ARTICLES

CONVICTS IN COURT: FELONIOUS LAWYERS MAKE A CASE FOR INCLUDING CONVICTED FELONS IN THE JURY POOL

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I. INTRODUCTION

Currently, in twenty-nine states and the federal court system, a convicted felon can practice law, but cannot serve on a jury.[1] In these jurisdictions, bar examiners conduct individualized evaluations of all aspiring attorneys, providing bar applicants with a felonious criminal history the opportunity to gain entry into the legal profession.[2] Yet, such jurisdictions also employ categorical, record-based juror eligibility statutes, which permanently prohibit convicted felons from taking part in the adjudicative process.[3] Ignored by courts and scholars,[4] this incongruent framework for assessing the value of prospective legal actors with a criminal past seemingly undermines the proffered rationales for excluding convicted felons from jury service, and civic life generally; thereby delegitimizing the law and potentially threatening reintegration initiatives.

Lawyers and jurors are equally vital to democratic systems of government. As Alexis De Tocqueville noted, "the prestige accorded to lawyers and their permitted influence in the government are . . .

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[1] *See* Appendix 2 (highlighting those jurisdictions that permanently exclude convicted felons from jury service but do not per se exclude convicted felons from the legal profession).

[2] *See infra* Part III.A.2; *see also* Appendix 1.

[3] *See, e.g.*, CAL. CIV. PROC. CODE § 203(a)(5) (West 2010); *see also* Appendix 2.

[4] Scholarship on the exclusion of felons from jury service has remained entirely exclusive from that on the licensing of bar applicants with a felonious criminal record.

the strongest barriers against the faults of democracy,"[5] while "[t]he jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule."[6] Accordingly, to protect the system of justice,[7] all jurisdictions screen potential lawyers and jurors,[8] banishing those who may jeopardize the functionality and integrity of indispensible legal institutions. But the procedures used by a majority of jurisdictions to evaluate a convicted felon's suitability for these two legal roles differ wildly, suggesting that gatekeepers maintain keenly divergent views of convicted felons.

Specifically, legislators and courts justify the preclusion of convicted felons from jury service by alleging that all those marked with a felony conviction uniformly "lack probity"[9] and are "inherently biased."[10] In this way, felon jury exclusion statutes rest solely on the presumption that a felony conviction renders one irreparably flawed,[11] to the extent that lawmakers must "define and protect juries"[12] by categorically locking all convicted felons out of the deliberation room.[13]

Yet, a majority of jurisdictions, while permanently banning convicted felons from jury service, do not per se disqualify all bar applicants with a felonious criminal history.[14] Instead, such jurisdictions opt to individually evaluate, and in some cases license, convicted felons who hope to practice law;[15] ostensibly ignoring the

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[5] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 263 (J. P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

[6] *Id.* at 276.

[7] *See infra* Parts II.C, III.B (discussing the justifications for the moral character and fitness determination and jury exclusion statutes).

[8] *See* Appendix 2 (noting that all jurisdictions evaluate the moral character and fitness of bar applicants and statutorily filter-out ineligible jurors).

[9] Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 74 (defining probity as "'[m]oral excellence, integrity, rectitude, uprightness; conscientiousness, honesty, sincerity'" (quoting 12 Oxford English Dictionary 540 (2d ed. 1989))).

[10] Kalt, *supra* note 9, at 74.

[11] *See, e.g.*, Washington v. State, 75 Ala. 582, 585 (1884) ("The presumption is, that one rendered infamous by conviction of felony . . . is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship.").

[12] Kalt, *supra* note 9, at 74.

[13] *See* Andrea Steinacker, *The Prisoner's Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801, 820–21 (2003) (commenting that "incapacitation provides the most compelling justification for disenfranchisement laws").

[14] *See infra* Part III.A.2; *see also* Appendix 2.

[15] *See* Maureen M. Carr, *The Effect of Prior Criminal Conduct on the Admission to Practice Law: The Move to More Flexible Admission Standards*, 8 GEO. J. LEGAL ETHICS 367, 383–84 (1995) ("The current majority approach of presumptive disqualification attempts to strike a balance among several competing concerns . . . allowing a fully rehabilitated individual the

supposed permanence of character flaws and biases.[16] Thus, adhering to an inconsistent evaluative framework, a majority of jurisdictions call into question the validity of the professed rationales for record-based juror eligibility statutes.

While per se excluding convicted felons from all meaningful legal roles is a tempting method by which to rectify such inconsistency, social science research demonstrates that the opposite approach is far more prudent. For example, law professor Tom Tyler's empirical work proposes that voluntary compliance surpasses deterrence as a means of social control, and that citizens are more likely to voluntarily comply with the law if they view the law as legitimate.[17] Additionally, because citizens contemplate the fairness of their experiences with the justice system when assessing the legitimacy of legal procedures,[18] authorities can influence one's sense of procedural justice by regulating conduct through thoughtful methods.[19]

Tyler contends that just procedures involve measures of representation, consistency, impartiality, accuracy, correctability, and ethicality.[20] Moreover, just procedures foster fairness,

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opportunity to serve the community in the capacity of his or her choice.").

[16] *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 (2009) (discussing the permanence of the irrebuttable presumptions that underlie felon jury exclusion statutes).

[17] Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 661 (2007) ("The findings of this research suggest that Americans generally accept the principles underlying the rule of law and defer to legal authorities when they believe that the authorities are acting in accord with those principles.").

[18] Tom R. Tyler, Jonathan D. Casper & Bonnie Fisher, *Maintaining Allegiance toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629, 646 (1989) (noting "people care a great deal about the interpersonal aspects of their interaction with authorities, that is, about being treated politely and having respect shown for their rights" (citing Tom R. Tyler, *What is Procedural Justice?*, 22 LAW & SOC'Y REV. 103–35 (1988); TOM R. TYLER, WHY PEOPLE OBEY THE LAW: PROCEDURAL JUSTICE, LEGITIMACY, AND COMPLIANCE (1989); Tom R. Tyler & Robert J. Bies, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice*, *in* ADVANCES IN APPLIED SOCIAL PSYCHOLOGY: BUSINESS SETTINGS 77–98 (J.S. Carroll ed., 1989))).

[19] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 277 (2006) ("[A]uthorities should govern based upon the consent of those that they govern, consent that develops from the experience of fairness when dealing with authorities. This fairness leads to legitimacy, a key precursor of consent and voluntary acceptance.").

[20] Tom R. Tyler & A. E. Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 115–91 (1992); TYLER, *supra* note 19; *see also* Denise C. Gottfredson, Brook W. Kearly, Stacy S. Najaka & Carlos M. Rocha, *How Drug Treatment Courts Work: An Analysis of Mediators*, 44 J. RES. CRIME & DELINQ. 3, 10 (2007) (citing Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 LAW & SOC'Y REV. 163, 166 (1997)).

legitimacy, and ultimately voluntary compliance with the law.[21] Yet, "[w]hen authorities are viewed as procedurally unjust, their legitimacy is undermined, leading to support for disobedience and resistance."[22] Hence, because per se exclusions, like record-based juror eligibility statutes, are inattentive to all of the components of procedural justice, they do not promote the legitimacy of law and potentially encourage recidivistic behavior. Conversely, the tailored assessments that govern a felon's access to the legal profession respect elements of procedural justice, legitimizing the law and likely facilitating law abiding conduct.

Though scholars have criticized felon jury exclusion statutes by highlighting their inherent flaws,[23] this article takes a different approach. This article considers felon jury exclusion statutes contextually, arguing that by unconditionally banning felon-jurors, while individually evaluating felon-lawyers, a majority of jurisdictions undermine their own rationales for expelling millions of Americans from the adjudicative process.[24] Moreover, informed by Tyler's theoretical framework, this article asserts that to achieve procedural justice, jurisdictions must perform case-by-case assessments of all convicted felons who seek to fulfill their civic duty as jurors, because uncompromising and inconsistent policies, in part, delegitimize the law and hinder reentry efforts.

Part II details the practice of felon jury exclusion, outlining the scope, application, and rationalization of record-based juror eligibility statutes. Part III examines the purposes and approaches for regulating a convicted felon's access to the legal profession. Part IV challenges the presumption that convicted felons threaten the probity of the jury by exposing the inconsistent conceptualizations of character at work in a majority of jurisdictions. Part IV critically assesses the inherent bias rationale for felon jury exclusion, questioning its validity by exploring the requisite duties of the lawyer and the juror. Part V acknowledges likely criticisms of challenging felon jury exclusion statutes contextually. Part VI

[21] Paternoster et al., *supra* note 20, at 166 (noting "compliance may depend as much or more on the procedural fairness of sanction delivery as it does on the characteristics of the sanction imposed").

[22] Tom R. Tyler, *Legitimacy and Criminal Justice: The Benefits of Self-Regulation*, 7 OHIO ST. J. CRIM. L. 307, 322 (2009) (citing Fischer et al., *Support for Resistance Among Iraqi Students: An Exploratory Study*, 30 BASIC & APPLIED SOC. PSYCHOL. 167–75 (2008)).

[23] *See, e.g.*, Kalt, *supra* note 9, at 69.

[24] *Id.* at 169–71 app. 2 (suggesting that the practice of felon jury exclusion impacts approximately sixteen million Americans, but noting that "[p]recisely quantifying the reach of felon exclusion is difficult").

reviews Tyler's theoretical framework, concluding that standardized individual assessments are normatively superior to inconsistent procedures that include blanket exclusions, as such uniform assessments elicit respect for the legal system and foster successful reintegration.

II. THE FELONIOUS JUROR

In the United States, the "felon" label has become increasingly salient.[25] For those to whom the criminal justice system affixes this permanent mark, there are a host of lasting consequences.[26] Specifically, certain restrictive legal constructs curtail the civic freedoms of a convicted felon.[27] Moreover, "collateral sanctions"[28] or "discretionary disqualifications"[29] are "often unknown to the offenders to [whom] they apply."[30] Included in this "'national crazy-

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[25] *See, e.g.*, Ted Chiricos, Kelle Barrick & William Bales, *The Labeling of Convicted Felons and its Consequences for Recidivism*, 45 CRIMINOLOGY 547, 547–49 (2007); *see also* Stephanie Bontrager, William Bales & Ted Chiricos, *Race, Ethnicity, Threat, and the Labeling of Convicted Felons*, 43 CRIMINOLOGY 589, 589 (2005) (finding that despite Florida law allowing judges to withhold adjudication of guilt for persons who have been found guilty of a felony, blacks and hispanics are less likely to have adjudication withheld and thereby more likely to be labeled felons).

[26] *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 1 (2003); *see also* JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 83 (2005); Alec C. Ewald & Marnie Smith, *Collateral Consequences of Criminal Convictions in American Courts: The View from the State Bench*, 29 JUST. SYS. J. 145, 145 (2008) (reporting a study in which judges were asked to assess the usefulness and impact of collateral sanctions); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634–35 (2006) (explaining that collateral consequences result not from the explicit punishment, but rather from the fact that an individual has been convicted).

[27] *See, e.g.*, JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 3 (2006) (discussing statutory restrictions on a convicted felon's ability to vote); *see also* ABA SECTION OF CRIMINAL JUSTICE ET AL., ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (2004); MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (2006); Kalt, *supra* note 9, at 65–189 (reviewing the practice of statutorily excluding convicted felons from jury service); Steinacker, *supra* note 13, at 801–28 (examining those legal measures that burden a felon's right to hold public office).

[28] ABA SECTION OF CRIMINAL JUSTICE ET AL., *supra* note 27, at 1 (defining a collateral sanction as "a legal penalty, disability, or disadvantage, however denominated, that is imposed on a person automatically upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence").

[29] *Id.* (defining a discretionary disqualification as "a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction").

[30] PETERSILIA, *supra* note 26, at 106.

quilt of disqualifications and restoration procedures'"[31] are legislative provisions that categorically limit or eliminate a convicted felon's chance to serve on a jury.

A. The Mechanics of Felon Jury Exclusion

To serve on a jury, a citizen must preliminarily meet statutorily enumerated juror eligibility requirements. Generally, all juror eligibility statutes require that prospective jurors: 1) are United States citizens; 2) are at least eighteen years of age; 3) live in the state and country in which they are summoned; 4) and possess a working knowledge of the English language.[32] Thus, for most citizens, establishing their eligibility to take part in the jury process is a relatively straightforward task, rarely resulting in dismissal. But for convicted felons, an additional record-based juror eligibility criterion often curtails, to some degree, their opportunity to partake in jury service.[33]

For example, California, a state that permanently expels convicted felons from the jury process, requires that a potential juror complete a "juror affidavit questionnaire"[34] prior to becoming part of the venire. This questionnaire lists California's juror eligibility requirements and instructs potential jurors to indicate those they do not meet. In relevant part, the juror affidavit questionnaire reads, "I am not qualified to serve as a prospective trial juror because I . . . have been convicted of a felony or malfeasance in office."[35] Completed and collected by an officer of the court at the outset of the jury selection process,[36] the juror affidavit questionnaire operates to categorically exclude all those with a felonious criminal history, foreclosing the possibility that a convicted felon might possess the requisite characteristics of a fit juror.

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[31] *Id.* (quoting MARGARET COLGATE LOVE & SUSAN M. KUZMA, DEPARTMENT OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY 1 (1996)).

[32] *See, e.g.*, CAL. CIV. PROC. CODE § 203(a) (West 2010).

[33] *Id.* ("All persons are *eligible* and qualified to be prospective trial jurors except . . . persons who have been convicted of a malfeasance in office or a felony.") (emphasis added); *see also* Appendix 2.

[34] STATE OF CALIFORNIA, JUROR AFFIDAVIT QUESTIONNAIRE, *available at* http://www.occourts.org/media/pdf/jaq.pdf.

[35] *Id.*

[36] The author is a convicted felon living in California; he observed the procedures outlined when the Superior Court of San Diego summoned him to jury service.

B. Jurisdictional Approaches to Felon Jury Exclusion

Felon jury exclusion provisions roughly divide into two types: those that absolutely remove a convicted felon's chances of ever serving as a juror (lifetime ban),[37] and those that allow for the possibility that a convicted felon might, at some point, decide a litigated matter (others).[38] Thirty-one states and the federal court system make convicted felons permanently ineligible to take part in the adjudicative process (lifetime bans).[39] Yet, apart from these lifetime bans, felon jury exclusion provisions vary significantly.[40]

"Ten states . . . exclude felons during the time that they are under sentence, under the supervision of the criminal justice system, or in prison;"[41] three states "allow parties to challenge felons for cause for life at the discretion of the court;"[42] five states "provide hybrids of various severity, either providing different rules for different situations, or using a rule combining penal status and some term of years;"[43] and two states place no restrictions on felon jury service.[44] Hence, while divergent statutory schemes comprise a "patchwork"[45] of standards, an overwhelming majority of jurisdictions banish felonious jurors for life.

C. Justifying Felon Jury Exclusion

Jurisdictions rationalize the exclusion of convicted felons from jury service by asserting that convicted felons "threaten the probity of the jury"[46] and are "inherently biased against the government."[47]

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[37] Kalt, *supra* note 9, at 150 (listing jurisdictions as "life" if they "bar felons unless civil rights have been restored, but have broad restoration provisions"); *see also* Appendix 2.

[38] Kalt, *supra* note 9, at 150 (noting that "most jurisdictions bar felons from juries for life, but many do not"); *see also* Appendix 2.

[39] Kalt, *supra* note 9, at 150–58; *see also* LOVE, *supra* note 27 (cataloguing the approaches taken by each state with respect to felon jury service).

[40] Kalt, *supra* note 9, at 150–58.

[41] *Id.* at 158 (noting that the ten states that employ this approach are: Alaska, Idaho, Indiana, Minnesota, North Carolina, North Dakota, Rhode Island, South Dakota, Washington, and Wisconsin); *see also* Appendix 2.

[42] Kalt, *supra* note 9, at 158 (noting that the three states that employ this approach are: Illinois, Iowa, and Massachusetts); *see also* Appendix 2.

[43] Kalt, *supra* note 9, at 158 (noting that the five states that employ this approach are: Arizona, Connecticut, District of Columbia, Kansas, and Oregon); *see also* Appendix 2.

[44] Kalt, *supra* note 9, at 158 (noting that only Colorado and Maine "do not exclude felons as felons from juries at all"); *see also* Appendix 2.

[45] Kalt, *supra* note 9, at 150 (explaining that this "patchwork" encompasses "standards of different durations, applied to different crimes, and to different kinds of juries"); *see also* Appendix 2.

[46] Kalt, *supra* note 9, at 104.

[47] *Id.* at 105.

Hence, by preventing convicted felons from serving as jurors, jurisdictions allegedly "protect juries rather than . . . punish or degrade felons."[48] Yet, courts have clearly articulated the purported logic of *only* the inherent bias rationale for felon jury exclusion statutes.[49] "[C]ourts have been less clear as to whether the threat that felons pose to jury probity stems from their degraded status or from their actual characteristics."[50]

As law professor Brian Kalt points out, two possibilities perhaps explain the probity rationale for felon jury exclusion statutes. First, a jurisdiction might presume that all convicted felons lack probity because they possess "poor character or innate untrustworthiness,"[51] traits that could compromise the jury process. Second, a jurisdiction may suppose that the "badges of shame"[52] or "degraded status"[53] of all convicted felons "undermine[s] the integrity of the institution."[54] Yet, in either case "[t]he precise mechanism by which felons threaten jury probity is unclear,"[55] leaving scholars to speculate about the causal connection between a felony conviction and a supposed lack of probity.

The inherent bias rationale for felon jury exclusion statutes holds that all convicted felons harbor biases that makes them "adversarial to the government."[56] Such biass apparently spawns a sympathy for criminal defendants,[57] thereby making those with a felonious criminal history "less willing, if not unwilling altogether, to subject another person to the horrors of punishment [they] ha[ve] endured."[58] In this way, a felony conviction purportedly destroys the capacity for impartiality, rendering one unsuitable for jury service.[59]

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[48] *Id.* at 74.

[49] *See, e.g.*, People v. Miller, 759 N.W.2d 850, 854–55 (Mich. 2008).

[50] Kalt, *supra* note 9, at 74.

[51] *Id.* at 102.

[52] *Id.*

[53] *Id.* at 104.

[54] *Id.* (Professor Kalt labels this the "taint" argument).

[55] *Id.* at 102.

[56] *Id.* at 105.

[57] *Id.* ("The core of the inherent bias argument is that felons remain adversarial to the government, and will sympathize unduly with any criminal defendant.").

