³⁹⁹ The same inquiry would need to be conducted no matter what group’s exclusion was challenged. It will not be difficult to establish that Hispanics or African-Americans are a cognizable group in many New York communities.

The challenger will then need to show that the disparity actually results from the challenged jury construction mechanism.⁴⁰⁰ The challenged mechanism need not have a discretionary element.⁴⁰¹ In *Alston*, it was sufficient that a high proportion of Afri-

³⁹⁴ *Alston*, 791 F.2d at 258.

³⁹⁵ *People v. Guzman*, 457 N.E.2d 1143, 1149 (N.Y. 1983).

³⁹⁶ *People v. Guzman*, 454 N.Y.S. 852, 859 (App. Div. 1982) (discussing testimony of expert statistician).

³⁹⁷ *Carter v. Jury Comm’n*, 396 U.S. 320, 327, 339–40; *see also* *Whitus v. Georgia*, 385 U.S. 545, 552 (1967) (African Americans were 27.1% of tax payers but only 9.1% of jury venire); *Turner v. Fouche*, 396 U.S. 346, 359 (1970) (60% of general population, 37% of grand jury list); *Sims v. Georgia*, 389 U.S. 404, 407 (1967) (24.4% of tax list, 4.7% of grand jury list).

³⁹⁸ Although such data has not yet been compiled, representation of African Americans and Hispanics in New York jury pools will likely be a reflection of the disproportionate engagement of African Americans and Hispanics with the criminal justice system. *See supra* text accompanying notes 32–36.

³⁹⁹ *People v. Guzman*, 45 N.Y.S.2d 852, 857–58 (App. Div. 1982).

⁴⁰⁰ *See supra* note 389 and accompanying text.

⁴⁰¹ *Alston v. Manson*, 791 F.2d 255, 257 (2d Cir. 1986), *cert. denied*, 479 U.S. 1084 (1987).

can Americans lived in urban areas in the state and that the quota system, which gave less representation to urban areas, could not help but partially exclude them.⁴⁰² New York's felon jury exclusion statute is analogous to the statutory scheme in *Alston*, since it too has the effect of partially excluding African Americans and Hispanics. In *Alston*, those excluded had chosen to live in urban areas.⁴⁰³ In the case of New York's felon jury exclusion statute, the effect of the law is to exclude individuals who have had a particular type of contact with the criminal justice system. In both cases, a facially neutral statute designed to regulate jury construction has a grossly disparate racial impact by diluting participation of racial minorities.⁴⁰⁴ Based on *Alston's* reasoning, it is not relevant that the effect of the felon jury exclusion statute did not originate with the exclusion of felons from the jury pool but rather with the conviction of those in the excluded population.⁴⁰⁵ This argument was not relevant in *Alston* and should be easily dismissed in the case of felon jury exclusion.

A challenger to New York's felon jury exclusion statute should be able to make out a prima facie case of presumptive discriminatory intent based on the gross racial disparity created by the exclusion of all those with felony-conviction histories from the jury pool for life.⁴⁰⁶ Once a challenger establishes a prima facie case based on the exclusion, the state may rebut the presumption of discriminatory intent.⁴⁰⁷

The rebuttal must demonstrate not the mere absence of discriminatory motivation but rather that "permissible racially neutral selection criteria and procedures have produced the monochromatic result."⁴⁰⁸ In *Guzman*, evidence that the disparity resulted from voluntary actions by those Hispanics summoned for jury service was a sufficient rebuttal (i.e., requesting exemptions to care for children or due to lack of English proficiency, not replying to

⁴⁰² *Id.*

⁴⁰³ See *Alston v. Lopes*, 621 F. Supp. 992, 995 (D. Conn. 1985), *aff'd sub nom. Alston v. Manson*, 791 F.2d 255, 257 (2d Cir. 1986), *cert. denied*, 479 U.S. 1084 (1987).

⁴⁰⁴ *Id.* at 996 ("[T]he statute operates directly to exclude Blacks from the jury array.").

⁴⁰⁵ As was true of the statutory scheme in *Alston*—that the effect originated in African Americans' decisions to live in urban areas—the effect of New York's statute similarly originates in decisions made by the excluded group, specifically felons' decisions to break the law. See *id.*

⁴⁰⁶ See *supra* text accompanying notes 35–44; see also Bob Herbert, *Watching Certain People*, N.Y. TIMES (Mar. 2, 2010), at A23 (discussing the discriminatory imposition of New York City's stop-and-frisk policy).

⁴⁰⁷ *Alston v. Manson*, 791 F.2d 255, 257 (2d Cir. 1986).

