

BANNED FROM THE JURY BOX: EXAMINING THE  
JUSTIFICATIONS AND REPERCUSSIONS OF FELON JURY  
EXCLUSION IN THE DISTRICT OF COLUMBIA

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INTRODUCTION

“The most heartrending deprivation of all is the inequality of status that excludes people from full membership in the community, degrading them by labeling them as outsiders, denying them their very selves.”<sup>1</sup> Felon exclusion from the jury box has been minimally studied, and the laws mandating it have remained mostly static.<sup>2</sup> Meanwhile, a robust catalogue of scholarship has been dedicated to discussing felon exclusion from the ballot box (felon disenfranchisement)<sup>3</sup> as well as the other political, social, and economic deprivations felons experience post-conviction (collateral consequences).<sup>4</sup> With the advent of progressive legislation seeking to further expand felon voting rights,<sup>5</sup> the District of Columbia must consider eliminating its ten-year per se ban of felons from

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<sup>1</sup> KENNETH L. KARST, *BELONGING TO AMERICA—EQUAL CITIZENSHIP AND THE CONSTITUTION* 4 (1989).

<sup>2</sup> *But see* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 65–67 (2003) (providing, among other things, an encyclopedia-like aggregation of the constitutionality of felon jury exclusion, the policy considerations used to justify it, and suggested approaches for the future).

<sup>3</sup> *See, e.g.*, Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1149–59 (1994) (discussing the statistical evidence proving felon disenfranchisement’s negative impact on the black vote); Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 173 (2001) (arguing against felon voting rights).

<sup>4</sup> *See, e.g.*, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 404–05 (1967) (noting the numerous types of civil disabilities affecting felons); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 154 (1999) (“Ultimately, exclusions from the political, economic and social spheres of life undermine the notion that offenders can ever be successfully rehabilitated. In conjunction with the exponential increase in the number and length of incarcerative sentences during the last two decades, collateral sentencing consequences have contributed to exiling ex-offenders within their country, even after expiration of their maximum sentences.”).

<sup>5</sup> *See* Kalt, *supra* note 2, at 188; Martin Auster Muhle, *Incarcerated Felons Could Be Allowed to Vote in Bill Moving Through D.C. Council*, NPR (Oct. 10, 2019), <https://www.npr.org/local/305/2019/10/10/769086866/incarcerated-felons-could-be-allowed-to-vote-in-bill-moving-through-d-c-council> (discussing pending legislation that would expand felon voting rights in DC to permit felons the right to vote while incarcerated).

serving on juries.<sup>6</sup> The prevailing justifications for excluding felons from juries—that felons harbor an inherent anti-government bias and lack probity—are misguided and unresolved by a per se ban, even if doing so is constitutional<sup>7</sup> and within a court’s authority.<sup>8</sup>

Part I of this piece will discuss the purpose of the American jury, and Part II will analyze the effects of overcriminalization and the historically unequal enforcement of criminal law. Part III will introduce and critique the general justifications for felon jury exclusion. Finally, Part IV will argue that felon jury exclusion can ultimately delegitimize the democratic rule of law. Decisions of justice made in the absence of input from a significant portion of the community can hardly be deemed democratic. Meanwhile, individuals with already weak ties to their communities may doubt the legitimacy of a system that demands obedience yet excludes them from participation.

## I. THE PURPOSE OF THE AMERICAN JURY

The Anglo-American jury system can be traced back to the Magna Carta.<sup>9</sup> Juries were used as a mechanism to preclude the King from “punishing anyone unless the individual had been judged by a jury of his peers.”<sup>10</sup> Juries reflected ideals of self-government because they allowed citizens to feel included in the process of determining the community’s moral sense and the outcome of local affairs, thereby “nourish[ing] loyalty” to the community’s legal system.<sup>11</sup>

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<sup>6</sup> See D.C. CODE § 11-1906(b)(2)(B) (2019) (disqualifying felons from jury service for “not less than one year after the completion of the term of incarceration, probation, or parole”); § 11-1904(a) (delegating power to promulgate a specific jury plan to the Board of Judges of the Superior Court); JURY PLAN FOR THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA § 7 (2013) (requalifying felons for jury service “ten (10) years since the completion of the juror’s incarceration, probation, supervised release or parole”).

<sup>7</sup> See Kalt, *supra* note 2, at 71 (suggesting the “constitutionality of felon exclusion speaks more to deficiencies in the legal standard than to the appropriateness of felon exclusion”).