[58] *Id.*

[59] *See, e.g.*, MICHIGAN SENATE FISCAL AGENCY, BILL ANALYSIS: JURY COMPENSATION AND QUALIFICATION: S.B. 1448 & 1452 AND H.B. 4551–4553 ENROLLED ANALYSIS (2003) [hereinafter MICHIGAN SENATE FISCAL AGENCY], *available at* http://legislature.mi.gov/documents/2001-2002/billanalysis/Senate/pdf/2001-SFA-1448-E.pdf (stating "[a] person who has been convicted of a felony might have a tainted view of the criminal justice system and sympathize with a criminal defendant"); *see also* People v. Miller, 759 N.W.2d 850, 873 n.49 (Kelly, J., dissenting) (arguing that felons have some prejudice

Though somewhat distinct, the justifications for felon jury exclusion possess a crucial similarity. Both the probity rationale and the inherent bias rationale rest on the assumption that all convicted felons possess traits that make them permanently unfit for jury service. While some scholars question the logic of this assumption,[60] proponents of felon jury exclusion statutes argue that such measures are necessary to protect juries, the justice system, and even crime victims.[61] Moreover, the Supreme Court has upheld felon jury exclusion statutes, proclaiming "jurisdictions are 'free to confine the [jury] selection . . . to those possessing good intelligence, sound judgment, and fair character.'"[62] Yet, an examination of the process by which a convicted felon can enter the legal profession, even in those jurisdictions that ban felonious jurors for life, reveals the flaws in the presumptions on which felon jury exclusion statutes rest.

III. THE FELONIOUS LAWYER

After successfully completing a grueling period of schooling, a prospective attorney faces two obstacles to professional licensure.[63] A bar applicant must not only pass a comprehensive exam testing legal knowledge,[64] but must also successfully navigate a moral character and fitness determination designed to establish that "graduating law students . . . meet high standards of moral character."[65] Though for many applicants this assessment amounts

given that "[o]ne convicted of the same crime charged against a defendant would, at a minimum, be thoroughly familiar with the nature of the crime(s) charged. The convict would know how such crimes are committed, the emotions and feelings associated with the guilt accompanying the criminal act(s), and criminal procedure in general.").

[60] *See* Kalt, *supra* note 9; *see also* Binnall, *supra* note 16.

[61] MICHIGAN SENATE FISCAL AGENCY, *supra* note 59 (stating that seating a felonious juror "is blatantly unfair to the prosecution and the crime victim").

[62] Kalt *supra* note 9, at 72 (citing Carter v. Jury Commission, 396 U.S. 320, 332 (1970)).

[63] *See* Marcus Ratcliff, *The Good Character Requirement: A Proposal for a Uniform National Standard*, 36 TULSA L.J. 487, 487 (2000) (characterizing the moral character and fitness determination as "the unknown requirement for admission to the bar" and noting that "[w]hile it is true that most entering law students know that at some point in the future they will be required to prove their knowledge on the bar exam, many of these students do not realize that they will also have to prove the fitness of their character before being admitted to the practice of law").

[64] *See* NAT'L CONFERENCE OF BAR EXAM'RS & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENT, ix–x, 3–5 (Erica Moeser & Margaret Fuller Corneille eds., 2009) [hereinafter NAT'L CONFERENCE OF BAR EXAM'RS].

[65] Richard R. Arnold, Jr., *Presumptive Disqualification and Prior Unlawful Conduct: The Danger of Unpredictable Character Standards for Bar Applicants*, 1997 UTAH L. REV. 63, 63 (1997) ("Every jurisdiction requires graduating law students to meet high standards of moral

to a time-consuming formality,[66] for convicted felons, a character evaluation can represent an insurmountable obstacle.[67]

A. Jurisdictional Approaches to Felonious Bar Applicants

The moral character and fitness process begins with the requirement that bar applicants complete a lengthy questionnaire which asks a series of significantly probing questions.[68] Contained in this application are "four major areas of inquiry, including an applicant's history of in-patient psychiatric hospitalization and out-patient mental health treatment, substance abuse and treatment, educational misconduct, and criminal conduct."[69] For an applicant with a felony criminal conviction, bar examiners will almost always seek out additional information about the offense.[70]

Once an applicant has provided the requested information to the relevant jurisdiction, the process for determining fitness of

character before they can be admitted to the bar and given a license to practice law.") (citing STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 624 (4th ed. 1995)); *see also* Keith Swisher, *The Troubling Rise of the Legal Profession's Good Moral Character*, 82 ST. JOHN'S L. REV. 1037, 1043 (2008) ("Every state requires applicants to prove good moral character before admission to the bar.").

[66] *See* Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 516 (1985) (pointing out that there is a "low incidence of applications denied on character grounds"); *see also infra* Part V.B.2.

[67] *See* Scott DeVito, *Justice and the Felonious Attorney*, 48 SANTA CLARA L. REV. 155, 158 (2008) ("Applicants with criminal acts in their past often face a heightened burden of proof of good moral character."); *see also* Arnold, *supra* note 65, at 63 (stating "for students with records of prior unlawful conduct the application process can become particularly troublesome. Applicants with incidents of unlawful conduct in their past can find the road toward bar admission confusing and unpredictable.").

[68] *See, e.g.*, COMM. OF BAR EXAM'RS, OFFICE OF ADMISSIONS, STATE BAR OF CAL., APPLICATION FOR DETERMINATION OF MORAL CHARACTER, *available at* http://calbar.ca.gov/calbar/pdfs/admissions/Moral-Character/adm_app_moral-character_1003.pdf; *see also* Donald H. Stone, *The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study*, 15 N. ILL. U. L. REV. 331, 331 (1995) (presenting the results of a 1995 survey of all but two states conducted "in order to determine the type of questions asked for the purpose of screening out persons who bar committees believed were not morally fit or mentally stable to practice law in their state").

[69] Stone, *supra* note 68, at 332 (noting that bar examiners often solicit an applicant's "armed forces discharge, marital status, [and] financial condition").

[70] *See, e.g.*, *id.* at 342 (noting that when an applicant has a felony on their criminal record, a bar examiner normally "seeks details of an applicant's criminal behavior, including: a. a description of the charge; b. the date the charge was made; c. the name, address, and telephone number of each person or entity initiating or bringing the charge; d. the name, address, and telephone number of each attorney you retained to assist you in defending the charge; e. the reason why the charges were brought against you; f. the final disposition of the charge; and, g. copies of the disposition order of the tribunal sufficient to describe the substantive resolution of the proceeding") (citing IDAHO STATE BAR, APPLICATION FOR THE IDAHO BAR EXAMINATION AND ADMISSION TO THE IDAHO STATE BAR ¶ 19 (2010), *available at* http:isb.idaho.gov/pdf/admissions/web_be_application.pdf).

character depends on the favored jurisdictional approach.[71] In some jurisdictions, a felony conviction per se disqualifies an applicant from admission to the bar.[72] Yet, in others, a felony conviction merely amounts to a presumptive disqualification, creating a "rebuttable presumption that an applicant with a record of prior unlawful conduct lacks the requisite character to practice law."[73]

1. Per se Disqualifications

Those jurisdictions that per se disqualify felonious bar applicants from the legal profession do so either permanently or temporarily.[74] While ten jurisdictions impose some form of per se disqualification on bar applicants with a felony criminal history,[75] only half of such jurisdictions per se disqualify convicted felons from the practice of law permanently.[76] The remaining half per se disqualify felonious applicants for an automatically-terminating period of time, usually a set-period of years after expiration of the imposed sentence.[77]

The severity of the per se disqualification notwithstanding, such an approach reflects the "'traditional view that 'certain illegal acts . . . evidence attitudes toward the law that cannot be countenanced among its practitioners; to hold otherwise would demean the profession's reputation and reduce the character requirement to a meaningless pretense.'"[78] Hence, like lifetime felon jury exclusion statutes, the per se disqualification model suggests that those with

[71] Carr, *supra* note 15, at 378 (noting "almost all of the states and the District of Columbia adopted rules guiding bar admission committees in their determination to allow or deny an applicant with a prior felony conviction the opportunity to practice law").

[72] *Id.* at 374 (describing the per se disqualification approach as "the historical approach, whereby individuals with prior criminal records are permanently disqualified from applying for admission to state bars").

[73] Arnold, *supra* note 65, at 74 (citing Carr, *supra* note 15, at 380).

[74] *See* Carr, *supra* note 15, at 381–83; *see also* Appendix 1.

[75] *See* Appendix 1. The ten jurisdictions that per se disqualify convicted felons from the bar either permanently or temporarily are: Florida, Idaho, Indiana, Mississippi, Missouri, New Jersey, Ohio, Oregon, Texas, and Utah.

[76] *Id.* The five jurisdictions that effectively per se exclude convicted felons from the bar permanently are: Florida (requires the restoration of civil rights which is non-automatic), Indiana (permanently excluding those convicted of a felony for life), Idaho and Oregon (permanently excluding those convicted of a felony that would otherwise result in disbarment), and Mississippi (permanently excluding those convicted of any felony besides manslaughter and violations of the Internal Revenue Code).

[77] *Id.* The five jurisdictions that per se exclude convicted felons from the bar temporarily are: Missouri, Ohio, and Texas (until five years after completion of sentence), New Jersey and Utah (until completion of sentence).

[78] Anthony J. Graniere & Hilary McHugh, Note, *Are You In or Are You Out? The Effect of a Prior Criminal Conviction on Bar Admission & A Proposed National Uniform Standard*, 26 HOFSTRA LAB. & EMP. L.J. 223, 243 (2008) (citing Carr, *supra* note 15, at 383).

a felonious criminal history are forever blemished,[79] and, as some scholars suggest, "destroys an individual's professional hopes and possibly deprives the bar and society of committed, rehabilitated lawyers."[80]

2. Presumptive Disqualifications

Forty-five states and the federal court system do not per se disqualify (permanently) a convicted felon from practicing law.[81] Instead, in these jurisdictions a felony conviction merely amounts to a presumptive disqualification rebuttable by a felonious bar applicant at a moral character and fitness determination.[82] During the determination, "evidence of complete rehabilitation is almost always required before a bar applicant with a record of prior unlawful conduct will be admitted."[83] Though demonstrating a change in one's character is a rather ambiguous task,[84] "[f]or bar fitness purposes, rehabilitation is the reestablishment of the reputation of a person by his or her restoration to a useful and constructive place in society."[85]

Specifically, states that employ the presumptive disqualification framework look for evidence of rehabilitation using either a "guided approach"[86] or an "[u]nguided approach."[87] Under the guided approach, jurisdictions use "specific guidelines and requirements for

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[79] Carr, *supra* note 15, at 381 (describing this view by stating "some crimes, if unpardoned, remain always as a blot on the applicant's character and prevent admission to the bar").

[80] *Id.* at 374.

[81] *See* Appendix 1. For the purposes of this article, presumptive disqualification jurisdictions include those jurisdictions that per se exclude convicted felons from the bar for an automatically-expiring time period. Because such per se exclusions are only temporary, they do not represent permanent banishment from the practice of law.

[82] Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection Upon Bar Admissions*, 39 CAL. W. L. REV. 1, 15 (2002) ("In the course of its investigation, an ethics committee may invite an applicant to an administrative hearing—purportedly informational in character.").

[83] Arnold, *supra* note 65, at 87; *see also* NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 64, at viii ("The bar examining authority may appropriately place on the applicant the burden of producing information.").

[84] *See In re* King, 136 P.3d 878, 889 (Ariz. 2006) ("'[I]n the case of extremely damning past misconduct, a showing of rehabilitation may be virtually impossible to make.'") (quoting *In re* Matthews, 462 A.2d 165, 176 (N.J. 1983)); *see also* Graniere & McHugh, *supra* note 78, at 231 (stating "'where serious or criminal misconduct is involved, positive inferences about the applicant's moral character are difficult to draw, and negative character inferences are stronger and more reasonable'") (quoting George L. Blum, Annotation, *Criminal Record as Affecting Applicant's Moral Character for Purposes of Admission to the Bar*, 3 A.L.R. 6th 49, 49 (2005)).

[85] *In re* Cason, 294 S.E. 2d 520, 522 (Ga. 1982).

[86] Graniere & McHugh, *supra* note 78, at 236.

[87] *Id.* at 239.

judging an applicant's moral character,"[88] while the unguided approach involves considering "'admission based on subjective personal feelings, beliefs and attitudes of the Bar Examiners.'"[89] Although scholars note that each approach has inherent drawbacks,[90] the benefit of this rubric is that applicants "receive a case-by-case determination after consideration of the 'totality of the record.'"[91] Thus, the presumptive disqualification approach is "more accepting of individuals who have, in the past, been convicted of a felony."[92]

B. Rationalizing Moral Character and Fitness Determinations

The national governing body of legal practitioners in the United States, the American Bar Association (ABA), asserts that "[t]he primary purpose of character and fitness screening before admission to the bar is the protection of the public and the system of justice."[93] Though bar examinations test professional competence, the ABA theorizes that "[t]he lawyer licensing process is incomplete if only testing for minimal competence is undertaken"[94] because "[t]he public is inadequately protected by a system that fails to evaluate character and fitness as those elements relate to the practice of law."[95] Thus, the ABA recommends that in each jurisdiction "[t]he bar examining authority should determine whether the present character and fitness of an applicant qualifies the applicant for admission,"[96] and whether an applicant is "one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them."[97]

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[88] *Id.* at 223; *see also* NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 64, at ix (listing the suggested factors to be used in assessing rehabilitation).

[89] Graniere & McHugh, *supra* note 78, at 223.

[90] *See* Arnold, *supra* note 65, at 73, 75 (noting critiques of the per se disqualification and the presumptive disqualification frameworks, and stating respectively "[t]he presumption made by the ABA and state bars that prior unlawful conduct by a bar applicant is predictive of future unlawful conduct or misbehavior as a lawyer has been criticized and remains unproven" and "[t]he flexibility for which the presumptive disqualification approach receives support is accompanied by a level of vagueness, which can undermine some of its benefits and leave applicants with a record of unlawful conduct vulnerable to unclear standards and unpredictable outcomes").

[91] Carr, *supra* note 15, at 388 (citing written response of Alan Ogden, Executive Director, State of Colorado Supreme Court Board of Law Examiners (Jan. 4, 1994)).

[92] Carr, *supra* note 15, at 383.

[93] NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 64, at vii.

[94] *Id.*

[95] *Id.*

[96] *Id.* at viii–ix.

[97] *Id.* at viii.

Echoing the sentiments of the ABA, the Supreme Court has also noted the importance of protecting the public and our system of justice by allowing "the profession itself [to] determine who should enter it."[98] Emphasizing the crucial role of practicing attorneys, Justice Frankfurter noted:

> It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield," . . . in defense of right and to ward off wrong. From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."[99]

Concerned that an attorney without the requisite moral make-up might engage in "potential abuses, such as misrepresentation, misappropriation of funds, or betrayal of confidences,"[100] the legal profession and courts defend the use of character evaluations by stressing the need to protect the system of justice "from those who might subvert it through subornation of perjury, misrepresentation, bribery, or the like."[101] Moreover, they allege that with such assessments "a state bar can maintain control and hopefully avoid the problems that unfit attorneys may cause."[102]

Additionally, courts and bar examiners justify a heightened level of scrutiny for felonious bar applicants by noting that "'good' moral character means the absence of proven 'misconduct.'"[103] As the ABA highlights, "[a] record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant may constitute a basis for denial of admission."[104] In this way, much like felon jury exclusion statutes, supposition about those with a felony criminal record plagues the moral character and fitness process. Yet, in a majority of jurisdictions, the moral character and fitness process *allows* for the possibility that certain

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[98] Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring).

[99] *Id*. at 247.

[100] Rhode, *supra* note 66, at 508.

[101] *Id*. at 509 (citing James E. Alderman, *Screening for Character and Fitness*, B. EXAMINER, Feb. 1982, at 23, 24; Ruel C. Walker, *Texas' Tests of Character Come Too Late*, 3 TEX. B. J. 177 (1940)).

[102] Ratcliff, *supra* note 63, at 492.

[103] Swisher, *supra* note 65, at 1043 (citing Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. Rev. 187, 199 (1995)).

[104] NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 64, at viii.

convicted felons are suitable to fill essential legal roles—belying the presumption that all those with a felonious criminal history are permanently unfit to take part in the pursuit of justice.[105]

IV. UNDERMINING THE PROBITY RATIONALE

As discussed, jurisdictions primarily justify felon jury exclusion statutes by arguing that convicted felons "threaten the probity of the jury."[106] And, while the manner in which those with a felonious criminal history threaten a jury's probity is ambiguous,[107] the rationale makes clear that a majority of jurisdictions presume that all felonious jurors possess unalterably bad character.[108] Yet, in twenty-nine states and the federal court system, that presumption exists alongside flexible moral character and fitness standards that acknowledge a more malleable conceptualization of character,[109] casting doubt on the veracity of the probity rationale for excluding convicted felons from jury service.

A. Two Views of Character

Discussions of one's character and its role in human behavior educe a host of varied viewpoints. Philosophers and ethicists often contend that "character will have regular behavioral manifestations: the person of good character will do well, even under substantial pressure to moral failure, while the person of bad character is someone on whom it would be foolish to rely."[110] In this way, character supposedly serves as a critical tool for predicting behavior, as it "decides the moral texture of life."[111] Yet, other scholars argue that experimental social psychology challenges the

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[105] Carr, *supra* note 15, at 378 (noting that the presumptive disqualification approach show that jurisdictions are "willing to engage in more flexible character screening processes when making decisions about individuals with prior felony convictions").

[106] Kalt, *supra* note 9, at 74 n.28 (listing those cases in which courts upheld felon jury exclusion based on the probity rationale); *see also supra* Part II.C.

[107] *Id*. at 104 (noting that the probity rationale centers on the idea that "felons are bad," and that they either threaten a jury's probity or its "appearance of probity" because of their flawed character).

[108] *Id*. at 102 (describing this view: "[i]f someone is not responsible enough to follow the law, how can they [sic] be responsible enough to decide guilt or innocence?") (citing State of Oregon Special Election Voters' Pamphlet, Ballot Measure 75, Arguments in Favor (1999)); *see also* Rector v. State, 659 S.W.2d 163, 173 (Ark. 1983) (stating "exclusion is intended to bar from the jury box the one class of persons least likely to respect and give effect to the criminal laws").

[109] *See* Appendix 2.

[110] JOHN M. DORIS, LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR 1 (2002).