⁴⁰⁸ *Id.*

the summons).⁴⁰⁹ The acts in *Guzman* all occurred after the individuals were summoned for jury service and relate directly to that service. An inadvertent computer error that excluded all residents of particular geographic regions with the effect of disproportionately excluding minorities was a sufficient rebuttal: the Second Circuit distinguished the computer error from the exclusions in *Alston* and *Castaneda* because it was a “series of mishaps and botches,” not a “considered government policy.”⁴¹⁰

But simply describing jury pool construction procedures in a neutral way is insufficient. In *Alston*, where the state did not address the effect of the challenged statute, which the court recognized directly excluded African Americans, but instead argued that any disparate treatment on the jury array is due solely to the use of voter registration lists in selecting jurors, the rebuttal was unsuccessful.⁴¹¹ Testimony by the state that the governing majority of the county was of the same race as those statistically excluded from the jury pool was also insufficient,⁴¹² as was testimony, without more, from selection officials that they acted without a discriminatory motive.⁴¹³

New York is not likely to be able to demonstrate that permissible racially neutral selection criteria and procedures produce the racial disparities in New York’s jury pool caused by felon jury exclusion. Although there is arguably a voluntary component to acquiring a felony-conviction history, it is distinguishable from the voluntary acts in *Guzman*—the likelihood of contact with the criminal justice system does not apply to any person “regardless of his or her race, sex or ethnicity,” the standard at work in *Guzman*.⁴¹⁴ Having a felony-conviction history is more like choosing where to live (as in *Alston*) or the type of work to engage in (as in *Thiel*); where one lives, what one does for a living, and an individual’s personal history, including a history of felony conviction, are all rather in-

⁴⁰⁹ See *People v. Guzman*, 457 N.E.2d 1143, 1147 (N.Y. 1983).

⁴¹⁰ *Ricketts v. City of Hartford*, 74 F.3d 1397, 1409 n.4 (2d. Cir. 1996).

⁴¹¹ *Alston v. Lopes*, 621 F. Supp. 992, 997–98 (D. Conn. 1985), *aff’d sub nom Alston v. Manson*, 791 F.2d 255 (2d Cir. 1986), *cert. denied*, 479 U.S. 1084 (1987).

⁴¹² *Castaneda v. Partida*, 430 U.S. 482, 499 (1977).

⁴¹³ *Id.* at 498 n.19.

⁴¹⁴ See *People v. Guzman*, 457 N.E.2d 1143, 1147 (N.Y. 1983) (“The fact that a much lower percentage of Hispanics responded to the summonses was not caused by the system and cannot be considered an inherent defect in the process. Hispanics also were disqualified and exempted from service in a greater percentage than non-Hispanics. The reasons—English literacy difficulties and responsibility for children—for these actions would apply to any person regardless of his or her race, sex, or ethnicity.”).

trinsic *characteristics* of individuals. They are not responses to receiving a jury summons like the acts used to rebut the presumption of discriminatory intent in *Guzman*.⁴¹⁵ If these are “acts” at all, they are not sufficiently voluntary to rebut the prima facie case of racial discrimination stemming from a systematic exclusion of a racial group from the jury pool. The state will likewise not be able to analogize to the computer error in *Ricketts*—felon jury exclusion is not a “series of mishaps and botches” but is a “considered government policy.”⁴¹⁶ New York’s rebuttal is likely to be insufficient.

The Court has not made clear whether an unrebutted *Castaneda* prima facie case is the end of an Equal Protection inquiry into systemic exclusion of a racial group from the jury pool or whether it simply establishes the intent required for strict scrutiny to apply.⁴¹⁷ The Second Circuit in *Alston* held that an unrebutted prima facie case of presumptive discrimination was a violation of the Equal Protection Clause without any further analysis.⁴¹⁸ In *Biaggi*, the court followed *Alston*.⁴¹⁹ If a court acknowledges a prima facie case and the state does not present a compelling rebuttal, a court in the Second Circuit, following *Alston* and *Biaggi*, will most likely directly conclude that a violation of Equal Protection has been established. A court might take an extra step and apply strict scrutiny to New York’s felon jury exclusion statute, but the arguments usually presented in support of such a statute are not likely to withstand such an exacting inquiry.⁴²⁰

C. Due Process

A litigant’s due process rights under either the Fifth or the Fourteenth Amendment are violated when there is an appearance of bias in the courtroom.⁴²¹ “[D]iscrimination in the selection of

⁴¹⁵ *Id.*

⁴¹⁶ See *supra* text accompanying note 410; see also N.Y. JUD. LAW § 510 (McKinney 2003).