<sup>8</sup> See *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (reasoning that “states remain free to prescribe relevant qualifications for their jurors”); *Carle v. United States*, 705 A.2d 682, 684–85 (D.C. 1998) (upholding the Board of Judges’s ten-year exclusion of convicted felons under the Jury Plan pursuant to § 11-1906(b)(2)(B)).

<sup>9</sup> See Amanda L. 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, 2112 (2005).

<sup>10</sup> *Id.*

<sup>11</sup> See J.R. Pole, “*A Quest of Thoughts*”: Representation and Moral Agency in the Early Anglo-American Jury, in “THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND”: THE JURY IN THE HISTORY OF THE COMMON LAW 101, 102 (John W. Cairns & Grant McLeod eds., 2002).

As America's legal system has evolved, so too has the American jury with the inclusion of women and minorities.<sup>12</sup> The expansion of the American jury represented the Supreme Court's belief that properly assembled juries certified the fairness of judicial outcomes.<sup>13</sup> The Supreme Court opined that the goal of the jury system was "to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal [was] given in accordance with the law by persons who [were] fair."<sup>14</sup> Thus, the jury becomes the mechanism through which "we place the decisions of justice where they rightly belong in a democratic society: in the hands of the governed."<sup>15</sup> Justice Breyer referred to this idea as "active liberty," noting that "the people themselves should participate in government," and "participation is most forceful when it is direct."<sup>16</sup> In short, the jury system was meant to be a key vehicle of direct democratic participation in the application of the law.

## II. OVERCRIMINALIZATION AND UNEQUAL APPLICATION OF THE LAW

Felon jury exclusion is yet another blow to the black community that flows from overcriminalization and the unequal application of the expanded criminal code. Like many collateral consequences associated with a felony conviction, felon jury exclusion exacerbates the alienation of felons from their communities.<sup>17</sup> Furthermore, felon jury exclusion has a particularly detrimental impact on the black community, especially black males. As Professor Mitchell argues, "[w]ith the increasing number of African-American males convicted of felonies, the issue is not proportional representation, but the lack of a viable pool from which to draw jury members . . . ."<sup>18</sup>

The historical increase in arrests, convictions of felonies, and imprisonment during the late twentieth century has been well-

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<sup>12</sup> See Kutz, *supra* note 9, at 2114–18 (noting that women gained the right to serve on a jury in the early twentieth century and distinguishing de jure from de facto exclusion of African-Americans).

<sup>13</sup> See *Georgia v. McCollum*, 505 U.S. 42, 49 ("Selection procedures that purposefully exclude African-Americans from juries undermine . . . public confidence—as well they should.").

<sup>14</sup> *Powers v. Ohio*, 499 U.S. 400, 413 (1991).

<sup>15</sup> William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 69–70 (2006).

<sup>16</sup> STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 15 (2005).

<sup>17</sup> See Margaret Colgate Love & Gabriel J. Chin, *Old Wine in a New Skin: The ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, 16 FED. SENT'G REP. 232, 232 (2004) (noting collateral sanctions perpetuate offenders' "alienation from the community").

<sup>18</sup> S. David Mitchell, *Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community*, 34 FORDHAM URB. L.J. 833, 858 (2007).

documented<sup>19</sup> and has resulted in an increase in post-conviction sanctions.<sup>20</sup> Studies estimate there are over 4,500 congressionally imposed, substantive criminal statutes that “cover broad swaths of conduct” and frequently “impose decades of imprisonment on criminal defendants.”<sup>21</sup> Many scholars point to this statistic as emblematic of the overcriminalization problem.<sup>22</sup> Others frame overcriminalization as a qualitative rather than a quantitative problem, arguing that courts actively contribute by expansively construing poorly defined crimes.<sup>23</sup> Finally, some scholars argue that overcriminalization results from the mutually reinforcing incentives of legislators and prosecutors to create and implement overly broad laws that grant extensive prosecutorial discretion in their enforcement.<sup>24</sup> Regardless of which theory undergirds the root cause of the problem, overcriminalization manifests itself in race-based enforcement.<sup>25</sup>

The detrimental effects of overcriminalization on discrete demographic groups is evident in the District of Columbia. DC has a significant incarceration problem, with an incarceration rate anywhere from the fifth highest to the highest in the nation.<sup>26</sup> The DC Department

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<sup>19</sup> See, e.g., Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 600–01 (2016) (discussing how the War on Drugs primarily contributed to the “exponential increase in the U.S. incarcerated population” between 1972 and 2010); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 706 (noting the excessively punitive federal criminal law of the twenty-first century).

<sup>20</sup> See Demleitner, *supra* note 4, at 155.