[111] *Id*.

traditional view of character. Specifically, situationist psychology research offers an alternative framework with which to explain conduct, suggesting that one's environment perhaps has a greater impact on one's actions than do inherent personality traits.[112]

1. Traditional Views

Law professor Anders Kaye notes that conventional character theories "assume that we have a certain sort of character, comprised of enduring, global character traits—traits that are not just consistent across time, but also across situations, and that manifest not just sporadically, but reliably."[113] This static conceptualization of character harkens back to the Aristotelian formulation of human nature which places "[a]n emphasis on robust traits and behavioral consistency,"[114] and speculates that "[k]nowing something about a person's character is supposed to render their behavior intelligible and help observers determine what behaviors to expect."[115]

The conventional view of character also holds that "every person chooses to develop good and bad character through autonomous actions,"[116] and "[o]nce a person [chooses] their character . . . he or she [is] not free to simply undo the choice."[117] Moreover, traditional character theorists posit that often one socially unacceptable act is adequate evidence that one possesses a normatively undesirable trait. In this way, bad character "require[s] very little in the way of behavioral consistency."[118] Thus, "one doesn't have to reliably falter, but only sporadically falter,"[119] to win the traditionalist's pejorative distinction of possessing bad character.

John Doris describes this view of character as "globalism."[120] He

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[112] *Id.* at 2 (summarizing the situationist position and stating "behavior is—*contra* the old saw about character and destiny—extraordinarily sensitive to variation in circumstance").

[113] Anders Kaye, *Does Situationist Psychology Have Radical Implications for Criminal Responsibility?*, 59 ALA. L. REV. 611, 647 (2008).

[114] DORIS, *supra* note 110, at 18.

[115] *Id*. at 5 (commenting "talk of character is a 'thick' discourse, intermingling evaluative and descriptive elements") (citing BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 128–31, 140–45 (1985)).

[116] Ekow N. Yankah, *The Good Guys and Bad Guys: Punishing Character, Equality, and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1028 (2004) (citing ARISTOTLE, *The Nicomachean Ethics*, *in* THE BASIC WORKS OF ARISTOTLE § 1114a (Richard McKeon ed., 1941)); *see also* John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575, 577 (1998) (explaining this position stating "cowardly actions add up to . . . cowardice").

[117] Yankah, *supra* note 116, at 1028.

[118] DORIS, *supra* note 110, at 20.

[119] *Id*. at 20.

[120] *Id*. at 22–23 (defining globalism as a theory that "construe[s] personality as more or

contends that under the globalist theory of character, "[i]f a person possesses a trait, that person will engage in trait-relevant behaviors in trait-relevant eliciting conditions with markedly above chance probability."[121] Specifically, globalism dictates that traits are: 1) consistent,[122] 2) stable,[123] and 3) evaluatively integrative.[124] For example, if one possesses the trait of dishonesty, that person will consistently act in a dishonest fashion in a host of varied situations. Moreover, in such situations, a dishonest person is also more likely to exhibit other traits of equal reprehensibility.

2. Situationist Psychology

Some scholars argue that conventional conceptualizations of character do not accurately reflect human nature.[125] Along these lines, Doris contends that "philosophical explanations referencing character traits are generally inferior to those adduced from experimental social psychology"[126] because "[t]hey presuppose the existence of character structures that actual people do not very often possess."[127] Simply, modern research indicates that behavior may primarily derive from the situations that confront an actor, rather than an actor's "dispositional structure."[128]

A series of experiments, now famous in social psychological literature, strengthen the claim that one's behaviors are largely a product of one's environment. By manipulating situational factors, researchers have been able to induce striking behaviors,[129] demonstrating that "situational influences can easily cause us to act in ways that we would not approve."[130] Kaye terms this

less coherent and integrated with reliable, relatively situation-resistant, behavioral implications").

[121] *Id*. at 23.

[122] *Id*. (discussing consistency and stating "[c]haracter and personality traits are reliably manifested in trait-relevant behavior across a diversity of trait-relevant eliciting conditions that may vary widely in their conduciveness to the manifestation of the trait in question").

[123] *Id*.

[124] *Id*. (discussing evaluative integration and stating "[i]n a given character or personality the occurrence of a trait with a particular evaluative valence is probabilistically related to the occurrence of other traits with similar evaluative valences").

[125] *Id.* at 1 ("This conception of character is both venerable and appealing, but it is also deeply problematic.").

[126] *Id.* at 6.

[127] *Id.*

[128] *Id.* at 26 (further arguing that conventional conceptualizations of character do not fully explain "the striking variability of behavior with situational variation").

[129] *See* Kaye, *supra* note 113, at 618–39 (discussing several experiments where researchers elicited alarming behaviors from unexpected human sources).

[130] *Id.* at 639.

phenomenon the "puppet problem,"[131] noting that quantifiable data shows that our acts are intimately connected to our surroundings.[132]

The situationist conceptualization of character challenges conventional views in several respects. Situationism holds that 1) "behavioral variation across a population owes more to situational differences than dispositional differences among persons";[133] 2) "[p]eople will quite typically behave inconsistently with respect to the attributive standards associated with a trait, and whatever behavioral consistency is displayed may be readily disrupted by situational variation";[134] and 3) "evaluatively inconsistent dispositions may 'cohabitate' in a single personality."[135] Returning to our dishonest straw-person, the situationist would argue that one who is dishonest may only act untruthfully in certain situations, but he or she may behave quite honestly if other circumstances present. In this way, the dishonest person has the capability to be both forthright and deceptive.

B. Jurisdictional Situationism: Probity's Detractor

Whether knowingly or unknowingly, jurisdictions that expel convicted felons from the jury process, but allow others to practice law, ostensibly join situationist theorists in acknowledging the weaknesses that plague the traditional views of character. Specifically, such jurisdictions openly accept the central precept of situationism —that perceived personality traits are often a poor predictor of human behavior—and therefore call into question the principal justification that drives their own felon jury exclusion statutes.[136]

Felon jury exclusion statutes comport entirely with a conventional conceptualization of character. First, lawmakers use felony convictions as indices of flawed character, suggesting that a felony conviction "springs from or manifests the actor's character, it comes from what makes him 'him.'"[137] Second, by unconditionally banning convicted felons from the venire without considering the

[131] *Id.* ("Because we are so vulnerable to situational influences, our characters cannot be as consistent as we generally imagine they are.").

[132] *Id.* ("The story of my act shifts from being a story about me to being a story about my surroundings, so that my acts belong, in some significant way, to forces beyond myself.").

[133] DORIS, *supra* note 110, at 24.

[134] *Id.*

[135] *Id.*

[136] *Id.* (noting that the "central theoretical commitments" of situationism "amount to a qualified rejection of globalism").

[137] Kaye, *supra* note 113, at 646.

possibility that a felonious juror may be fit to serve on a jury, a majority of jurisdictions suggest that flawed character is static, irremediable, and predictive of future behavior.[138] Hence, felon jury exclusion statutes adhere to a traditional, rigid conceptualization of character.

Contrarily, the presumptive disqualification approach for assessing the moral character and fitness of felonious bar applicants departs from conventional conceptualizations of character in important ways. Though such an approach still attributes bad character to those with a felonious criminal record,[139] it also acknowledges a convicted felon's ability to act in ways that reflect good character by allowing those applicants with a felony criminal history to rebut the presumption that they boast only undesirable personality traits.[140] Thus, the presumptive disqualification approach seemingly borrows from situationist theory, challenging the tenets of the conventional view of character, and affirming that along with potential character flaws, convicted felons likely also possess commendable traits which are observable in select situations.

For those who endorse a traditional view of character, the presumptive disqualification approach to moral character and fitness determinations overlooks the alleged true nature of convicted felons. Conventionalists might argue that selectively admitting felonious bar applicants jeopardizes the legal profession and the system of justice by ignoring the ingrained character flaws that exist among all convicted felons.[141] They might also commend jurisdictions that systematically banish convicted felons from the deliberation room, claiming that such measures appropriately ally with traditionalist conceptions of character, and are necessary to protect society from the perpetually bad.

But such contentions are void of evidentiary support. Instead, defenders of customary character analysis often cite "common sense"[142] as a means by which to hold fast to their position and

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[138] DORIS, *supra* note 110, at 1 (commenting that such a view holds that "character is destiny").

[139] *See supra* Part III.A.2. (noting that a felony conviction presumptively disqualifies a felonious bar applicant).

[140] *Id.*

[141] Kalt, *supra* note 9, at 73 n.28 (citing People *ex rel.* Hannon v. Ryan, 312 N.Y.S.2d 706, 712 (App. Div. 1970) (stating "it would be a strange system, indeed, which permitted those who had been convicted of anti-social and dissolute conduct to serve on its juries")).

[142] DORIS, *supra* note 110, at 12 ("'[C]ommon sense' is a keenly felt constraint in psychology, and this has served to put [ ] situationist psychology . . . at a certain rhetorical

reject contradictory research.[143] Moreover, as Kaye notes, fundamental attribution error,[144] confirmation bias,[145] and misperceptions of consistency[146] likely all play a part in reinforcing the traditionalist viewpoint that "we and those around us bear robust, global character traits."[147]

Alternatively, situationism, which indicates that traditionalist claims are empirically untenable, "derives from a substantial and diverse body of experimental work."[148] The presumptive disqualification approach to felonious bar applicants furthers the validated situationist assertion that conventional views of character do not accurately portray human nature.[149] Further, the presumptive disqualification approach concedes the flaws of the character theory underlying the probity rationale for felon jury exclusion. Thus, by using inconsistent processes for evaluating a convicted felon's suitability for legal roles, a majority of jurisdictions bolster the contention that felon jury exclusion statutes have little to do with character and are simply constructs of unwarranted conjecture and speculation.

V. QUESTIONING INHERENT BIAS

Legislators and courts also justify felon jury exclusion statutes by asserting that convicted felons uniformly harbor an "inherent[] bias[] against the government."[150] The "inherent bias rationale[]"[151]

disadvantage, inasmuch as it threatens time-honored notions of personality and character.").

[143] *Id.* (noting "it is alleged that everyday convictions about personality constrain psychological theorizing").

[144] *See* Kaye, *supra* note 113, at 637 ("It has been well-established that we are strongly inclined to explain human acts in terms of character traits or dispositions, even when we have only observed a single act, and even when there are strong reasons to believe that situation had a profound influence on the actor.") (citing LEE ROSS & RICHARD E. NISBETT, THE PERSON AND THE SITUATION 4 (1991)).

[145] Kaye, *supra* note 113, at 637–38 (stating that confirmation bias forces us to "reject information that conflicts with our working models of people, and retain information that supports our working models, such that once we have decided a person is a certain 'kind' of person, it is very unlikely that we will question the characterization") (citing ROSS & NISBETT, *supra* note 144, at 139–44).

[146] *Id.* at 638 ("[W]e are likely to accurately perceive others as acting consistently—but for reasons having nothing to do with any characterological consistency on their part.").

[147] *Id.*

[148] DORIS, *supra* note 110, at 13 (highlighting that situationist research includes "many naturalistic field studies, dating back to the 1920s").

[149] *Id.* (noting that if situationism "is empirically supportable, it should be empirically falsifiable" and opining that "given the extent of empirical support," there is "good reason for believing that falsification is not forthcoming").

[150] Kalt, *supra* note 9, at 105.

[151] *Id.* at 85.

presumes that a felonious juror, if allowed to serve, would unfairly prejudice the jury in favor of a criminal defendant because of prior negative experiences with the criminal justice system.[152]

Yet, as scholars note, precluding all convicted felons from the adjudicative process likely does little to protect the impartiality of the tribunal,[153] betrays the modern view of the jury as "a body truly representative of the community,"[154] and is illogical in civil litigation between private parties.[155] Still, proponents of these ineffective and overinclusive measures overlook their inherent shortcomings, arguing that "[t]he exclusion of ex-felons from jury service . . . promotes the legitimate state goal of assuring impartiality of the verdict."[156]

But perhaps the strongest indictment of the inherent bias rationale comes from the legal profession. By simultaneously licensing felonious lawyers while banishing felonious jurors, a majority of jurisdictions suggest that the practice of law does not require neutrality or, in the alternative, that convicted felons have the capacity to act without bias. Yet, lawyers are primarily "officers of the court"[157] and, like jurors, have obligations to society that often require detached analysis and dispassionate assessment. Moreover, jurisdictions that exclude convicted felons from jury service make clear that convicted felons cannot act without bias holding "that felons are generally less trustworthy and responsible than others, and that they just cannot be counted on to be 'fair.'"[158]

Nonetheless, a majority of jurisdictions—while precluding convicted felons from serving on a jury because of an apparent lack of objectivity—allow convicted felons to practice law, a profession that demands impartiality.[159] Thus, a majority of jurisdictions recognize a convicted felon's ability to remain neutral, undermining

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152 *See supra* Part II.C.

153 Kalt, *supra* note 9, at 105 ("[M]any groups have generally strong biases in criminal cases . . . in the case of crime victims, the justice system does not presume that they are all incapable of being objective in *all* trials.").

154 Smith v. Texas, 311 U.S. 128, 130 (1940); *see also* Kalt, *supra* note 9, at 107 ("To the extent that inherent bias among felon jurors leads to legitimate skepticism, the automatic exclusion of felons is less acceptable and smacks of viewpoint discrimination.").

155 Kalt, *supra* note 9, at 105 (pointing out that "the inherent bias argument does not explain why felons should be excluded from civil juries in cases where the government is not a party," and also noting that only Oregon distinguishes between a civil and criminal trial in its felon jury exclusion statute).

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

157 Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 76 (1989) ("[T]he profession continues to characterize itself publicly as a body of officers of the court.").

158 United States v. Boney, 977 F.2d 624, 642 (D.C. 1992) (Randolph, J., dissenting).

159 *See* Appendix 2.

their own justification for exiling felonious jurors.

A. The Impartial Lawyer

Today, attorneys are no longer "the only enlightened class not distrusted by the people."[160] As Justice O'Connor notes, "[f]ew Americans can even recall that our society once sincerely trusted and respected its lawyers."[161] Rather, society largely views lawyers as combative adversaries,[162] teeming with greed[163] and lacking integrity.[164]

Yet, "[t]wo antagonistic models describe the role of lawyers in our legal system."[165] While the attorney's role as "loyal and zealous client protector"[166] is "[m]ore familiar to the public,"[167] the attorney also functions as an officer of the court,[168] frequently requiring that he or she act without bias "in a quasi-judicial or quasi-official capacity"[169] when confronting the difficult ethical dilemmas the legal profession presents.

For example, the ABA's Model Rules of Professional Conduct ("the Model Rules") dictate that "a lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."[170] Moreover, the Model Rules also require that "[i]n an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether

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[160] DE TOCQUEVILLE, *supra* note 5, at 269.

[161] Sandra Day O'Connor, *Address at the University of Oregon Dedication of the William W. Knight Law Center: Professionalism*, *in* 78 OR. L. REV. 385, 386 (1999).

[162] RENNARD STRICKLAND & FRANK T. READ, THE LAWYER MYTH: A DEFENSE OF THE AMERICAN LEGAL PROFESSION 3–4 (2008) ("A recent study showed that in the minds of the American public, the term 'lawyer' was almost synonymous with 'courtroom advocate.'").

[163] DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 3–4 (2000) ("Of all the traits that the public dislikes in attorneys, greed is at the top of the list . . . . About three-fifths of Americans describe attorneys as greedy, and between half and three-quarters believe that they charge excessive fees.").

[164] *Id.* at 4 ("The public's other principal complaint about attorneys' character involves integrity . . . . Only a fifth of those surveyed by the American Bar Association . . . felt that lawyers could be described as 'honest and ethical.'").

[165] Gaetke, *supra* note 157, at 40.

[166] James A. Cohen, *Lawyer Role, Agency Law, and the Characterization "Officer of the Court,"* 48 BUFF. L. REV. 349, 353 (2000).

[167] Gaetke, *supra* note 157, at 40 (noting further that this role is also "more comfortable to lawyers").

[168] O'Connor, *supra* note 161, at 387 ("A great lawyer is always mindful of the moral and social aspects of the attorney's power and position as an officer of the court.").

[169] Gaetke, *supra* note 157, at 48.

[170] MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2007).

or not the facts are adverse."[171] In such situations, because a lawyer's duty as an officer of the court possibly mandates the "subordination of the interests of the client and the lawyer to those of the judicial system and the public,"[172] he or she faces an ethical quandary. To adhere to the Model Rules, a lawyer must put financial welfare and client concerns aside in order to make an impartial determination of what is professionally ethical.

Other instances may also require that a lawyer ignore vested interests. Consider a scenario in which a criminal defendant admits guilt to an attorney of record, forcing the attorney to weigh responsibilities to the client against "the pursuit of truth and justice."[173] As Michael Asimow and Richard Weisberg contend, in such circumstances, a lawyer might act as a "weak adversarialist[],"[174] "less concerned with . . . zealous advocacy, protection of client confidences, and procedural justice, and more concerned with the pursuit of substantive justice."[175] Authorized by the Model Rules,[176] this position allows an attorney to "do less than the lawyer's adversarial best,"[177] and to a degree, subvert responsibilities to the client in favor of obligations to the justice system.[178] Again, this difficult decision forces a lawyer to engage in unbiased deliberation.

Admittedly, some scholars portray an attorney's bifurcated duties

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[171] *Id.* at R. 3.3(d).

[172] Gaetke, *supra* note 157, at 48.

[173] Daniel Northrop, Note, *The Attorney-Client Privilege and Information Disclosed to an Attorney with the Intention that the Attorney Draft a Document to be Released to Third Parties: Public Policy Calls for at least the Strictest Application of the Attorney-Client Privilege*, 78 FORDHAM L. REV. 1481, 1484 (2009) ("[U]ncritical acceptance and support of the attorney-client privilege has allowed for the expansion of the privilege and the denial of competing societal and legal concerns . . . . [and] a reanalysis of the attorney-client privilege would best serve the interests of justice.").

[174] Michael Asimow & Richard Weisberg, *When the Lawyer Knows the Client is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature*, 18 S. CAL. INTERDISC. L.J. 229, 236 (2009) ("[W]eak adversarialism . . . foregrounds values such as the truth-finding function of trials, the obligation of candor toward the tribunal, and the need to protect the reputation of truthful witnesses and the interests of other third parties who may be damaged by the litigation.").

[175] *Id.* at 236.

[176] *Id.* at 237 n.33 (noting that "discretionary provisions allow lawyers wiggle room to act in good faith when they confront difficult and dangerous ethical and moral quandaries") (citing Bruce A. Green, *Criminal Defense Lawyering at the Edge: A Look Back*, 36 HOFSTRA L. REV. 353, 391-92 (2007)).

[177] Asimow & Weisberg, *supra* note 174, at 236.