⁴¹⁷ See *United States v. Biaggi*, 909 F.2d 662, 677 n.4 (2d Cir. 1990); see also, e.g., *Ricketts v. Hartford*, 74 F.3d 1397, 1407–08 (2d Cir. 1996) (discussing exclusion of minority jurors in a civil case).

⁴¹⁸ *Alston v. Manson*, 791 F.2d 255, 256–57 (2d Cir. 1986).

⁴¹⁹ *Biaggi*, 909 F.2d at 677 n.4 (expressing reservations about the Supreme Court’s intention for the *Castaneda* test on a different issue).

⁴²⁰ See *supra* Part III.A.3.

⁴²¹ See Joshua M. Segal, *The Satisfying “Appearance of Justice”: The Uses of Apparent Impropriety in Constitutional Adjudication*, 117 HARV. L. REV. 2708, 2722–24 (2004) (discussing the value of perceived bias in creating an injury-in-fact for purposes of standing required under Article III). The appearance of bias seems clearly sufficient to make out a due process violation when the issue is the appearance of a judge’s bias. “[T]he appearance of evenhanded justice . . . is at the core of due process.” Mayberry

jurors ‘casts doubt on the integrity of the judicial process’ and places the fairness of a criminal proceeding in doubt.”⁴²² Empirical evidence supports this assertion.⁴²³ In *Peters*, the appearance of bias created by a jury constructed through an illegal discriminatory mechanism was sufficient to make out a due process violation in the opinion of three Justices.⁴²⁴ Three other Justices found other violations sufficient to invalidate the proceedings without relying on due process.⁴²⁵ Since *Peters*, the Court has clearly stated that the extent of due process protections applicable to jury selection is an open issue, at least in the context of selecting members of a grand jury:

We need not explore the nature and extent of a defendant’s due process rights when he alleges discriminatory selection of grand jurors . . . That issue, to the extent it is still open based upon our earlier precedents, should be determined on the merits, assuming a court finds it necessary to reach the point.⁴²⁶

Although there are no New York cases where a court found a due process violation based on an illegally constructed jury, the District Court for the Eastern District of New York has explained that, “[t]o make out a prima facie claim that a jury’s composition violated a defendant’s due process rights, the defendant has the burden of showing that the process used to select the jury pool systematically excluded a substantial and identifiable segment of the community.”⁴²⁷ It will not be difficult to demonstrate that there is such an appearance as a result of statutory felon jury exclusion and its racially skewed effects.

IV. CONCLUSION

New York excludes all individuals who have ever been convicted of a felony from its jury pool except in the most extraordi-

v. Pennsylvania, 400 U.S. 455, 469 (1971) (Harlan, J., concurring) (addressing appearance of bias by a judge). Even decisionmakers who in fact have no actual bias must be disqualified if there might be an appearance of bias. *See id.* at 465 (majority opinion).

⁴²² *Powers v. Ohio*, 499 U.S. 400, 411 (1991) (quoting *Rose v. Mitchell*, 443 U.S. 545, 556 (1979)).

⁴²³ *See Austin*, *supra* notes 47–52 and accompanying text.

⁴²⁴ *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (plurality) (relying on due process).

⁴²⁵ *Id.* at 506–07 (Brennan, Powell, White, JJ., concurring in the judgment) (deciding on grounds other than due process).

⁴²⁶ *Campbell v. Louisiana*, 523 U.S. 392, 400–01 (1998).

⁴²⁷ *Ballard v. Walker*, 772 F. Supp. 1335, 1342 (E.D.N.Y. 1991) (quoting *People v. Guzman*, 457 N.E.2d 1143, 1146 (N.Y. 1983), citing *Peters*, 407 U.S. at 503, *Duren v. Missouri*, 439 U.S. 357, 364 (1979), *cert. denied*, 466 U.S. 951 (1984)).

nary circumstances.⁴²⁸ This practice undermines the representativeness of juries, their inclusiveness, and public confidence in the courts. It also compromises individual constitutional rights. Despite the inclusion of those with felony-conviction histories in the jury pools of nearly half of U.S. jurisdictions, the effectiveness of those judicial systems has not been compromised. The mechanisms for insuring that juries are competent and unbiased—*voir dire*, peremptory challenges, and challenges for cause—all work in those jurisdictions without alienating a segment of the populations from the mechanisms of civic participation. The citizens of New York deserve no less.

⁴²⁸ N.Y. JUD. LAW § 510(3) (McKinney 2003); *supra* note 3 and accompanying text.