<sup>21</sup> Hopwood, *supra* note 19, at 699.

<sup>22</sup> See, e.g., *id.* at 703 (“In the 1980s, the Department of Justice estimated that about 3000 federal crimes existed. More recently, studies have appraised that Congress has created over 4500 criminal statutes.”) (citations omitted).

<sup>23</sup> See generally Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 540 (2012) (emphasizing “overcriminalization has *qualitative* dimensions” in addition to the “better-known quantitative aspects”).

<sup>24</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 528 (2001) (emphasizing that “[c]riminal law is not just the product of politics; it is the product of a political *system* . . . by which power over the law and its application is dispersed among a set of actors with varying degrees of political accountability” and “certain baseline incentives”).

<sup>25</sup> See, e.g., Paul D. Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 911 (1997) (“African-Americans comprise more than 50 percent of the people in prison in the United States, even though they are only 12 percent of the country's population.”); David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 298–300 (1999) (detailing the deep cynicism among blacks toward the criminal justice system that results from racially targeted traffic stops); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 262–68 (2004) (noting the dramatic increase in incarceration rates of blacks resulting from the War on Drugs as well as the comparatively longer sentences of black offenders).

<sup>26</sup> Compare Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> (ranking DC first), with The Sentencing Project, *Fact: DC Has a Mass Incarceration Problem*, SENT’G PROJECT,

of Corrections reports that 88.2 percent of male inmates and 81.3 percent of female inmates are black.<sup>27</sup> These figures starkly contrast the DC population, which is only 47.7 percent black.<sup>28</sup> Moreover, about half of women and the majority of men incarcerated in DC are pretrial or sentenced felons and, thus, are or likely will be affected by DC's per se felon jury exclusion.<sup>29</sup> These numbers demonstrate how the unequal application of an expansive criminal code on the black community in DC will result in disproportional exclusion of the black community from serving on juries. Given its vast impact on such a discrete group, the question must be asked: Is felon jury exclusion justified?

### III. DEBUNKING THE JUSTIFICATIONS FOR FELON JURY EXCLUSION

The primary justifications for excluding felons from jury service are to avoid bias against the government and to preserve the probity of the jury. However, “[n]o current research supports the notion that the prospective felon-juror population is more biased against the government or lacks probity to a greater degree than their non-felon-juror counterparts.”<sup>30</sup> Even if these justifications were legitimate, the voir dire process is probably just as effective of a screening mechanism for felon jurors as it is for non-felon jurors.

#### A. *Inherent Bias*

The justification for excluding felons on the basis of inherent bias asserts that felons will likely be biased against the government and unfairly sympathetic towards criminal defendants.<sup>31</sup> Although this may be true in *some* cases, per se exclusion of *all* felons from juries on the basis of inherent bias is largely unjustified.

First, the inherent bias justification that suggests felons will harbor anti-government animus and unfairly bias the prosecution is inapplicable in civil cases where the government is not a party, yet felons are equally excluded from civil and criminal cases in most jurisdictions and in DC.<sup>32</sup>

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[https://sentencingproject.salsalabs.org/dc\\_mass\\_incarceration?wvpId=f09d0080-b9c5-11e7-b163-12c35146c141](https://sentencingproject.salsalabs.org/dc_mass_incarceration?wvpId=f09d0080-b9c5-11e7-b163-12c35146c141) (last visited Oct. 14, 2019) (ranking DC in the top five).

<sup>27</sup> D.C. DEP'T OF CORR., DC DEPARTMENT OF CORRECTIONS FACTS AND FIGURES 5 (July 2019),

[https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DC\\_Department\\_of\\_Corrections\\_Facts\\_and\\_Figures\\_July\\_2019.pdf](https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DC_Department_of_Corrections_Facts_and_Figures_July_2019.pdf).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* (reporting 62.4 percent of men and 49.6 percent of women are pretrial or sentenced felons).

<sup>30</sup> 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, 16–17 (2009).

<sup>31</sup> See Kalt, *supra* note 2, at 105.

<sup>32</sup> *Id.* at 105 n.194; D.C. CODE § 11-1906(b)(2)(B) (2019) (disqualifying felons from jury service for “not less than one year after the completion of the term of incarceration,

That is, felons are excluded even when the government is not a party to the litigation.

Second, courts must recognize that many other groups also have strong biases, such as crime victims and their relatives or police officers and their relatives.<sup>33</sup> Non-felons' biases are subject to an individualized assessment through the voir dire process, rather than exclusion en masse. Some scholars argue that impartiality occurs "when group differences are not eliminated but rather invited, embraced, and fairly represented."<sup>34</sup> With felon exclusion, however, permitting biased non-felons to serve on a jury while per se excluding potentially biased felons suggests that the voir dire process merely privileges some biases over others.