[178] *See id.* at 235 (describing the contrasting approach of "strong adversarialism (sometimes referred to as 'neutral partisanship')" which "emphasizes the objective of zealous representation and protection of client confidences . . . foreground[ing] the client's interests above all other values").

as simply two forms of advocacy.[179] Arthur Gross Schaefer and Leland Swenson suggest that the practice of law requires a lawyer to act as an advocate "for the few"[180] and "for the many."[181] They posit that when acting as an advocate for the few, attorneys "act solely in the interest of the individual client or firm they represent[,]"[182] and when acting as an advocate for the many, attorneys "act as officers of the court, promoting the interests of the legal profession, the legal system, and society as a whole."[183] Though this model holds that lawyers consistently act as interested representatives when "satisfy[ing] professional duties to their clients and the legal system,"[184] this model also implicitly considers the frequent need for attorneys to act impartially, acknowledging that "[l]awyers are required to behave in ways that are sometimes inconsistent with their beliefs on a daily basis."[185]

Clearly, the duties of the lawyer require that they regularly act as neutral referees, calling on professional and personal experience in an effort to fulfill an "obligation to aid the administration of justice."[186] For an attorney, competing occupational obligations require objective analyses informed by the tenets of justice and personal conviction. Thus, like the adjudicative process, the practice of law involves a measure of impartiality.

B. Can Convicted Felons Act Without Bias?

Criticizing the alleged pro-defendant, inherent bias rationale for felon jury exclusion, scholars contend that "[s]uch a notion of universal, unidirectional bias is not particularly plausible."[187] Further, courts suggest that while some convicted felons might harbor resentments towards the justice system that condemned them to prison, others "may have developed a callous cynicism about protestations of innocence, having no doubt heard many such laments while incarcerated."[188] A convicted felon may also "desire

[179] *See* Arthur Gross Schaefer & Leland Swenson, *Contrasting the Vision and the Reality: Core Ethical Values, Ethics Audit and Ethics Decision Models for Attorneys*, 32 PEPP. L. REV. 459, 459 (2005).
[180] *Id.* at 466.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.* at 474.
[185] *Id.* at 466.
[186] Langen v. Borkowski, 206 N.W. 181, 190 (Wis. 1925).
[187] Kalt, *supra* note 9, at 106.
[188] United States v. Boney, 977 F.2d 624, 642 (D.C. Cir. 1992) (Randolph, J., dissenting).

to show others—and himself—that he is now a good citizen . . . lead[ing] him to display an excess of rectitude, both in his deliberations and in his vote."[189] Additionally, there exist a number of cases in which a felonious juror has rendered a guilty verdict—validating the contention that a convicted felon can overcome a strong bias against the prosecution.[190]

Yet, jurisdictions that justify felon jury exclusion statutes by pointing consistently to the inherent bias rationale all but ignore the possibility that a convicted felon can deliberate objectively, holding that "[a]t some point, a juror's past experience must lead to a presumption of bias because of the juror's inherent knowledge from experience,"[191] and that such a bias always cuts in favor of a criminal defendant. As the California Supreme Court has stated:

> The Legislature could reasonably determine that a person who has suffered the most severe form of condemnation that can be inflicted by the state—a conviction of felony and punishment therefor—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. Because these antisocial feelings would often be consciously or subconsciously concealed, the Legislature could further conclude that the risk of such prejudice infecting the trial outweighs the possibility of detecting it in jury selection proceedings.[192]

Nevertheless, a majority of jurisdictions selectively adhere to the inherent bias rationale by expelling felonious jurors while admitting felonious lawyers to the bar.[193] Such a framework outwardly concludes, in part, that many "jurors can overcome their biases, making fair and objective judgments despite their predispositions."[194] In this way, the majority approach to assessing the suitability of convicted felons for legal roles weakens the inherent bias rationale to the point of superfluity, suggesting that inherent bias is but a myth engineered to mask less acceptable purposes for exiling convicted felons from the adjudicative process.

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[189] *Id.*

[190] *See, e.g.*, *Boney*, 977 F.2d. 624; Anderson v. Commonwealth, 107 S.W.3d 193 (Ky. 2003); People v. Miller, 759 N.W.2d 850 (Mich. 2008).

[191] *Miller*, 759 N.W.2d at 874.

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

[193] *See* Appendix 2.

[194] SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 6 (1988).

VI. ACKNOWLEDGING CRITICISMS

Undoubtedly, proponents of felon jury exclusion statutes will contest the assertion that allowing convicted felons to enter the legal profession undercuts the justifications for felon jury exclusion statutes. Assuredly, criticisms will center on the idea that the jury is a sacrosanct legal institution that requires increased protection from those who may threaten its integrity. Critics might also argue that the jury system has no feasible means by which to perform character screenings as rigorous as those performed by bar examiners in presumptive disqualification jurisdictions. And finally challengers could contend that, unlike the legal profession, the jury system cannot monitor convicted felons that gain access to the jury box; there are no rules of professional conduct governing deliberations. Yet while these oppositions to the contextual challenge of felon jury exclusion have superficial appeal, none is strong enough to justify the consequences of the civic expulsion of an exceedingly large swath of our population.

A. Twelve Good Men and True: An Outdated Calculus

For decades, a fear of crime and criminals has permeated American society. As David Garland notes, "[w]hat was once regarded as a localized, situational anxiety . . . has come to be regarded as a major social problem and a characteristic of contemporary culture."[195] Today, "a fearful, angry public"[196] drives legislative efforts to protect the populous from "unruly youth, dangerous predators, and incorrigible career criminals."[197] In short, "[t]he emotional temperature of policy-making has shifted from cool to hot,"[198] and it is fear that has served as a catalyst for a departure from more progressive ideologies.

Promulgated to protect the citizenry from those who may threaten the functionality and integrity of the adjudicative process, felon jury exclusion statutes are attempts to allay fears of those who bear the mark of a felony conviction.[199] But such fears reflect an

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[195] DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 10 (2001).

[196] *Id.*

[197] *Id.*

[198] *Id.* at 11.

[199] United States v. Boney, 977 F.2d 624, 642 (D.C. Cir. 1992) (Randolph, J., dissenting) ("That a felon has been unwilling to conform his conduct raises doubts about his capacity to honor the juror's oath, and to comply with the trial judge's instructions.").

characterization of a jury system that no longer exists. Today, a jury trial is a rare occurrence and, when utilized, often embraces juror bias as a means of enhancing deliberations. Moreover, the principle asset of the modern jury is not its accuracy as a judicial institution, but rather its capacity for educating participants on the workings of democracy. Catering to fears of felonious jurors, proponents of excluding felons from juries cling to obsolete visions of the jury as merely a decision making body composed entirely of those who bring no preconceived notions to the deliberation process, largely ignoring the educative aspects of serving as a juror.

1. The Jury as a Judicial Institution: Working Hard or Hardly Working?

Some commentators opine that "the greatest value of the jury is its ability to decide cases correctly."[200] Infusing democratic ideals into the judiciary,[201] the jury provides "insight into the character of American justice."[202] But "the American jury system is dying out"[203] as "jury trials today are marginalized in both significance and frequency."[204]

Currently, a jury trial is an uncommon occurrence in the United States. "From 1989 to 1999, the number of civil jury trials declined by twenty-six percent, and the number of criminal trials dropped by twenty-one percent."[205] As one federal trial judge explains, "[t]oday, our federal criminal justice system is all about plea bargaining. Trials—and thus, juries—are largely extraneous. An accused individual who requests a trial may, as a functional matter (though we obstinately deny it), be punished severely for requesting what

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[200] Charles W. Joiner, *From the Bench, in* THE JURY SYSTEM IN AMERICA 143, 146 (Rita James Simon ed., 1975).

[201] William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 74 (2006) ("The jury system proves the wisdom of the Founders in their utilization of direct democracy to temper the potential excesses of the only unelected branch of government.").

[202] *Id.*; *see also* WILLIAM L. DWYER, IN THE HANDS OF THE PEOPLE: THE TRIAL JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY 153 (2002) (discussing the popularity of the jury trial in America, and noting that nearly all civil jury trials and ninety percent of criminal jury trials on the planet take place in the United States).

[203] United States v. Reid, 214 F. Supp. 2d 84, 98 n.11 (D. Mass. 2002) (noting specifically that the number of jury trials is declining "more rapidly on the civil than on the criminal side of the courts and more rapidly in the federal than in the state courts—but dying nonetheless").

[204] Young, *supra* note 201, at 74.

[205] *Id.*

was once a constitutional right."[206] Moreover, civil trials succumb to arbitration and summary judgment at an alarming rate.[207]

In addition to being an infrequent tool for administering justice, the jury trial is widely criticized as an inaccurate method by which to achieve a proper verdict.[208] Though "[t]here has remained a broad conviction among Americans that the jury system is a positive and necessary force in the quest for justice,"[209] the effectiveness of the jury as a vindicator of rights is often the subject of intense scrutiny.[210] Critics of the jury system advance two main substantive contentions:[211] "that the jury is incompetent"[212] and "that the jury is prejudiced."[213]

a. Incompetent Jurors

Arguments highlighting the incompetence of juries point out that "the jury, composed, after all, of amateurs, is a decision-making body prone to error."[214] Judge Jerome Frank opined that "juries apply law that they don't understand to facts that they can't get straight."[215] Because "jurors do not explain the basis of their

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[206] *Id.* at 76.

[207] *Id.* at 77–78 (stating "[t]he Supreme Court . . . has interpreted the Federal Arbitration Act to supplant juries with arbitrators whenever possible" and "strong scholarly analyses suggest that trial judges overuse summary judgment to take triable cases away from juries").

[208] KASSIN & WRIGHTSMAN, *supra* note 194, at 4 (noting that "juries are viewed simultaneously as partial and impartial, brilliant and stupid, active and passive, compliant and rebellious, conscientious and expedient").

[209] Randall T. Shepard, *State Court Reform of the American Jury*, 117 YALE L.J. POCKET PART 166 (2008), *available at* http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/state-court-reform-of-the-american-jury/.

[210] HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY 4 (1966) (stating that the jury "from its inception . . . has been the subject of deep controversy, attracting at once the most extravagant praise and the most harsh criticism"); *see also* KASSIN & WRIGHTSMAN, *supra* note 194, at 3 (commenting that "scholarly debate over juries can be traced about as far back in history as juries themselves").

[211] Some scholars and citizens also contend that the costs associated with the jury system outweigh its usefulness. *See, e.g.*, KASSIN & WRIGHTSMAN, *supra* note 194, at 3 ("Critics maintain that the system is a very costly anachronism, consuming human resources and government expenditures in massive doses, that it is burdensome to those called into service, and that it is largely responsible for congestion and delay in the civil courts.").

[212] VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 20 (1986).

[213] *Id.*

[214] KASSIN & WRIGHTSMAN, *supra* note 194, at 3; *see also* Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 792 (2000) ("A major theme of popular criticism is that competent, responsible people rarely serve on juries; instead, American juries are made up of incompetent people—the uneducated, the jobless, the people who pay so little attention to the news that they have never heard of litigants who are major public figures.").

[215] HANS & VIDMAR, *supra* note 212, at 19 (citing Judge Jerome Frank).

decision,"[216] it is often difficult to ascertain whether a jury truly understands a case at bar.[217] Moreover, many times complex litigation ensures that jurors find it increasingly difficult to understand the law at issue,[218] let alone how the law applies to the given facts of a case.[219] Thus, the modern jury system is perhaps void of "practical value in promoting justice."[220]

b. Prejudiced Jurors

Critics of the jury system also note that jurors too often make decisions by relying on feelings rather than assessing evidence, arguing that jurors "are gullible creatures, too often driven by emotion and too easily motivated by prejudice, anger and pity."[221] These critics contend that the model jury is "an impartial tribunal, one that is not predisposed to favor a particular outcome,"[222] requiring that a juror act solely as "impartial adjudicator[]"[223] arriving to court a "tabula rasa."[224] Accordingly, this traditional view of the jury system demands, perhaps unrealistically,[225] that jurors "base their verdicts on an accurate appraisal of the evidence presented in court while disregarding all facts, information, and personal sources of knowledge not formally admitted into evidence."[226]

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[216] *Id.* at 115.

[217] *See id.* (continuing "all [jurors] are required to do is indicate whether the verdict is for or against the plaintiff (or in criminal cases whether the defendant is guilty or not guilty)").

[218] *See, e.g.*, KASSIN & WRIGHTSMAN, *supra* note 194, at 3–4 ("It is said that the average person is not smart enough or educated enough to understand, much less decide, technically complex civil cases such as antitrust suits."); *see also* HANS & VIDMAR, *supra* note 212, at 121 (discussing the average juror's ability to understand jury instructions and commenting "[n]ot surprisingly, given the convoluted language and special legal terms, jurors' comprehension is often very low").

[219] *See* Skidmore v. Baltimore & Ohio R.R., 167 F.2d 54, 60 (2d Cir. 1948) ("But while the jury can contribute nothing of value so far as the law is concerned, it has infinite capacity for mischief, for twelve men can easily misunderstand more law in a minute than the judge can explain in an hour.").

[220] Phoebe A. Haddon, *Rethinking the Jury*, 3 WM. & MARY BILL RTS. J. 29, 29 (1994).

[221] KASSIN & WRIGHTSMAN, *supra* note 194, at 4.

[222] *Id.* at 6.

[223] Lisa Dufraimont, *Evidence Law and the Jury: A Reassessment*, 53 MCGILL L. J. 199, 208 (2008).

[224] Bryan Myers & Len Lecci, *Revising the Factor Structure of the Juror Bias Scale: A Method for the Empirical Validation of Theoretical Constructs*, 22 LAW & HUM. BEHAV. 239, 239 (1998).

[225] *See* JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 100 (1994) ("This is a demanding notion of impartiality, requiring jurors to be independent not only from the dictates of others but also from their own opinions and biases.").

[226] KASSIN & WRIGHTSMAN, *supra* note 194, at 7–8.

But the Supreme Court has refined the requisite characteristics of an impartial tribunal holding that "only 'representative' juries are 'impartial' juries."[227] This more enlightened view of the adjudicative process demands that jurors possess "qualities of human nature and varieties of human experience,"[228] thereby acknowledging that "[d]eliberations are considered impartial . . . when group differences are not eliminated but rather invited, embraced, and fairly represented."[229] Therefore, though still charged with the task of impartially weighing evidence,[230] the juror no longer must "appear in court with a blank slate, neutral and untainted by life experiences."[231]

The Court's modern vision of the jury values thorough deliberation achieved through partiality.[232] As Jeffrey Abramson explains, "[t]o eliminate potential jurors on the grounds that they will bring the biases of their group into the jury room is . . . to misunderstand the democratic task of the jury, which is nothing else than to represent accurately the diversity of views held in a heterogeneous society."[233] Hence, "[i]f the jury is balanced to accomplish this representative task, then as a whole it will be impartial, even though no one juror is."[234]

Thus, it is rare that a felonious juror, or any juror, will have an opportunity to deliberate and decide a litigated matter. Moreover, questions abound as to whether the jury system is the optimal means by which to enforce law. A good many jurors may be incompetent and, in keeping with modern conceptualizations of the jury, more than a few will harbor biases. Accordingly, while stopping well short of conceding that the jury system is an ineffective method of administering justice, one can conservatively dismiss the notion that the jury is the type of sacrosanct institution

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[227] ABRAMSON, *supra* note 225, at 100 (citing Taylor v. Louisiana, 419 U.S. 522, 528 (1975)).

[228] Peters v. Kiff, 407 U.S. 493, 503–504 (1972).

[229] ABRAMSON, *supra* note 225, at 101 (continuing "[t]he jury will achieve the 'overall' or 'diffused' impartiality that comes from balancing the biases of its members against each other").

[230] MORTIMER S. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 66 (1973) (noting that the ideal juror "find[s] the facts on the basis of the evidence presented and . . . return[s] a general verdict by applying those facts to the law as given by the judge").

[231] KASSIN & WRIGHTSMAN, *supra* note 194, at 6.

[232] *Peters*, 407 U.S. at 503–504 (highlighting that "exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented").

[233] ABRAMSON, *supra* note 225, at 101.

[234] *Id.*; *see also* HANS & VIDMAR, *supra* note 212, at 51 (noting "not only for fact-finding but also for legitimation, a representative jury is desirable").

many felon jury exclusion proponents claim necessitates the outright eviction of those who have perhaps committed but one legal indiscretion.

2. The Jury as an Educative Force: Overlooking an Invaluable Asset

De Tocqueville argued that "[t]o regard the jury simply as a judicial institution would be taking a very narrow view of the matter."[235] Accordingly, he asserted that jury service "instill[s] some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free."[236] Yet proponents of felon jury exclusion statutes, while painstakingly chronicling the exalted judicial function of the jury, often overlook the most-valuable aspect of the adjudicative process—the jury's pension for teaching the citizenry through active participation in democracy.[237]

Echoing De Tocqueville, Justice Breyer articulated the contemporary concept of active liberty. Active liberty "refers to a sharing of a nation's sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. And a sharing of sovereign authority suggests several kinds of connection between that legitimacy and the people."[238] One of the core principles of active liberty, Justice Breyer notes, is the idea that "the people themselves should participate in government"[239] and that "[p]articipation is most forceful when it is direct."[240] And as some scholars contend, "[t]he most stunning and successful experiment in direct popular sovereignty in all history is the American jury."[241]

Nonetheless, those who favor record-based juror eligibility requirements seldom note the educative aspect of the adjudicative process when measuring the sanctity of the jury. They rarely consider that "[j]uries teach each individual not to shirk

[235] DE TOCQUEVILLE, *supra* note 5, at 272.

[236] *Id.* at 274.

[237] KASSIN & WRIGHTSMAN, *supra* note 194, at 4 (commenting "[w]ith juries arousing so much ambivalence and controversy, it should come as no surprise to learn that the legal system is often thoroughly confused about how they act and, in turn, how they should be treated").

[238] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 15 (2005).

[239] *Id.*

[240] *Id.*

[241] Young, *supra* note 201, at 69.

responsibility for his own acts"[242] and "invest each citizen with a sort of magisterial office; they make all men feel that they have duties toward society and that they take a share in its government."[243] Instead, champions of felon jury exclusion statutes allege that the modern jury, because of its revered status, requires protections that are, in some instances, exceedingly severe. Yet given the uncertainty about the functionality of the adjudicative process and the uniform benefits of juror participation, it is clear that the jury necessitates no more protection from convicted felons than does the "great calling."[244]

B. Voir Dire vs. Moral Character and Fitness Determinations

A second criticism of contextually attacking the justifications for felon jury exclusion statutes will likely highlight the thoroughness of moral character and fitness evaluations and the superficiality of voir dire. At a minimum, critics may allege that voir dire, because of its inherent restraints, cannot equal the assessments of felonious bar applicants made by bar examiners. But such an argument assumes that the flaws of voir dire are markedly more severe than those present in the moral character and fitness process, making current jury selection procedures unsuitable for screening felonious jurors. A closer look at both processes reveals that this assumption lacks support.