### B. *Probity*

The exclusion of felons on the basis of probity asserts that felons lack "moral excellence, integrity, rectitude, uprightness; conscientiousness, honesty, [and] sincerity" evidenced by their willingness to break the law.<sup>35</sup> However, this justification is suspect for numerous reasons.

First, the probity justification is based on the idea that "flawed character is static, irremediable, and predictive of future behavior."<sup>36</sup> However, this contradicts the DC bar's presumptive disqualification approach used to assess the morality and character of a felonious bar applicant.<sup>37</sup> By adhering to a presumptive disqualification standard, the DC bar employs a case-by-case method to determine whether a convicted felon possesses the requisite moral character and fitness to become a lawyer. Conversely, the DC Code and the enabling *Jury Plan for the Superior Court of the District of Columbia* adopt a per se disqualification of felons from jury service during and ten years after incarceration, probation, supervised release, or parole.<sup>38</sup> DC courts should consider why individualized assessment of probity is sufficient for determining a

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probation, or parole"); § 11-1904(a) (delegating power to promulgate a specific jury plan to the Board of Judges of the Superior Court); JURY PLAN FOR THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA § 7 (2013) (requalifying felons for jury service "ten (10) years since the completion of the juror's incarceration, probation, supervised release or parole").

<sup>33</sup> See Kalt, *supra* note 2, at 105–06.

<sup>34</sup> JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 101 (1994).

<sup>35</sup> *Probity*, 12 OXFORD ENGLISH DICTIONARY 540 (2d ed. 1989).

<sup>36</sup> James M. Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73 ALB. L. REV. 1379, 1396–97 (2010).

<sup>37</sup> See *id.* at 1437; NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 5 (2019) (Judith A. Gundersen & Claire J. Guback eds., 2019), <http://www.ncbex.org/assets/BarAdmissionGuide/NCBE-CompGuide-2019.pdf>.

<sup>38</sup> See COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, *supra* note 37, at 5; D.C. CODE § 11-1906(b)(2)(B) (2019); JURY PLAN FOR THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA § 7 (2013).

felon's probity to *practice* law whereas it is insufficient to assess a felon's probity in *helping adjudicate* the law as a juror.

Second, the probity justification is under- and over-inclusive.<sup>39</sup> Basing jury exclusion on people's criminal status or title may not be an accurate reflection of the probity they possess. Some felonious individuals are just as honest and sincere—if not more—as some non-felonious individuals, and some non-felonious individuals are just as dishonest and insincere—if not more—as some felonious individuals.<sup>40</sup> In other words, someone's status as a non-felon may merely indicate that they are beneficiaries of "limited police resources and prosecutorial discretion," not that they are generally honest and morally excellent.<sup>41</sup> If our criminal justice system has faith in the voir dire process to exclude dishonest non-felons from the venire on an individualized basis, it is unclear why this winnowing process would not be equally as effective as applied to purportedly dishonest felons.<sup>42</sup>

#### IV. EXCLUSION AND THE LEGITIMACY OF THE DEMOCRATIC RULE OF LAW

The disproportionate impact of felon jury exclusion on black males in DC belies the democratic legitimacy of juries as adjudicative bodies representing the totality of the DC community. Further, by marginalizing felons from juries, felons may individually doubt the law's fairness and legitimacy because they lack the opportunity to participate in self-government. A justice system that is representative and impartial is more likely to be perceived as fair.<sup>43</sup> When citizens view the system as fair, they are more likely to view the rule of law as legitimate and more likely to voluntarily comply.<sup>44</sup>

It is estimated that more than 16 million felons and ex-felons represent 7.5 percent of the adult population, 22.3 percent of the black adult population, and an astounding 33.4 percent of the black, adult male population in the United States.<sup>45</sup> Simply extrapolating these figures to DC, it becomes clear that excluding felons from jury service likely marginalizes a *significant* portion of DC's population. In doing so, a large,

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<sup>39</sup> See Kalt, *supra* note 2, at 102.

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

<sup>41</sup> *Id.* at 103 (noting that over 40 percent of adults in America have used illegal drugs).

<sup>42</sup> *Id.*

<sup>43</sup> See Binnall, *supra* note 30, at 40–41.

<sup>44</sup> See *id.* (arguing "authorities should govern based upon the consent of those they govern, consent that develops from the experience of fairness when dealing with authorities" because "fairness leads to legitimacy, a key precursor of consent and voluntary acceptance" (quoting TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 277 (2006)).

<sup>45</sup> See Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, *ANNALS AM. ACAD. POL. & SOC. SCI.* 281, 283 (2006).

identifiable portion of DC’s community is not involved in making decisions of justice. As Judge Irving Kaufman wrote,

[T]here can be no universal respect for law unless all Americans feel that it is their law—that they have a stake in making it work. When large classes of people are denied a role in the legal process—even if that denial is wholly unintentional or inadvertent—there is bound to be a sense of alienation from the legal order.<sup>46</sup>

With potentially over one-third of black, adult males excluded from the jury box, the decisions of justice can hardly be deemed democratic because they only represent the self-government of a portion of the DC community.<sup>47</sup> Further, the fairness and legitimacy of the law from the individual felon’s perspective could be tainted by felon jury exclusion. By per se denying felons the opportunity to serve on a jury, they are denied the opportunity to foster a relationship with the state through participation in its authoritative regime—instead they are merely subject to it.<sup>48</sup> Indeed, it is difficult to imagine how felons view the law as belonging to them at all.<sup>49</sup> If participation begets fairness, fairness begets legitimacy, and legitimacy begets voluntary compliance, excluding felons from the jury box undermines the legitimacy of the rule of law and discourages compliance.

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<sup>46</sup> Irving R. Kaufman, *A Fair Jury—The Essence of Justice*, 51 JUDICATURE 88, 91 (1967).

<sup>47</sup> See D.C. DEP’T OF CORR., *supra* note 27, at 5; Binnall, *supra* note 30, at 2 (“As was the case when legal constructs routinely prevented women and racial minorities from serving on juries, legislative measures that make felons ineligible for jury service damage our collective society by creating a class of outsiders, forced to watch democracy move forward with only limited opportunities to influence its direction.”).

<sup>48</sup> See James M. Binnall, *Felon-Jurors in Vacationland: A Field Study of Transformative Civic Engagement in Maine*, 71 ME. L. REV. 71, 88–96 (2018) (detailing a study that found Maine’s lack of felon exclusion promoted criminal distancing by helping felons develop a pro-social self-concept, accept pro-social roles, and reintegrate in a way that triggered wholehearted community investment); Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 59–61 (1994) (“The jury’s . . . responsibility . . . extends beyond its principal duty of resolving the dispute for individuals in a particular case.”).

<sup>49</sup> Young, *supra* note 15, at 71 (“Like all government institutions, our courts draw their authority from the will of the people to be governed. The law that emerges from these courts provides the threads from which our freedom is woven. Yet while liberty flourishes through the rule of law, ‘there can be no universal respect for law unless all Americans feel’ the law is theirs. Through the jury, the citizenry partakes in the execution of the nation’s laws and, in that way, each citizen can claim rightly that the law belongs partly to him or her.” (quoting Kaufman, *supra* note 46, at 91)).

## CONCLUSION

In essence, felon jury exclusion is a policy that marginalizes felons from their communities and “impedes the ability of felons to transition back into society” because “they are denied a stake in what happens in their communities.”<sup>50</sup> DC courts should eliminate the current per se exclusion that bars felons from jury service during and ten years after their incarceration, probation, supervised release, or parole. Instead, the courts should consider other narrower alternatives, such as those rooted in an individualized assessment rather than a per se exclusion.<sup>51</sup> Specifically, the voir dire process’s individualized assessment of bias and probity can combat the problem of under- and over-inclusion in the venire that occurs as a result of per se exclusion.<sup>52</sup> An individualized approach would be consistent with DC’s current individualized assessment for determining the moral character and fitness of aspiring felonious lawyers. Such a solution would promote a representative jury where felons feel engaged and responsible for the administration of justice, even if they are ultimately not selected to serve.

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<sup>50</sup> Kutz, *supra* note 9, at 2135.

<sup>51</sup> The ABA suggests only excluding felons who are in actual confinement or on probation, parole, or other court supervision. AM. BAR ASS’N, PRINCIPLES FOR JURIES AND JURY TRIALS: AMERICAN JURY PROJECT 4 (2005), [https://www.americanbar.org/content/dam/aba/administrative/american\\_jury/principles\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/american_jury/principles_authcheckdam.pdf).

<sup>52</sup> See Binnall, *supra* note 30, at 33 (“To condemn the use of voir dire in determining a felon’s characteristics based on the idea of personalized government is to condemn voir dire as a mechanism generally.”).