1. Voir Dire: Is It That Bad?

The law recognizes voir dire as the only tool for ascertaining the capability and impartiality of potential jurors.[245] For virtually all citizens, voir dire "is a routine part of every trial,"[246] and for attorneys and judges "an opportunity to learn about [jurors'] existing prejudices."[247] Voir dire can take minutes to months[248] and

[242] DE TOCQUEVILLE, *supra* note 5, at 274.

[243] *Id.*

[244] *In re* Applicants for License, 55 S.E. 635, 642 (N.C. 1906) (Brown, J., dissenting).

[245] *See* Paula L. Hannaford-Agor & G. Thomas Munsterman, *Ethical Reciprocity: The Obligations of Citizens and Courts to Promote Participation in Jury Service*, *in* JURY ETHICS: JURY CONDUCT AND JURY DYNAMICS 21, 25 (John Kleinig & James P. Levine eds., 2006) (describing voir dire as "the jury selection phase" where "the focus shifts abruptly from general presumptions about individuals' ethical capacity to intense attention on the individual and his or her ability to be fair and impartial in the context of a specific trial").

[246] HANS & VIDMAR, *supra* note 212, at 67.

[247] *Id.*

[248] *See id.* (noting that voir dire "may be as brief as 20 minutes or as long as 8 hours for an average trial" and that "in the Hillside Strangler trial in Los Angeles, . . . the *voir dire* and

can involve anything from detailed questions to superficial interrogatories.[249] In some instances, lawyers ask the questions, while in others, only the judge examines the prospective jurors.[250] Thus, voir dire is relatively fluid, often changing to suit the circumstances of the case at bar.[251]

But many critics contend that voir dire is an inadequate procedure for selecting impartial jurors.[252] Kassin and Wrightsman assert that to find objective jurors, both judges and lawyers "must use their opportunity to question jurors for the purposes intended,"[253] and "they must know what they are doing."[254] Yet attorneys and the court seldom adhere to these two conditions. Lawyers, who have a vested interest in seating jurors who will favor their client's position, rarely use voir dire to empanel a neutral jury.[255] Rather, as one lawyer remarks, "I don't want an impartial jury. I want one that's going to find in my client's favor."[256] Moreover, both judges and attorneys most often rely on intuition and stereotypes to whittle down the venire.[257] Thus, critics of voir dire are correct, to a degree, when asserting that "the problem with the jury system is basically a problem of bad jurors."[258]

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jury selection took 49 court days").

[249] *See id.* (commenting "[q]uestions may be wide-ranging or more specifically related to the case").

[250] *See id.* ("During *voir dire*, the trial judge and/or the attorneys ask questions of prospective jurors.").

[251] *See* Ellsworth & Reifman, *supra* note 214, at 792–93 ("The high-publicity spectacle trials typically involve greatly expanded voir dire, partly because they are high-publicity.").

[252] *See* Julie E. Howe, *An Ethical Framework for Jury Selection: Enhancing Voir Dire Conditions*, in JURY ETHICS: JURY CONDUCT AND JURY DYNAMICS 35, 37 (John Kleinig & James P. Levine eds., 2006) ("Improvements in voir dire conditions have been studied and proposed by the legal community including judges, attorneys, trial consultants, and social psychologists.").

[253] KASSIN & WRIGHTSMAN, *supra* note 194, at 49.

[254] *Id.*

[255] *See* Ellsworth & Reifman, *supra* note 214, at 793 (hypothesizing that "'[b]ad jurors' are seated on juries because they are the ones the attorneys and the jury consultants are looking for").

[256] KASSIN & WRIGHTSMAN, *supra* note 194, at 50 (citing Morton Hunt, *Putting Juries on the Couch*, N.Y. TIMES, Nov. 28, 1982, *available at* 1982 WLNR 273454).

[257] *See id.* at 54 (noting "[i]n addition to their implicit theories of personality, some lawyers make assumptions about group structure and dynamics"); *see also* HANS & VIDMAR, *supra* note 212, at 71 (discussing judges as voir dire interrogators; stating "judges do not do a good job . . . [j]udges ask leading questions, suggest appropriate replies, and do not probe fully for the existence of bias" (citing NATIONAL JURY PROJECT & NATIONAL LAWYERS GUILD, THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE: A MANUAL FOR LAWYERS, LEGAL WORKERS, AND SOCIAL SCIENTISTS (D. Kairys, J. Shulman & S. Harring eds., 1975))); Roger W. Shuy, *How a Judge's Voir Dire Can Teach a Jury What to Say*, 6 DISCOURSE & SOC'Y 207, 207–22 (1995).

[258] Ellsworth & Reifman, *supra* note 214, at 792.

Proposals for amending the jury selection process range from the abolition of juries to a more succinct form of voir dire, designed to ensure efficiency and to partially eliminate an attorney's ability to engineer the tribunal.[259] Yet as some scholars contend, such reforms are destined for failure.[260] Any process crafted to forecast human behavior, including impartiality, must account for situational differences and individual characteristics. As Ellsworth and Reifman point out, "[a]n understanding of the situation is a much better predictor of a person's behavior than an understanding of the person. Jury researchers have searched in vain for individual differences—race, gender, class, attitudes, or personality—that reliably predict a person's verdict and have almost always come up empty handed."[261] Therefore, while voir dire may not be the optimal method for selecting an entirely neutral tribunal, the existing jury system, even with its constraints, is as good as any feasible alternative.

2. Moral Character and Fitness Determinations: Are They That Good?

Many question whether the bar's present system of moral screening is effective.[262] Further, many also question whether the purpose of evaluating an applicant's character actually stems from a desire to preserve and advance the legal profession rather than a need to protect the public and our justice system.[263]

In 1985, Deborah Rhode published an assessment of the moral character and fitness processes in the United States.[264] Based on two years of collected data,[265] Rhode found that moral character and fitness screening procedures nationwide were fraught with drawbacks that potentially hindered their professed goals. Though bar examining authorities expressed great confidence in their

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[259] *See id.* at 792–94.

[260] *See id.* at 794–96.

[261] *Id.* at 795.

[262] *See* Swisher, *supra* note 65, at 1072 (commenting that, with regard to moral character and fitness determinations, "[t]he time has come—belatedly—to forgive and forget this troubling mark on the legal profession's good moral character"); *see also* Arnold, *supra* note 65, at 67 (noting "[u]ndeniably, the legal profession ranks low on the public's list of professions that maintains high levels of honesty and integrity").

[263] Swisher, *supra* note 65, at 1069 (questioning whether the use of "good moral character" has been "perverted, devalued, and misappropriated for the bar's reputation and self-image").

[264] *See* Rhode, *supra* note 66.

[265] *Id.* at 503 (describing her methodology noting that her research included "compiled data from bar examining authorities, reported judicial cases, and accredited law schools" from "1982 and 1983").

systems of evaluation,[266] none had empirically evaluated their procedures for determining the fitness of potential attorneys.[267]

In her research, Rhode discovered that "the most commonly cited problem in the certification process is the inadequacy of time, resources, staff, and sources of information to conduct meaningful character inquiries."[268] The investigative efforts of some states amount to "a check on residency or a phone call to someone who knows or knows of the applicant"[269] while only "[h]alf the states routinely check police records and contact at least some previous employers."[270] Moreover, though "[a]lmost all jurisdictions demand personal references of varying number . . . [m]ost examiners found employers or personal references were 'only rarely' or 'virtually never' of assistance."[271]

In addition, Rhode's study uncovered that seldom were bar applicants denied admission based on a perceived lack of character. For example, "[i]n the forty-one states that could supply 1982 information, bar examiners declined to certify the character of approximately .2% of all eligible applicants, an estimated fifty-odd individuals."[272] Rhode hypothesizes that such a rate likely stems from the timing of the moral character and fitness determination, which occurs after a law student has invested exorbitant amounts of money and time into a legal career—perhaps fostering bar examiners' "reluctan[ce] to withhold certification."[273]

Yet even with unlimited resources and a concerted willingness to

[266] *Id.* at 555 ("Most bar examiners involved in the certification process express confidence in its general effectiveness. About 60% . . . of respondents engaged in initial character screening in all fifty states identified no problems in the current system. Over half . . . of the chairmen at the highest review level in selected jurisdictions found the process effective; a quarter were unsure, but only fourteen percent believed that it was ineffective.").

[267] *Id.* at 556 ("Despite most bar examiners' confidence in their predictive capacities, there have been no attempts, however primitive, to assess the effectiveness of certification procedures. Not only is there an absence of controlled research, no state bar has examined the records of disciplined or disbarred attorneys to determine what, if anything, in their records as applicants might have foreshadowed later problems. Nor have any studies attempted to examine the careers of candidates denied admission for evidence of subsequent moral lapses. Finally, and perhaps most disturbingly, the courts and examiners involved in certification have failed to confront the large volume of social science research that questions both the consistency and predictability of moral behavior." (footnote omitted)).

[268] *Id.* at 512 (footnote omitted).

[269] *Id.* at 513.

[270] Rhode, *supra* note 66, at 513.

[271] *Id.* at 513–14.

[272] *Id.* at 516 (continuing "[t]he only other empirical data available suggest that this percentage has remained relatively constant over the last quarter century" (footnote omitted)).

[273] *Id.*

seek out and deny all those with questionable character, bar examiners would likely meet with limited success. As Rhode notes, "[d]ecisionmakers are frequently drawing inferences about how individuals will cope with the pressures and temptations of uncertain future practice contexts based on one or two prior acts committed under vastly different circumstances."[274] Understandably then, adequately protecting the public from the immoral lawyer by attempting to predict a lifetime of occupational behavior is an almost impossible task.

Thus, assuming that convicted felons somehow threaten legal institutions, the level of protection afforded the legal profession and the jury by their respective screening mechanisms is virtually identical, even when the potential participant is a convicted felon. Though the moral character and fitness determination is not the most effective method for evaluating the fitness of aspiring attorneys, and though the jury selection process often results in error, these flaws stem from the tasks each process must complete.

Bar examiners hope to predict a future lawyer's conduct by merely conducting, at most, a background check and an interview. Similarly, attorneys and judges seek to find jurors who will act impartially, by conducting a period of question and answer. But such expectations of bar examiners and legal authorities are unrealistic. Human beings are complex and react to the situations they confront; personality dispositions do not alone drive behavior. Thus, to condemn an argument against felon jury exclusion statutes on the grounds that voir dire is a less accurate filtering mechanism than the moral character and fitness determination is to mistakenly assume that any cursory process can alone predict a person's actions.

C. The Rules of Professional Conduct: Do They Matter?

A final criticism of contextually attacking the rationales for felon jury exclusion statutes will assuredly rest on the existence and enforcement of the lawyer's rules for professional conduct. While the legal profession can keep an eye on its members in the hope that it might "eliminat[e] the diseased dogs before they inflict their first bite,"[275] the jury system has no such mechanism for control. The

[274] *Id.* at 560.

[275] *Id.* at 509 (quoting Donald T. Weckstein, *Recent Developments in the Character and Fitness Qualifications for the Practice of Law: The Law School Role; The Political Dissident*, 40 B. EXAMINER 17, 23 (1971)).

rules of professional conduct allows for the contention that licensing felonious lawyers is inherently less risky than seating a felonious juror. But while such an argument presumes that the lawyer's code of conduct is born of noble intentions and effective at regulating attorney conduct, a critical look at the rules of profession conduct tell a different story.

Richard Abel argues that rules of professional conduct can only work if: (1) they clearly state desired behaviors and (2) differ from everyday edicts of morality and law.[276] Yet the legal profession's rules of ethics are not clear[277] and "simply restate the most commonplace morality."[278] Moreover, the consequences for violating professional rules of conduct are varied and virtually inconsequential. As Abel notes,

> Study after study has shown that the current rules of professional conduct are not enforced. Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are imposed, the lawyer soon returns to practice, in that state or another.[279]

In addition, some scholars contend that these ethical rules merely exist to safeguard "lawyers' economic monopoly over law-related services."[280] In this way, ethical rules do not legitimize the profession,[281] but instead serve to "control the markets in which they sell their labor."[282] For example, Terence Halliday argues that

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[276] Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, *in* LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER 18, 19–20 (Susan D. Carle ed., 2005) (stating "[i]n order for rules to mold behavior, they must set forth the boundaries of that behavior with clarity" and "[r]ules of professional conduct are likely to make a significant contribution to directing behavior only if they differ from prevailing law and morality").

[277] *Id.* at 20 (noting "the Model Rules are drafted with an amorphousness and ambiguity that render them virtually meaningless").

[278] *Id.* (pointing out that the legal profession's rules of professional conduct require adherence to basic principles such as "do your work promptly, stay in communication with your client, do not represent adverse interests, [and] hold client property in trust" (footnotes omitted)).

[279] *Id.*

[280] LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER 13 (Susan D. Carle ed., 2005) [hereinafter LAWYERS' ETHICS].

[281] *See* Abel, *supra* note 276, at 22 (critically noting that "rules of legal ethics are an attempt by elite lawyers to convince themselves that they have resolved their ethical dilemmas . . . there is little evidence that anyone pays attention to ethical rules beyond the small proportion of lawyers who draft, discuss, and enact them, or those who request ethical opinions" and that "most lay people know little more than that such rules exist, and those who are aware of the rules are probably skeptical about their contents").

[282] *Id.* at 21 ("All occupations in a capitalist system seek to control the markets in which

professional regulation helps a profession maintain ultimate control over the marketplace by fostering alignment with government.[283] Specifically, a quid pro quo makes it "unlikely that professions will serve the state without any consideration of cost to themselves,"[284] and that "for the state to profit from professional resources it must sometimes recognize, sometimes guard against, and sometimes appropriate the interests of professions—indeed, press them beyond monopoly."[285] Accordingly, what results is "an implicit concordat between states and established professions: in exchange for the state's implicit guarantee that the traditional monopoly of the profession will be largely preserved."[286]

Therefore, while the postulated purposes for the legal profession's rules of conduct involve rhetoric centering on protecting the public and our system of justice, perhaps such noble aspirations are not the only reasons for monitoring lawyers. Though possessing a somewhat conspiratorial quality, deserving of consideration are those theories that cite the preservation and advancement of the legal occupation as justification for rules of professional conduct. Such theories may help explain the continued recognition of commandments that are vastly ineffective.

The rules of professional conduct are an ambiguous guide to behaving as would anyone in a position of trust. Additionally, the rules provide very little disincentive for straying from the path of good conduct. Coupled with perhaps disingenuous origins, the ineffectiveness of the legal profession's conduct code makes arguments based on its capacity to protect unsupportable. Like the moral character and fitness screening, the rules of professional conduct do little to insulate society from attorneys who might engage in unethical behavior. Thus, defending against attacks on felon jury exclusion statutes by spotlighting these ethical mandates is to erroneously ignore the practical defects of all such regulations.

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they sell their labor. Some occupations organize unions. Others form associations that attempt to secure state support for their control over entry to the market. In other words, they aspire to control the supply of services by controlling the production *of* and *by* producers of those services. The justification for control, typically, is that the services require a high level of technical skill and that only those who already possess such skill can determine whether others have acquired it.").

[283] LAWYERS' ETHICS, *supra* note 280, at 14 ("Halliday's theory is that the legal profession's collective organization allows it to bring its special expertise to the service of *state power*.").

[284] Terence C. Halliday, *Beyond Monopoly: Lawyers, State Crises, and Professional Empowerment*, *in* LAWYERS' ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER 25, 29 (Susan D. Carle ed., 2005)

[285] *Id.*

[286] *Id.*

VII. REINTEGRATION AND THE LEGITIMACY OF THE LAW

Some reentry scholars question whether prohibiting convicted felons from serving on juries significantly impacts reintegration, even defending felon jury exclusion statutes by differentiating them from other categorical exclusions. Yet other scholars note that the exclusion of convicted felons from jury service is a part of a larger framework of banishment that unfairly marginalizes those with a felonious criminal history and undermines reintegration by delegitimizing the law in the eyes of convicted felons. Specifically, preclusions affecting convicted felons "influence[] both [their] view of the legitimacy of group authority and ultimately [their] obedience to group norms."[287] Moreover, when such preclusions are procedurally unjust, convicted felons are less likely to view the law as legitimate and, in turn, less likely to voluntarily comply with its mandates.

A. *Does Felon Jury Exclusion Really Matter?*

Admittedly, few citizens enjoy jury service. Rather, most people view jury service as "a waste of [their] time and taxpayer monies, a burden to be avoided if at all possible, and if not, to be dispensed with as quickly and with as little effort as possible."[288] Not surprisingly then, many scholars contend that "more immediate factors such as employment and education make more of a difference in rehabilitation and recidivism,"[289] even condoning those legal restrictions that bar convicted felons from juries.

For instance, in his article *Invisible Punishment: An Instrument of Social Exclusion*, Jeremy Travis offers several methods by which "to constrain the impulse to punish those who violate our laws by diminishing their rights and privileges."[290] One of Travis' recommendations is "individualized justice."[291] This principle is rather straightforward: authorities should tailor collateral sanctions so that they serve a purpose but are not so overinclusive as to make

[287] Raymond Paternoster et al., *supra* note 20, at 165 (commenting "[a] key proposition of this group-value model of procedural justice is that adhering to fair procedures will cement persons' ties to the social order because it treats them with dignity and worth and certifies their full and valued membership in the group").

[288] Hannaford-Agor & Munsterman, *supra* note 245, at 21.

[289] Kalt, *supra* note 9, at 133.

[290] Jeremy Travis*, Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 34 (Marc Mauer & Meda Chesney-Lind eds., 2002)

[291] *Id.* at 35.

them an additional punishment that creates barriers to readjustment.

Yet, in condemning overinclusive, restrictive legal constructs Travis offers a rather counterintuitive example of a collateral sanction that "may appropriately be automatic."[292] He notes that "barring convicted felons from jury eligibility automatically may well be reasonable to protect the integrity of criminal trials."[293] He goes on to argue that "the vast majority of collateral sanctions cannot be justified this way . . . these sanctions should be imposed in ways that tailor the punishment to the circumstances."[294]

Though for many jury service is an unenviable task, for convicted felons record-based juror eligibility criteria represent yet another form of stigmatization and marginalization.[295] To allege that felon jury exclusion is only a minor consequence of a criminal conviction is to accommodate a privileged perspective. As one reformer explains, "[o]ne barrier may not be that big a deal . . . . You can't get housing . . . you can't get ID and no one will hire you. Cumulatively, that sends a signal: You're not wanted."[296] Thus, for those who bear the mark of a felony conviction, exclusion from jury service clearly matters on several levels.

B. The Importance of Procedural Fairness

To foster compliance with the law, authorities regularly rely on measures of social control.[297] For example, criminal sanctions "seek[] to deter rule breaking by threatening to punish wrongdoing."[298] Yet empirical evidence suggests that deterrence has only a marginal impact on a citizen's willingness to obey the law.[299] Nevertheless, lawmakers expend an inordinate amount of

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[292] *Id.*

[293] *Id.*

[294] *Id.*

[295] *See* James M. Binnall, *EG1900 . . . The Number They Gave Me When They Revoked My Citizenship: Perverse Consequences of Ex-Felon Civic Exile*, 44 WILLAMETTE L. REV. 667, 680–688 (2008).

[296] Eva. S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U. C. DAVIS L. REV. 111, 138 (2007) (citing Gary Fields, *Arrested Development: After Prison Boom, a Focus on Hurdles Faced by Ex-Cons,* WALL ST. J., May 24, 2005, at A1).

[297] *See* Tyler, *supra* note 22, at 308 (stating "[i]rrespective of the type of case involved, the traditional means of obtaining compliance is via social control").

[298] *Id.*

[299] *See id.* at 309 (commenting "it is not surprising that studies which empirically test the deterrence model typically find either that deterrent effects cannot be reliably detected or that, when they are detected, their magnitude is small").

resources attempting to deter illegal behavior,[300] often ignoring potential alternative schemes by which to facilitate compliance.[301]

Professor Tom Tyler suggests a normatively superior method for cultivating legal obedience. He contends that "the legal system benefits when people voluntarily defer to regulations to some degree and follow them, even when they do not anticipate being caught and punished if they do not."[302] Thus, authorities can promote law-abiding behavior by moving away from the forced acquiescence characteristic of deterrence and toward a "value-based model"[303] focused on eliciting "voluntary acceptance and cooperation."[304]

This "self-regulation" approach[305] suggests that "internal motivational forces . . . lead people to undertake voluntary actions,"[306] and that "values shape rule-following."[307] Accordingly, Tyler theorizes that when citizens view the law as legitimate, they are more likely to follow its directives and that legal procedures impact the perceived legitimacy of the law.[308] Specifically, Tyler asserts that the legitimacy of the law is contingent on: (1) a citizen's "prior views about law and government"[309] and (2) "the use of fair procedures during the experience itself."[310] Therefore, self-regulation can only succeed if authorities take steps to legitimize the law by employing legal policies that citizens view as procedurally fair, while continuously evaluating these policies to ensure that they continue to portray the law as legitimate.[311]

In the context of recidivism, research specifically addressing

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[300] *See id.* at 309 (noting "[t]he high costs of deterrence arise because authorities have to create and maintain a credible threat of punishment for wrongdoing").

[301] *See id.* at 310 (proposing that the methods used to evaluate a deterrence framework foster its continued existence because such methods "approach this issue by defining the issue as whether or not deterrence 'works,'" failing to "consider how strongly deterrence works" and "compare the effectiveness of deterrence to alternative models and approaches").

[302] *Id.* at 312.

[303] Tyler, *supra* note 22, at 311.

[304] *Id.* (contending "if [the] goal is simply to achieve compliance with the law, a value-based model is as or more effective than the deterrence model").

[305] *Id.* at 311.

[306] *Id.* at 313.

[307] *Id.* at 326.

[308] *See generally* Tyler, *supra* note 17.

[309] Tyler, Casper, & Fisher, *supra* note 18, at 643, 645 (stating "[t]o the extent that a regime can promote the development of widespread affective attachment, a cushion of support develops that enables the state to impose substantial burdens on citizens without losing their allegiance").

[310] *Id.* (noting "the government can influence the impact of negative outcomes on allegiance by delivering those outcomes through procedures that citizens will view as fair").

[311] Tyler, *supra* note 22, at 334 (commenting "it is important to institutionalize mechanisms for evaluating legal authorities in terms of their legitimacy as well as the consistency of their policies and practices with the principles of procedural justice").

procedural justice indicates that citizens who have committed criminal offenses and who have had prior negative experiences with the law are more likely to voluntarily comply with the law if they perceive the law to be legitimate. For example, Gill McIvor assessed the effectiveness of Scottish Drug Courts and found that the "interactions that took place in court between offenders and sentences encouraged increased compliance and supported offenders in their efforts to address their drug use and associated offending."[312] In another setting, researchers studying the perpetrators of domestic violence discovered that "the manner in which an arrestee is handled plays an important role in reducing the likelihood of recidivating behavior."[313] Additionally, analyses of graduated sanctions in the probation and parole setting show that "[a] perception of unfairness may increase noncompliance"[314] with supervision conditions. Thus, evidence suggests that the fairness of procedures impacts even a criminal offender's behavior.

B. Creating Fair Legal Procedures

Several factors influence citizens' views of the law. Tyler and others have "identified six components of procedural justice: (1) representation, (2) consistency, (3) impartiality, (4) accuracy, (5) correctability, and (6) ethicality."[315] Moreover, data indicates that "persons attribute legitimacy to legal authorities and voluntarily follow rules out of a sense of duty and obligation when legal authorities treat them fairly."[316] Concomitantly examining felon jury exclusion statutes and moral character and fitness determinations reveals the procedural justness of an individualized approach to felonious bar applicants. But such an examination also shows how unconditional, record-based juror eligibility statutes and inconsistent schemes for evaluating a convicted felon's suitability

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[312] Gill McIvor, *Therapeutic Jurisprudence and Procedural Justice in Scottish Drug Courts*, 9 CRIMINOLOGY & CRIM. JUST. 29, 45 (1999).

[313] Faye S. Taxman, David Soule, & Adam Gelb, *Graduated Sanctions: Stepping into Accountable Systems and Offenders*, 79 THE PRISON J. 182, 186 (1999).

[314] *Id.* at 187.

[315] Paternoster et al., *supra* note 20, at 167 (citing Gerald S. Leventhal, *Fairness in Social Relationships*, *in* CONTEMP. TOPICS IN SOC. PSYCHOL. (J. Thibaut, J.T. Spence, & R.C. Carson eds., 1976)); *see* Gerald S. Leventhal, *What Should be Done with Equity Theory?: New Approaches to the Study of Fairness in Social Relationships*, *in* SOCIAL EXCHANGE: ADVANCES IN THEORY AND RESEARCH (K.J. Gergen, M.S. Greenberg, & R.H. Willis eds., 1980); *see also* TYLER, *supra* note 19; Tom Tyler & E. Allen Lind, *A Relational Model of Authority in Groups*, 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 115-191 (1992)).

[316] Paternoster et al., *supra* note 20, at 167.

for legal roles undermine the fairness and legitimacy of the law.

1. Representation

Citizens perceive the law as fair when it provides them "a forum in which they can tell their story."[317] As Tyler points out, "people want to have an opportunity to state their case to legal authorities."[318] Thus, it should come as no surprise that categorical exclusions—like those that preclude convicted felons from jury service—often spark feelings of helplessness and futility. Conversely, by allowing convicted felons to address their past—as do those jurisdictions that adhere to the presumptive disqualification approach to moral character and fitness determinations—authorities cultivate fairness. In this regard, while felon jury exclusion statutes undermine the representation element of procedural justice, individualized evaluations of felonious bar applicants help to develop the fairness of legal procedures.

2. Consistency

As Paternoster and others note, "consistency in decisionmaking refers to similarity of treatment"[319] and one can assess similarity of treatment across persons[320] or over time.[321] In addition, a person can also evaluate the similarity of treatment across situations or contexts. When doing such an analysis, one would likely view the law as consistent in its decisionmaking when it employs analogous procedures in the same or similar situations or contexts. In the case of a convicted felon's access to legal roles, the inconsistency that characterizes the majority approach clearly fosters a sense that the law is unfair and procedurally unjust, thus undermining the law's legitimacy and the likelihood for voluntary compliance by convicted felons.

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[317] Tyler, *supra* note 17, at 664 (continuing by noting that citizens "want to have a 'voice' in the decisionmaking process").

[318] *Id.*

[319] Paternoster et al., *supra* note 20, at 167 (emphasis omitted).

[320] *Id.* (stating that people assess consistency "across persons" by "compare[ing] the treatment they receive with the treatment given other people").

[321] *Id.* at 167–68 (stating that people assess consistency "across time" by "compare[ing] their current treatment with both their past experiences and how they expect to be treated").

3. Impartiality

For citizens who come into contact with legal or quasi-legal processes, "[t]ransparency and openness foster the belief that decisionmaking procedures are neutral."[322] As Tyler points out, "people react to signs that the authorities with whom they are dealing are neutral . . . making decisions based upon consistently applied legal principles and the facts of the case rather than personal opinions and biases."[323] Along these lines, most jurisdictions publish their moral character and fitness standards.[324] Moreover, the ABA produces an annual report outlining most jurisdictions' bar application process for those with a felonious criminal history.[325] By contrast, felon jury exclusion statutes are "invisible punishments"[326] justified entirely by speculation and conjecture. Thus, for convicted felons, the presumptive disqualification approach to the moral character and fitness process promotes a far greater sense of the law's neutrality and fairness than hidden record-based juror eligibility standards that make blanket assumptions about those with a felonious criminal history.

4. Accuracy

People generally view the law as fair when decisions are accurate. The accuracy of a decision largely depends on authorities' employing procedures that "publicly bring[] the problem to light"[327] and are "based on factual information"[328] In short, procedures that provide citizens with a sense that authorities "make competent, high-quality decisions . . . are more likely to be viewed as fair."[329] Individualized moral character and fitness determinations of felonious bar applicants almost always involve a hearing and the consideration of evidence provided by the prospective attorney.[330]

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[322] Tyler, *supra* note 17, at 664.
[323] *Id.*
[324] *See* Appendix 1.
[325] *See* NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 64, at 6–9.
[326] Travis, *supra* note 290, at 16; *see also* TRAVIS, *supra* note 26, at 64–65 (continuing "[i]n short, this universe of criminal sanctions has been hidden from public view, ignored in our national debate on punishment policy, and generally excluded from research on the life course of ex-offenders or the costs and benefits of the criminal sanction").
[327] Paternoster et al., *supra* note 20, at 168.
[328] *Id.*
[329] *Id.*
[330] *See* Rhode, *supra* note 66, at 506 (noting "all judicial denials of admissions must meet minimum due process standards of notice and an opportunity to be heard").

Such procedures likely foster the applicant's perception that the proceedings are fair. Conversely, felon jury exclusion statutes fail to give one a sense that they accurately exclude incompetent jurors. For instance, often courts fail to overturn verdicts rendered by juries that include statutorily ineligible felon-jurors,[331] creating an ambiguity about the accuracy of felon jury exclusion statutes.

5. Correctability

When procedures provide a mechanism for higher review, those subjected to such procedures will more readily view the process as fair.[332] A convicted felon cannot appeal his or her dismissal from a jury that results from a record-based juror eligibility statute. Rather, felon jury exclusion measures are definite and unchallengeable.[333] Yet moral character and fitness determinations are almost always appealable.[334] Most often those applicants denied admission to the bar because of a prior felony conviction have the option of reapplying after a specified period of time or challenging the decision of bar authorities through that jurisdiction's appellate system.[335] In this way, bar admission processes promote the perception that they are fair and just while felon jury exclusion statutes undermine the correctability element of procedural justice.

6. Ethicality

Along with an opportunity to state their claims to a neutral tribunal, citizens want to feel that authorities respect their rights.[336] Courteous treatment is an indicator of such respect. As

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[331] *See, e.g.*, United States v. Boney, 977 F.2d. 624, 627 (D.C. Cir. 1992); Anderson v. Kentucky, 107 S.W.3d 193, 196 (Ky. 2003); People v. Miller, 759 N.W.2d 850, 863–64 (Mich. 2008).

[332] Paternoster et al., *supra* note 20, at 168 (stating "[t]o be perceived as procedurally fair, authorities must supply some mechanism by which decisions thought to be unfair or incorrect can be made right").

[333] Though no administrative mechanisms allow an excluded felon-juror to challenge record-based juror eligibility requirements, some have unsuccessfully explored constitutional challenges to felon jury exclusion statutes. *See generally* Binnall, *supra* note 16 (describing constitutional challenges to felon jury exclusion statutes).

[334] *See* Rhode, *supra* note 66, at 506–07 n.69.

[335] *Id.* at 507 (noting, for example, that "[s]ome state courts defer to the bar's assessments absent an 'abuse of discretion, arbitrary action, fraud, corruption or oppression'" while "[o]ther jurisdictions will determine applicants' qualifications *de novo* or resolve reasonable doubts in their favor").

[336] Paternoster et al., *supra* note 20, at 168 (stating "[r]espectful treatment by legal authorities is seen to be directly related to perceptions that authorities are moral, legitimate, and are deserving of compliance").

Tyler explains, "people are sensitive to whether they are treated with dignity and politeness and to whether their rights as citizens and as people are respected . . . [p]eople react favorably to the perception that the authorities are benevolent and caring and are sincerely trying to do what is best for the public."[337] Yet, as previously outlined, the procedures by which a majority of jurisdictions expel convicted felons from the jury process are callous and embarrassing.[338] Alternatively, by providing a bar applicant with a felony criminal record the opportunity to explain their past indiscretions—either orally or in writing—jurisdictions that license felonious lawyers preserve an offender's dignity, nurturing the perception that legal procedures are fair and legitimate.

Moreover, when authorities "explain or justify their actions in ways that show an awareness of people's needs,"[339] citizens will view the law as legitimate. Understandably then, when authorities impose inconsistent regulations without justification citizens are more likely to deem the law unfair. In a majority of jurisdictions, bar regulations seemingly conclude that felons are malleable beings, while permanent record-based juror eligibility statutes allege that one with a felonious criminal history is a static deviant. Therefore, the majority approach for regulating a convicted felon's access to the legal profession and the jury box undermines the protectionist justifications for excluding felons from jury service—forcing convicted felons to question the true intentions of the authorities that expel them from the deliberation room, the fairness of felon jury exclusion statutes, and the law generally.

By considering reentry a holistic concept, one avoids the inclination to examine collateral sanctions and discretionary disabilities from an instrumental viewpoint.[340] Instead, as Tyler argues, one must view compliance with the law, and in turn reintegration, normatively[341] stressing "what people regard as just and moral as opposed to what is in their self-interest."[342] In this

[337] Tyler, *supra* note 17, at 664.

[338] *See supra* Part II.A. (detailing California's procedures for dismissing felonious jurors).

[339] Tyler, *supra* note 17, at 664.

[340] TYLER, *supra* note 19, at 4 (noting that "people who make instrumental decisions about complying with various laws will have their degree of compliance dictated by their estimate of the likelihood that they will be punished if they do not comply").

[341] *See id.* at 3–4 (commenting that "[t]his normative commitment can involve personal morality or legitimacy" and "[n]ormative commitment through personal morality means obeying a law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior").

[342] *Id.* at 3.

light, it is relatively easy to see how policies grounded in blanket assumptions and faulty stereotypes, which do not provide those they impact the opportunity to rebut legal presumptions, help to create, rather than curb, the problem of recidivism. In addition, equally as damaging to reintegration are the inconsistent procedures for regulating access to legal roles, which detract from the law's legitimacy by simultaneously promoting procedural justice and outright injustice.

VIII. CONCLUSION

By examining the majority approach to evaluating prospective attorneys and potential jurors, the logical flaws in the justifications for felon jury exclusion statutes are evident. Twenty-nine states and the federal court system provide convicted felons the opportunity to demonstrate rehabilitation, but uniformly presume all convicted felons permanently unsuitable for jury service. Thus, the majority approach for screening would-be legal actors is both inconsistent and illogical, prompting an unbiased observer to question the true purposes for felon jury exclusion statutes.

Such a system, though defended by supposition and conjecture, cannot withstand criticisms from its own ranks. While this article highlights the substantive challenges of predicting behavior through standard screening processes, it also notes the superfluity of attempting to protect the public from convicted felons. Those with a felonious criminal history pose no greater risk to the legal profession or the jury than do countless other citizens who may be unfit for legal service. Nevertheless, fear has served as a catalyst for restrictive, overinclusive legal constructs aimed at convicted felons.

Though this article may at time appear to endorse the categorical exclusion of convicted felons from the legal profession, its reliance on Tom Tyler's research indicates otherwise. By conducting an individual assessment of each convicted felon who wishes to productively engage the legal system, jurisdictions adhere to the principals of procedural justice, coloring the law fair and legitimate. Legitimacy leads to voluntary compliance with legal mandates and thus, can potentially curb recidivism.

Perhaps the only plausible attack on criticisms of felon jury exclusion statutes is philosophical, rooted in "theories of social

contractarianism and civic republicanism."[343] There are some who claim that felonious jurors lose the right to participate in government when they depart from the law's mandates,[344] suggesting that the commission of crime is a conscious choice that represents a rejection of societal values. But criminal responsibility may encompass far more than an individual's intrinsic composition. As noted, experimental research shows that circumstances play a large role in a person's behavior. Nevertheless, those who forward the such arguments for felon jury exclusion statues consider only personal choice when calculating what an offender deserves or does not deserve, ignoring more modern theories of criminality.

I am a licensed attorney and a convicted felon. Thus, I can represent a client in the most grievous of circumstances, but I cannot decide even a minor civil dispute. Though I committed a crime years ago and swore to uphold the United States Constitution when I entered the legal profession, I will never be worthy to serve as an empanelled juror. This incongruity is troubling and seemingly unexplainable. Thus, my hope is that this Article furthers a burgeoning dialogue that addresses the illogicality of precluding millions of Americans from performing an essential civic duty.

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[343] Kalt, *supra* note 9, at 121.
[344] *See, e.g.*, Washington v. State, 75 Ala. 582 (1884).

APPENDIX 1: A CONVICTED FELON'S ACCESS TO THE LEGAL PROFESSION

As noted, almost all jurisdictions in the United States evaluate the character of a felonious bar applicant on an individualized basis using the presumptive disqualification approach. In those states, applicants with a felony criminal history have an opportunity to rebut the presumption that they lack the requisite character to practice law (the presumptive disqualification approach). Yet, a few select jurisdictions do not assess the moral character of each bar applicant with a felony criminal history. Instead, such states per se disqualify convicted felons from attaining professional licensure as an attorney (the per se approach).

The following list categorizes all United States jurisdictions by the manner in which they evaluate the character of a bar applicant with a felony criminal history. As shown, those jurisdictions that per se disqualify convicted felonious bar applicants do so 1) for a period of years; 2) for the period of the imposed sentence;[345] 3) for life, if the felony criminal history would have led to disbarment in that jurisdiction; 4) for life, if the felony criminal history included certain demarcated offenses; and 5) for life, unless the applicant's civil liberties are restored.

Note that for the purposes of this article, presumptive disqualification jurisdictions include those jurisdictions that per se exclude convicted felons from the bar for an automatically-expiring time period. Because such per se exclusions are only temporary, they do not represent permanent banishment from the practice of law.

State	**Moral Character & Fitness Determination Approach**
Alabama	Presumptive Disqualification[346]
Alaska	Presumptive Disqualification[347]

[345] The "imposed sentence" refers to any period of incarceration or supervised release (parole or probation).

[346] ALA. STATE BAR, RULES GOVERNING ADMISSION TO THE ALABAMA STATE BAR R. V (2009), *available at* http://www.alabar.org/admissions/files/AdmissionRulesRegbooksept2009.pdf (making no mention of felony convictions, but stating "[t]he burden is on the applicant to establish to the reasonable satisfaction of a majority of the said committee that the applicant possesses such character and qualifications as to justify the applicant's admission to the Bar and qualify the applicant to perform the duties of an attorney and counselor at law").

[347] ALASKA COURT SYS., 2009–2010 ALASKA BAR RULES pt. I, R. 2, § 1(d)(1), *available at* http://www.state.ak.us/courts/bar.htm (noting that "[c]onduct manifesting a significant

Arizona	Presumptive Disqualification[348]
Arkansas	Presumptive Disqualification[349]
California	Presumptive Disqualification[350]
Colorado	Presumptive Disqualification[351]
Connecticut	Presumptive Disqualification[352]
Delaware	Presumptive Disqualification[353]
District of Columbia	Presumptive Disqualification[354]

deficiency in the honesty, trustworthiness, diligence or reliability of an applicant is a basis for denial of admission" and listing a series of factors to be considered including "a criminal conviction except minor traffic violations").

348 COMM. ON EXAMINATIONS OF THE SUPREME COURT OF ARIZ., RULES FOR ADMISSION OF APPLICANTS TO THE PRACTICE OF LAW IN ARIZONA R. 36(b)(2)(A) (2005), *available at* http://www.supreme.state.az.us/admis/pdf/Rules for Admission as of 12-1-05 rev 1006 with ph.pdf ("There shall be a presumption, rebuttable by clear and convincing evidence presented at an informal or formal hearing, that an applicant who has been convicted of a misdemeanor involving a serious crime or of any felony shall be denied admission.").

349 ARK. JUDICIARY, RULES GOVERNING BAR ADMISSION R. XIII (2004), *available at* http://courts.state.ar.us/rules/bar_admission/index.cfm (making no mention of felony convictions, but stating "[t]he practice of law is a privilege," and "[a]dmission to practice is based upon the grade made on the examination if one is taken, moral qualifications, and mental and emotional stability").

350 STATE BAR OF CAL., RULES OF THE STATE BAR OF CALIFORNIA tit. 4, div. 1., R. 4.40(A)–(B) (2008), *available at* http://calbar.ca.gov/calbar/pdfs/rules/Rules_Title4_Div1-Adm-Prac-Law.pdf (stating that "[a]n applicant must be of good moral character as determined by the Committee," and that "[t]he applicant has the burden of establishing that he or she is of good moral character" defined as "qualities of honesty, fairness, candor, trustworthiness, observance of fiduciary responsibility, respect for and obedience to the law, and respect for the rights of others and the judicial process").

351 COLO. SUPREME COURT BD. OF LAW EXAM'RS, RULES GOVERNING ADMISSION TO THE BAR OF THE STATE OF COLORADO R. 201.9(4) (2007), *available at* http://www.coloradosupremecourt.com/BLE/Forms/Rules.pdf (describing as "[p]robable cause for denial," any situation in which "[t]he applicant has been convicted of a felony or a crime of moral turpitude, or any crime involving a breach of fiduciary duty, or accepted a deferred judgment which is pending as to such a charge in any jurisdiction").

352 CONN. BAR EXAMINING COMM., REGULATIONS OF THE CONNECTICUT BAR EXAMINING COMMITTEE art. VI-11 (2009), *available at* http://www.jud.state.ct.us/CBEC/regs.htm#VI (noting that a felony conviction "creates a presumption of and may result, in the absence of evidence to the contrary, in a finding of lack of good moral character and/or fitness to practice law").

353 SUPREME COURT OF THE STATE OF DEL., RULES OF THE BOARD OF BAR EXAMINERS OF THE STATE OF DELAWARE R. 51–52 (2008), *available at* http://courts.state.de.us/forms/download.aspx?id=28388 (Delaware requires that all applicants obtain a "preceptor" who must certify that the applicant "is a person of good moral character and reputation," and must "have sufficient personal knowledge of the applicant's background, or make a reasonable investigation into the applicant's background from independent sources other than the applicant or the applicant's family").

354 D.C. COURT OF APPEALS, RULES OF THE DISTRICT OF COLUMBIA COURT OF APPEALS R. 46(d) (2008), *available at* http://www.dcappeals.gov/dccourts/docs/DCCA_Rules.pdf ("No applicant shall be certified for admission by the Committee until the applicant demonstrates good moral character and general fitness to practice law."); *see In re* Manville, 538 A.2d 1128, 1133 n.4 (D.C. 1988) (en banc); *In re* Polin, 596 A.2d 50, 53 n.4 (D.C. 1991) (each listing factors courts will consider when assessing whether a bar applicant with a felonious criminal history has demonstrated sufficient rehabilitation to enter the legal profession).

Florida	Per se Disqualification unless civil rights are restored (non-automatic); then a felony conviction amounts to a Presumptive Disqualification[355]
Georgia	Presumptive Disqualification[356]
Hawaii	Presumptive Disqualification[357]
Idaho	Per se Disqualification for life for those felony convictions that would otherwise result in disbarment[358]
Illinois	Presumptive Disqualification[359]
Indiana	Per se Disqualification for life[360]
Iowa	Presumptive Disqualification[361]

[355] FLA. BD. OF BAR EXAM'RS, RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE BAR R. 2-13.3 (2009), *available at* http://www.floridabarexam.org/public/main.nsf/rules.html (stating that "[a] person who has been convicted of a felony is not eligible to apply until the person's civil rights have been restored," which is not an automatic occurrence in Florida, instead it requires an application).

[356] SUPREME COURT OF GA., RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN GEORGIA pt. A, § 7 (2010), *available at* http://www.gabaradmissions.org/pdf/admissionrules.pdf (making no mention of a felony conviction, but noting "[i]f, during the investigation of an applicant, information is obtained which raises a question as to the applicant's character or fitness to practice law, the Board may require the applicant to appear, together with his or her counsel if he or she so desires, before the Board or any designated member for an informal conference concerning such information").

[357] SUPREME COURT OF THE STATE OF HAW., RULES OF THE SUPREME COURT OF THE STATE OF HAWAI'I R. 1.3(c)–(e) (2006), *available at* http://www.state.hi.us/jud/ctrules/rsch.htm#Rule_1.3 (making no mention of felony convictions, but stating "[a] lawyer should be one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them," and that "[a] record manifesting deficiency in . . . respect for the law shall be grounds for denying an application").

[358] BD. OF COMM'RS OF THE IDAHO STATE BAR, IDAHO BAR COMMISSION RULES R. 210(a), 501(p) (1986), *available at* http://isb.idaho.gov/pdf/rules/ibcr.pdf ("Conviction of a serious crime," defined to include "any felony," "shall constitute criteria for disqualification of an [a]pplicant.").

[359] BD. OF ADMISSIONS TO THE BAR AND THE COMM. ON CHARACTER AND FITNESS OF THE SUPREME COURT OF ILL., RULES OF PROCEDURE R. 6.4(a) (2007), *available at* https://www.ibaby.org/static/RulesofProcedure.pdf (making no mention of felony convictions, but stating that unlawful conduct "should be treated as cause for further detailed inquiry before the Committee decides whether the law student registrant or applicant possesses the requisite character and fitness to practice law").

[360] IND. BD. OF LAW EXAM'RS, RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS R. 12(2) (2010), *available at* http://www.in.gov/judiciary/rules/ad_dis/ad_dis.pdf ("Anyone who has been convicted of a felony *prima facie* shall be deemed lacking the requisite of good moral character.").

[361] IOWA LEGISLATURE, COURT RULES ch. 31, R. 31.9(1) (2008), *available at* http://www.legis.state.ia.us/DOCS/ACO/CR/LINC/03-26-2010.chapter.31.pdf (making no mention of felony convictions, but simply stating that "[t]he Iowa board of law examiners shall make an investigation of the moral character and fitness of any applicant and may procure the services of any bar association, agency, organization, or individual qualified to make a moral character or fitness report").

Kansas	Presumptive Disqualification[362]
Kentucky	Presumptive Disqualification[363]
Louisiana	Presumptive Disqualification[364]
Maine	Presumptive Disqualification[365]
Maryland	Presumptive Disqualification[366]
Massachusetts	Presumptive Disqualification[367]
Michigan	Presumptive Disqualification[368]
Minnesota	Presumptive Disqualification[369]

[362] KAN. SUPREME COURT, RULES RELATING TO ADMISSION OF ATTORNEYS R. 707 (2009), *available at* http://www.kscourts.org/rules/Rule-Info.asp?r1=Rules+Relating+to+Admissions+of+Attorneys&r2=126 (making no mention of felony convictions, but noting "[i]n determining whether an applicant possesses good moral character, the Board shall consider evidence of . . . unlawful conduct").

[363] KY. BAR ASS'N, RULES OF THE SUPREME COURT OF KENTUCKY R. 2.011 (2008), *available at* http://www.kyoba.org/rules/scr2.011.pdf (making no mention of felony convictions, but stating "[t]he applicant shall have the burden of proving that he or she is possessed of good moral character" and that " "'good moral character' includes qualities of honesty, fairness, responsibility, knowledge of the laws of the state and the nation and respect for the rights of others and for the judicial process").

[364] LA. SUPREME COURT COMM. ON BAR ADMISSIONS, ADMISSION RULES R. XVII, § 5(E)(21) (2008), *available at* http://www.lascba.org/admission_rules.asp ("Conviction or a plea of guilty or 'no contest' to any misdemeanor or felony, including juvenile proceedings" "should be considered to be a basis for investigation and inquiry before recommending admission.").

[365] ME. BD. OF BAR EXAM'RS, MAINE BAR ADMISSION RULES R. 9(a) (2009), *available at* http://www.mainebarexaminers.org/PDF Files/MBAR0109.pdf (making no mention of felony convictions, but stating "[e]ach applicant shall produce to the Board satisfactory evidence of good moral character," and "[t]he attributes of character that are relevant to this determination are those pertinent to the trust placed in lawyers by the public and clients as well as to the requirement that lawyers in this state comply with the Maine Bar Rules").

[366] COURT OF APPEALS OF MD., RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND R. 5(a) (2009), *available at* http://www.courts.state.md.us/ble/pdfs/baradmissionrules.pdf (making no mention of felony convictions, but noting that "[t]he applicant bears the burden of proving . . . good moral character and fitness for the practice of law," and "[f]ailure or refusal to answer fully and candidly any question set forth in the application or any relevant question asked by a member of the Character Committee, the Board, or the Court is sufficient cause for a finding that the applicant has not met this burden").

[367] MASS. SUPREME JUDICIAL COURT BD. OF BAR EXAM'RS, RULES OF THE BOARD OF BAR EXAMINERS R. V.1, V.2.2 (2008), *available at* http://www.mass.gov/bbe/barrules.pdf (stating that "[a] record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of a candidate may constitute a basis for denial of a recommendation for admission," and "[f]actors such as incarceration, probation, restrictions of parole still in effect, current unsatisfied judgments or unfulfilled sentences, while not determinative, generally are considered to indicate that the rehabilitation process has not been completed." Additionally, "[t]he candidate shall have the burden to establish by clear and convincing evidence his or her current good character and fitness").

[368] MICH. BD. OF LAW EXAM'RS, RULES, STATUTES AND POLICY STATEMENTS R. 1(B)-1 (2009), *available at* http://courts.michigan.gov/supremecourt/BdofLawExaminers/BLE Rules, Statutes, and Policy Statements.pdf (making no mention of felony convictions, but defining "good moral character" as "the propensity on the part of the person to serve the public in a fair, honest, and open manner," and commenting that "[t]he Board [of Law Examiners] considers 'fair' to mean legitimately sought, done, given, etc., for example, proper under the rules; courteous; civil; in a fair manner").

Mississippi	Per se Disqualification for life for all felonies except manslaughter and violations of the Internal Revenue Code[370]
Missouri	Presumptive Disqualification (once five years have passed from completion of sentence)[371]
Montana	Presumptive Disqualification[372]
Nebraska	Presumptive Disqualification[373]
Nevada	Presumptive Disqualification[374]
New Hampshire	Presumptive Disqualification[375]

[369] MINN. STATE BD. OF LAW EXAM'RS, CHARACTER AND FITNESS FOR ADMISSION TO THE BAR: A GUIDE TO THE CHARACTER AND FITNESS STANDARDS AND INVESTIGATION OF APPLICANTS TO THE BAR IN MINNESOTA question 8 (2007), *available at* http://www.ble.state.mn.us/character_and_fitness.html ("There is no type of misconduct that will automatically render an applicant ineligible for admission to the Minnesota Bar. The Board makes a current assessment of character and fitness for each applicant. If an applicant has a history of serious misconduct, an applicant may still be eligible for admission. The applicant must show evidence of rehabilitation and current good character.").

[370] MISS. BD. OF BAR ADMISSIONS, RULES GOVERNING ADMISSION TO THE MISSISSIPPI BAR R. VIII, § 6 (1991), *available at* http://www.mssc.state.ms.us/rules/msrulesofcourt/rules_admission_msbar.pdf ("Every person who has been or shall hereafter be convicted of a felony, in a court of this or any state or a court of the United States, manslaughter or a violation of the Internal Revenue Code excepted, shall be incapable of obtaining a license to practice law.").

[371] MO. SUPREME COURT RULES, RULES GOVERNING THE MISSOURI BAR AND THE JUDICIARY R. 8.04(a) (2003), *available at* http://www.courts.mo.gov/page.jsp?id=46 (follow "Rules Governing the Missouri Bar and the Judiciary—Rules 1–18") ("Any person, whether sentence is imposed or not, who has pleaded guilty or nolo contendere to or been found guilty of any felony of the United States, this state, any other state or any United States territory is not eligible to apply for admission to the bar of this state until five years after the date of successful completion of any sentence or period of probation as a result of the conviction, plea, or finding of guilt.").

[372] STATE BAR OF MONT., RULES OF PROCEDURE OF THE COMMISSION ON CHARACTER AND FITNESS OF THE SUPREME COURT OF MONTANA § 4(h) (1998), *available at* http://www.montanabar.org/displaycommon.cfm?an=1&subarticlenbr=6 ("An applicant found guilty of a felony is conclusively presumed not to have present good moral character and fitness. The presumption ceases upon completion of the sentence and/or period of probation.").

[373] NEB. JUDICIAL BRANCH, NEBRASKA SUPREME COURT RULES § 3-103(C) (2008), *available at* http://www.supremecourt.ne.gov/rules/pdf/Ch3Art1.pdf (stating that "[a] record manifesting a significant deficiency by an applicant in one or more of the following essential eligibility requirements for the practice of law may constitute a basis for denial of admission," and listing, as one of these essential eligibility requirements, "[t]he ability to conduct oneself with respect for and in accordance with the law and the Nebraska Rules of Professional Conduct").

[374] SUPREME COURT OF NEV., NEVADA SUPREME COURT RULES R. 51(1)(d) (2009), *available at* http://www.leg.state.nv.us/CourtRules/SCR.html (making no mention of felony convictions, but stating that "[a]n applicant for a license to practice as an attorney and counselor at law in this state shall . . . [d]emonstrate that the applicant is of good moral character and is willing and able to abide by the high ethical standards required of attorneys and counselors at law").

[375] SUPREME COURT OF THE STATE OF N.H., RULES OF THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE R. 42(5)(a), (j) (2010), *available at* http://www.courts.state.nh.us/rules/

New Jersey	Presumptive Disqualification (upon completion of sentence)[376]
New Mexico	Presumptive Disqualification[377]
New York	Presumptive Disqualification[378]
North Carolina	Presumptive Disqualification[379]
North Dakota	Presumptive Disqualification[380]
Ohio	Presumptive Disqualification (once five years have passed from completion of sentence)[381]

scr/scr-42.htm (making no mention of felony convictions, but stating that "[a]ll persons who desire to be admitted to practice law shall be required to establish their moral character and fitness to the satisfaction of the Standing Committee on Character and Fitness of the Supreme Court of New Hampshire in advance of such admission," and that "[i]f the recommendation of the committee on character and fitness is against admission, the report of the committee shall set forth the facts upon which the adverse recommendation is based and its reasons for rendering an adverse recommendation." Further, "[t]he committee shall promptly notify the applicant about the adverse recommendation and shall give the applicant an opportunity to appear before it and to be fully informed of the matters reported to the court by the committee, and to answer or explain such matters").

[376] N.J. COMM. ON CHARACTER, REGULATIONS GOVERNING THE COMMITTEE ON CHARACTER § 202:8(a) (2002), *available at* http://www.njbarexams.org/commchar/char.htm ("A candidate who is on probation or parole from a sentence for a criminal offense shall not be eligible for consideration by the Committee until the probation or parole has been successfully completed.").

[377] N.M. BD. OF BAR EXAM'RS, RULES GOVERNING ADMISSION TO THE BAR R. 15-103(C)(3)(a) (2008), *available at* http://www.nmexam.org/rules/rules103.htm (making no mention of felony convictions, but noting that "unlawful conduct" "may be treated as cause for further inquiry before the Board determines whether the applicant possesses the character and fitness to practice law").

[378] N.Y. STATE BD. OF LAW EXAM'RS, RULES OF THE COURT/BOARD OF LAW EXAMINERS § 520.12(a), (c) (2000), *available at* http://www.nybarexam.org/Rules/Rules.htm (making no mention of felony convictions, but noting only that "[e]very applicant for admission to practice must file with a committee on character and fitness appointed by the Appellate Division of the Supreme Court affidavits of reputable persons that applicant possesses the good moral character and general fitness requisite for an attorney and counselor-at-law," and that "[t]he Appellate Division in each department may adopt for its department such additional procedures for ascertaining the moral character and general fitness of applicants as it may deem proper").

[379] BD. OF LAW EXAM'RS OF THE STATE OF N.C., NORTH CAROLINA BOARD OF LAW EXAMINERS CHARACTER AND FITNESS GUIDELINES (2001), *available at* http://www.ncble.org (follow "Character & Fitness" hyperlink) (making no mention of felony convictions, but noting that "unlawful conduct" "may be treated as cause for further inquiry before the Board decides whether the applicant possesses the requisite character and fitness to practice law").

[380] N.D. SUPREME COURT, NORTH DAKOTA ADMISSION TO PRACTICE RULES R. 2(B)(1)(c)(1) (2009), *available at* http://www.ndcourts.com/rules/Admission/frameset.htm (making no mention of felony convictions, but stating that "[w]hen an applicant's record of conduct includes inappropriate behavior . . . the [State Board of Law Examiners] will make further inquiry before deciding whether the applicant possesses the good moral character and fitness to practice law required for a positive recommendation," and noting that inappropriate behavior includes "unlawful conduct").

[381] SUPREME COURT OF OHIO & OHIO JUDICIAL SYS., SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR R. I § 11(D)(5)(a)(i)–(iii) (2009), *available at*

Oklahoma	Presumptive Disqualification[382]
Oregon	Per se Disqualification for life for those felony convictions that would otherwise result in disbarment[383]
Pennsylvania	Presumptive Disqualification[384]
Rhode Island	Presumptive Disqualification[385]

http://www.supremecourt.ohio.gov/LegalResources/Rules/govbar/govbar.pdf#Rule1 ("If an applicant has been convicted of a felony under the laws of this state, the laws of the United States, or the laws of another state or territory of the United States, or adjudicated a delinquent child for conduct that, if committed by an adult, would be such a felony, the applicant shall undergo a review by the Board of Commissioners on Character and Fitness in accordance with Section 12 of this rule, and the applicant may be approved for admission only if all of the following apply: (i) More than five years have passed since the applicant was released from parole, probation, community control, post-release control, or prison if no post-release control or parole was maintained; (ii) The rights and privileges of the applicant that were forfeited by conviction have been restored by operation of law, expungement, or pardon; (iii) The applicant is not disqualified by law from holding an office of public trust."); *see also* SUPREME COURT OF OHIO & OHIO JUDICIAL SYS., SUMMARY OF CHARACTER AND FITNESS PROCESS IN OHIO, SPECIAL PROVISIONS FOR APPLICANTS WITH FELONY RECORDS (2010), *available at* http://www.supremecourt.ohio.gov/Boards/characterFit/CFProcess.pdf ("There is no *per se* bar to admission for applicants with felony records. However, an applicant who has a felony record must prove full and complete rehabilitation and satisfy special temporal and substantive conditions. The applicant is also subject to additional scrutiny, including a mandatory review by the Board, even if a local Admissions Committee has recommended an unqualified approval of the applicant. Applicants who have been convicted of the most serious kinds of felonies—aggravated murder, murder, attempted murder, or rape—must undergo yet another review by, and receive approval from, the Supreme Court itself.").

[382] OKLA. SUPREME COURT, RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF OKLAHOMA R. I, § 1 (2009), *available at* http://www.okbbe.com/docs/rules_governing_admission.pdf (making no mention of felony convictions, but stating "[t]o be admitted to the practice of law in the State of Oklahoma, the applicant . . . shall have good moral character, due respect for the law, and fitness to practice law").

[383] OR. STATE BD. OF BAR EXAM'RS & OR. SUPREME COURT, RULES FOR ADMISSION OF ATTORNEYS R. 3.10 (2009), *available at* http://www.osbar.org/_docs/rulesregs/admissions.pdf ("An applicant shall not be eligible for admission to the Bar after having been convicted of a crime, the commission of which would have led to disbarment in all the circumstances present, had the person been an Oregon attorney at the time of conviction.").

[384] PA. BD. OF LAW EXAM'RS, PENNSYLVANIA BAR ADMISSION RULES R. 203(b)(2) (1999), *available at* http://www.pabarexam.org/bar_admission_rules/203.htm (making no mention of felony convictions, but stating that "[t]he general requirements for admission to the bar of this Commonwealth are . . . absence of prior conduct by the applicant which in the opinion of the Board [of Law Examiners] indicates character and general qualifications (other than scholastic) incompatible with the standards expected to be observed by members of the bar of this Commonwealth").

[385] Judiciary of Rhode Island, Committee on Character and Fitness, http://www.courts.state.ri.us/supreme/bar/characterfitness.htm (last visited Apr. 1, 2010) ("Established by the Supreme Court in 1988, the Committee on Character and Fitness determines the moral fitness of Rhode Island Bar applicants by scrutinizing their finances, legal training, and criminal records, if any. Additionally, applicants must participate in a personal interview. If further review is warranted following the interview, applicants may be referred to the full committee for a hearing. A recommendation is then made to the Supreme Court as to whether or not an applicant should be admitted to the bar or even be allowed to take the bar examination. The Supreme Court may either grant the applicant's request or

South Carolina	Presumptive Disqualification[386]
South Dakota	Presumptive Disqualification[387]
Tennessee	Presumptive Disqualification[388]
Texas	Presumptive Disqualification (once five years have passed from completion of sentence, or conviction is reversed or pardoned)[389]
Utah	Presumptive Disqualification (upon completion of sentence)[390]
Vermont	Presumptive Disqualification[391]

require the applicant to show cause why the court should grant the request.").

[386] S.C. JUDICIAL DEP'T, SOUTH CAROLINA APPELLATE COURT RULES R. 402(c)(2), (4) (2010), *available at* http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=402.0& subRuleID=&ruleType=APP (making no mention of felony convictions, but noting that "[n]o person shall be admitted to the practice of law in South Carolina unless the person . . . is of good moral character," and "has been found qualified by a panel of the Committee on Character and Fitness").

[387] S.D. BD. OF BAR EXAM'RS, RULES AND REGULATIONS FOR ADMISSION TO PRACTICE LAW IN SOUTH DAKOTA R. 16-16-2.3(1)(a) (2009), *available at* http://www.sdjudicial.com/uploads/ bar_exam/09RReg.pdf (noting that, with respect to the Moral Character and Fitness Determinations in South Dakota, "[u]nlawful conduct, including cases in which the record of arrest or conviction was expunged, with the exception of juvenile arrests and dispositions unless they pertain to a serious felony" "may be cause for further inquiry").

[388] TENN. BD. OF LAW EXAM'RS, TENNESSEE SUPREME COURT RULES R. 7, art. 6, § 6.01(a) (1992), *available at* http://www.state.tn.us/lawexaminers/docs/rul7.pdf ("An applicant shall not be admitted if in the judgment of the Board there is reasonable doubt as to that applicant's honesty, respect for the rights of others, and adherence to and obedience to the Constitution and laws of the State and Nation as to justify the conclusion that such applicant is not likely to adhere to the duties and standards of conduct imposed on attorneys in this State. Any conduct which would constitute grounds for discipline if engaged in by an attorney in this State shall be considered by the Board in making its evaluation of the character of an applicant.").

[389] TEX. BD. OF LAW EXAM'RS, RULES GOVERNING ADMISSION TO THE BAR OF TEXAS R. IV(d)(2) (2002), *available at* http://www.ble.state.tx.us/Rules/NewRules/ruleiv.htm ("An individual guilty of a felony under this rule is conclusively deemed not to have present good moral character and fitness and shall not be permitted to file a Declaration of Intention to Study Law or an Application for a period of five years after the completion of the sentence and/or period of probation.").

[390] UTAH OFFICE OF BAR ADMISSIONS, RULES GOVERNING ADMISSION TO THE BAR R. 14-708(f)(3) (2006), *available at* http://www.utcourts.gov/resources/rules/ucja/ch14/07%20 Admissions/USB14-708.html ("A rebuttable presumption exists against admission of an applicant convicted of a felony offense. For purposes of this rule, a conviction includes entry of a nolo contendre [sic] (no contest) plea. An applicant who has been convicted of a felony offense is not eligible to apply for admission until after the date of completion of any sentence, term of probation or term of parole or supervised release, whichever occurred last. Upon an applicant's eligibility, a formal hearing as set forth in this article before members of the Character and Fitness Committee will be held. Factors to be considered by the Committee include, but are not limited to, the nature and seriousness of the criminal conduct resulting in the conviction(s), mitigating and aggravating factors including completion of terms and conditions of a sentence imposed and demonstration of clearly proven rehabilitation.").

[391] VT. BD. OF BAR EXAM'RS, RULES OF ADMISSION TO THE BAR OF THE VERMONT SUPREME COURT § 11(b)(1) (2010), *available at* http://www.vermontjudiciary.org/LC/d-BBELibrary/

Virginia	Presumptive Disqualification[392]
Washington	Presumptive Disqualification[393]
West Virginia	Presumptive Disqualification[394]
Wisconsin	Presumptive Disqualification[395]
Wyoming	Presumptive Disqualification[396]

BBErules8-18-08.pdf (making no mention of felony convictions, but stating that "[t]he purpose of requiring an applicant to possess present good moral character is to exclude from the practice of law those persons possessing character traits that are likely to result in injury to future clients, in the obstruction of the administration of justice, or in a violation of the Rules of Professional Conduct. These character traits usually involve either dishonesty or lack of trustworthiness in carrying out responsibilities. There may be other character traits that are relevant in the admission process, but such traits must have a rational connection with the applicant's present fitness or capacity to practice law and accordingly must relate to the state's legitimate interests in protecting prospective clients and the system of justice.").

[392] Va. Bd. of Bar Exam'rs, *Character & Fitness Questions: Can a Convicted Felon take the Virginia Bar Exam?*, http://www.vbbe.state.va.us/faq/faqcfall.html ("Conviction of a felony is not an absolute bar to taking the Virginia bar exam, but it is a factor which will be considered in determining whether a person can prove by clear and convincing evidence that he/she possesses the requisite good character and fitness to qualify for admission to the Virginia bar. The Board's Character and Fitness Committee of the Board considers the nature of the crime, how long ago it was committed, the punishment, and positive contributions to society since the conviction. A pardon or a restoration of the person's civil rights is certainly a positive factor."); *see also* VA. BD. OF BAR EXAM'RS, RULES OF THE VIRGINIA BOARD OF BAR EXAMINERS § III(2)(A) (1993), *available at* http://www.vbbe.state.va.us/pdf/VBBERules.pdf (making no mention of felony convictions, but noting that "commission or conviction of a crime" "may be treated as cause for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law").

[393] WASH. COURTS, WASHINGTON STATE COURT RULES: ADMISSION TO PRACTICE RULES R. 24.2(a)(1) (2006), *available at* http://www.courts.wa.gov/ (follow Court Rules, Rules of General Application, Admission to Practice Rules, 24.2 Factors Considered when Determining Character and Fitness) (making no mention of felony convictions, but stating that "unlawful conduct" "shall be considered by the Admissions staff and Bar Counsel when determining whether an applicant shall be referred to the Character and Fitness Board for a determination of the applicant's character and/or fitness to practice law").

[394] SUPREME COURT OF APPEALS OF W. VA., RULES FOR ADMISSION TO THE PRACTICE OF LAW IN WEST VIRGINIA R. 5.0, *available at* http://www.state.wv.us/wvsca/Bd%20of%20Law/lawprac.htm#Rule 5.0. Requirement of good moral character of applicant ("An applicant who has previously been convicted of a felony or other serious crime carries a heavy burden of persuading the court that he or she presently possesses good moral character sufficient to be invited into the legal community.") (citing *In re* Dortch, 486 S.E.2d 311, 320 (W. Va. 1997)).

[395] WIS. SUPREME COURT, WISCONSIN SUPREME COURT RULES: RULES OF THE BOARD OF BAR EXAMINERS § BA 6.02(a) (2009), *available at* http://www.wicourts.gov/sc/scrule/DisplayDocument.html?content=html&seqNo=36673 (making no mention of felony convictions, but stating "unlawful conduct" "should be treated as cause for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law").

[396] WY. JUDICIAL BRANCH, RULES AND PROCEDURES GOVERNING ADMISSION TO THE PRACTICE OF LAW § IV, R. 401(b)(1) (2010), *available at* http://www.courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=PracticeOfLawAdmission.xml (making no mention of felony convictions, but noting that "unlawful conduct" "may be treated by the Board as cause for non-recommendation or for further inquiry before the Board decides whether the applicant possesses the character and fitness to practice law").

APPENDIX 2: COMPARISON: A CONVICTED FELON'S ACCESS TO THE LEGAL PROFESSION AND A CONVICTED FELON'S ACCESS TO A JURY

For each jurisdiction in the United States, the following list illustrates 1) the approach taken by bar examiners faced with an applicant who is a convicted felon,[397] and 2) "the duration of felon jury exclusion."[398] Highlighted are those jurisdictions that allow convicted felons to practice law (those that employ the presumptive disqualification approach or the temporary Per se Disqualification approach), but prohibit convicted felons from ever serving on juries (lifetime ban).[399]

State	Moral Character & Fitness Determination Approach	Duration of Felon Jury Exclusion
Alabama	**Presumptive Disqualification**	**Lifetime Ban**
Alaska	Presumptive Disqualification	During Supervision
Arizona	Presumptive Disqualification	Lifetime Ban (repeat offenders) During Supervision (first offenders)
Arkansas	**Presumptive Disqualification**	**Lifetime Ban**
California	**Presumptive Disqualification**	**Lifetime Ban**
Colorado	Presumptive	Lifetime Ban (grand

[397] *See* Appendix 1. The information in this column appears in more detail in Appendix 1.

[398] Kalt, *supra* note 9, at 150–57 nn. 376–426. This entire column, and almost all of the terminology that is used to indicate the duration of felon jury exclusion, were taken directly from Brian C. Kalt's article, *The Exclusion of Felons from Jury Service* (*supra* note 9). Specifically, I transposed Kalt's "Appendix 1.A: Felon Exclusion Statutes" into this chart to make the necessary comparisons.

[399] To make the topical jurisdictional data comparable, I maintained a crucial aspect of Kalt's methodology. Certain jurisdictions require the restoration of civil rights prior to allowing a convicted felon to rebut a presumption of flawed character during the moral character and fitness determination process. If the restoration of civil rights is not automatic in such jurisdictions, I listed them as per se disqualifying convicted felons from the practice of law permanently. Likewise, if a jurisdiction requires the restoration of a felon's civil rights as a prerequisite for jury service, but does not restore them automatically, Kalt listed them as banning felons from jury service for life.

	Disqualification	juries) No Exclusion (petit juries)
Connecticut	Presumptive Disqualification	During Incarceration or Seven Years from Conviction (whichever is longer)
Delaware	**Presumptive Disqualification**	**Lifetime Ban**
District of Columbia	Presumptive Disqualification	During Supervision Plus Ten Years
Florida	Per se Disqualification (unless civil rights are restored – non-automatic)	Lifetime Ban
Georgia	**Presumptive Disqualification**	**Lifetime Ban**
Hawaii	**Presumptive Disqualification**	**Lifetime Ban**
Idaho	Per se Disqualification (if felony conviction would otherwise result in disbarment)	During Supervision
Illinois	Presumptive Disqualification	Challengeable for Cause (for life)
Indiana	Presumptive Disqualification	During Sentence
Iowa	Presumptive Disqualification	Challengeable for Cause (for life)
Kansas	Presumptive Disqualification	During Supervision or Ten Years from Conviction (whichever is longer)
Kentucky	**Presumptive Disqualification**	**Lifetime Ban**
Louisiana	**Presumptive Disqualification**	**Lifetime Ban**
Maine	Presumptive Disqualification	No Exclusion
Maryland	**Presumptive Disqualification**	**Lifetime Ban**

Massachusetts	Presumptive Disqualification	During Incarceration or Seven Years from Conviction (whichever is longer) Removable for Cause (for life)
Michigan	**Presumptive Disqualification**	**Lifetime Ban**
Minnesota	Presumptive Disqualification	During Sentence
Mississippi	Per se Disqualification (for all felonies except manslaughter and violations of the Internal Revenue Code)	Lifetime Ban
Missouri	**Presumptive Disqualification (once five years have passed from completion of sentence)**	**Lifetime Ban**
Montana	**Presumptive Disqualification**	**Lifetime Ban**
Nebraska	**Presumptive Disqualification**	**Lifetime Ban**
Nevada	**Presumptive Disqualification**	**Lifetime Ban**
New Hampshire	**Presumptive Disqualification**	**Lifetime Ban**
New Jersey	**Presumptive Disqualification (upon completion of sentence)**	**Lifetime Ban**
New Mexico	**Presumptive Disqualification**	**Lifetime Ban**
New York	**Presumptive Disqualification**	**Lifetime Ban**
North Carolina	Presumptive Disqualification	During Supervision
North Dakota	Presumptive	During Incarceration

	Disqualification	
Ohio	**Presumptive Disqualification (once five years have passed from completion of sentence)**	**Lifetime Ban**
Oklahoma	**Presumptive Disqualification**	**Lifetime Ban**
Oregon	Per se Disqualification (if felony conviction would otherwise result in disbarment)	During Incarceration Plus Fifteen Years (criminal and grand juries) During Incarceration (civil juries)
Pennsylvania	**Presumptive Disqualification**	**Lifetime Ban**
Rhode Island	Presumptive Disqualification	During Supervision
South Carolina	**Presumptive Disqualification**	**Lifetime Ban**
South Dakota	Presumptive Disqualification	During Supervision
Tennessee	**Presumptive Disqualification**	**Lifetime Ban**
Texas	**Presumptive Disqualification (once five years have passed from completion of sentence or conviction is reversed or pardoned)**	**Lifetime Ban**
Utah	**Presumptive Disqualification (upon completion of sentence)**	**Lifetime Ban**
Vermont	**Presumptive Disqualification**	**Lifetime Ban**
Virginia	**Presumptive**	**Lifetime Ban**

	Disqualification	
Washington	Presumptive Disqualification	During Supervision (if committed after July 1984) Lifetime Ban (if committed before July 1984)
West Virginia	**Presumptive Disqualification**	**Lifetime Ban**
Wisconsin	Presumptive Disqualification	During Sentence
Wyoming	**Presumptive Disqualification**	**Lifetime Ban**